



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL MISC. APPL. NO. 92 OF 2012

REPUBLIC APPLICANT

VERSUS

CHRISTINE SYOKAU MUSEMBI RESPONDENT

R U L I N G

The application dated 19/7/2012 is brought under **Order 349** of the **Criminal Procedure Code**. The application seeks the following orders:-

1. **“THAT the court be pleased to admit the applicant’s appeal out of time notwithstanding that it has been brought after 14 days.**
2. **THAT the annexed petition be deemed as duly served.”**

The application is supported by the affidavit sworn on 19/7/2012. The gist of the said affidavit is that the advocate for the Applicant was unaware of the orders until the period for appeal had lapsed. It is further stated that the intended appeal has overwhelming chances of success.

The application is opposed to as per the replying affidavit sworn on 6/12/12 by the Respondent, **Christine Syokau Musembi**. The Respondent who was the accused in the criminal case has contended that she was acquitted because the complainant had failed to attend court on three occasions and that additional and/or new evidence had been introduced by the prosecution. It is further averred that there was no delay in availing the proceedings of the lower court and that there was therefore no good cause why the Applicant did not appeal within the time provided for by the law. According to the Respondent, starting the lower court case afresh would be prejudicial and unfair to him.

The application was canvassed by way of written submissions which I have duly considered.

Section 349 of the **Criminal Procedure Code** provides as follows:-

“An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:

Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellants or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.”

The affidavit in support shows that the matter was brought to the attention of the office of the Director of

Public Prosecutions on 12/6/2012. Proceedings were requested on 26/6/2012 and the same availed on 9/7/2012. The application at hand was filed on 19/7/12. There was a delay by about two weeks by the State Law office and a further delay by the court in supplying the proceedings by about two weeks. The delay in my view was not inordinate and has been sufficiently explained.

I have perused the annexed copies of the proceedings of the lower court and also considered the intended petition of appeal. I have also considered the provisions of **section 202** of the **Criminal Procedure Code** under which the Respondent was acquitted. The intended appeal is not frivolous.

With the foregoing, there is good cause to allow the application. Consequently, the application is allowed with costs to the Respondent.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **4th** day of **July** 2013.

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B. THURANIRA JADEN

JUDGE