



Director of Public Prosecutions v Omar & 5 others (Criminal Application 34 of 2014) [2017] KESC 18 (KLR) (Crim) (23 March 2017) (Ruling)

Director of Public Prosecutions v Ahmed Mohammed Omar & 5 others [2017] eKLR

Neutral citation: [2017] KESC 18 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CRIMINAL
CRIMINAL APPLICATION 34 OF 2014
JB OJWANG & NS NDUNGU, SCJJ
MARCH 23, 2017**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

AHMED MOHAMMED OMAR 1ST RESPONDENT

AHMED ABDALLA SHAFFI 2ND RESPONDENT

MICHAEL NGUNGU LEWA 3RD RESPONDENT

MOSES LOCHICH 4TH RESPONDENT

NELSON KIPCHIRCHIR TOO 5TH RESPONDENT

ERIC EBERE MELCHIZEDEK 6TH RESPONDENT

Whether the Supreme Court had jurisdiction to enlarge time for the filing of a notice of appeal

The applicant sought orders for enlargement of time to file a notice of appeal. The applicant wanted to challenge a Court of Appeal decision allowing an appeal from the High Court decision in which the respondents had been found guilty on charges of murder. The court found that there was no jurisdictional basis upon which the application for enlargement of time, for filing a notice of appeal at the Supreme Court, could be made. Further, no question of constitutional interpretation or application within the mandate of the Supreme Court was raised and the question raised did not fall within the court's jurisdiction.

Reported by Beryl Ikamari

Constitutional Law - Office of the Director of Public Prosecutions - commencement of legal proceedings - independence of the Office of the Director of Public prosecutions - whether it was constitutional for the Director of



Public Prosecutions to consult various stakeholders before deciding on whether to lodge an appeal at the Supreme Court - Constitution of Kenya 2010, article 157(10).

Jurisdiction - *jurisdiction of the Supreme Court - whether the Supreme Court had jurisdiction to enlarge time for the filing of a notice of appeal*

Brief facts

The applicant sought orders for enlargement of time to file a notice of appeal. The applicant wanted to challenge a Court of Appeal decision allowing an appeal from the High Court decision in which the respondents had been found guilty on charges of murder.

The applicant's explanation for the delay in filing the notice of appeal was that it sought views from various stakeholders in the case and it took considerable time and effort to come up with recommendations that an appeal was merited. Views were sought from members of the families of the deceased persons (victims), members of the public, civil society, human rights groups and campaigners.

The respondents filed grounds of opposition stating that the applicant had allowed itself to be influenced by external forces in decision making, there was no right of appeal in criminal matters which were of the kind at issue, the court lacked jurisdiction to entertain the application and that the delay of 2 months in filing the notice of appeal was inordinate and a violation of the respondents' fundamental rights and freedoms. The respondents also stated that the proposed appeal offended the doctrines of legitimate expectation and proportionality and the principle that litigation had to come to an end.

Issues

- i. Whether the Supreme Court had jurisdiction to enlarge time for the filing of a notice of appeal.
- ii. Whether it was constitutional for the Director of Public Prosecution to consult with various stakeholders before making a decision on whether to lodge an appeal at the Supreme Court.

Relevant provisions of the Law

Constitution of Kenya 2010,

Article 157 - Director of Public Prosecutions

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

Held

1. Article 157(10) of the Constitution provided that the Director of Public Prosecutions would not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers, he or she would not be under the direction or control of any person of authority.
2. There was no legal basis for the applicant to defer filing the notice of appeal pending general consultations with persons with no direct standing in the criminal case.
3. There was no jurisdictional basis upon which the application for enlargement of time, for filing a notice of appeal at the Supreme Court, could be made.
4. No question of constitutional interpretation or application within the mandate of the Supreme Court was raised and the question raised did not fall within the court's jurisdiction.

Application dismissed.

Citations

Statutes

None referred to

Advocates

None mentioned



RULING

1. Upon perusing the application by way of *Ex parte* Notice of Motion dated 1st September 2014 and filed on 2nd September 2014 seeking enlargement of time to file a Notice of Appeal; and
2. Upon reading the supporting affidavit of kioko kamula sworn on 1st September 2014:
3. We have considered the applicant's written submissions in which he contests the merits of the Court of Appeal decision allowing an appeal from the High Court decision in which the respondents had been found guilty on charges of murder, in Criminal Case No.14 of 2010 – Republic v. Ahmed Mohammed Omar & 6 Others.
4. The deponent avers that the applicant's delay in filing a Notice of Appeal was for good cause, and that such delay was in any case, not inordinate.
5. The deponent avers that he had, following the delivery of the Judgment of the Court of Appeal, "constituted a team of Prosecution Counsel with instructions that they review the entire evidence and proceedings in the High Court and the Court of Appeal with a view to establishing whether there were good grounds to lodge an appeal to the Supreme Court."
6. The deponent avers that the said investigative team (para.5 above), was "mandated to weigh in the view of members of the families of the deceased persons (victims), members of the public, Civil society, Human Rights groups and campaigners, and then to independently come up with their recommendations...."
7. The deponent avers that it is the actions referred to in the foregoing paragraph that occasioned delay in filing a Notice of Appeal, that is: "the time and effort... required in reviewing the entire record and consultations ...[taking a] considerable amount of time and concentration...."
8. The deponent avers that it is the team referred to above that "returned a verdict that there are good grounds for the Director of Public Prosecutions to lodge an appeal to the Supreme Court"; and that "the 14 days provided for the filing of [a] Notice of Appeal had by then expired and the DPP now seeks enlargement of time within which to file the same."
9. The respondents, on 30th December, 2016 sought the rejection *in limine*, by their grounds of opposition dated 13 December, 2016, of the application for extension of time to file a Notice of Appeal.
10. The respondent's grounds are, firstly, that "the Director of Public Prosecutions has allowed himself to be influenced by external forces in his decision-making, contrary to the provisions of the Constitution"; secondly, that the applicant "has no right of appeal in criminal matters of this kind"; thirdly, that this Court lacks "jurisdiction to entertain the application and the proposed appeal"; fourthly, that the delay of more than two months in filing a Notice of Appeal "is inordinate and in violation of the Respondents' fundamental freedoms and rights."
11. The respondents, furthermore, assert that "the proposed appeal offends the doctrines of legitimate expectation, proportionality and the principle that litigation must come to an end [as] the Respondents have resumed duties as public officers since the delivery of the Judgment in the Court of Appeal."
12. Even as the respondents found their objections on principles of the Constitution, the applicant too cites the same Constitution, thus: "We believe the issue meets the necessary...threshold under Article



163(4) and (5) of the Constitution as it is a general matter of great public importance affecting the criminal justice system.”

13. This Court disposes of the question summarily. By Article 157(10) of the Constitution –

The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

14. There Was No Basis In Law for the applicant to defer the filing of the Notice of Appeal pending general consultations with persons with no direct standing in the criminal case.

15. There is no jurisdictional basis upon which the applicant seeks to move the Supreme Court to enlarge time for filing a Notice of Appeal.

Orders

Reasons

The Applicant’s *Ex parte* Notice of Motion dated 1st September, 2014 is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2017.

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J.B. OJWANG N.S. NJOKI

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

