

# REPUBLIC OF KENYA

## IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: *Ojwang & Njoki, SCJJ*)

### CRIMINAL APPLICATION NO. 34 OF 2014

– BETWEEN –

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

– AND –

1. AHMED MOHAMMED OMAR
2. AHMED ABDALLA SHAFFI
3. MICHAEL NGUNGU LEWA
4. MOSES LOCHICH
5. NELSON KIPCHIRCHIR TOO
6. ERIC EBERE MELCHIZEDEK

.....RESPONDENTS

## RULING

[1] UPON perusing the application by way of *Ex parte* Notice of Motion dated 1<sup>st</sup> September 2014 and filed on 2<sup>nd</sup> September 2014 seeking enlargement of time to file a Notice of Appeal; and

[2] UPON reading the supporting affidavit of KIOKO KAMULA sworn on 1<sup>st</sup> 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 30<sup>th</sup> 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.

| <b>ORDERS</b>  | <b>REASONS</b>  |
|--|---|
| The Applicant’s <i>Ex parte</i> Notice of Motion dated 1 <sup>st</sup> September, 2014 is dismissed. | <p>(a) The applicant’s grounds for delay in filing the Notice of Appeal fall outside the Constitution and the law.</p> <p>(b) No question of constitutional interpretation or application is raised coming within the mandate of the Supreme Court.</p> <p>(c) The question raised does not fall within the Supreme Court’s jurisdiction.</p> |

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of March, 2017.**

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**J.B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

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**N.S. NJOKI**

**JUSTICE OF THE SUPREME COURT**

**I certify that this is**

**a true copy of the original**

**REGISTRAR,  
SUPREME COURT OF KENYA**