* lodging appeal out of time

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA

MISC. APPLICATION NO. 16 of 1995

UGANDA ..... APPELLANT

VERSUS

JOHN NAWASWA,
ODEKE DANIEL ..... RESPONDENTS

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

R U L I N G

This ruling is in respect of an application for leave to lodge notice of appeal out of time. The application was brought by the DPP under the provisions of section 328A(1) of Criminal Procedure Code, it is dated 1/9/95. The application is supported by the affidavit of one John Lasu which is dated 18/9/1995. The learned counsel for the 2 respondents Mr. Mutyabule swore an affidavit in reply on behalf of the 2 respondents.

The back ground of this application as may be gathered from the records available and the arguments of the two learned counsel who appeared in this application, is that the 2 respondents John Nawaswa and Odeke Daniel were charged before the court of magistrate Grade I at Jinja with the offence of emblezzlement; one of them was acquitted on 21/3/1995 and another was acquitted on 17/5/1995. After that acquital it would seem no step was taken to lodge any appeal or notice of appeal until the lawyers of one of the acquitted respondents gave notice of his intention to sue the complainants in the criminal case i.e. Kakira Sugar works, it was then that the learned senior State Attorney was contacted to take up the matter, hence this application.

The learned Senior State Attorney who appeared on behalf of the applicant argued that there was delay in lodging the necessary notice of appeal because he did not get communication from AIP Etomet who prosecuted the case in the lower court in time. He received the communication about the acquittal of

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the 2 respondents through one Lasu sometime on 28/6/1995 although the decision of the Grade I magistrate was made on 17/5/1995. It was not until sometime in July 1995 that he got the relevant file from the police. He finally instituted this application on 18/9/1995 (the record on the file shows the date as 19/9/1995 not 18/9/1995 as stated by the counsel in his submission). According to him there was a reasonable ground as to why the notice of appeal could not be lodged within 14 days as required by law. He also argued that the 2 respondents were charged with the offence of embleszzlement of a sum of 2,260,000/= which is a substantial amount and that makes the case to be important and of public interest.

In reply to Mr. Okwenga's submission Mr. Mutyabule the learned counsel for the 2 respondents argued that there was no reasonable cause as to why this application should be granted. According to him the case which is the subject of this application did not proceed ex-parte as the state was represented, therefore the state cannot complain about the failure to get information about the outcome of the case in time for them to appeal. He also pointed out that the affidavit sworn by Mr. Lasu in support of this application is worthless since it is hearsay. In his view this application was brought for the purpose of harrassing the respondents because they had sued the school which was the complainant in the criminal case.

There are essentially 2 matters to be settled in this application. The 1st is whether or not any reasonable cause or good cause has been shown as to why the applicant did not lodge his appeal or notice of appeal in time. The 2nd is the issue raised by Mr. Mutyabule which is whether or not the affidavit of Lasu sworn in support of this application is valid.

The expression "good cause" appearing in section 326(6) of Criminal Procedure Code is not defined in that Code so it must be given its natural and gramatical meaning. Normally sufficient cause or good cause relates to the applicant's inability or failure to take a particular step in time stipulated by law: Mugo and others v. Wanjiru and others (1970) EA 481 and Charles Kangamiteto v. Uganda (1978)HCB 124. In deciding whether or not the applicant has established "good

account all the circumstances surrounding a particular case. Judging from the contents of paragraph 6 of Lasu's affidavit the respondents were acquitted in 2 stages, one was acquitted on 21/3/1995 and the other was acquitted on 17/5/1995. It was not until 19/9/1995 that the state found it necessary to file this application to enable the state to appeal against these acquitals. The learned counsel for the applicant gave as his reason for not appealing in time that he did not get the news of the acquittals until 28/6/1995. This explanation given by the learned counsel for the applicant does not sound convincing because the state throughout the proceedings was represented by an AIP who ought to have informed his superiors of the acquittals immediately after the court had made its decision. As pointed out by Mr. Mutyabule the learned counsel for the respondent, this was not an ex-parte proceeding. This court fails to understand the purpose of the presence of the prosecutor in court if that prosecutor does not communicate with his supperiors as to what goes on in court, it is only unfortunate that the idea to appeal did not originate from the prosecutor but from the representative of the complainant, which may mean that the prosecutor was either satisfied with the acquittals so there was no point of requesting the learned state attorney for an appeal or he was just indifferent about the whole matter.

Mr. Okwanga the learned senior state attorney in this argument speaks of this case being of importance and in public interest. With due respect, I do not agree with him because if the case was as important as he would like us believe, he would have remained in close touch with the prosecutor in this case so as to be in proper picture of the progress of the case, he would not have waited until the complainant's representatives contacted him several months after the acquittals. It is my view that this matter came out as something of an afterthought after the complainant's representative had been served with a notice of intention to sue the complainant as pointed out in paragraph 7 of Lasu's affidavit. Otherwise I cannot see any reason as to why the state should have waited for nearly 6 months to make up its mind to appeal if the case was so important.

With due respect I agree with Mr. Mutyabule's contention that the sole purpose of this application might be to harrass his clients because of the intended civil litigation against the complainants in the criminal case. It is my considered view that no reasonable or good cause has been shown as to why the applicant took almost 6 months before he could institute this application. The position would have been quite different and understandable if the case had been heard ex-parte or if the complainants had conducted the criminal case without the state being represented by the whole AIP who is a senior officer and who carried out his duty on behalf of the DPP. This case must be destinguished from the case of: Zaidi A. Suleiman v. R. (1958)EA 65 because in that case good cause had actually been shown as the applicant acted quite shiftly. I have found the decision of this court in the cases of: Charles Kangmiteto v. Uganda (1978)HCB 124 and Aristela Kabwimukya v. John Kasigwa (1978)HCB 251, quite helpful on this point.

As regards to the affidavit in support of this application I quite agree with Mr. Mutyabule's submission that the affidavit sworn by Mr. Lasu is nothing but hearsay as Lasu himself did not know anything as to why there was a delay in filing the appeal or notice of appeal or why Mr. Etomet did not communicate the outcome of the case to the learned Senior State Attorney. The proper person who was competent to swear an affidavit relating to the cause of the delay would have been either Mr. Etomet himself who conducted the criminal proceedings or Mr. Okwanga who was in possession of the facts as to why he could not lodge his notice of appeal in time. Mr. Lasu was a mere security man at the complainant's factory and chairman of the PTA of the school and he appeared in this case just as an ordinary prosecution witness which in itself does not qualify him to swear an affidavit relating to the cause of the delay which prevented the applicant from appealing in time; to say the least, his (Lasu's) affidavit apart from being hearsay it was worthless as it is inadmissible as pointed out in the cases of: In the matter of bail application no. 478/74 and in the matter of Jinja criminal case no. 54 of 1974 HCB 201 and Abdu Serunjogi v. Sekitto (1977)HCB 242. Since the affidavit in support of this application is defective it cannot be relied upon it is therefore worthless and of no value as far as the case for the applicant is concerned.

In view of the fact that the applicant has not shown a good cause for his failure to appeal or file a notice of appeal in time and in view of the fact that Lasu's affidavit is incurably defective this application cannot be sustained, it is accordingly dismissed with costs to the 2 respondents.

C. M. KATO
JUDGE
10/6/96