

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: OTHMAN C.J, KIMARO, J.A., And MASSATI, J.A.)

ARUSHA CRIMINAL APPLICATION NO.1 OF 2011

1. LOGILEIKI MELIYO@KITIM 2. SINDULA WANGA @KYARISHOY 3. MELIYO KITIMU @KARISKO 4. MASAY NGOYAI 5. LONING'O SINDULA 6. MEVAASHI SAITABAU	}	APPLICANTS
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VERSUS

1. LONGIDARE MENAVE 2. MEDIMI LIKIGELYE 3. LOSHIRU LESKARI 4. MESAYA SUMANGA 5. THE DIRECTOR OF PUBLIC PROSECUTIONS	}	RESPONDENTS
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**(Application for restoration of withdraw appeal from the
decision of the Court of Appeal of Tanzania at Arusha)**

(Nsekela, Luanda, Massati, JJJ. A.)

**dated the 16th day of May, 2012
in
Criminal Appeal No. 71 of 2010**

RULING OF THE COURT

21st & 28th September, 2012

KIMARO, J.A.:

The six applicants named above were prosecution witnesses in Arusha District Court Criminal Case No. 1103 of 2006 in which the four respondents were charged with six counts of arson and two counts of

causing grievous harm contrary to sections 319 and 225 of the Penal Code [CAP 16 R.E. 2002]. The District Court acquitted the respondents. Aggrieved by the decision of the trial court, the Director of Public Prosecutions appealed to the High Court. That was Criminal Appeal No.22 of 2009. The High Court dismissed the appeal. Still aggrieved, the Director of Public Prosecutions filed a second appeal in the Court of Appeal. It is Criminal Appeal No 71 of 2010. Before the hearing of the appeal, the Director of Public Prosecution decided to withdraw it under Rule 4(2) (a) of the Court of Appeal Rules 2009 (The Rules).

The Applicants were discontented by the decision taken by the Director of Public Prosecutions to withdraw the appeal. They filed an application under rule 77(3) of the Court of Appeal Rules, 2009 for the restoration of the appeal.

When the application was called on for the hearing, Mr. Felician Mahatane, learned advocate appeared holding a watching brief for the applicants, Mr. Duncan Oola learned advocate represented the 1st, 3rd and 4th respondents. The 2nd respondent was reported dead. The 5th

respondent was represented by Vincent Mwamnyange, learned State Attorney.

The 5th Respondent raised a preliminary objection, a prior notice for the same having been given earlier under Rule 4(2) of the Court Rules. The content of the preliminary objection is that the applicants have no "*locus standi*" to file the application. Mr. Mwamnyange said since the applicants were not parties to the appeal which was withdrawn, they cannot file an application to have the same restored. He said such powers are vested on the Director of Public Prosecution being the appellant who withdrew the appeal. He cited the case of **Director of Public Prosecutions V Thomas Mollel @Askofu** Criminal Appeal No. 30 of 1998(CAT) (unreported) to augment his submission. He prayed that the application be struck out for being incompetent.

Mr. Duncan Oola, learned advocate for respondents 1, 3, and 4 fully supported the learned State Attorney. He prayed that the application be dismissed.

On his part, Mr. Mahatane learned advocate for the applicant said he was in Court watching brief to see if there was any way in which the

applicants could be assisted. He admitted that there were difficulties in the application but he insisted that the applicants have "*locus standi*" to file the application.

This is a straight forward application which need not tax us. Parties to Criminal Appeal No. 71 of 2010 were The Republic versus Longidare Menave, Midini Lekagelwe, Loshiru Leskari(now a deceased) and Mesalya Sumanga. The notice of withdrawal of the appeal was given by the Director of Public Prosecutions under Rule 77(1) of the Court Rules 2009. However, it was brought to the attention of the Court when the appeal was called on for the hearing. Hence the Court allowed the withdrawal under Rule 4(2)(a) of the Court Rules. The applicants cited Rule 77(3) of the Court Rules as the enabling provision for filing the application for the restoration of the appeal. Rule 77(3) reads as follows:

*"An appeal which has been withdrawn may be restored by leave of the Court **on the application of the appellant** if the Court is satisfied that the notice of withdrawal was induced by fraud or*

mistake and that the interest of justice required that the appeal be heard.” (Emphasis added).

Rule 77(3) is specific on who has the “*locus standi*” to file an application for restoration of appeal which was withdrawn. It is the appellant and not anyone else. The case of **Director of Public Prosecution V Thomas Mollel @ Askofu** (supra) cited by the learned State Attorney is not relevant in this application. The case dealt with the question whether the powers of the Director of Public Prosecution to issue notice of appeal under section 379 of the Criminal Procedure Act, 1985 are exclusive to him or they can be exercised by other officers. In this application the enabling provision cited by the applicants is explicit. It is only the appellant who has “*locus standi*” to move the Court to restore a withdrawn appeal. Since the applicants were not appellants in the appeal, we entirely agree with both Mr. Mwamnyange learned State Attorney, and Mr. Duncan Oola, learned advocate that they have no “*locus standi*” to file the application. We uphold the preliminary objection and dismiss the application. As for the predicament facing Mr. Felician Mahatane, learned advocate, it is upon him, as an advocate, to venture on where the remedy of the applicants lies, but definitely, it is not in this application.

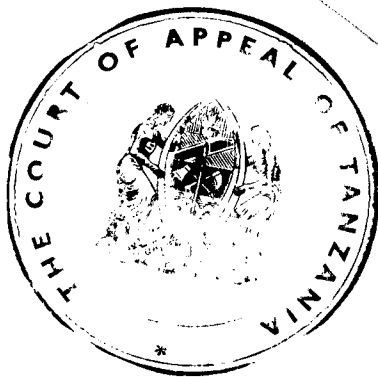
DATED at ARUSHA this 26th day of September, 2012.

M. C. OTHMAN
CHIEF JUSTICE

N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL