

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

**(CORAM: MUGASHA, J.A., MWANGESI, J.A., And MWANDAMBO, J.A.)**

**CRIMINAL APPEAL NO. 343 OF 2016**

**ABDUL OMARY AZIZI @ ATHUMANI MOHAMED.....1<sup>ST</sup> APPELLANT**  
**DUNI HASSAN MWAIGOGA @ PETER LUPEMBE.....2<sup>ND</sup> APPELLANT**  
**VERSUS**  
**THE REPUBLIC ..... RESPONDENT**  
**(Appeal from the Ruling of the High Court of Tanzania  
at Mwanza)**

**(Makaramba, J.)**

**dated the 10<sup>th</sup> day of June, 2016  
in**

**Misc. Criminal Application No. 26 of 2016**

.....

**RULING OF THE COURT**

25<sup>th</sup> & 29<sup>th</sup> November, 2019.

**MUGASHA, J.A.:**

In this appeal, the appellants are seeking reversal of the decision of the High Court of Tanzania (Makaramba, J.) which refused to grant them an extension of time to lodge their respective notices of intention to appeal to the Court against the decision of the High Court (Rweyemamu, J.) dated 3/5/2006 in Criminal Appeal No. 317 of 2004.

What precipitated the present appeal is to the effect that, before the District Court of Mwanza at Mwanza, the appellants together with thirteen other persons were jointly charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 RE 2002. At the end of the trial, the appellants along with two others not parties to this appeal, were on 30<sup>th</sup> August, 2004 convicted as charged and sentenced to the statutory term of thirty (30) years imprisonment.

Aggrieved, the appellants unsuccessfully appealed to the High Court which dismissed their first appeal against the aforesaid conviction and the sentence on 3/5/2006. Still undaunted, on 7/6/2006, the appellants lodged a notice of appeal to the Court. Subsequently, on 7/11/2011, they lodged a notice to withdraw the appeal under Rule 77 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The respective notice of withdrawal was attended to and on 11/4/2012, the appeal was marked withdrawn and deemed to have been dismissed. Four years later, that is, on 20/4/2015, the appellants resurfaced before the High Court vide two separate applications now seeking extension of time to lodge the notice of appeal to the Court against the decision of the High Court which had earlier dismissed their appeal. The said application was predicated under section

11(1) of the Appellate Jurisdiction Act [CAP 141 RE.2002] (The AJA). In their supporting affidavit, the appellants deposed to have withdrawn the appeal having acted on the advice of the Butimba Prison authorities. This was flanked by the Officer in charge of the Prison who in his affidavit deposed that, since the impugned judgment of the High Court was availed to his office after expiry of time to lodge the notice of appeal, the appellants had to withdraw the appeal and as such, prevailing circumstances were behind the appellants' control. Having consolidated and heard together those applications, unimpressed, the High Court dismissed the application having concluded thus:

*"In the present application, the Applicants ought to have accounted for each day in the delay in bringing the applications immediately after receiving the Order for withdrawal of the appeal. The Applicants merely by attributing the delay on Prison Officers, flies in the face of obligation put squarely on their shoulders under Rule 75 of the Court of Appeal Rules, 2009...The court record clearly absolves the Prison Officers of the blame as it shows that they promptly fulfilled their statutory duty of transmitting the applications to the Court after being submitted to them by the Applicants.*

*This Court, for the above reasons, finds and determines that, the Applicants have failed to account for every day of delay immediately after receiving the Order for withdrawal from the Court of Appeal. This would make the consolidated applications for extension of time to file Notice of Appeal out of time devoid of merits. Accordingly, they both fail and are dismissed."*

Following the dismissal by the High Court of the application for extension of time to lodge a notice of appeal to the Court, still undaunted, the appellants have lodged the present appeal seeking the indulgence of the Court to vary the decision of the High Court and instead grant them enlargement of time to lodge the notice of appeal to the Court to enable them to appeal against the decision of the High Court which dismissed their first appeal. In the Memorandum of Appeal, the appellants have fronted five grounds of complaint which for reasons to be apparent in due course, we shall not reproduce them.

At the hearing of the appeal before us, the appellants appeared in person unrepresented whereas the respondent Republic had the services of Mr. Paschal Marungu, learned Senior State Attorney and Ms. Magreth Mwaseba, also learned State Attorney.

In view of the stated background underlying the present appeal, we had to initially probe the parties to address us on the propriety or otherwise of the application for extension of time to lodge the notice of appeal before the High Court considering that, the appellants had earlier on withdrawn their appeal under Rule 77 (1) of the Rules and it was deemed to have been dismissed. This being a point of law, the appellants opted to initially hear the submission of the learned Senior State Attorney reserving a right to reply if need arises.

When invited to address the Court Mr. Marungu submitted that, since the appeal was withdrawn under Rule 77 (1) of the Rules, the appellants ought to have invoked Rule 77 (3) of the Rules by seeking leave of the Court to restore the appeal. In this regard, the learned Senior State Attorney argued that, the appellants' application for extension of time to lodge the notice of appeal to the Court was not properly before the High Court. On the way forward, he urged the Court to invoke its revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act Cap 141 RE. 2002 (the AJA) to quash the Ruling of the High Court and proceed to strike out the purported appeal which has been rendered incompetent.

On the other hand, while the 1<sup>st</sup> appellant urged the Court to proceed with the hearing of the appeal against the decision of the High Court which dismissed the first appeal, the 2<sup>nd</sup> appellant had nothing useful in reply apart from leaving the matter to be determined by the Court.

Having considered the submissions of the parties and examined the record of appeal, the issue for our determination is the propriety or otherwise of the appellants' application before the High Court for extension of time to lodge the notice of appeal to the Court and the respective determination which is a subject of the appeal before us.

It is clear that, the lodging of a notice of appeal to the Court is regulated by Rule 68 (1) of the Rules which in addition stipulates that, the notice of appeal institutes an appeal. As earlier intimated, the appellants herein had filed the notice of appeal to the Court and subsequently instituted a notice to withdraw it as reflected at page 62 of the record of appeal which is indicative of among other things, the following:

***"NOTICE OF WITHDRAWING APPEAL***

*(Made under Rule 77 (1) of the Tanzania  
Court of Appeal Rules, 2009)*

*TAKE NOTICE that, the Appellants herein mentioned have lost interest in this appeal hence do not intend to prosecute it, on ground that the appeal is incompetent for being time barred.*

*WHEREFORE: The Appellants prays that the appeal be marked withdrawn."*

Pursuant to the said notice, as earlier pointed out, on 11/4/2012 the appeal was marked withdrawn and therefore deemed to have been dismissed under Rule 77 (1) of the Rules. The respective Order was served to the appellants who later having invoked the provisions of section 11 (1) of the AJA sought before the High Court an extension of time to lodge the notice of appeal to the Court. Was this a proper remedy? Our answer is in the negative and we shall give our reasons.

The withdrawal of a criminal appeal before the Registrar and the resulting remedy are regulated by Rule 77 (1) and (3) of the Rules which categorically stipulate as follows:

Rule 77 (1)

*" An appeal may be withdrawn at any time before hearing by written notice to the Registrar signed by the appellant or his advocate, and upon notice*

*being given the appeal shall be deemed to have been dismissed."*

Rule 77 (3)

*"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 interests of justice required that the appeal be heard."*

In the light of the stated position of the law, where an appeal is withdrawn under Rule 77 (1) of the Rules, the same shall be deemed to have been dismissed but it can, with leave of the Court, be resuscitated and restored under Rule 77 (3) of the Rules.

Apparently, we have gathered that our counterparts in Kenya and Uganda have similar provisions which prescribe the remedial measures of withdrawn criminal appeals before the Court of appeal. In Kenya, the Judicature (Court of Appeal) Directions made under section 13 of the Judicature Act, Rule 70 stipulates as follows:-



Rule 70 (1)

*" An appeal may be withdrawn at any time before hearing in writing to the Registrar signed by the appellant, and upon notice being given the appeal shall be taken to have been dismissed."*

Rule 70 (3)

*"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 interests of justice required that the appeal be heard."*

Similar provisions exist under Rules 70 (1) and (3) of the Supreme Court of Uganda in the Judicature (Court of Appeal Rules) Directions made under section 48 (1) (b) of the Judicature Act of Uganda. The essence of the said provisions is to regulate the fate of appeals withdrawn before the Registrar whereby their restoration is the sole domain of the Court upon the proof that the withdrawal was induced by fraud or mistake. Thus, once

such appeal is withdrawn and deemed to be dismissed, it is not open for the appellant to return to the High Court and seek extension of time to lodge a notice of appeal to appeal against a withdrawn appeal which can only be resuscitated by the Court itself as aforesaid.

In the present matter, since the appeal was withdrawn and deemed to have been dismissed under Rule 77 (1) of the Rules, the appellants improperly sought the indulgence of the High Court having applied for extension of time to lodge the notice of appeal to the Court. In the light of the stated position of the law, if the appellants were still desirous of pursuing an appeal, they ought to have invoked Rule 77 (3) of the Rules and seek restoration of the appeal upon satisfying the Court that, the withdrawal was induced by fraud or mistake and that the interests of justice required that the appeal be heard. Moreover, though what prompted the withdrawal of the appeal was that it was time barred, that was the issue of incompetence or otherwise of the appeal which was yet to be determined by the Court and not the Prison Officers. Thus, it seems to us, the appellants who now claim to be still desirous of pursuing an appeal against the decision of the High Court which dismissed their first appeal, though advised, were unaware of the consequences prescribed under Rule

77 (3) of the Rules of withdrawing an appeal under Rule 77 (1) of the Rules. Consequently, in the absence of any appeal before us, we are unable to heed to the 1<sup>st</sup> appellant's plea that we should hear and determine the appeal against the decision of the High Court because the second appeal is yet to be restored and it is not before us.

All said and done, we agree with the learned Senior State Attorney that, the application for extension of time before the High Court was untenable as it was not vested with requisite jurisdiction to entertain and determine the remedy of the appeal withdrawn under Rule 77 (1) of the Rules. We wish to reiterate that, jurisdiction is the initial matter to begin with before a judge proceeds to entertain and adjudicate any matter. In this particular case, had the High Court Judge considered Rule 77 (3) of the Rules on the consequences of a withdrawing a criminal appeal under Rules 77 (1) of the Rules, he would not have entertained the application for extension of time to lodge a notice of appeal to the Court.

On the way forward, we invoke revisional jurisdiction under section 4 (2) of the AJA and hereby nullify the entire proceedings and the Ruling in respect of Misc. Criminal Application No. 36 of 2016. As no appeal can stem

from a nullity, we find the purported appeal incompetent and accordingly strike it out. Order accordingly.

**DATED** at **MWANZA** this 28<sup>th</sup> day of November, 2019.

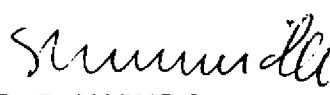
S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

This Ruling delivered this 29<sup>th</sup> day of November, 2019 in the presence of the Appellants in person, and Ms. Ghati William Mathayo, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



  
S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**