

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., FIKIRINI, J.A., And KIHWELO, J.A.)

CRIMINAL APPLICATION NO. 71/08 OF 2020

SIJAONA S/O KAYANDA @ TRAIPHON APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

(Application from the Judgment of the High Court of Tanzania at Mwanza)

(Mchome, J.)

dated the 11th day of July, 2004

in

Criminal Sessions Case No. 12 of 2002

.....

RULING OF THE COURT

13th & 15th July, 2021

NDIKA, J.A.:

The applicant, Sijaona s/o Kayanda @ Traiphon, applies under rule 77 (3) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") for the following orders:

- 1. An order that leave be granted to restore Criminal Appeal No. 263 of 2006 which was withdrawn on 20th July, 2012.*
- 2. An order that the Registrar of the High Court supply him a copy of the judgment handed down by Mchome, J. on 11th July, 2004.*
- 3. An order that the Registrar of the High Court supply him the record of appeal for Criminal Appeal No. 263 of 2006 for him to draw up and file a memorandum of appeal.*

4. *An order that he be acquitted and released from custody should the Registrar fail to supply him the record of appeal for Criminal Appeal No. 263 of 2006.*
5. *Any other order that the Court will deem fit to grant.*

In support of the application, the applicant swore an affidavit. On its part, the respondent opted to file no affidavit in reply.

The applicant states in his notice of motion and the accompanying affidavit that on 21st October, 2001 he was convicted by the District Court of Geita at Geita on two counts of robbery with violence and rape and that he was sentenced to fifteen years' imprisonment on each count, both sentences being ordered to run concurrently. On appeal vide Criminal Appeal No. 12 of 2004, the High Court (Mchome, J.) upheld the convictions as well as the sentence on the first count. Besides, the court enhanced the sentence on the second count to life imprisonment. Still dissatisfied, he duly lodged a notice of intention to appeal to this Court. By that notice, Criminal Appeal No. 263 of 2006 was instituted.

According to the applicant, since the institution of the appeal in 2006 he has not been served with the record of appeal and, consequently, the appeal is yet to be heard. He submitted several reminders to the Registrar of the High

Court requesting to be supplied with copies of the proceedings of the High Court and the judgment delivered by Mchome, J. but to no avail. He then filed Miscellaneous Criminal Application No. 82 of 2017 in the High Court at Mwanza seeking extension of time to appeal to this Court but the High Court (Rumanyika, J.) struck out the matter on the reason that it was frivolous and vexatious. Undeterred, he filed Criminal Application No. 65/08 of 2019 in this Court seeking extension of time, as a second bite, to institute an appeal in this Court but that application was also struck out on 30th March, 2020 by a single Justice of the Court (Ndika, J.A.) on the ground that it was misconceived. The outcome of that decision was based on fact that the applicant's appeal to the Court (Criminal Appeal No. 263 of 2006) was marked withdrawn by the order of the Court dated 20th July, 2012.

The applicant bemoans that he was not given or shown any legal document which proves that the appeal was withdrawn by him. He states further, in the notice of motion, that the failure by the Court to produce such document allegedly written by him and acted upon for the withdrawal of the appeal under rule 77 (1) of the Rules implies that the appeal was withdrawn by fraud and perjury. He thus prays that the appeal be restored and that the Registrar be ordered to serve him a copy of the record of appeal to allow him to file a memorandum of appeal so as exercise his constitutionally guaranteed

right of appeal. In the event that the Registrar cannot serve him the record of appeal, he urges that he should be acquitted of the offences and released from prison.

When the matter was placed before us for hearing, the applicant appeared via a video link to Butimba Central Prison while on the adversary side, Mr. Emmanuel Luvinga, learned Senior State Attorney, entered appearance.

In his short address, the applicant urged that his appeal be restored, contending that it was withdrawn without his consent.

Replying, Mr. Luvinga conceded to the first prayer regarding the plea for restoration of the withdrawn appeal. However, he opposed the grant of the rest of the prayers on the ground that the enabling provisions cited for the application only concerned with the grant of leave for restoration of an appeal which was wrongly withdrawn.

Rejoining, the applicant expressed his dismay that the matter has been dragging on in court for a long time. He reiterated his prayer that his appeal be restored and that it should be heard and determined expeditiously.

We have examined the record and taken account of the arguments made by the parties. As hinted earlier, Mr. Luinga had no qualms about the plea for restoration of the appeal but urged us to reject the rest of the prayers on the ground that they do not fall within the purview of the enabling provisions cited. All the same, we are enjoined to determine tenability of the plea for the restoration of the appeal, which is the essence of this matter.

It is noteworthy that rule 77 (3) of the Rules cited as an enabling provision for this application is explicitly circumscribed to granting leave for restoration of an appeal that had been withdrawn upon a notice of withdrawal induced by fraud or mistake. For ease of reference, we extract the said rule thus:

*"(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."*

[Emphasis added]

The above provision, in our view, is plain and clear. It vests discretion in the Court to order restoration of an appeal withdrawn under rule 77 of the

Rules if it 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 justifying his quest for restoration of the appeal, the applicant disputed having ever submitted a notice of withdrawal. On that basis, he contended that his appeal was withdrawn fraudulently or by perjury.

We have examined the court records including an extract from the relevant register of the Court and established with certainty that the appeal involving the applicant as the first appellant and his co-appellant Masalu Kachungwa Lugulila (**Sijaona Kayanda Tryphon and Masalu Kachungwa Ludugulila v. Republic**, Criminal Appeal No. 263 of 2006) was marked withdrawn on 20th July, 2012 by the order of the Court (Othman, C.J.). The Court acted on a notice of withdrawal that originated from the appellants. The applicant's unembellished denial in his supporting affidavit that he did not file any notice of withdrawal does not amount to proof that the notice acted upon by the Court was false. To make matters worse, the applicant did not file any affidavit from the Officer-in-Charge of his prison to support his claim. In the premises, we are unpersuaded that the withdrawal complained of was induced by fraud or mistake.

As we have declined to grant the first prayer, the need to consider and determine the other prayers does not arise since the said prayers are essentially consequential upon the first prayer being granted.

In the upshot, we find the application devoid of substance. It stands dismissed.

DATED at **MWANZA** this 15th day of July, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 15th day of July, 2021 in the presence of the applicant in person linked via video conference at Butimba Prison and Ms. Georgina Kinabo, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL

