

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISCELLANEOUS CRIMINAL APPLICATION NO. 16 OF 2020

*(Originating from Extended Criminal Session No. 19 of 2018, on 9th November 2019
at KISUTU Resident Magistrate Court before Hon. Mazengo)*

ESTER JONFREY LYIMO----- APPLICANT

VERSUS

THE REPUBLIC----- RESPONDENT

RULING

21st February, 2020.

In this application the applicant who was convicted on the charge of Murder and sentenced to death by this court through Hon. Mazengo (PRM) with Extended Jurisdiction on 11/11/2019 in Extended Criminal Session No. 19 of 2018, brought an application under Section 11(1) of Appellate Jurisdiction Act (Cap. 141 R. E. 2002) for the following reliefs:

That:

- a) This Honourable court be pleased to extend time within which the applicant to lodge a Notice of Appeal.

b) This Honourable court be pleased to extend time for the applicant to lodge appeal out of time.

c) This honourable court be pleased to issue any order it deem fit and just to the applicant.

The matter was scheduled at first for mention with view of setting hearing date on the 14/02/2020 when it was noted by the court that the applicant through prison authority had issued a Notice of Appeal which was not attached to her application. The court therefore directed the applicant's advocate to make a follow up to establish whether there was any Notice of Appeal issued and filed by the applicant in court before the court proceeds to hear and determine the application. The hearing was therefore adjourned to 21/02/2020.

On 21/02/2020 when the matter was called before me for hearing, Mr. ELIAMAN DANIEL learned advocate assisted by MS MIRIAM NDESARUWA advocate for the applicant informed the court that upon making a follow up it was discovered that there was a Notice of Appeal issued by Applicant through prison authority and duly filed in court on 29/11/2019 which was well within the time limitation of 30 days for filing the notice as sentence was meted on

11/11/2019. Mr. DANIEL therefore prayed for withdrawn of the application as the same was filed inadvertently for not being aware of the existence of the notice of Appeal. He also tendered the said notice to prove its existence.

In response to the withdrawal prayer, Mr. ADOLF KISIMA learned State Attorney quickly pointed out that the conviction and sentence dates indicated in the Affidavit sworn by Mr. GABRIEL MASANGA (Advocate) in support of the application and the one in the Notice of Appeal were contradicting each other. That the affidavit at paragraph 3 reads that it is 09/11/2019 contrary to the one in the Notice of Appeal which is 11/11/2019. There being variance of dates he prayed this court to shake out the application for being defective or order otherwise.

In reply MR. DANIEL learned Advocate admitted the said variation of dates but submitted that the same had no effect to his prayer for withdrawal and if the court finds any still the same could be remedied by applying the overriding objectives principle. He therefore prayed court to grant the prayer.

I have considered the submissions by both parties with regard to the prayer for withdrawal of this application. It is

apparent record that the application was prepared by the applicant's advocate out of ignorance of existence of the Notice of Appeal, since there is now a proof that it was received by the court on 29/11/2019.

It is now a settled law that Notice of Appeal institutes the appeal in criminal cases. See the case of **WILLIAM SUNDAY V. R.**, Criminal Appeal No. 75 of 2007. As it has been disclosed in this application the Notice of Appeal was issued on 29/11/2019 which was well within time. And for I hasten to conclude that there is an appeal in the Court of Appeal instituted by the applicant the fact which renders the present application meaningless.

MR. KISIMA learned State Attorney has asked this court to strike out the application instead of withdrawing it for containing variations of conviction and sentence dates of the applicant between the affidavit in support of the application and the Notice of Appeal. With all due respect to Mr. KISIMA, striking out the application will have no any effect. The effect of striking out the application is temporary as the applicant is not barred from bringing a fresh one subject to the Limitation of the law. However, in the circumstances of this case where there is already an appeal

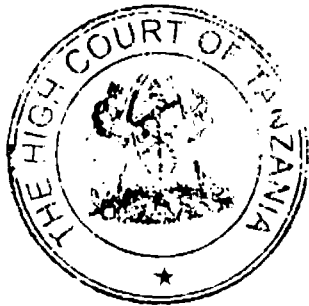
before the Court of Appeal I see no point to reject the applicant's prayer of withdrawing her application which I have already noted to be of no value any more.

In the event, Mr. KISIMA's prayer to strike out the application is reject and I proceed to order that this application is marked as withdrawn as per Mr. DANIEL's prayer.

It is so ordered.

It is so ordered.

DATED at DAR ES SALAAM this 21st day of February, 2020.




E. Kakolaki

JUDGE

21/02/2019

The ruling has been delivered, today in the presence of the applicant herself, Mr. ELIAMAN DANIEL Advocate assisted by MS. MARIAM NDESARUWA advocate and Mr. ADOLF KISIMA learned State Attorney.


E. Kakolaki

JUDGE

21/02/2019