



**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

CRIMINAL APPEAL NO. 12 OF 2019

(Arising from criminal appeal No. 56/2014 of Bukoba District Court and original criminal case no. 69/2014 Kassambya Primary Court)

RUTANJAGA MATHIAS.....1ST APPELLANT
BERIGINA RAPHAEL.....2ND APPELLANT

VERSUS

ELIAS EMMANUEL.....RESPONDENT

JUDGMENT

Date of last order 08/05/2020

Date of judgment 11/05/2020

N.N. Kilekamajenga, J.

The appellants were convicted by Kassambya Primary Court for the offence of malicious damage to property vide case No. 69 of 2014. They were sentenced to serve one year in prison or pay a fine of Tshs. 200,000/=. They were also ordered to compensate the complainant an amount of Tshs. 2,000,000/=. Aggrieved by the decision of the Primary Court, the appellants appealed to the District Court of Bukoba through Criminal Appeal No. 56 of 2014. On 17th February 2016, when the appeal was scheduled for the hearing, the appellants were absent; the case was '*withdrawn for want of prosecution*'. The appellants

did not challenge the order of the District Court on time, so they sought an order of extension of time before this Court. This Honourable Court enlarged time for the appellants to file the appeal though out of time. The appellants finally lodged the appeal containing four grounds coached thus:

- 1. That, the Resident Magistrate grossly erred at (sic) law and fact and had no jurisdiction to withdraw the Criminal Appeal No. 56/2014 for want of prosecution.*
- 2. That, by ordering the withdrawal of Criminal Appeal No. 56/2014 for want of prosecution and in the absence of the appellant, the Resident Magistrate grossly erred at (sic) law to deny the Appellants their right to be heard.*
- 3. That, the order passed by the Honourable Resident Magistrate on 17th February 2016 is tainted with irregularities which vitiate the whole proceeding(sic) dated 17th February 2016.*
- 4. That, Criminal Appeal No. 56/2014 was not heard on merits, the rights of the parties were not finally determined.*

When the parties appeared for hearing before this Honourable Court, they prayed to dispose of the case by way of written submissions and the prayer was granted. During the submission, the counsel for the appellants argued that there is no law which confers jurisdiction to the Resident Magistrate to withdraw the appeal for want of prosecution. The order of the District Court was therefore illegal, null and void. The learned counsel for the appellants further argued that the appellants were denied the right to be heard by the order of the magistrate.

She referred the Court to the cases of **Yazid Kassim Mbakileki v. CRDB (1996) LTD and Jackem Auction Marts and Court Broker Civil Reference No. 14/04 of 2018** (CA) at Bukoba (unreported) and **Yakobo Magoiga Gichere v. Penina Yusuph, Civil Appeal No. 55 of 2017**, CA at Mwanza (unreported).

The learned counsel for the appellants argued that if this Court substitutes the 'withdrawal' with the 'dismissal' order, such an order will still cause injustice to the appellants because the case was not heard on merit. The dismissal order may lead to endless litigation as the parties' rights have not been determined. She urged the Court to declare the order of withdrawal for want of prosecution illegal, null and void. The order should be quashed so that the matter may be heard on merit.

On the other hand, the counsel for the respondent argued that the District Court gave the appellants the right to be heard but they were absent when the case was fixed for hearing. He impugned the case of **Yazidi** (*supra*) for being distinguishable to the case at hand. In the case of **Yazidi** (*supra*), the court did not hear the parties while in this case the appellants were given the right to be heard. The Court should not be confused with the words '*withdrawn for want of prosecution*' and '*dismissed for want of prosecution*'. He finally urged the Court to correct the order of the District Court and appear as '*the appeal is dismissed*'

for want of prosecution' instead of '*case withdrawn for want of prosecution.*' The learned counsel for the respondent vehemently argued that nullifying the proceedings based on the said order will authorise the acts of the appellants and their advocate who absented from the court without justifiable cause. In his argument, he urged the Court to consider the cases of **Berena Banoba v. Ferdinand Banoba, High Court, Misc. Criminal Application No. 2 of 2016**, HC at Bukoba (unreported) and **Rutanjaga Mathias and another v. Elias Emmanuel, PC Criminal Appeal No. 5 of 2016**, HC of Bukoba (unreported).

When rejoining, the learned counsel for the appellants insisted that the District Court issued an unlawful order. Replacing the withdrawal order with the dismissal order will culminate further litigation because the case has not been heard on merit. She urged the Court to allow the appeal and quash the proceedings and order of the District Court.

In understanding whether the appeal has merit, it is pertinent to know the consequences of the order issued by the District Court on 17th February 2016. When the appeal was '*withdrawn for want of prosecution*', the order inhibited the appellants from applying for necessary orders in the same court. When the case is withdrawn, it may be inapplicable to set aside the order. In other words, the appellants were technically prevented from approaching the District Court for justice. As argued by the counsel for the appellants, the appellants were denied

the right to be heard even on the reason for their absence on the day of the hearing. The right to be heard is the most fundamental right afforded to every party. If the appeal could be '*dismissed for want of prosecution*', the order could allow the appellants to apply before the same court to set it aside. When the court sets aside the dismissal order, the appeal is reinstated for hearing. Unfortunately, this remedy may not be available for cases withdrawn. Besides, as rightly argued by the counsel for the appellants, the magistrate had no jurisdiction to withdraw the case in the absence and without the appellants' consent. Hence, the withdrawal order was erroneous and contrary to the known practices of courts in Tanzania. Where the appellant does not appear on the date of hearing, the appropriate order is to '*dismiss the case for want of prosecution*' and not to '*withdraw the case for want of prosecution*'.

Therefore, the appellants were denied the right to be heard, **first**, on their absence when the case was fixed for the hearing; **second**, on the appeal to be heard on merit. The dismissal order in lieu of withdrawal order may not quench the thirst of the appellants. The trend of justice has moved towards the administration of justice by abiding by substantive justice than to be held-up with technicalities which may inhibit the justice. The overriding desire of courts is to see justice being done than raising technicalities to prevent substantive justice. In the instant case, the case was not heard on merit, the dismissal order may

not assist the parties in reaching justice. While the major overriding objective, in this case, is justice, the same may be reached through the hearing of the case on merit. I am mindful, this Court has jurisdiction to correct the anomaly and impose the dismissal order instead of the withdrawal order. In my view, the dismissal order will not do justice to the parties.

I am hesitant to remedy the anomaly using **Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977**. The article provides:

107A.-(1) The Judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania.

(2) In delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say:

(a) impartiality to all without due regard to ones social or economic status;

(b) not to delay dispensation of justice without reasonable ground;


(c) to award reasonable compensation to victims of wrong doings committed by other persons, and in accordance with the relevant law enacted by the Parliament;

(d) to promote and enhance dispute resolution among persons involved in the disputes; and

(e) to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice.

I believe, the Constitution is too sacred to remedy this minor irregularity. The principle of the overriding objective which is now gaining momentum in the administration of justice in Tanzania should be the direction of every magistrate because technicalities, whichever professionally coined, may not be in the best interest of substantive justice.


Based on the reasons alluded to above, the appeal is allowed. As the District Court issued an erroneous order, the anomaly should be corrected in favour of the appellants. I hereby set aside the order of the District Court which withdrew the appeal in the appellants' absence. As the case was not heard on merit, also based on the principle of overriding objective, I direct the appeal to be heard on merit. I do not see a better reason to quash the proceedings thereof. However, for the interest of justice and fair hearing, the appeal should be heard before another magistrate. Order accordingly.


Ntemi N. Kilekamajenga
Judge
11/05/2020

Court:

Judgment delivered in the presence of the learned counsel for the respondent, Mr. Peter J. Matete and the first appellant. Right of appeal explained to the parties.




Ntemi N. Kilekamajenga
Judge
11/05/2020