

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

MISC. CRIMINAL APPLICATION NO. 5 OF 2023

(Originating From Criminal Application No. 1 of 2023 Criminal Case No. 127/2022

District Court of Simanjiro)

FRANK GODFREY MSHANA.....1ST APPLICANT

NICOLOUS NGOO.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

15th March & 30th March, 2023

Kahyoza, J.

Frank Godfrey Mshana and Nicolous Ngoo are facing a charge of unnatural offence. They filed an application for Revision praying this Court to call for and examine the records of criminal case **No. 127/2022 R. V. Franck Godfrey Mshana and Nocolous Ngoo** for the purpose of satisfying itself as to the correctness, legality, propriety of the order. On the date fixed for hearing, both applicants and their advocate defaulted to enter appearance. This Court dismissed the application for want of prosecution. Aggrieved, they instituted the current application seeking for an order to set aside the dismissed order.

The applicant's reason for their failure to enter appearance was that on the hearing date they boarded a private car which was driven by their

advocate, Mr. Allen Godian. When they reached Nanja area (Monduli district) Nicolous Ngoo, fell sick. They resolved to go back for medical treatment. Thus, the applicants' reason for failure to appear was due to illness of the 2nd applicant, a situation, which forced their advocate and the first applicant to attend him.

Ms. Blandina, the learned State Attorney who appeared for the respondent vehemently opposed the application. She opposed the application without filing a counter affidavit. It is trite law, she cannot oppose facts in the affidavit without filing an affidavit. She did not contradict the allegation that the second applicant fell sick, but contended that there was no sufficient reason why the first applicant did not attend.

In his short rejoinder, Mr. Allen the applicant's advocate submitted that the first applicant could not as he and the first applicant had to attend the second applicant.

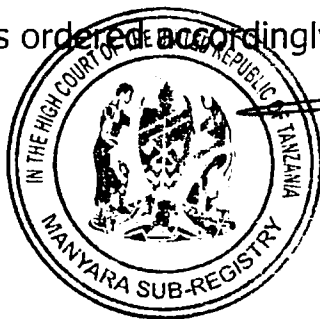
There is one issue whether the applicants have adduced sufficient reason for non-appearance. I wish to state at the outset that I agree with the respondent's State Attorney that the first applicant did not disclose sufficient reason for his absence. The fact that the second applicant fell sick, is a sufficient ground for the second applicant's non-absence. The first applicant did not explain what role he prayed that had he not played that role, the second applicant's life would have been in-danger. Not only that but also, he did not even swear an affidavit to support the allegations.

As to the absence of the applicant's advocate and the second applicant, I am not moved by the argument the second applicant fell sick on their way

to Babati. I examined the affidavit and annexes thereto and found that the second applicant was attended at 12:51 Pm. The application was set for hearing at 09:00am. If it was true that the applicants were driving from Arusha to Babati to attend this Court, they needed at least two hours to drive from Arusha to Babati. For that reason, they must have commenced their journey before 07:00Am. It is hardly one hour drive from Arusha to Monduli that means they were at Monduli before 08:00Am. There is no explanation as to what be fell them from 08:00Am, when they may have decided to go back to Arusha to 12:51 Pm when they appeared before Kaloleni Medical Centre for medical attention. To add salt to an injury, the second applicant did not swear an affidavit to prove the allegation that he fell sick.

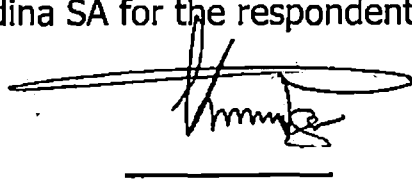
I am in agreement with the respondent's learned State Attorney that the applicants are all out to cause unnecessary delays to the trial. All in all, since the respondent's State Attorney did not dispute the allegation by filing a counter affidavit and since, the applicants were absent for the first day set for hearing, I find that the second applicant has adduced sufficient reason that he was absent due to sickness and the advocate had to attend him. I therefore, set aside the dismissal order and restore Criminal Application No. 1/2023.

It is ordered accordingly.



J. R. Kahyoza
Judge
30/3/2023

Court: Ruling delivered in the virtual presence of Mr. Allen the applicants' advocate and Ms. Blandina SA for the respondent. B/C Dora present.

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', is written over a horizontal line. The signature is stylized with a large, sweeping initial 'J'.

J. R. Kahyoza
Judge
30/3/2023