TANZANIA / JUDGMENT

francis candidus ndiwu vs the republic 2023 tzhc 23024 28 november 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SONGEA SUB-REGISTRY AT SONGEA MISC. CRIMINAL APPLICATION NO. 18 OF 2023 (Originating from Criminal Appeal No. 36 of2023, High Court of Tanzania at Songea) FRANCIS CANDIDUS NDIWU ..... APPLICANT VERSUS THE REPUBLIC ..... RESPONDENT

RULING

Date: 16th and 28th November, 2023 KARAYEMAHA, J. This is the ruling in respect of an application filed by the applicant above-mentioned beseeching this court to restore Criminal Appeal No. 36 of 2023 which was marked withdrawn on 28th August, 2023 before Hon. Kisanya, Judge at the instance of the applicant through his advocate. The application was made under the provisions of section 371(3) of the Criminal Procedure Act [Cap 20 Revised Edition 2022] (henceforth the CPA) and supported by an affidavit sworn by Francis Candidus Ndiwu. The respondent (Republic) fervently opposed the application i through the counter affidavit sworn by Mr. James David Rhobi, the learned State Attorney. All started with the arraignment of the applicant before Nyasa District Court at Nyasa (the trial court) for the offence of Criminal trespass contrary to section 299(a)(b) of the Penal Code [Cap 16 Revised Edition 2022]. After a full trial, the trial court was satisfied that the prosecution proved its case against the applicant herein beyond reasonable doubt. He was convicted and finally sentenced to serve a period of three (3) months imprisonment. Deeply aggrieved with the conviction and sentence imposed against him, the applicant filed an appeal to challenge that decision. It appears that before the appeal could be finalised, the applicant had completed serving the sentence and released from prison. Apparently, when the appeal was called on for hearing on 28th August, 2023, the applicant was present along with his advocate. The latter stood and informed the court that they were withdrawing the appeal because the appellant had fully served the sentence. Consequent to that submission, this court marked the appeal withdrawn. It appears that event did not amuse the applicant. He resorted to this application in order to have his appeal restored. 2 When the application was called for hearing, the applicant was represented by Mr. Makame Sengo, learned advocate whereas the respondent enlisted the legal services of Mr. Alfred Maige and Mr. Madundo Mhina, learned State Attorneys. The application was argued orally. Throwing the first jab was the applicant's counsel. The learned counsel capitulated the background of the

application and contended that when the appeal came for hearing on 28th August, 2023 the appeal was withdrawn. He argued further that the applicant did not know what was going on because his former advocate did not properly advised him on the effect of withdrawing the appeal. The learned counsel casted blames on the court asserting that it did not inquire from the applicant if what his counsel said was true. The applicant's counsel averred that the client's right could not be defeated by the advocate's advice. To bolster his argument, Mr. Sengo referred this court to the case of James Gidion Kusaga v. Registered Trustee of the North Eastern Diocese of the Evangelical Lutheran Church of Tanzania, Civil Application No. 145/12 of 2023, CAT-Tanga and added that the scenario of that case is similar to the case 3 at hand. For these reasons, Mr. Sengo urged this court to grant the prayer of restoration of the withdrawn appeal. Submitting in rebuttal, Mr. Maige began by requesting to adopt counter-affidavit sworn to form part of his submission. The learned State Attorney did not agree with the applicant. He submitted that the applicant and his former advocate discussed the decision to withdraw the appeal and its impact thereafter. He added that when the advocate represents a client, he submits before the court on what his client directs him to do. He held the view that the applicant was attempting to turn hostile against his former advocate. The learned State Attorney pointed out circumstances under which the appellant would be excused. He said they would be if on the fateful date he was sick or not of sound mind. On whether the court was duty bound to afford him a chance to say if he wished to withdraw his appeal or not, Mr. Maige argued that the assertion would sound if he brought it to the attention of the court. Mr. Maige sought refuge to the proceedings before Hon. Kisanya, Judge and submitted that they do not indicate if the applicant either raised his hand to ask for clarification or that he complained to have been prevented by the language barrier. To him the applicant's silence 4 amounted to agreeing to what his advocate prayed. To underscore his proposition, he cited the case of Lim Han Yung and Another v. Lucy Treseas Kristensen, Civil Appeal No. 219 of 2019, CAT-DSM. Turning to the case of James Gidion Kusaga {supra) cited by the counsel for the applicant, Mr. Maige argued that the same is distinguishable to the instant case. Whereas this case is predicated on withdrawing the appeal in presence of the appellant, the counsel in that case was blamed for advising the appellant to go by revision instead of appeal. He prayed the application be dismissed for lack of merit. In his rejoinder, Mr. Sengo distinguished the case of Lim Han Yung and Another (supra) on what he said in that principle was the duty of a client to make follow up and not to leave everything to his advocate. He argued that the gist of this application is failure of the counsel to properly advice the applicant not failure to appear in court. He insisted that the case he cited was relevant to the facts of this case. After a vigilant consideration of the submissions from both parties, it is the view of this court that the issue calling for determined is whether the applicant advanced a sufficient cause for the court to use its discretionary powers to restore Criminal appeal No. 36 of 2023. This 5 is the spirit under section 371(3) of the CPA, which is quoted for easy of reference: "371. (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 there are sufficient reasons that the appeal be Aear^'fEmphasiS added] The provision above mentioned is quoted in discretion form, that means it is upon the court to grant or refuse to restore the case after satisfied itself if the applicant has adduced sufficient reasons to warrant his case which was withdrawn to be restored. The law did not define the word "sufficient

reasons" but the court through its decisions defined the same. In the case of Rashidi Othman Ramadhani v. Director of Public Prosecutions, Criminal Application No. 20/15 of 2019, Court of Appeal of Tanzania at Zanzibar, the court borrowed a leaf from the interpretation of the phrase in the case of Reginal Manager TANROADS Kagera v. Ruaha Concreate Company Limited, Civil Application No. 96 of 2007 (unreported). Where the court interpreted that; "What constitutes 'sufficient cause' cannot be laid down by hard and fast rules. This must be determined by reference to all the circumstances of each particular case. This means that the applicant must place before 6 the Court material which will move the Court to exercise its discretion..." In the present case, the applicant averred under paragraph 6 of the affidavit supporting the application that his former prayed his appeal to be withdrawn for reasons that he had already served his sentence while it was to be heard. What has astonished me is the averment under paragraphs 7 and 8. To present my dismay let me quote them: "7. That, while all that were proceeding (sic) I was not aware of what the actual discussion was and what its effects after the appeal was withdrawn as my counsel never clarified it to me.

8. That, my counsel made the decision to withdraw the said appeal without consulting me but even the court never gave me a room to address and or give opinions before it was withdrawn." I have anxiously considered these paragraphs in tandem with the Mr. Sengo's submission. The applicant's complaints under these paragraphs are unsubstantiated. This court has generated several; questions some of which have direct answers. Was the appellant present in court on the 28th August, 2023? The answer is in the positive. Did he meet his advocate and discuss on what the case was about? Pondering the averments in the paragraph expounded in Mr. Sengo's submission, the answer is in the positive. Did this court accord a chance to parties to 7 address it? The answer is yes. Did the appellant seek clarification on what Mr. Eliseus stated? Surely, the answer is in the negative. Was there a language barrier? Facts of this application are silent and therefore the answer is in the negative because usually proceedings are recorded in English but speeches are done in Kiswahili. Since they were conducted in Kiswahili that is why the applicant has no misgivings. I have also considered the period spent by the appellant to prefer this application. The appeal was withdrawn on the 28th August, 2023 but this application was preferred on the 29th September, 2023 a month after. The applicant has not said what he did all that period. In my considered view, if what happened in court displeased him, I think he would take immediate step. This was not done. That notwithstanding, the applicant is attempting to conduct a forum shopping. He does not know whom to blame. He has blamed his former advocate who discussed with him on what should be addressed to the court. He has in similar disposition blamed the court which in fact should be a neutral party in the case. The role of the court is to receive addresses from parties. If represented from the advocates. More often than note, courts have been giving chances to parties to seek clarifications even if they are represented. Nevertheless, it is the party 8 himself to move the court by raising the hand or sounding out. If this does not take place, it is considered that the advocate has spoken his client's mind and the court is unwarranted to interfere. However, this is not often. That done, I now consider whether the applicant has assigned

good reason. In my considered humble view, I think not. In his entire 11 paragraphed affidavit, the applicant has not revealed what effect has he encountered which were not discussed. As correctly submitted by Mr. Maige, effects of the appeal ending and the appellant remaining spotted with criminal record cannot be escaped when discussing on the fate of the appeal. Unless we are told that the applicant did not discuss anything with his former advocate, the remaining prevailing perception is that they discussed on everything. As a matter of practise at the time a client hires an advocate to represent him before the court of law, it is presumed that whatever the advocate does is on behalf and interest of his client's instruction(s). Therefore, there was no need for this court to ask the applicant on the authenticity of his advocate's submission he hired to represent him. As rightly as submitted by Mr. Maige, the applicant would have raised his 9 hand to seek clarification or bring his qualms on the attention of the trial court. His silence was tantamount to accepting his advocate's address. I have portioned time and read both cases of James Giodion Kusaga (supra) and Lim Han Yung (supra) and learnt that they instil a requirement on parties to pay good attention when the case is going on and participate fully even if they are represented by advocates. In this case, the applicant ought to participate fully by asking clarification in court when the proceedings were going on not to blame the court while the trial Judge is unaware and innocent. With due respect this is an afterthought. Consequently, I am of the considered view that no sufficient reasons have been adduced to justify granting of an application for restoring the withdrawn appeal. The application has miserably failed the test. Accordingly, it hereby dismissed. It is so ordered. DATED at SONGEA this 28th day of November, 2023. 10

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