

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.188 OF 2012

(An Appeal arising out of the Judgment of R.E. OUGO (MRS.) - SPM delivered on 14th June 2007 in Nairobi ACC. Case No.3 of 2004)

ALOYS OWINO OWEGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

On 25th February 2016, the advocate for the Appellant informed the court that she wished to withdraw the appeal. The State did not have any objection to the withdrawal of the appeal. This court marked the appeal as withdrawn and ordered the file closed. That would have been the end of the story. However, it was not to be. On 26th April 2016, the Appellant made an application under **Articles 50, I59(2)(d) and 165(3)** of the **Constitution** seeking to have the said orders of this court marking the appeal as withdrawn set aside. The Appellant further sought orders for the reinstatement of the appeal to hearing. The grounds in support of the application are stated on the face of the application and supported by the annexed affidavit of the Appellant, his advocate Mr. Francis Wasuna Advocate and Susan Otieno Advocate. The thrust of the Appellant's application is that the advocate who appeared for the Appellant on the particular date that the appeal was scheduled to be heard misapprehended the instructions that she had been given and instead of withdrawing from acting for the Appellant, she withdrew the appeal itself. The Appellant told the court that he is still interested to pursue his appeal. On its part, the State was of the view that the Appellant had failed to prosecute his appeal on several occasions and the order of withdrawal of the appeal that was made by the court should be seen in that context. However, the State left the issue of whether to reinstate the appeal to hearing to the court.

The grounds in support of the application for the setting aside of the order of withdrawal and reinstatement of the appeal were amplified by Mr. Wasuna in the submission that he made before court. This court has considered the said submission. The issue for determination by this court is whether the Appellant made a case for this court to set aside the order of withdrawal of the appeal that was recorded by the court. It is important that the background to what transpired before the order of withdrawal was made be set out for clarity. The Appellant lodged an appeal against the decision of the trial court which found him guilty of two counts under the **Anti-Corruption and Economics Crimes Act**. The appeal was lodged on 9th July 2012. The appeal was admitted to hearing on 30th October 2012. Since then, the appeal has been listed before the court on several occasions for hearing.

In virtually all the dates that the appeal came up for hearing, the advocate of the Appellant failed to appear before court. Several advocates held his brief essentially with a view to adjourning the hearing of the appeal. The parties appeared before this court on 28th January 2015. They recorded a consent to the effect that the appeal be disposed of by the parties filing and exchanging written submission. The said submission was supposed to be filed and exchanged within 30 days. The Appellant did not file any submission. When the parties appeared before Ngenye J on 6th May 2015, a Mr. Chege holding brief for the Appellant's counsel gave a false report to the Judge to the effect that this court had taken over the conduct of this matter. He requested the Learned Judge to refer the matter to this court for further hearing. The report was false because by issuing directions that the parties may file written submission in support

of their respective cases, this court had not assumed exclusive jurisdiction to hear the appeal. Ngenye J had jurisdiction to hear the appeal. There was no legal impediment preventing the Learned Judge from hearing the appeal.

With hindsight, it is apparent to this court that the Appellant had not complied with the direction issued by this court made pursuant to the consent to the effect that parties file written submission in support of their respective opposing positions. The Appellant was looking for an excuse to have the hearing adjourned. The matter was listed for hearing on several occasions thereafter until the 21st January 2016 when this court fixed the appeal for hearing on 25th February 2016. Again as is evident from the record of the court, counsel for the Appellant was absent. A Mr. Kamwendwa held his brief. The Appellant was not in court. On 25th February 2016, again the advocate for the Appellant was absent. The Appellant was present. A Ms. Otieno held the advocate's brief. The court insisted that the appeal which had been pending hearing for a considerable period of time proceeds to hearing. The advocate present in court informed the court that she wished to withdraw the appeal. Ms. Nyauncho for the State did not oppose the withdrawal of the appeal. The court issued the order marking the appeal as withdrawn. It ordered the file closed.

This court has given this background with a view to bring out the conduct of the Appellant since the appeal was filed. It is clear to this court that the Appellant has been indolent in the prosecution of his appeal. He has failed to prosecute the appeal on the several occasions that the appeal was listed for hearing. On the particular day that the advocate for the Appellant informed the court that she wished to withdraw the appeal, this court was ready to hear the appeal. In fact, the court having earlier granted the adjournment due to the absence of the Appellant, fixed the date for the hearing of the appeal in court. The appeal was at the material time one of the older appeals still pending hearing before the court. This court is not persuaded by the reasons put forward by the counsel for the Appellant for his failure to attend court. Taken in context, the reasons advanced by learned counsel is one of the many reasons that had previously been made with a view to delaying the hearing of the appeal. It is trite that a case belongs to a litigant. It is up to that litigant to pursue, with diligence, the hearing of his case. In the circumstances of this appeal, this court is not prepared to exercise its discretion in favour of the Appellant.

The upshot of the above reasons is that the application seeking to set aside the order of withdrawal of the appeal dated 26th April 2016 is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2016

L. KIMARU

JUDGE