



REPUBLIC OF KENYA



KENYA LAW
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**Chitavi v Republic (Criminal Application 11 of 2014)
[2022] KECA 497 (KLR) (1 April 2022) (Ruling)**

Neutral citation: [2022] KECA 497 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPLICATION 11 OF 2014
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
APRIL 1, 2022**

BETWEEN

ANTHONY MKALA CHITAVI APPLICANT

AND

REPUBLIC RESPONDENT

(An application to reinstate a withdrawn appeal being an appeal from the judgment of the High Court of Kenya at Mombasa (Muya, J.) dated 1st November 2013 in High Court Criminal Appeal No. 279 of 2011)

RULING

1. In his application dated 20th July 2017 made under Rule 68(3) of the Court of Appeal Rules, the applicant, Anthony Mkala Chitavi, prays for an order of reinstatement of his appeal herein which was withdrawn at the request of his previous advocate on 13th February 2017. The appeal arises from a judgment of the High Court (Muya, J.) given on 1st November 2013 in Mombasa Criminal Appeal No. 279 of 2011 upholding his conviction and sentence by the Magistrates Court for an offence under the *Anti-Corruption and Economic Crimes Act*.
2. Urging the application before us on 31st January 2022, learned counsel for the applicant Mr. Nyanje referred the Court to the affidavit supporting the application in which the applicant deposed that his previous advocate, Stephen Kithi, applied to withdraw the appeal without his instructions, authority or consent; that by the time the appeal came up for hearing on 13th February 2017, the record of appeal was not even ready and the onus for preparing it lay with the court; that the withdrawal of the appeal was made without his knowledge, was fraudulent and mistaken. Counsel submitted that the applicant's right to fair hearing under Article 50 of the *Constitution* was thereby violated and that this is a proper case for the appeal to be reinstated.



- 3. Learned Prosecution Counsel Ms. Vallerie Ongeti holding brief for Mr. Nyoro did not oppose the application. Counsel urged the Court to allow the application in the interest of justice and so that the appeal may be heard.
- 4. Rule 68(3) of the *Court of Appeal Rules* confers on the Court discretion to grant leave for restoration of an appeal that has been withdrawn if satisfied that the withdrawal was induced by fraud or mistake and that the interest of justice requires that the appeal be heard. The deposition by the applicant that his previous advocate withdrew the appeal without reference to him is not challenged. In the circumstances, we think counsel for the respondent properly conceded the request for restoration of the appeal.
- 5. We allow the applicant’s application dated 20th July 2017 and order that the applicant’s appeal herein be and is hereby reinstated for hearing. The Deputy Registrar of the Court is hereby directed to give directions towards expeditious disposal of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 1ST DAY OF APRIL 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

