IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL (APPLICATION) NO. 50 OF 2018

BETWEEN

ABDI RASHID ADEN HUSSEIN.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment the High Court of Kenya at Garissa (Muchemi & Mutuku, JJ.)

***dated 29th January, 2013 in HC.CR. A. No. 3 of 2012*)**

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RULING OF THE COURT

Even though he had been charged on the main count of robbery with violence contrary to **section 296** of the Penal Code, the applicant **Abdi Rashid Aden Hussein** was acquitted on it and convicted on the alternative lesser charge of handling stolen goods. For that he was sentenced to serve 10 years in prison.

He was aggrieved and filed **Criminal Appeal No. 3 of 2012** before the High Court at Garissa. The appeal was heard by Muchemi and Mutuku, JJ. who not only dismissed it, but, having come to the conclusion that the evidence established that the appellant was guilty of the main charge, proceeded to convict him on the same. The learned Judges then sentenced him to suffer death as by law prescribed.

That disastrous turn of events provoked a second appeal to this Court. Before that appeal was heard, however, the Supreme Court decided, in ***FRANCIS KARIOKO MURUATETU & ANOR vs. REPUBLIC [2017] eKLR,*** that the mandatory nature of the death sentence was unconstitutional as it deprived trial courts of their proper jurisdiction to consider and exercise discretion in sentencing thus impinging the right to fair trial. This opened the door to trial courts to consider mitigation whether at the trial stage or at resentencing.

Thus it was that when the applicant's appeal was listed for hearing before Nambuye, Koome & Kantai, JJ.A, the Court was informed by his then advocate, which the applicant himself confirmed, that he wished to withdraw the appeal. And the Court accordingly granted leave for its withdrawal.

True to his intention, the applicant then appeared before the High Court at Garissa with a plea that the sentence imposed by that Court be reconsidered and altered, to his advantage. He was not lucky. Expressing himself devoid of jurisdiction to do what he viewed as tantamount to supervising his colleagues who had imposed the death sentence, Kariuki, J. dismissed the resentencing application in a ruling delivered on 21st January 2020.

Not one to easily give up, the appellant has returned to this Court vide his motion dated 13th February 2020 brought under **Rule 68(3)** of the **Court of Appeal Rules** seeking to have his previously withdrawn appeal reinstated and heard on remit. He swears in his supporting affidavit that he made a mistake in so withdrawing the appeal, although his current advocate, **Mr. Anyara** in his address to us seems to load more of that blame on the previous advocates for allegedly misadvising the applicant. This is becoming a mantra too easily and too commonly adopted by succeeding advocates, but which is often a self-serving and self-ingratiating excuse.

Even though **Mr. O'Mirera**, learned counsel for the respondent did not oppose the application, he launched into an impassioned speech about his *"relentless objection to **MURUATETU** (supra)"*and especially the manner in which it has been interpreted and implemented by the

courts. We do not deem it necessary to polemicize the issue, let alone comment on it in our determination of the current application.

Rule 68(3) sets out in rather straight-forward terms that;

> ***"An appeal which has been withdrawn may be restored by the leave of the Court on the application of the appellant if the Court is satisfied that the notice of withdrawal was induced by fraud or mistake and that the interests of justice require that that the appeal be heard."***

Having given the application before us due consideration, we think it falls within the sub-rule. Seeing as mistake is defined in **Blacks Law Dictionary** as ***"1. An error, misconception or misunderstanding; an erroneous belief…",*** we think that in the circumstances of this case, whether on his own, or upon advice of counsel then on record, the applicant was induced by mistake to withdraw his appeal.

But mistake is not enough. For the sub-rule to apply, we must be satisfied that the interests of justice require that the appeal be heard. And we are so satisfied. The appellant is facing the ultimate penalty of **death** imposed on him by the court to which he had appealed against conviction and a **10-year** sentence that he would have long completed but for that turn of events. We think that the appeal is patently deserving of hearing on merit, to deny the applicant that opportunity would be highly prejudicial to him. Added to this is the State's non-objection, with the result that the application is for allowing.

Accordingly, leave is granted and the appeal herein be and is hereby reinstated for hearing on a date to be fixed by the Registrar on priority.

Dated and delivered at Nairobi this 23rd day of October, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR