



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPLI. NAI NO. 3 OF 2008

SOSPETER MWANGI KARANJA.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(An application to rescind and/or set aside an order made on the 3rd June, 2008 in Criminal Appeal No. 81 of 2007 by Honourable Justices Tunoi, Bosire and Onyango Otieno

in

CR. A. No. 81 of 2007)

RULING OF THE COURT

SOSPETER MWANGI KARANJA, the applicant herein, seeks two orders expressly under the provisions of rules 56 and 67 of the Court of Appeal Rules. First, that this Court grants him leave to restore Criminal Appeal No. 81 of 2007; and second, that the order of withdrawal of the appeal this Court made on 3rd June, 2008 be declared a nullity, set aside and that the appeal be heard afresh. The applicant is not represented before us and is prosecuting the motion in person.

It is necessary to set out briefly the facts giving rise to this application. The applicant had been arraigned before the Chief Magistrate, Nairobi, on a charge of stealing by agent contrary to section 283 of the Penal Code. However, before the trial commenced the State sought to enter a *nolle prosequi*. Despite resistance by the applicant's counsel the trial magistrate accepted it and the applicant was accordingly discharged under section 87 (a) of the Criminal Procedure Code. Being aggrieved, the applicant preferred an appeal in the superior court, but, the same was dismissed by Lesiit, J on 23rd March, 2007, mainly, for want of jurisdiction.

Undaunted, the applicant filed a second appeal before this Court, being Criminal Appeal No. 81 of 2007. When it was called for hearing on 3rd June, 2008 the applicant's then counsel Mr. Macharia informally applied to withdraw it on the ground that having perused and considered the law, he was of the view that this Court had no jurisdiction to hear the appeal. The Senior State Counsel, Mr. Kivihya did not oppose the application and the Court, then, granted the application and made the order marking the appeal as withdrawn under the provisions of rule 67(4) of the Court of Appeal Rules.

The applicant admits that he was present in Court with Mr. Macharia before the counsel applied for the withdrawal of the appeal. But, he now tells us that he was not consulted by the counsel before the said counsel moved the Court to record a withdrawal order. With respect, this averment is neither here nor there. The compromise by Mr. Macharia bound the applicant as there is no indication or evidence that counsel acted outside his instructions.

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 the notice of withdrawal was induced by fraud or mistake and that the interests of justice require that the appeal be heard. This is stated so by rule 67(3). But, this rule does not help the applicant in any way nor is the rule applicable herein since the application for withdrawal had been made informally. Again, the applicant has been unable to place before us any material to support any allegation that there could have been inducement by fraud or mistake on the part of his counsel to make the application that he did.

The applicant was not tried, nor convicted of any offence. Neither was he sentenced nor any finding made against him. In the circumstances, this Court had no jurisdiction to entertain his appeal nor even the application now before us. This is so by dint of section 361 of the Criminal Procedure Code. Furthermore, it has not been shown to us how the interests of justice do dictate that the appeal be heard.

In the result we are of the view that this application is misconceived and we do not have jurisdiction to entertain it. It is hereby ordered struck out.

Dated and delivered at Nairobi this 9th day of October 2008.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR