IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA
(CORAM: MBAROUK, J.A., MKUYE, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 65 OF 2016

ATHUMANI SALUM MPANGO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Kaji, J.)

dated the 30th June, 2003
in
Criminal Appeal No. 42 of 2001

RULING OF THE COURT

28th February, & 13th March, 2018

MKUYE, J.A.:

Before the District Court of Singida at Singida, the appellant Athumani Salum Mpango and another were charged with the offence of gang rape contrary to sections 130 (2)(a) and 131A (1) and (2) of the Penal Code Cap. 16 Vol. 1 of the Laws (now Cap. 16 R.E. 2002). Following a full trial, they were convicted and sentenced to life imprisonment. Aggrieved, they appealed in the High Court. While the other appellant's appeal was successful and was acquitted, the appellant's appeal was unsuccessful; and

since the conviction and sentence on gang rape could not stand in respect of him alone, he was convicted of rape and sentenced to thirty (30) years imprisonment.

Still aggrieved, the appellant has brought this second appeal against the decision of the High Court on four grounds of appeal which can be extracted as follows:

1. *The two courts below did not consider the requirement of section 240 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002.*
2. *The appellant was not informed of his right of cross examination to the person who prepared the medical report in respect of PW1.*
3. *The two Courts below did not consider the need of calling Ally Suku to corroborate the prosecution's evidence.*
4. *Since the prosecution failed to bring Ally Suku as was ordered by the appellate Judge, it implies that*

the prosecution failed to prove its case beyond reasonable doubt.

The brief facts leading to this appeal can be stated:

The appellant and Amina Shabani (PW1) are brother and sister who share the same mother Halima Rajabu (PW3) but with different fathers. PW1 worked to Ally Suku as a caretaker of his children.

On 8/9/1998 at about 8:00 pm, PW1 took back a child to Ally Suku at Ipuma area. On her way back home, while accompanied by Ally Suku she met the appellant who was in company of two other persons, one Hamis (who was the 2nd accused at the trial) and his brother called Juma. The appellant offered to escort PW1 back home but she resisted as she was already in company of Ally Suku. As the appellant insisted to escort her and when PW1 realized that he was drunk and violent, she agreed to be escorted by him. But alas! after she had succumbed to the offer, the appellant together with his companion grabbed her and dragged her towards the rocks instead of going home. Ally Suku tried to intervene but failed. They undressed her and had carnal knowledge of her in turns starting with the

appellant, then Hamis and Juma was the last. Thereafter, the appellant pushed an iron rod in PW1's vagina causing her severe injuries and she could not walk without a help of another person.

She raised an alarm whereupon some people responded and they carried her home.

The matter was reported to Mohamed Mwakihiya (PW2), a ten cell leader who advised them to see him on the following day. On that day PW2 escorted them to the Police Station where a PF3 was issued and later she was examined at Singida Government Hospital whereby it was revealed that her vaginal wall was found oozing of blood (Exh. P1).

The appellant was arrested immediately and the 2nd accused, Hamis Omari, was arrested later and were both arraigned before the court as was stated earlier on.

In his defence, the appellant disassociated himself with the offence. So did the 2nd accused.

As already alluded to above, after a full trial, both accused persons were convicted and awarded a sentence of life imprisonment. On appeal to

the High Court, the 2nd appellant's appeal succeeded and was released from custody while the appellant's appeal partially succeeded as he was convicted of a lesser offence of rape and sentenced to 30 years imprisonment in lieu of life imprisonment meted out to him by the trial court.

At the hearing of the appeal, the appellant appeared in person and unrepresented; whereas the respondent Republic was represented by Ms. Salome Magesa, leaned State Attorney.

At the outset, we wished to satisfy ourselves on the propriety of the appeal. Our attention was drawn to the issue as to whether there was a charge sheet in the record of appeal, it being a requirement under Rule 71 (2) (b) and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Ms. Magesa, forthrightly submitted that the charge sheet was not included in the record of appeal. She said, they traced it in the court's original file and through their office at Singida but it could not be found. In that regard, she contended that the shortcoming was fatal and could not be cured. She, therefore, urged the Court to invoke section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 and nullify the proceedings of

both lower courts, quash the conviction and set aside the sentence imposed upon him and make an appropriate order after considering the time he has spent in custody from when he was arrested.

When the appellant was given the floor to respond to what the State Attorney submitted, he did not have anything to contribute and understandably so, he being a layperson, and left the matter to the Court to decide.

There is no gainsaying that in this appeal, the charge sheet which initiated the criminal trial against the appellant in the trial court is missing. Sections 132 and 135 (1) of the Criminal Procedure Act, Cap. 20 RE. 2002 (the CPA) provide for the requirement of framing a charge and the mode under which the offence or offences are to be charged. Essentially, the two provisions of the law require the charge to be in a form of statement of offence specifying the charged offence; and the statement of offence which contain the particulars or description of the offence in an ordinary language which will provide the accused a reasonable information regarding the nature of the offence he is facing. Apart from providing the accused with the necessary information, the charge also sets an obligation on the basic rules

on criminal and evidence which require the prosecution to prove that there was *actus reus* of the charged offence with the necessary *mens rea*. (see **Isidori Patrice Vs. Republic,** Criminal Appeal No. 224 of 2007 (unreported). Hence, the charge sheet is a very crucial document in criminal matters.

In this case, as alluded to earlier on, the charge sheet is missing in the record of appeal. Ms. Magesa informed the Court on their efforts made to trace it from the original court file and their office and the office of the Regional Crimes Office for Singida Region but in vain.

Rule 71(2) (b) and (4) of the Rules mandatorily requires the charge sheet to be included in the record of appeal. It provides as follows:

> *"71 (2) For purposes of an appeal from the High Court in its original jurisdiction the record of appeal* ***shall contain*** *copies of the following documents in the following orders:-*
>
> *(a) .....*
>
> ***(b) the information, indictment or charge;***

(c) .....

(d) ..... etc.

(4) For the purpose of appeal from the High Court in its appellate jurisdiction, ***the record of appeal shall contain documents relating to the proceedings in the trial corresponding as nearly as may be to those set out in sub-rule (2)*** *and shall contain also copies of the following documents relating to the appeal to the first appellate court:-*

(a) the petition of appeal;

(b) the record of proceedings;

(c) the judgment;

(d) the order, if any,

and in the case of a third appeal, shall contain also the corresponding documents in relation to the

second appeal and the certificate of the High Court that a point of law is involved." [Emphasis added].

We are aware that the Court has taken different approaches when faced with a situation where documents are missing in the record of appeal. In the case of **Hamis Shaban @ Hamis (Ustadhi) Vs. Republic,** Criminal Appeal No. 259 of 2010 (unreported), the Court proceeded with the hearing of the appeal while the PF3 and a medical report which were tendered and admitted as exhibits during trial were missing in the record of appeal. In doing so the Court was, in the first place, inspired by the decision of a Kenyan case of **Mulewa and Another Vs. Republic,** [2002] 2 EA 488, where it was stated that:

"The courts must in this matter ***try to hold the scale of justice evenly between the parties and*** *whilst not wholly satisfactory solution can be expected for such unsatisfactory state of affairs ... the course followed by the judge was on balance, the fairest and most just and is the only solution which*

offers an opportunity for judicial determination on the merits of the case ...". [Emphasis added].

Secondly, the Court opted to proceed with hearing because the appellant refrained from making reference to the two missing documents and abandoned some of his grounds of appeal. At the end, the Court found that the prosecution's case was not proved and dismissed the appeal in its entirety.

Another approach which is commonly adopted by the Court where some documents are found missing in the record of appeal has been to adjourn the matter to anable the same to be traced and or reconstituted. There is a long list of authorities on this aspect but just to mention a few, they include: **Nassoro s/o Mussa Vs. Republic,** Criminal Appeal No. 404 of 2015; **Ally Shaban Vs. Republic,** Criminal Appeal No. 32 of 2011; **Shaban Juma Vs. Republic,** Criminal Appeal No. 90 of 2012; and **Robert s/o Madololyo Vs. Republic,** Criminal Appeal No. 486 of 2015 (all unreported).

For instance, in the case of **Nassoro s/o Mussa** (supra), where the entire record of the trial proceedings was missing in the record of appeal, the Court adjourned the hearing of the appeal so that the Deputy Registrar could obtain the missing documents from the office of the Director of Public Prosecutions who said he was in possession of a copy thereof.

Likewise, in the case of **Robert s/o Madolilyo** *(supra)* whose decision was rendered on 19/2/2018, where the Court was faced with a situation in which the entire record of the District Court of Bariadi in Criminal Case No. 40 of 2002 and the High Court at Tabora in Criminal Appeal No. 14 of 2001 were missing in the record of appeal, the Court, speaking through Juma, C.J., while adopting with approval the decision of a South African case of **Phillip Daniel Schoombe Vs. The State,** [2016] 2 SACC 50, ordered the Deputy Registrar in collaboration with other stakeholders such as the appellant, the Resident Magistrate in charge for Bariadi District Court, the office of the Director of Public Prosecutions, the police investigating files and the Prison Department to reconstitute the missing record of appeal before being fixed for hearing by the Registrar of the Court of Appeal.

Also, in the case of **Ally Shaban** (supra), the hearing of the appeal with a record of appeal which did not include the charge sheet, the caution statement and the identification parade register was adjourned by the Court to enable it to be rectified.

On our part, we totally subscribe to the approach taken by the Court in **Nassoro Mussa's** case *(supra)* and **Ally Shaban's** case (supra). We think, even in this case after the State Attorney had informed the Court of their fruitless efforts taken to trace the missing charge sheet, which implies that the record of appeal is incomplete, the proper option would have been to adjourn the matter to enable the same to be traced before fixing it for hearing in the next sessions. However, we think each case has to be determined on its own circumstances. We shall explain.

We have considered the peculiar circumstances of this case and we think that ordering an adjournment would not be in the interest of justice. We say so because, we have considered that the appellant was arrested in 1998 when the alleged offence was committed. He underwent trial and in 1999 he was convicted and sentenced to thirty years imprisonment. It means as todate he has served a substantial part of his sentence. We have also

considered the provisions of section 49 of the Prisons Act, Cap. 58 RE 2002. The said section provides:

> *"49(1) Convicted criminal prisoners sentenced to imprisonment may by industry and good conduct earn a remission of one-third of their sentence or sentences:"* [Emphasis added]

If the appellant has been industrious and depicted good conduct as stipulated by the above section, he may complete his sentence by 2019. In that case, if we take the option of adjourning the appeal so as to rectify the record, we think, the appeal might entail to undergo a long process of appealing.

In her submission, Ms. Magesa urged the Court to invoke section 4 (2) of AJA and nullify the entire proceedings, quash the conviction and set aside the sentence but we think that provision is in applicable to this case.

Given such peculiar circumstances of this case, and the fact that the appeal is incompetent for being incomplete, we strike the appeal out. We further direct that should the appellant be still interested to pursue the

appeal, he should pursue it after complying with the provisions of Rule 71 (2) (b) and (4) of the Rules.

It is so ordered.

DATED at **DODOMA** this 12th day of March, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL