

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

(CORAM: JUMA, C.J., MJASIRI, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 404 OF 2015

NASORO S/O MUSSA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Rumanyika, J.)

dated the 28TH August, 2015

in

Dc. Criminal Appeal No. 36 of 2013

RULING OF THE COURT

13th & 15th February, 2018

JUMA, C.J.:

The appellant NASSORO S/O MUSSA was in the District Court of Kigoma at Kigoma convicted by the trial Magistrate (C.S. Uiso-RM) for the offence of rape contrary to section 130 (1) (2) (e) of the Penal Code, Cap 16. According to the particulars of the charge, around noon on 17/8/2010, at Kahabwa-Gungu area within the municipality of Kigoma in Kigoma Region, the appellant had carnal knowledge of a then

15 year old girl (name withheld). Upon his conviction, the appellant was ordered to serve 30 years imprisonment, with 6 strokes of the cane. His appeal to the High Court at Tabora (S.M. Rumanyika, J.) was dismissed. In his Memorandum of Appeal to this Court the appellant raised five (5) grounds of complaints.

The appellant appeared before us in person on 13th February, 2018 and preferred to let Ms. Upendo Malulu, learned State Attorney who appeared for the respondent Republic, to address the Court first. Ms Malulu began by pointing out that this instant appeal cannot proceed because the record of appeal has not complied with Rule 71 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which, she submitted, identifies documents which are mandatory part of any record of criminal appeals to the Court. The missing record in question, she submitted, is the entire record of the trial proceedings at Kigoma District Court in Criminal Case No. 368 of 2010.

The learned State Attorney suggested a solution. She urged, that although the Deputy Registrar of the High Court at Tabora has sworn an affidavit relating to the missing record of the proceedings, and has

stated that all her efforts to look for the missing records have all failed, Ms Malulu disclosed that the Office of the Director of Public Prosecutions has possession of the missing record, and it should not be difficult for the Deputy Registrar to get these copies.

Before we proceed to determine the way forward to this appeal, it is appropriate to trace the background to the missing record of the trial proceedings at Kigoma District Court.

There were early signs, during the hearing of the first appeal, about the missing records of the trial court. Page 28 of the record of this appeal shows that on 7/8/2014, Mr. Miraji Kajiru, learned State Attorney, asked the first appellate court to supply him with the copies of the proceedings of the trial District Court. Rumanyika, J. granted the request. On 11/8/2014 when the parties appeared before the High Court, no copies of the proceedings had been supplied to the respondent Republic. Although the hearing was adjourned several more times, with same order of supply of copies of the proceedings being issued, on 17/08/2015 Mr. Rwegira, learned State Attorney was still complaining that he had not received the copies of the proceedings. It

is not clear from the record why it was taking so long for the Deputy Registrar to supply the respondent with the copies of the missing proceedings. It is apparent that by the time the first appellate Judge began the hearing of that appeal the respondent Republic had finally received its copy of the missing proceedings.

Apart from the strict legal requirements under Rule 71 (2) of the Rules Ms. Malulu referred earlier, the grounds of appeal which the appellant has preferred expect the Court to look at the record of the trial court. The appellant's grounds of appeal have taken issue with the uncorroborated evidence of the complainant, evidence of his visual identification, failure to consider his defence which all require closer examination of the trial record of the proceedings.

There is no doubt to us that when court records are missing, it does not only lead to lengthy delays, but it besmirches the trust which the Judiciary craves from the general public. We have not come across any provision in the Criminal Procedure Act, Cap 20 (CPA), or the Appellate Jurisdiction Act, Cap 20 (AJA) or in the Tanzania Court of Appeal Rules, 2009 (the Rules) which expressly or by necessary

implication, directs what should be done when the Court is faced with scenario of misplaced or missing records of the proceedings. It is quite plausible that the legislature intentionally left it to the Court's discretion, to determine the way forward, depending on special circumstances of each case. Rule 71 (2) of the Rules which Ms. Malulu cited to us read together with sub-rule (4), are couched in the following mandatory language about the documents which should form part of the records of criminal appeals to the Court which this instant appeal lacks—

*"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—**"*

*"71 (4) For the purposes 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—**"*

[Emphasis added.]

Although the affidavit of the Deputy Registrar asserts that the record of the proceedings of the Kigoma District Court in Criminal Case No. 368 of 2010 are missing and her efforts have proved futile, she did not take a further step, such as reconstruction of the missing record of the proceedings by sourcing from outside the registries of the Kigoma District Court and the High Court at Tabora.

We think that any loss or misplacement of any court record or part of court proceedings is a serious matter that requires Deputy Registrars of the High Court to not only particularize the concrete efforts that they have made to trace back or restore the missing record, but to show what concrete efforts beyond mere words they have taken to reconstruct or restore the record before scheduling the matter for hearing by either High Court or this Court.

A persuasive decision of the Court of Appeal of Kenya in **JOHN KARANJA WAINAINA V REPUBLIC** [2004] eKLR, at very least shows some of the concrete efforts which Deputy Registrars in Kenya invariably take, which the Deputy Registrars of Tanzania should take, before they throw up their arms in despair and declare that their efforts

to trace or restore the missing records have failed. In **JOHN KARANJA WAINAINA**, the Deputy Registrar of Kenya confirmed to the Court of Appeal of Kenya that—

"...he was unable to prepare the records of appeal because the entire file containing the handwritten or even typed proceedings, and the judgment including the exhibits have disappeared and cannot be traced."

But the Kenyan decision shows the specific efforts of reconstruction of record from looking for records in the custody or possession of prison department, or police investigation records or even from the prosecution record.

It is very apparent that in his search for missing records, the Deputy Registrar of Kenya went outside the court registry, by even interviewing the appellant, the police who investigated and from the prison records—

"Also lost without trace are the investigation and prosecution files of the police. Again, no one knows for sure which police station arrested the appellant. It would appear also that the appellant whose memory

seems to be fading probably due to old age is vague of many details about his prosecution and subsequent conviction.”

The readiness of Ms. Upendo Malulu, the learned State Attorney to offer copies of the missing record of the proceedings is an example of reconstruction of court records which the Deputy Registrars should build on. It is an ironic twist of fate, then, that the respondent Republic who took so much trouble to get copies of the missing proceedings, was later in this appeal, to turn into benefactor of the High Court registry which somehow failed to keep that same copy. Where specific circumstances so require, reconstruction of the missing record should also involve close interview of the appellant, sourcing documents from the custody or possession of the police investigations files, and from Officers-in-Charge of Prison who at diverse times, held the appellant in their respective custody.

In the end result, we grant the adjournment sought. We adjourn the hearing to the time to be fixed by the Registrar; this shall be soon after obtaining from the Office of the Director of Public Prosecutions

(Tabora Zone), of copies of the missing record of the Kigoma District Court in Criminal Case No. 368 of 2010. It is ordered accordingly.

DATED at **TABORA** this 13th day of February, 2018.

I. H. JUMA
CHIEF JUSTICE

S. MJASIRI
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

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



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL