IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J.A. MKUYE, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 573 OF 2017

NORBERT RUHUSIKA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Iringa)

(Jundu, J.)

Dated the 15th day of August, 2008
in
DC. Criminal Appeal NO. 22 OF 2006

JUDGMENT OF THE COURT

14th & 19th August, 2019

MZIRAY, J.A.:

For proper appreciation of the circumstances in which the Court was prompted to take this course of action it is convenient to set out the background of the matter briefly. The appellant Norbert Ruhusika was charged before the District Court of Mufindi at Mafinga with the offence of rape contrary to section 130 (1) (2) and 131 of the Penal Code, Cap 16 of the Laws Revised. He was convicted and sentenced to thirty years imprisonment.

Dissatisfied with the conviction and sentence, he filed his first appeal to the High Court at Mbeya which was Criminal Appeal No. 49 of 2003. On 30/4/2003 that appeal was dismissed (the late Mrema, J.) for being filed out of the prescribed time and contrary to section 361 (b) of the Criminal Procedure Act, Cap. 20 (the C.P.A.).

Undeterred, the appellant filed Miscellaneous Criminal Application No. 4 of 2006 in the High Court of Tanzania at Iringa for extension of time to file appeal out of time. On 28/8/2006, Kaijage, J. (as he then was) granted the application. The appellant proceeded to file (DC) Criminal Appeal No. 22 of 2006 which unfortunately was heard on merits and dismissed on 15/8/2008 (Jundu, J. as he then was). Still struggling, he filed Miscellaneous Criminal Application No. 10 of 2013 seeking for extension of time to lodge his application to lodge his notice of appeal out of time to challenge the dismissal of his appeal in the High Court. The application was heard by Shangali, J. (as she then was). This time, luck was on his side because on 3/11/2017 he was granted extension of time to lodge his notice of appeal to this Court out of time. He promptly filed the notice of appeal and subsequently filed this appeal to challenge the decision of the High

Court (Jundu, J. as he then was) dated 15/8/2008 in (DC) Criminal Appeal No. 22 of 2006.

When the appeal was called on for hearing the Court detected that some of the vital documents which were essential for the determination of the appeal were missing. These documents included the charge sheet, the proceedings of the trial court and High Court and the judgment of the High Court. The only available documents were the judgment of the trial court and some documents in relation to the applications which the appellant was pursuing in the High Court to enable him get access to this Court. Due to the aforementioned deficiency, we invited parties to address us on the way forward due to the incompleteness of the record.

Ms. Kasana Maziku, learned Senior State Attorney who appeared for the respondent/Republic was the first to take the floor. She conceded that those documents are indeed missing in the record of appeal. She took us to Rule 71 (2) and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules), which explains what documents are required to be included in the record of appeal. She expressed her views that the missing documents are vital in the determination of the appeal and without them the appeal

cannot proceed on merit. She informed the Court that the respondent/Republic is aware that there were efforts made to reconstruct the record of appeal but were unsuccessful. She asked the Court to consider all the efforts taken by the appellant for quite a long time in pursuing the appeal and for the interest of justice, the learned Senior State Attorney proposed three options which if one is taken by the Court, possibly could meet the justice of this appeal. The first option was to order for the reconstruction of the record of appeal. The second was to order a retrial and the last option was to quash the conviction and set the appellant at liberty, taking into consideration that by now he has served almost eighteen (18) years in jail.

On his part, the appellant pleaded with the Court for his release lamenting that he has served a substantial part of the sentence and that the fault is not of his own.

On our part, we have given due consideration to the submissions made by the learned Senior State Attorney in respect of the three options she suggested to us in determining this appeal. We also share the sentiments expressed by the appellant taking into account the endless

struggle he made up to this stage and the fact that the missing record is not his fault.

To start with the first option of reconstruction of the record, the immediate question we pose is whether it is practicable. We are alive that the few documents available in the record of appeal are a result of the efforts taken to comply with the requirements of Rule 71(2) and (4) of the Rules. But such efforts could not bear fruits. We are aware and we take judicial notice that there has been change in registries on which records which were preserved in Mbeya High Court Registry had to be transferred to Iringa High Court Registry. Among the records are those connected to this appeal. With this change, one cannot eliminate the possibility for some of the documents to be misplaced. The idea to reconstruct the record could have served the day but to us appears to be not practicable.

The second option suggested by the learned Senior State Attorney is to order retrial. We are mindful that a retrial would only be ordered where the trial was either illegal or defective and that the conviction could only be quashed when the appeal has been heard on merit. In the absence of the record of the trial court, it cannot be established that the trial before that

court was illegal or defective. Additionally, we think that practically it will not be possible to get the witnesses who had earlier testified. Also the possibility of the prosecution to fill up gaps in its evidence cannot be overruled. It would appear therefore that an order for retrial would also not be a viable option in the circumstances of this case.

The last remaining option is to release him. We note that the appellant was convicted on 2/3/2001 and sentenced to thirty years on a charge of rape. He must by now have served 18 years in jail which to us is a substantial part of the sentence. In our view, and as rightly pointed by the learned Senior State Attorney, taking into consideration that the appellant has served 18 years in jail and efforts to trace the missing record has proved futile, for all fairness and for the best interest of justice the release of the appellant will be the most and fair approach for us to consider in the circumstances of the case. The situation compels us to take this course. We are settled that the course we are taking is the fairest and we could not find any other means we could have employed to bring to an end this appeal.

In the result, we set aside the conviction and sentence imposed by the trial court and discharge the appellant forthwith. We further direct that the appellant be set at liberty unless otherwise held in lawful custody.

Order accordingly.

DATED at **IRINGA** this 16th day of August, 2019.

R.E.S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered on this 19th day of August, 2019 in the presence of Appellant in person and Ms. Pienzia Nichombe, State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL