**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MZIRAY, J.A., SEHEL, J.A., And KITUSI, J.A)**

**CRIMINAL APPEAL NO. 367 OF 2013**

**DORNAD S/O KASWIZA ..... APPELLANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**(Arising from Misc. Criminal Application No. 21 of 2007 High Court of Tanzania at Sumbawanga)**

**(Sambo, J.)**

**Dated 22nd Day of October, 2013**
**In**
**Criminal Case No. 226 of 1999**

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**JUDGMENT OF THE COURT**

**24th September & 15th October, 2019**

**KITUSI, J.A.:**

This appeal poses unique legal as well as practical issues. The appellant was sentenced to a jail term of 30 years by Mpanda District Court for an offence, vide Criminal Case No. 226 of 1999 and has been serving that sentence from 2002 to date. There is abundant evidence that the appellant has consistently been trying to assail that decision but all has been in vain. We shall refer to the instances.

In 2002 the applicant applied for leave to appeal out of time but the application was dismissed by Mrema, J. (as he then was) on 29th March 2004. In July 2007 he made another application, this time for extension of time to appeal. This was struck out by Sambo, J. (as he then was) on 22nd October 2013. On 30th October 2013 the appellant lodged a Notice of Appeal to the Court intending to challenge the decision of Sambo, J. aforesaid, and subsequently filed a Memorandum of Appeal, the subject of the instant appeal.

When the appeal was called on for hearing, we noted glaring inconsistencies in the available information regarding two aspects, one; the nature of the offence with which the appellant was charged, convicted and sentenced and two; what is the latest status and order of the matter at the High Court. To begin with the offence, a copy of the judgment of the District Court shows that the appellant was charged with and convicted for Armed Robbery, Contrary to section 285 and 286 of the Penal Code. However, both in the Chamber Summons that instituted Misc. Criminal Application No. 21 of 2007 before Sambo, J. and in the Notice of Appeal that initiated this appeal, the offence cited is Rape Contrary to Section 130 and 131 of the Penal Code.

Secondly, we gathered from the ruling of Sambo, J. that, the High Court, Mbeya Registry heard and determined Criminal Appeal No. 78 of 2004 on 20th December 2004, and that this appeal originated from Criminal Case No. 226 of 1999, Mpanda District Court. This incidentally, was the reason Sambo, J. dismissed Misc. Criminal Application No. 21 of 2007 which had sought extension of time to appeal against Criminal Case No. 226 of 1999, Mpanda District Court. The learned Judge took the view that the High Court having determined the appeal, could not entertain the application for extension of time to lodge another appeal against the same decision of the District Court. Very unfortunately however, there is nothing in the record relevant to the said Criminal Appeal No. 78 of 2004, because there is neither a copy of the judgment nor of the proceedings.

The Memorandum of Appeal has complicated matters all the more, and we reproduce it, omitting the names of the parties;

> *"(Appeal from the Ruling of the High Court of (T) at Sumbawanga before Hon. K.M.M. SAMBO-Judge; dated on 22th Day of October, 2013. Original Criminal Case No. 226/1999 from the District Court of Mpanda at Mpanda)*
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> ***MEMORANDUM OF APPEAL***

***DONARD KASWIZA**: Appeal against the decision of the Ruling mentioned above where **he was convicted of RAPE Contrary to Section 130(1) (2) (e) and 131 of the Penal Code of the law and sentenced to Thirty (30) years imprisonment. The Appeal is against conviction and sentence** on the following grounds so to say:*

1. ***THAT,** your lordships, the learned **trial Judge** erred in law when he failed to observe that despite appellant's prayers to appear in person at the hearing of the appeal, still the same was tried in his absentia and its outcome delivered to him three months later when the period stipulated by law to file notice of appeal has already elapsed hence denied his right of appeal.*
2. ***THAT,** without prejudice of the aforementioned ground, the learned judge erred as failed to consider the application filed by the applicant to the High Court (T) at Sumbawanga seeking leave of the Court to file notice of appeal to the Court of Appeal of (T) at Mbeya; That having waited for long time without any response from the Registrar, as a layman and convict who solely depend the custodian of the Prison in all correspondence and administrative matters, was*

*advised by the officer in-charge of Isanga Central Prison to file another application.*

3. ***THAT,*** *the said Misc. Criminal Application previous file by the appellant to the High Court of (T) to seek leave of the Court to file Notice of Appeal to the Court of Appeal of (T) at Mbeya was never registered and the appellant nor summoned for hearing; the fact which denied his fundamental basic right of appealing as required by law.*
4. ***THAT,*** *the High Court of (T) did fail to guarantee the appellant's rights to be heard as enshrined by Article 13(6) (a) of the Constitution of the United Republic of Tanzania 1977 as amended from time to time and rendered to jeopardizing the Criminal jurisprudence despite the fact that the appellant has been in Prison custody for long time.*

***WHERE OF:-***

*The appellant pray that your lordships allow this appeal,* ***quash the conviction set aside the sentence and acquit."***

From that excerpt, this appeal partly purports to challenge the decision of Sambo, J. who refused extension of time to appeal to the High Court on the ground, as earlier shown, that the High Court had already

determined the appeal. And yet another part of the appeal seeks to challenge the conviction and sentence. The first anomaly in the matter is that if we find fault in the decision of Sambo, J., it will mean that the High Court should have extended time to the appellant, which means that at the end of the day the appellant will only have time extended to him, and not more. The second anomaly is that the decision which dealt with the appellant's conviction and sentence, that is, Criminal Appeal No. 78 of 2004, is not being appealed against although the appellant moves for an order quashing the conviction and setting aside the sentence.

At the hearing of this appeal, the appellant appeared in person, unrepresented, whereas the respondent, the Director of Public Prosecutions, entered appearance through Mr. Tumaini Kweka and Ms. Lilian Itemba, both Principal State Attorneys. Aware of the appellant's possible inability to appreciate the highlighted mix-up of proceedings on account of his being an unrepresented layman, we invited the learned Attorneys to address the following points, before giving him (appellant) an opportunity to address us on the same;

(1) The mix up in the charged offence

(2) The fact that the High Court determined Criminal Appeal No. 78 of 2004 yet it is not the one being appealed against.

(3) That the appeal seeks to challenge the decision of Sambo, J. in Criminal Application No. 21 of 2007 which dealt with extension of time, yet invites the Court to quash the conviction and set aside the sentence.

It was Mr. Kweka, learned Principal State Attorney, who submitted on the points and demonstrated the dilemma involved, it being precipitated by the fact that the appellant has served over two thirds of the sentence and due to be released soon. The learned Principal State Attorney appreciated our concern that the decision of Sambo, J. in Criminal Appeal No 21 of 2007 wrongly referred the matter as originating from a conviction and sentence for Rape. He invited us to quash it. But still this suggestion begs the question, what should be the consequent order in view of the fact that the appellant is almost completing the jail term? He submitted again, that we cannot consider the merits of the appeal against the conviction and

sentence, because neither the proceedings of the trial nor the copy of the judgment in Criminal Appeal No. 78 of 2004 are available for our scrutiny.

On his part, the appellant submitted that the wrong reference to Rape instead of Armed Robbery should not be blamed on him because, being a prisoner, he was relying fully on the Prison Officers to prepare court documents for him. He therefore made two alternative prayers. One, he prayed that we give him a short time so that he can amend the documents and cure the anomalies. Two, we be pleased to quash the conviction and set aside the sentence.

It is appalling that we have to consider the perennial issue of missing records once again. At the outset, we cannot grant the appellant's first prayer for two reasons. First, the High Court has determined the appeal from the District Court so that is the latest status of the matter at the first appellate court. Secondly, we cannot order extension of time to appeal to us while knowing that we have no material before us to determine that intended appeal. It remains for us to consider the appellant's alternative prayer.

We are aware of our previous decisions that insist on making efforts to reconstruct the records. Such cases include **Robert Madololyo V. The Republic**, Criminal Appeal No. 486 of 2015, (unreported). We ask ourselves whether it is possible in this case to reconstruct the record. The answer is, certainly, in the negative for reasons that will appear in the preceding pages. The other option is to order a retrial. We recently ordered retrial in the case of **Samwel Gitau Saitoti @ Saimoo and Michael Kimani Peter @Mike @Kim V. The Republic,** Criminal Appeal No. 5 of 2016 (unreported). We therefore pose another question in relation to this, whether an order of retrial will serve the justice of this case. We are afraid that an order of retrial will be impractical, considering the lapse of time as witnesses may no longer be there, and it will also prejudice the appellant who has already served over two thirds of the sentence. The last option is total acquittal, which is what the appellant is suggesting.

For the reasons we have shown above, we can order neither reconstruction of the record nor a retrial, but we have to decide the appeal before us, anyway. We were faced with an almost similar dilemma in the case of **Norbert Ruhusika V. The Republic**, Criminal Appeal No. 573 of 2017, (unreported). We considered the length of the time the appellant

had already served in prison to order an outright release of the appellant. The relevant part of our decision goes thus;

> *"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."*

Similarly in this case the appellant has almost completed the jail term of 30 years. We therefore grant the appellant's prayer for outright acquittal by invoking our revisional powers under Section 4 (2) of the Appellate Jurisdiction Act, [Cap 141, R.E 2002] and nullify the entire proceedings and judgment of Mpanda District Court in Criminal Case No226 of 1999, as well as the subsequent decisions and orders of the High Court

in relation to that case. We set aside the sentence of 30 years which was imposed on the appellant by the trial court and order his immediate release if he is not held for some other lawful cause.

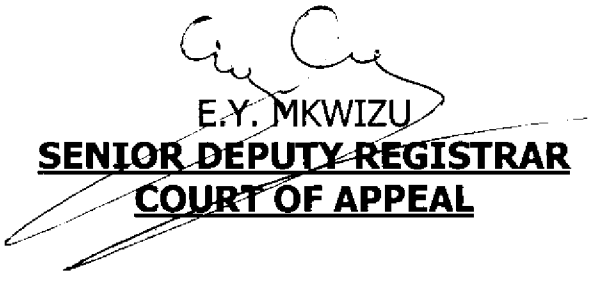
**DATED** at **DAR ES SALAAM** this 7th day of October, 2019.

R. E. MZIRAY
**JUSTICE OF APPEAL**

B. M. A. SEHEL
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

The Judgment delivered on this 15th day of October, 2019 in the presence of the appellant in person and Mr. Genes Tesha, learned Senior State Attorney for the respondent/Republic; is hereby certified as a true copy of the original.



E.Y. MKWIZU
**SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL**