IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MMILLA, J.A., MWANGESI, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 175 OF 2011

SAID S/O SHABANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Arusha)

(Mwakibete, J.)

dated 6th day of June, 1985
in
HC. Criminal Session Case No. 44 of 1984

.....

JUDGMENT OF THE COURT

25th March & 15th August, 2019

MMILLA, J.A.:

The appellant, Said Shaban and another person not the subject of this appeal, were in 1985 charged before the High Court of Tanzania, Arusha Registry, with the offence of manslaughter contrary to section 195 of the Penal Code Cap. 16 of the Laws. Following his plea of guilty on 6.6.1985, the appellant was convicted and sentenced to a term of life imprisonment. Indiscreetly however, he did not readily exercise his option to appeal until

in 2011 when he successfully applied for extension of time in which to appeal and began the appeal process.

After leave was granted to him to appeal out of time, the appellant became entitled to be supplied with the record of appeal in terms of Rule 71 of the Tanzania Court of Appeal Rules, 2009 (the Rules). Regrettably, he has so far not been supplied with the record because it is said it cannot be found. It is on that account that a notice has been given under Rule 4 (2) (a) and (b) of the Rules vide which the Court is being asked to quash the judgment and conviction entered against the appellant on 6.6.1985, set aside the sentence and release him from prison.

On the date of hearing of this application on 25.3.2019, the appellant, who was also present in Court, enjoyed the services of Mr. Elvaison Maro, learned advocate; while the respondent/Republic was represented by Mr. Azaeli Mweteni, learned State Attorney.

Principally, Mr. Maro submitted that the notice they filed to the effect that the Court takes action to quash the appellant's conviction resulting into setting aside the sentence was prompted by the fact that the appellant has so far not been supplied with the record of appeal, and that no any

documents are available to permit a reconstruction of the record. Relying on the Court's observation in the case of **Robert s/o Madololyo v. Republic**, Criminal Appeal No. 486 of 2015 (unreported), Mr. Maro was certain that the appellant cannot be heard on merit. He added that because of such prevailing situation, the appellant did not file his memorandum of appeal, which is the basis for asking the Court to invoke revisional powers in order to grant the orders sought in this notice. He was confident, on the basis of the cases of **Maulid Juma v. Ismail Mrindoko,** Civil Appeal No. 198 of 2016, CAT and **Martin Nguma and 2 Others v. Republic,** Criminal Appeals Nos. 46 and 69 of 1976 (both unreported), that the Court had inherent powers to deal with the matter in a manner proposed.

Mr. Maro pointed out as well that the right to be heard is a constitutional right expressed under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time (the Constitution). He cited as well the case of **Julius Ishengoma Francis Ndyanabo v. The Attorney General** [2004] T.L.R. 14 (particularly page 33), in which the Court underscored the essence of a person's right to unimpeded access to Court.

Similarly, Mr. Maro brought to the attention of the Court the case of **A. J. Simpson v. Nakuru District Council, 19 K.L.R 17** which though it did not concern missing records, it is relevant because it was not possible to read it. He contended that in the circumstances of that case, the court quashed the judgment and conviction, but left the matter in the hands of the prosecutor.

In concluding his submission, Mr. Maro urged the Court to quash the judgment and conviction of the trial High Court in the present matter and release the appellant on account that the appellant has been behind bars for 34 years.

On his part, Mr. Mweteni appreciated the fact that upon being successful in an application for extension of time in which to appeal the appellant was by virtue of Rule 71 (2) of the Rules entitled to be supplied with a record of appeal to enable him to appeal, he nevertheless worried that quashing the judgment and conviction, and setting aside the sentence on the grounds advanced by Mr. Maro would set a very dangerous precedent, thus opening a Pandora's box. He requested the Court to refuse the application.

In a brief rejoinder, Mr. Maro appreciated his learned friend's concern, but was nonetheless clear that it is unfortunate the situation cannot indefinitely be left like this. He was positive that the matter should be decided once and for all because any further delays will jeopardize the appellant's rights, and that something must be done and now, in order to rescue and guarantee the appellant's rights.

We have carefully considered the rival arguments of counsel for the parties. First and foremost, we absolutely agree with Mr. Maro that after filing a notice of appeal consequent upon being granted leave to appeal out of time in 2011, the appellant became entitled to be supplied with the record of appeal under Rule 71 (1) of the Rules. That would have enabled him to comply with the requirement to file a memorandum of appeal as contemplated under Rule 72 (1) of the Rules. Where the appellant was supplied with the record of appeal but failed to timely file the memorandum of appeal, the Court would have no better option but to dismiss the appeal under Rule 72 (5) of the Rules.

In the present matter, we were informed that the efforts of the officials of the Court to trace the record of appeal spreading from 2011 to 2019

were unsuccessful. A call was made to the parties and other stake holders, the appellant, the office of the Director of Public Prosecution, the prison authority and the police inclusive, to come forth with whatever papers they had in connection with that case to enable reconstruction of the record to pave way for the appeal to be heard on merits. Unfortunately, that did not bear any fruits because none had any such documents. That translates into the fact that reconstruction of the record is not possible.

We wish to also point out that we had the opportunity of hearing the parties on whether or not sufficient effort was made to trace the said documents. We were satisfied that such effort was made but bore no fruits. Since the respondent did not suggest any forward plan, and considering that the appellant had been waiting for the record from 2011 to 2019 which is about 8 years; we held in the Court's ruling of 27th September, 2018 that such a fact constituted evidence that the appellant's legal remedy was not forthcoming, reminding us of the legal maxim that justice delayed is justice denied. As such, we were not prepared to further condone delays in determining the fate of the appellant's appeal. Consequently, we direct the notice filed by Mr. Maro on the former's behalf to be heard.

We wish to hastily point out in the first place that we agree with Mr. Maro that the right to appeal or rather access to justice is statutory. Focus is on the provisions of section 6 (1) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA) and article 13(6) (a) of the Constitution. Section 6 (1) of the AJA provides that:-

> *"(1) Any person convicted on a trial held by the High Court or by a subordinate court exercising extended powers May appeal to the Court of Appeal:*
>
> *(a) where he has been sentenced to death, against conviction on any ground of appeal; and*
>
> *(b) in any other case–*
>
> *(i) against his conviction on any ground of appeal; and*
>
> *(ii) against the sentence passed on conviction unless the sentence is one fixed by law."*

On the other hand, article 13 (6) (a) of the Constitution confirms that the right to be heard is a constitutional. That article provides that:-

"To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

(a) When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right to of appeal or other legal remedy against the decision of the court or the other agency concerned."

The import of this article was, among others, discussed in the case of **Julius Ishengoma Francis Ndyanabo** (supra).

In that case, the appellant had stood as a candidate in the October, 2000 general election and lost. Aggrieved, he filed an election petition before the High Court to challenge the validity of the results as per section 111 (1) of the Elect Act, 1985. In accordance to section 111 (2) of that Act, the Registrar did not fix a date for hearing as the appellant had not deposited the mandatory Tzs. 5 million as security for costs as required by the subsection. The appellant filed a petition under article 30 (3) of the

Constitution and section 4 of the Basic Rights and Enforcement Act, 1994 for a declaration that the subsection was unconstitutional as it denied ordinary persons without means access to justice. He appealed to the Court following the dismissal of his petition.

After a long deliberation on the question of access to justice, apart from the general observation that that right is one of the most important rights a person is entitled to enjoy in a democratic society, the Court underscored that:-

> *". . . The constitution rests on three fundamental pillars namely. (1) rule of law; (2) fundamental rights; and (3) independent, impartial and accessible judicature. These three pillars of the constitutional order are linked together by the fundament right of access to justice. . ."*

The Court added:-

> *"Access to Courts is, undoubtedly, a cardinal safeguard against violations of one's rights, whether those rights are fundamental or not. Without that*

right, there cannot be rule of law and, no democracy. A Court of law is the "last resort of the oppressed and the bewildered." Anyone seeking a legal remedy should be able to knock on the doors of justice and be heard."

As already pointed out in this judgment, 8 years have elapsed and the appellant has not been supplied with the record of appeal. Apart from lamenting that to grant the appellant's prayers in the notice under consideration would set a very dangerous precedent, thus opening a Pandora's Box; Mr. Mweteni did not make any suggestions as to what should be done with the appellant's appeal. That was very unsatisfactory.

Having said that a reconstruction of the record in the circumstances of the present case is not possible, and because a resolve to this appeal is inevitable; what remains is to find the way forward.

We deliberated the case of **A. J. Simpson v. Nakuru District Council** (supra) he had referred us on that point. In that case, upon being satisfied that it was not possible to read it, the court quashed the judgment and conviction, but left the matter in the hands of the prosecutor.

We similarly considered the cases of **Kayoza v. Republic**, (PC) criminal Revision No. 91 of 1989 and **Foibe Lewanga v. Bernard Anthony**, Misc. Civil Application No. 27 of 1993 (both unreported) cited in **Pitfalls in Litigation** by Reuben Lobulu, First Edition, Perfect Printers, 2004 at pages 223 and 225. Although both of them are High Court decisions, we are satisfied that the principle propounded in those that the court may order trial *de novo* in such circumstances is quite sound, to which we associate ourselves. See also the note by Sohani in the Code of Criminal Procedure, 12th Edition, at page 846 where it was expressed that:-

> *"Where on an appeal before the High Court from a conviction and sentence for murder, it appeared that the entire record had been lost and no trace of it could be discovered the High Court directed that the conviction and sentence and all other proceedings in the case be set aside and a new trial held."*

As already pointed out, Mr. Maro urged the Court in the present case to quash conviction, set aside the sentence and release the appellant from jail.

On our part, we decline to take the course of action proposed by Mr. Maro of quashing conviction, setting aside the sentence and releasing the appellant from jail. We are saying so because we agree with the observation of learned Judge Lee Bozalek in the case of **Pieter Davids v. S** (A571/12) [2013] ZAWCH 72 that circumstances of each case may vary widely. The learned judge said that:-

> *"The court mustn't "prescribe a uniform course of conduct in matters involving missing records since the circumstances of each case may vary widely."*

To the contrary, we are confident that the decisions in the cases of **Kayoza v. Republic** and **Foibe Lewanga v. Bernard Anthony** (supra) where retrial was ordered provide an appropriate guide in this regard. This is because it will always give the court chance in each particular case to consider the conditions leading to the disappearance of the record, and also to contemplate if public interest demands a retrial in the

circumstances of the case. We also think that it will vouch the Republic's worry of setting a dangerous precedent, thus opening a Pandora's Box if the Court grants Mr. Maro's prayer that we quash the judgment, conviction and set aside the sentence **on the ground of the record of appeal having been irretrievably lost.**

In the circumstances, in terms of the power vested on us under section 4 (2) of the AJA, we quash the judgment and conviction in High Court (Arusha) Criminal Session No. 44 of 1984, and set aside the sentence which was imposed on the appellant. However, we are not prepared to order a retrial for reasons we endeavour to give.

As the scant record will show, the appellant was faced with a charge of manslaughter which ordinarily does not attract the maximum sentence of life imprisonment unless there are cogent reasons to that effect. Also, the appellant has been in jail for about 34 years now, which in our view does not arguer well for us to order a retrial. Similarly, if we order a retrial there are conceivable difficulties of getting witnesses, 37 years after the incident.

For these reasons, we allow the application and order appellant's immediate release from prison unless he is otherwise being continually held for some other lawful course.

Order accordingly.

DATED at **DAR ES SALAAM** this 12th day of June, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 15th day of August, 2019 in the presence of Said s/o Shabani, the Appellant and Mr. Azaeli Mweteni, State Attorney for the Respondent is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL