

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MWANGESI, J.A., MWANDAMBO, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 429 OF 2015

CHARLES RAMADHANI - ----- APPELLANT

VERSUS

THE REPUBLIC ----- RESPONDENT

(Appeal from the judgment of the High Court of Tanzania

at Tabora)

(Rutakangwa, J.)

dated the 29th day of November, 2002

in

Criminal Appeal No. 64 of 2001

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JUDGMENT OF THE COURT

20th & 25th November, 2020

MWANGESI, J.A.:

Before us, is a second appeal which is peculiar in that, we are called upon to determine it in the absence of the records of neither the trial court nor the first appellate court. The only records concerning the impugned decision which have been availed in the record of appeal, are a warrant committing the appellant to prison, which was issued by the District court of Nzega on the 18th July, 2001, his notice of intention to appeal against the judgment of the District court which was lodged in that court on 19th July,

2001 and another warrant also committing him to prison following dismissal of his appeal, which was issued by the High Court of Tanzania Tabora District Registry, on 29th November, 2002. In all documents, it is indicated that the appellant was sentenced to life imprisonment, following his conviction of the offence of gang rape contrary to the provisions of section 131 (3) A (1) and (2) of the Penal Code.

From what could further be gathered in the record of appeal, even when the appellant was seeking for extension of time in the High Court of Tanzania at Tabora so as to lodge the instant appeal, the records of both courts were missing as reflected on pages 23 to 26 of the record of appeal. Under the circumstances, it is no wonder that there are no grounds of appeal which were lodged by the appellant after he was granted the sought extension of time on 29th September, 2015. What is contained in the purported memorandum of appeal are mere complaints of the appellant regarding the missing documents. In its own words, the said memorandum of appeal by the appellant reads thus: -

"1. That, the loss of record of proceedings and judgment of both the trial court and first appellate court, deprived the appellant having lost the presumption of innocence following his conviction,

the ability to prove that the two lower courts below, convicted him with errors.

- 2. That, the record shows that the appellant was engaged in the reconstruction of the lost records.*
- 3. That, there is an indication that the charge preferred against the appellant was defective as it can be discerned from the conviction form (warrant of commitment) of both the trial court and the first appellate court in that, the charge preferred against the appellant was under section 131 (3) A (1) and (2) of the Penal Code, Cap 16 as amended by section 7 of the SOSPA Act No. 4 of 1998 without including section 130 of the Penal Code, the principle (sic) provision creating the offence of rape."*

The issue on the missing records of the appeal was earlier on raised before our brothers in the previous session on 8th May, 2020. Even though by then there was already filed in the record of appeal, an affidavit sworn by Mr. Beda Robert Nyaki, the Deputy Registrar, indicating that all efforts to locate the missing documents from other stake holders had proved futile, the Court still granted another chance to him to make more efforts in tracing them. In so doing, the Court was moved by the oral information which was

given by the appellant in Court, that there were some copies of the record that could be obtained from the prison, which could assist the Court in working on his third ground of complaint in the memorandum of appeal, that he was wrongly convicted.

On the date when the appeal was called on for hearing before us, the appellant entered appearance in person, legally unrepresented, whereas the respondent was represented by Ms. Upendo Malulu, learned Senior State Attorney. At the outset, Ms. Malulu rose to inform the Court that the order which was issued by the Court on 8th May, 2020 had been complied with, whereby some missing records obtained from the prison that is, commitment warrants of the appellant and the notice of intention to appeal lodged in the District court of Nzega, had been incorporated in the record of appeal. Nonetheless, the learned Senior State Attorney went on to argue, those documents were of no assistance in making the hearing of the appeal proceed, on account that they are not among the records envisaged under the provisions of rule 71 (2) and (4) of the Tanzania Court of Appeal Rules, **(the Rules)**.

When probed by the Court if the documents retrieved from the prison were not capable of shading some light on the complaint by the appellant in

the third ground of his purported memorandum of appeal, that he was convicted under improper provisions of law, the response by Ms. Malulu was that even though the contents in those documents suggest that indeed the appellant was convicted under provisions of the Penal Code which were not complete, in the absence of the proceedings of the case, it was not possible to fairly and objectively determine such complaint. Proper consideration of the said complaint, could only be made in the presence of complete record of appeal that has been compiled in compliance with the provisions of Rule 71 (2) and (4) of **the Rules**, she argued.

Submitting on the way forward in view of the missing records in this appeal, the learned Senior State Attorney argued that even though the appellant was on 18th July, 2001 condemned by the District court of Nzega to serve life imprisonment, a sentence which was upheld by the first appellate High Court of Tanzania at Tabora District Registry on 29th November, 2002 regard being had to the fact that as of now, the appellant has already served about twenty years or so, she was convinced that the said period was sufficient. Placing reliance on the holding in **Mfaume Shaban Mfaume Vs the Republic**, Criminal Appeal No. 194 of 2014 (unreported), as well as the holding of the Supreme Court of Ghana in **John**

Bonuah @ Eric Annor Blay Vs the Republic, Criminal Appeal No. J3/1/2015 of July, 2015, she asked us to quash the proceedings of the lower courts and set the appellant at liberty.

On his part, the appellant being a lay person who was not legally represented, had nothing substantial to chip in other than supporting the submission made by the learned Senior State Attorney, that he be set at liberty.

What stands for the Court to deliberate and determine in view of the circumstances pertaining to this appeal as alluded to above, is the issue as to what should be the way forward in resolving the appellant's complaint in the appeal before us. Before we embark on considering it, we think it is apposite to state some general principles governing the administration of criminal justice. They are, **one**, that the responsibility for keeping the court records in safe and proper custody and producing them on demand, rests on the relevant court. **Two**, the appellant has got an unfettered Constitutional right to use all available legitimate avenues, to pursue his legal rights. And **three**, an impugned decision, is prima facie correct until otherwise declared.

It is apparent in the light of the affidavit sworn by Mr. Beda Robert Nyaki, the Deputy Registrar of the High Court of Tanzania at Tabora on 9th

August, 2019, that the efforts to trace the missing records in the appeal at hand, have proved futile. In its own words, the Deputy Registrar deponed in paragraphs 2 and 3 of his affidavit that: -

- "2. That the case files in Criminal Case No. 28 of 2001 the Republic Vs Charles Ramadhan of Nzega District court and Criminal Appeal No. 64 of 2001 Charles Ramadhan Vs the Republic High Court of Tanzania at Tabora, are nowhere to be traced.*
- 3. That, I have made efforts to write to the stake holders to find the charge sheet, proceedings, judgment, exhibits, petition of appeal to the High Court, proceedings and exhibits in Criminal Appeal No. 64 of 2001 and the judgment but in vain.*

There is no general rule in our jurisprudence on the way forward when the Court is faced with the problem of missing records of the lower courts as the one in the appeal under scrutiny. When the Court was faced with a similar scenario in the case of **Robert s/o Madololyo Vs the Republic**, Criminal Appeal No. 486 of 2015 (unreported), after having visited the practice obtained in other jurisdictions, it was of the view that the other viable means of remedying the situation, was for the Deputy Registrar of the

High Court, to involve other stake holders in the administration of justice, to reconstruct the records. Part of its order went thus: -

"The hearing of the appeal is adjourned to allow the Deputy Registrar to reconstruct the records of appeal and thereafter, the Deputy Registrar of the Court of Appeal, shall fix the date of hearing of the appeal at the earliest possible session."

According to the record of appeal in this appeal, it is indicated that the procedure proposed in the case of **Robert s/o Madololyo** (supra), was adopted whereby, all stake holders were requested by the Deputy Registrar to avail him with any available records concerning the original case and the appeal, so that he could reconstruct the record of appeal but to no avail. This is reflected in paragraphs 3 and 4 of the affidavit of Mr. Beda Robert Nyaki, the Deputy Registrar of the High Court of Tanzania at Tabora, which was sworn on 26th June, 2020 where he deponed that: -

"3. That, I have made efforts to write to the stake holders to find the commitment warrant and other records like charge sheet, proceedings, judgment, exhibits in criminal case No. 28 of 2001, notice of intention to appeal, petition of appeal, proceedings and judgment in criminal appeal No.

64 of 2001 of the High Court of Tanzania for purposes of reconstructing the record but all in vain.

4. That, so far in an effort to reconstruct the record, we succeeded to get commitment warrant, notice of intention to appeal and order of the appeal from Uyui Central Prison and the rest of record, we failed to get from stake holders. Also I made efforts to trace the records at the High Court of Tanzania at Tabora Criminal Registry and archive but in vain."

The efforts to reconstruct the record of appeal having failed as per the sworn affidavit of the Deputy Registrar above, we had to look for other possible means in which we could deal with the appellant's appeal for the triumph of justice, and without offending the fundamental principle in the administration of criminal justice, that an appellant is not entitled to an acquittal on the mere basis of the loss or destruction of the judicial records of the lower courts. The decision of the Supreme Court of Ghana in **John Bonuah's case** (supra) was much persuasive to us where an alternative method was proposed in a situation where reconstruction of the record proved impossible. It was held that: -

"Where reconstruction of the record of appeal is neither feasible nor possible, the Court should consider to order for re-trial."

Such alternative method of ordering for trial *de novo*, happened also to be examined by our neighbouring Court of Appeal of Kenya in the case of **Joseph Maina Kariuki Vs the Republic**, Criminal Appeals No. 53 and 105 of 2004, which was cited in **John Bonuah @ Eric Annor Blay** (supra), where upon considering the peculiar circumstances of that particular appeal, the Court observed that: -

"...the appellant could not be kept in prison indefinitely when it was possible for his appeal to have been concluded according to the law."

The application of the proposed method of ordering for re-trial, involves consideration of some factors amongst which include, availability of witnesses, the nature and seriousness or complexity of the of the offence under which the appellant was convicted of, and the time in which the appellant has spent in custody.

When we put into test this alternative method of trial *de novo* to the appeal which is before us, we seriously doubt the availability of the witnesses and exhibits to establish the offence of gang rape under which the

appellant stood charged with and convicted of in the impugned decision. The possibility is further complicated by the fact that, the charge sheet leveled against the appellant, is among the records of appeal which went missing. Under the circumstances, it may prove difficult for the prosecution to draw a fresh charge against the appellant in a case which they are not in possession of its facts and particulars.

The foregoing apart, regard also being had to the time which the appellant has spent in prison, that is from 18th July, 2001 when he was convicted by the District court of Nzega to date that is, a period of about twenty years or so, we think, this is yet another factor of which as it was correctly argued by the learned Senior State Attorney, does not justify issuance of an order for trial *de novo*, which inevitably will cause the appellant to continue being put under restraint for reasons which are not of his own making.

Basing on the circumstances which have been highlighted above, we find ourselves inclined to heed to the prayer by Ms. Malulu of following suit to what we held in **Mfaume Shaban Mfaume Vs the Republic** (supra), where, upon having failed to locate the missing records of the lower courts

for purposes of according a fair hearing and determination of the appellant's appeal, we stated in part that: -

"The right course to take as correctly urged by the learned State Attorney, is to invoke our revisional powers under section 4 (2) of the AJA as we hereby do and nullify the proceedings and judgments of the two courts below and quash the conviction and sentence imposed on the appellant."

We went on to state in the above case on the way forward thus: -

"We have considered the peculiar circumstances in this matter particularly the fact that the appellant has been incarcerated for about sixteen years from the date of conviction and sentence, thereby serving a substantial part of his sentence --- justice will triumph if the appellant is set free. We thus order the immediate release of the appellant from prison unless he is continually held for some other lawful cause."

In the same vein, the failure by the Court to get the records of the lower courts which could have assisted us to fairly and objectively determine the appellant's appeal before us and regard being put to the period which the appellant has already served in prison that is; about twenty years we think, even though his sentence was for life, prudence dictates

that justice will triumph if we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 and quash the proceedings of both lower courts as we hereby do, and set aside the sentences which were meted down against the appellant, and order for his immediate release from prison.

We accordingly order so.

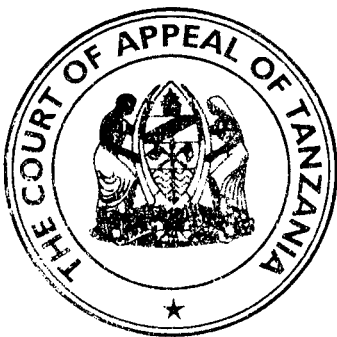
DATED at **TABORA** this 24th day of November, 2020.


S. S. MWANGESI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 25th day of November, 2020 in the presence of appellant in person and Mr. Tumaini Pius Ochoro, learned counsel for the respondents is hereby certified as a true copy of the original.




D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL