IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MWANGESI, J.A., MWANDAMBO, J.A. And LEVIRA, 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 24th day of August, 2015
in
Criminal Appeal No. 36 of 2013
.....

JUDGMENT OF THE COURT

20th & 25th November, 2020

MWANDAMBO, J.A.:

The District Court of Kigoma, tried and convicted Nassoro s/o Mussa, the appellant herein, of the offence of rape contrary to section 130(1) (2) (e) of the Penal Code, Cap. 16 R.E. 2002 [now RE.2019]. The particulars of the charge were to the effect that on 17th August, 2010 at about 12:00 hours the appellant had carnal knowledge of a girl aged 16 years at a place called Kahabwa-Gungu area in Kigoma Municipality to which the appellant pleaded not guilty.

To prove the charge, the prosecution paraded the victim of the offence (PW1) and a doctor who examined her (PW2). According to

the judgment of the trial court appearing at pages 9 to 21 of the record of appeal, the appellant aided two persons who committed the offence; "a pastor" and another undisclosed person who raped her in turn whilst the appellant held PW1's legs apart facilitating the commission of the offence. It is also evident from the trial court's judgment that after the fateful incident, PW1 narrated the ordeal to her sister stating that she identified her assailant; the appellant by a scar above his eye. However, it was not until 17th November, 2010; three months later to be exact, when the police arrested the appellant who was later arraigned in the trial court for the offence of rape. It is equally evident from the judgment of the trial court that the appellant had told the trial court that his arrest was initiated by one Bob Dullah in connection with a demand for TZS 35,000.00 or his clothes. Neither PW1's sister nor the police who investigated the case was called to testify before the trial court. The judgment is equally silent if there was any identification parade conducted through which the appellant was identified. Furthermore, that judgment said nothing about the appellant's defence.

In its judgment, the trial court made a finding that the appellant did not personally have carnal knowledge of PW1 other than aiding the

assailants both of whom were at large. Nonetheless, it held that the appellant was culpable on the strength of section 22 (1(c) of the Penal Code. It thus convicted the appellant as charged. Upon such conviction, the appellant earned a custodial sentence of 30 years' imprisonment with 6 strokes of the cane. Both conviction and sentence did not amuse the appellant who unsuccessfully appealed to the High Court sitting at Tabora in DC. Criminal Appeal No. 36 of 2013.

The first appellate court determined that appeal on three main grounds of complaint namely; conviction founded on weak evidence which did not prove the charge beyond reasonable doubt, appellant's conviction founded on uncorroborated evidence and lack of evidence proving that the appellant committed gang rape.

Mr. Rwegira Deusdedit, the learned Senior State Attorney who represented the respondent/Republic before the first appellate court did not support conviction and the sentence. He was emphatic supporting the appeal on four main grounds to wit; one, the evidence by the prosecution was at variance with the charge; two, non-compliance with section 132 of the Criminal Procedure Act, Cap. 20 R.E. 2002 [now R.E. 2019] (the CPA) in preferring the charge against the appellant who only aided the actual offenders; three, weak

evidence of visual identification in the absence of identification parade; and four, unexplained delay in arresting the appellant coupled with the failure by the prosecution to call an arresting officer or investigator to testify (at pp 37-38 of the record of appeal). Nevertheless, the High Court (Rumanyika, J.) did not purchase in any of those arguments. It concurred with the trial court and dismissed the appeal culminating into the instant appeal.

Initially, this appeal was called on for hearing on 13th February 2018 on which date hearing could not proceed for reasons which will become apparent shortly. It turned out on that date that the proceedings of the trial court were missing from the record of appeal. The Court was apprised through an affidavit of Beda Nyaki, Deputy Registrar of the High Court that efforts to trace the missing copy of the proceedings were barren of fruit. In the course of hearing, Ms. Upendo Malulu, learned Senior State Attorney representing the respondent/Republic intimated to the Court that her office was in a position to assist in retrieving the missing copies of proceedings. With that assurance, hearing of the appeal was adjourned pending reconstruction of the record of appeal from the copies of proceedings

to be availed by the office of the Director of Public Prosecutions (the DPP) here in Tabora.

In our ruling adjourning the hearing, we registered our concern on the disquieting state of affairs surrounding the appeal and urged the Deputy Registrars to try and draw lessons from other jurisdictions which have had similar experiences. We made reference to several decision from other jurisdictions drawing inspiration on how such courts have dealt with situations involving lost or destroyed records. Of particular relevance is the decision of Woods (Mrs.) CJ of the Superior Court of Judicature of Ghana in **John Bonuah @ Eric Anor Blay v. The Republic,** Criminal Appeal No. J3/1/2015 (unreported) dated 9th July, 2015. That decision drew experiences from the US, South Africa and Kenya on similar problems like ours in this appeal. From the above decision, this Court stressed that:-

> *"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." [at page 6].

In compliance with the Court's order of 13th February 2018, the Deputy Registrar, High Court, Tabora Zone wrote to the office of the DPP in Tabora requesting for the missing copies of proceedings vide letter Ref. No. J/HCT/C-90/Vol. VII/2/87 dated 11th June 2018. By its letter Ref. No. NPS of TB/C.20/D.R/01 dated 24th September 2020, the Office of the National Prosecution Service (NPS), Tabora Region informed the Deputy Registrar that the copies requested could not be traced from its office. Earlier on, the Deputy Registrar had sent similar letters to the Prison Officer-In-charge, Uyui Central Prison which, like the NPS, could not be of any assistance towards reconstruction of the record of appeal in line with the order made on 13th February 2018.

Against the above background, on 20th October 2020, Mr. Beda Robert Nyaki, Deputy Registrar, deponed to an affidavit indicating that the efforts to obtain missing copies from the stakeholders had failed. In other words, the position obtaining on 13th February 2018 had not changed despite the order for adjournment pending exhaustive efforts towards reconstruction of the record of appeal after engaging other stakeholders.

The above notwithstanding, the appeal was cause listed for hearing during the current sessions of the Court. On 20th November 2020 on which the appeal was called on for hearing, Ms. Upendo Malulu, Senior learned State Attorney appeared representing the respondent/Republic. The appellant fended for himself. In view of the fact that the position obtaining on 13th February 2018 had not changed rendering the record of appeal deficient on account of the missing copies of proceedings of the trial court, Ms. Malulu offered what she considered to be a solution to the quagmire. She did so placing reliance on our previous decision in **Mfaume Shabani Mfaume v. R,** Criminal Appeal No. 194 of 2014 (unreported) in which, faced with a similar situation, we invoked our revisional power under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 [R.E 141 2019] henceforth the AJA, and nullified the proceedings of the trial court resulting in the discharge of the appellant.

The learned Senior State Attorney invited the Court to do alike in the instant appeal having regard to the fact that the appellant had served substantial part of the sentence. Not surprisingly, the appellant welcomed the learned Senior State Attorney's prayer.

Arising from the above, it is clear that this appeal is still riddled with uncertainties which render it impossible for the Court to proceed with its determination this way or the other. Admittedly, the state of affairs in the instant appeal, are, to say the least quite disturbing. We registered our concerns during the previous occasion in this appeal that loss of court records and other documents erodes the confidence and trust bestowed on the judiciary for the proper administration of justice. Undeniably, the proceedings of the trial court are missing that as indicated earlier, efforts to trace them from the stakeholders have not been successful as can be discerned from the affidavit of the Deputy Registrar.

Naturally, in the absence of such proceedings, the Court cannot meaningfully and objectively determine the grounds in the memorandum of appeal. Sadly, the solution going forward has not been provided for under the law. As remarked previously, the legislature has left it to the courts to look for a solution. There is not so much precedent locally and so, resort must be had to global jurisprudential best practices for guidance. Faced with a similar situation like ours, in **Bonuah's** case (supra) the Superior Court of Judicature of Ghana made very pertinent to observations which we

subscribe. At the risk of making this judgment unduly long, we have found necessary reproducing at length the relevant excerpt thus:

> *"Judicial records are clearly vital to the proper functioning of courts. But these may be lost or destroyed either through plain burglary, or fire or some other unfortunate natural calamity. In this technological age, it may also be lost through the inability to recover electronic data; that is recorded court proceedings, or scanned exhibits, from a crashed computer. Thus, it is not only against sound judicial policy but clearly impracticable to prescribe a one-size- fit all uniform conduct in matters of lost or destroyed judicial records, given the varying circumstances of each case and also the several related factors that must legitimately influence judicial decisions arising from such incidents.*
>
> *Thus, in cases of this kind, the real challenge lies in reconciling two competing interest. These are firstly, an appellant's unfettered constitutional right to a fair hearing, as already noted, a fair and just appeal hearing on the merits within a reasonable time, by direct access to the trial record, in conformity with the fundamental principle that an appeal is a re-hearing; and secondly, the overriding*

constitutional duty of appellate courts, indeed all courts, to keep the streams of justice pure; to protect it from manipulation and abuse, and from being overran by unscrupulous persons acting in collusion with dishonorable court officials to pervert its course. Inevitably, an appellate court faced with this impasse has a duty to ensure, on balance, that these competing interests are simultaneously realized." [At page 6]

In its subsequent decision, in **Kwame Nkrumah@ Taste v. Republic**, Criminal Appeal No. J3/1/2016 (unreported) dated 26th July, 2017 the said court referring to **Bonnuahs'** case summarized the relevant factors which must inform an appellate court like ours in cases of lost or destroyed records as follows:

1. *An Appellant shall not be at fault, responsible or blamable for the loss or destruction.*
2. *An appellant is not automatically entitled to an acquittal upon the mere proof of lost or destroyed trial proceedings.*
3. *The quantum or magnitude of the missing record-lost or destroyed-and its relevance to the appeal in question shall be determined by the court.*

4. *Where it is proven that the missing record is material to the determination of the appeal it is for the court to determine the viability of a reconstruction of the lost record.*

5. *Where reconstruction is impossible then a retrial may be ordered depending on the circumstances such as the nature of the offence and the length of time spent in custody.* [At page 6].

Back home, in **Mfaume Shaban Mfaume v. R.** (supra) cited to us by Ms. Malulu, the Court was confronted with a similar problem of loss of record of proceedings of the trial court. Apparently, the first appellate court had determined an appeal before it without the record of proceedings of the trial court.

Like in the instant appeal, copies of trial court proceedings went missing in **Mfaume's** case which made it impossible to proceed with the hearing of the appeal. Similarly like in the instant appeal, efforts to trace the missing copies failed to enable reconstruction of the record of appeal. Furthermore, there was evidence through an affidavit of the Deputy Registrar of the High Court explaining failed efforts to trace the much needed copies of proceedings. The only difference lies in the fact that the High Court in **Mfaume**'s case determined the appeal which gave rise to the impugned decision without being seized with the trial

court's proceedings. Confronted with the dilemma in balancing the scales of justice between the appellant's right to a hearing on his appeal and the fact that his conviction had not been reversed by any court, the Court resorted to its revisional power and declared the proceedings before the first appellate court irregular so was the resultant judgment. In consequence, it nullified those proceedings. Having nullified the proceedings of the first appellate court in exercise of its revisional power under section 4(2) of the AJA, it became inevitable to order that there could not have been any valid appeal from the irregular proceedings of the High Court. At the end of it all, the Court quashed the conviction and set aside the sentence meted out to the appellant.

The Court arrived at that conclusion having regard to the period the appellant had spent in prison serving his sentence which it considered to be substantial. We have found ourselves compelled to take a similar path as in this appeal.

The appellant in this appeal was sentenced to serve 30 years' imprisonment with 6 strokes of the cane. He was sentenced by the District court on 13th April 2011. He has thus spent 9 years and more than seven months in prison. That period may not be as substantial

compared to 16 years in **Mfaume Shaban Mfaume's** case but we do not consider that it is in the best interest of justice holding the appellant indefinitely in prison in the absence of any guarantee of the availability of proceedings which will pave way for the hearing of his appeal. That possibility remains a moot one given the position explained above which militates against the appellant's right to a fair determination of his appeal guaranteed under Article 13(6) (a) of our Constitution.

There is one more factor behind the approach which has informed us to take the approach in this appeal. As indicated earlier, the respondent/Republic did not support the appellant's conviction. The learned Senior State Attorney expressed his doubt on the validity of the charge which, to him was not drawn in conformity with section 132 of the CPA taking into account the role the appellant is claimed to have played in the commission of the offence. Similarly, he was emphatic that the evidence adduced by the prosecution was at variance with the charge. Sadly, the first appellate court's judgment is conspicuously silent on these pertinent legal issues.

In consequence, all factors taken into consideration, we find it inevitable to exercise our revisional power under section 4 (2) of AJA

and quash the proceedings of the High Court in DC. Criminal Appeal No. 36 of 2013 as well as the judgment of that Court dismissing the appellant's appeal. Further, the trial court's proceedings giving rise to the appellant's conviction and sentence in Criminal Case No. 368 of 2010 are quashed and the judgment convicting the appellant quashed and sentence set aside. Inevitably, our order shall result in the appellant's immediate release from custody unless held therein for any other lawful cause.

Order accordingly.

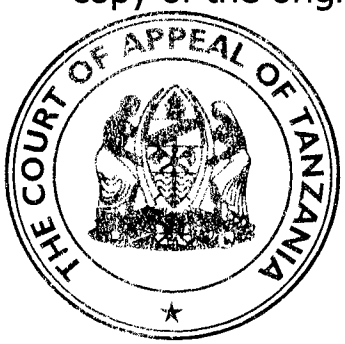
DATED at **TABORA** this 25th day of November, 2020.

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 Ocharo, Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL