

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MKUYE, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO. 177 OF 2016

JUMA MKANGAMO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mapigano, J.)

dated the 22nd day of December, 1986

in

HC. Criminal Sessions Case No. 24 of 1985

JUDGMENT OF THE COURT

21st February & 16th March, 2020

MKUYE, J.A.:

This is a rather unique case. What can be gleaned from the scanty information available on record is that the appellant Juma Mkangamo was way back in 1986 charged and convicted with the offence of murder contrary to section 196 of the Penal Code Ordinance, Cap. 16, before the High Court of Tanzania at Morogoro in Criminal Sessions Case No. 24 of 1985 (Mapigano, J as he then was) dated 22/12/1986 and was sentenced

N.B. *There is a correction at page 8 last paragraph where it was indicated that the reference was Rule 4 (2) and (b) of the Rules but it ought to have been section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 as corrected.*

to suffer death by hanging. This is as per the Committal Warrant found at page 33 of the so called record of appeal.

It would appear that the appellant filed his notice of appeal and waited to be furnished with the record of appeal but that did not materialize. The appellant after having failed to lodge an appeal within time, in 2013 filed an application (Criminal Application No. 105 of 2013) for extension of time to file a fresh notice of appeal but was on 9/10/2014 struck out for being incompetent (Sheikh, J. as she then was). Still dissatisfied, on 15/08/2014 the appellant lodged another application (Criminal Application No 130 of 2014) seeking extension of time to lodge a notice of appeal. Though there are no proceedings to that effect, there is an order granting extension of time by Ruhangisa, J (as he then was) on 22/6/2015. On 10/7/2015 he duly lodged the current notice of appeal. However, up to the time this appeal was called on for hearing the appellant was yet to be availed with the record of appeal. What can be gathered from the record we have is that, the Registrar of the High Court (RHC) has made several efforts to reconstruct the record of appeal by seeking assistance from the Prisons Authority, the Tanzania Police Force, Office of the Director of Public Prosecutions and the Resident Magistrates

Court for Morogoro, but all the efforts have proved futile and the RHC has sworn an affidavit to that effect.

Despite such state of affairs, the applicant has fronted two grounds of appeal as follows:

- "1). *The right of appeal of the appellant has been obstructed by missing trial record of Criminal Sessions Case No. 24 of 1985.*
- 2). *The learned trial judge erred in law and in fact by convicting the appellant basing on prosecution evidence which was not proved beyond reasonable doubt."*

When the appeal was called on for hearing, the appellant was represented by Mr. Paschal Kamala, learned counsel; whereas the respondent/Republic was represented by Ms Mwanaamina Kambakono, learned Senior State Attorney, assisted by Ms Chesensi Gavyole, learned State Attorney.

Arguing the appeal, Mr. Kamala contented that though the appellant lodged his notice of appeal on 10/7/2015 after having obtained extension of time from the High Court on 22/6/2015, the RHC has not served him

with the record of appeal as per Rule 76(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Instead, he submitted, the applicant was served with documents showing that the copies of proceedings and judgment sought to be appealed against are missing. He added that the Registrar has sworn an affidavit showing the efforts she made in reconstructing the record but in vain. While relying in the unreported Criminal Appeal No. 573 of 2017 between **Norbert Ruhusika and the Republic**, in which the Court released the appellant who was in prison for 18 years on the ground of missing record, he urged the Court find that the appellant who has been in prison for 34 years ought to be treated the same way. In addition, while citing a Kenyan case of **Jackson Muthuria Mwaura and Another v. Republic**, Criminal Appeal No. 58 of 1989 in which the appellant was released because some documents were missing in the record of appeal, he asked the Court to set aside the High Court's decision and release the appellant on similar grounds.

Upon our prompting as to whether they had been availed with copy of judgment because of the grounds of appeal they have lodged in Court, the learned advocate had no satisfactory explanation.

In reply, Ms Kombamkono in the first place appreciated the efforts made by the RHC to reconstruct the record but proved futile. She, however, resisted the proposition made by her learned friend of releasing the appellant arguing that the cited case of **Norbert Ruhusika** (supra) is distinguishable because in that case the appellant who was charged with rape had served a sentence of 18 years and remained with only 2 years unlike in this case where the appellant was charged with a capital offence punishable by death and does not attract a release.

With regard to the Kenyan case of **Jackson Muthuria Mwaura** (supra) the learned Senior State Attorney said, it was also distinguishable as in that case there were some pages missing in the case file unlike here where the whole record is missing.

In that regard she argued that, this being a capital offence case, in order for justice to be seen to be done to both sides, the Court should invoke Rule 4(2)(a) and (b) of the Rules and nullify the proceedings and judgment, quash the conviction, set aside the sentence and leave the matter in the hands of to the Director of Public Prosecutions (DPP) to determine on the course of action to be taken.

We have dispassionately considered the arguments from either side. We wish to start by stating that Part IV of the Rules deals with criminal appeals. Rule 68 of the Rules deals with notice of appeal. Under sub rule (1) of the said Rule, a notice of appeal is a vital document as it institutes the appeal. (See also **William Sunday v. Republic** Criminal Appeal. No. 75 of 2007; **Lukelo Uhahula v. Republic** Criminal. Appeal No. 23 of 2012; **Mussa Iddi and Another v. Republic** Criminal Appeal No. 404 of 2013 and **Msafiri Hassan Masimba v. Republic**, Criminal Appeal No. 375 of 2013 (all unreported).

In this case, the appellant lodged an application for extension of time to file a notice of appeal and was granted on 22/6/2015. He lodged the required notice within time after having been granted extension of time to do so. He lodged it on 10/7/2015. There is no doubt that the notice of appeal was lodged within time.

Rule 71(1) of the Rules in mandatory terms requires the RHC to prepare the record of appeal after a notice of appeal has been lodged. Sub rules (2), (3) and (4) prescribe the content or rather the documents to be included in the record of appeal depending on the type of appeal to be instituted. Further to that, in terms of Rule 76 of the Rules, the RHC in

mandatory terms is required to serve the record of appeal on the appellant and respondent and to send four copies thereof to the Registrar as soon as the record of appeal has been prepared.

In this case, this, as was rightly argued by both counsel, no record of appeal was availed to the parties as they could not be traced as was averred by the RHC. The RHC has sworn an affidavit showing the efforts she made to reconstruct the record of appeal but in vain.

In that regard, Mr. Kamala has urged the Court to be guided by the cases of **Norbert Ruhusika** (supra) and **Jackson Muthuria Mwaura** (supra) and release the appellant. However, with due respect, we find that **Norbert Ruhusika's** case (supra) is distinguishable to this case. This is because in that case the appellant was charged with an offence of rape punishable by imprisonment for 30 years unlike in this case where the appellant was charged with a capital offence punishable by only one punishment of death by hanging. Secondly, in that case the appellant had served 18 years in jail which was considered by the Court to be a substantial part of sentence while having regard the remission scheme under which the appellant had remained with on two years to complete his sentence as opposed to this case where the appellant was sentenced to

death penalty. In this regard, we agree with the learned State Attorney that the Court must take into consideration that justice is seen to be done to both sides.

We also find that the case of **Jackson Muthuria Mwaura** (supra) is distinguishable because in that case the Court set aside the conviction and released the appellant who was convicted of murder on account that it was unsafe to rely on the record of appeal which was incomplete.

On our part, we have also keenly considered the scenario at hand. We appreciate the fruitless efforts made by the RHC to reconstruct the record. Further to that, we have considered the learned appellants' prayer for the release of the appellant. Nevertheless, we think, this being a capital offence with capital punishment, releasing him without **more** will not serve the interest of both sides. On the other hand, we go along Ms. Kombakono's proposition that the appellant be released with a leeway for the DPP to determine the action to take, if he so wishes.

That said and done, we, in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 nullify the proceedings and judgment, quash the conviction and set aside the sentence meted out to the

appellant. We further order that the appellant be released forthwith from custody. As for the way forward, we leave the matter to the wisdom of the DPP.

It is so ordered.

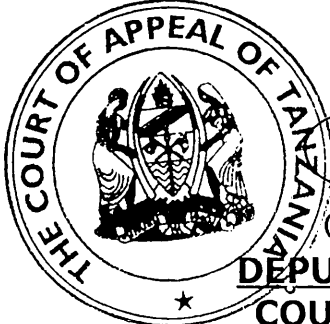
DATED at DAR ES SALAAM this 11th day of March, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 16th day of March, 2020 in the presence of the appellant in person and Ms. Anna Chimpaye, learned Senior State Attorney for the respondent is hereby certified as a true copy of the original.

The seal of the Court of Appeal of Tanzania is circular, featuring the national coat of arms of Tanzania in the center. The text "THE COURT OF APPEAL OF TANZANIA" is written around the perimeter of the seal, with a small star at the bottom center.
G. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL