

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: NDIKA, J.A., WAMBALI, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 405 OF 2018

YUSUPH S/O MBULULO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Iringa)

(Mwipopo, J.)

dated the 28th day of January, 2000

in

Criminal Sessions Case No. 9 of 1995

.....

RULING OF THE COURT

19th & 28th April, 2021

NDIKA, J.A.:

The appellant, Yusuph s/o Mbululo, was convicted of murder by the High Court of Tanzania sitting at Iringa (Mwipopo, J.) on 28th January, 2000 and was, accordingly, sentenced to death. As it shall be unveiled shortly, his quest for appealing against the conviction was conceivably frustrated by misplacement or loss of not only the initial notice of appeal he supposedly lodged on 14th February, 2000 to manifest his intention to appeal to this Court but also the entire trial court record. To revive his pursuit of justice and freedom, he approached the High Court at Iringa (Banzi, J.) vide Miscellaneous Criminal Application No. 20 of 2018 and obtained on 10th October, 2018 an

order extending time upon which he lodged a fresh notice of appeal on 11th October, 2018, thereby instituting the present appeal.

At the hearing of the appeal before us on 19th April, 2021, Mr. Jally Willy Mongo, learned counsel, stood for the appellant, who also appeared via a remote link from the Iringa Prison where he is held. For the respondent, Mr. Juma Masanja, learned Senior State Attorney, appeared with the assistance of Ms. Rehema Mpagama, learned State Attorney.

It transpired that the appeal could not proceed to hearing on the merits because the entire record of the proceedings before the High Court was missing. Addressing us on this predicament, Mr. Mongo acknowledged that the present record before us contains none of the core documents required by Rule 71 (2) (a) to (h) and (j) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). He submitted that the absence of the said documents renders the appeal impossible to be heard and determined. On how this disconcerting state of affairs should be handled, Mr. Mongo made reference to two decisions of the Court for guidance: **Nasoro s/o Mussa v. Republic**, Criminal Appeal No. 404 of 2015; and **Charles Ramadhani v. Republic**, Criminal Appeal No. 429 of 2015 (both unreported). In particular, he referred to pages 10 and 11 of the typed decision in **Nasoro s/o Mussa** (*supra*) where the Court referred with approval to the decision of the Supreme Court of Ghana in **Kwame Nkrumah**

@ **Taste v. Republic**, Criminal Appeal No. J3/1/2016 (unreported) stating the factors that must inform an appellate court 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 the time spent in custody."*

While acknowledging that the Deputy Registrar of the High Court at Iringa had made effort to trace the missing record as shown by various correspondences on record, he regretted that the said searches were not

exhaustive as certain key stakeholders in the matter such as the Office of the Director of Public Prosecutions (“the DPP”) were not contacted to assist in a bid to reconstruct the missing record. We understood him to mean that so far there is no definitive declaration by the relevant functionaries of the High Court that the trial court record is lost or destroyed, and if so, whether an effort to reconstruct the missing record has been attempted and exhausted without success. On this basis, he urged us to order the Deputy Registrar, High Court, Iringa District Registry in terms of Rule 4 (2) (a) and (b) of the Rules as follows: one, to prepare the record as soon as possible; and two, in the event that the record cannot be prepared on account of being lost or destroyed, an exhaustive effort to reconstruct the missing record be done by involving all stakeholders.

In response to a query by the Court, Mr. Mongo urged that the Deputy Registrar, High Court at Iringa should work with his counterparts at the High Court District Registries in Songea and Mbeya because the appellant’s trial originated from Songea District Registry and that his initial notice of appeal, now missing, was allegedly forwarded along with the rest of the records to the High Court, District Registry at Mbeya as it doubled as a sub-registry of this Court.

Mr. Masanja essentially associated himself with the submissions of his learned friend. However, he stressed that already a number of stakeholders

have been involved in an effort to retrieve or reconstruct the missing record. He referred to pages 37 to 38 of the record showing the letter of the Acting Chief Registrar dated 1st August, 2016 to the Deputy Registrar, High Court at Songea, copied to the Deputy Registrar, High Court at Mbeya, directing both of them to search for the missing record. Moreover, he referred to the letter of the State Attorney in Charge at Songea (pages 14 to 15 of the record) dated 10th July, 2012 to the Officer in Charge, Isanga Central Prison, Dodoma, copied to the Hon. Principal Judge, High Court, Dar es Salaam and the State Attorney in Charge at Mbeya. In that letter, the addressee was informed that the relevant documents on the appellant's trial that the DPP's offices at Songea had were transmitted to their offices at Mbeya under a cover letter referenced as J/SA/C.10/3/21 of 24th January, 2001 to allow for the hearing of the appellant's appeal to this Court. According to Mr. Masanja, the said information was not acted upon so as to access and retrieve the records in the custody of the offices at Mbeya. On that basis, he submitted that it was premature to conclude that the entire record is lost and cannot be reconstructed.

On the way forward, Mr. Masanja agreed with his learned friend that an order be made as per the guidance in **Nasoro s/o Mussa** (*supra*) for tracing the missing record and, if tracing is impossible, for reconstructing the missing record. However, he urged that the said order be directed towards the Deputy

Registrar, High Court at Songea from whose registry the matter originated and that he should work in tandem with his two counterparts at Iringa and Mbeya District Registries.

We have keenly considered the concurrent submissions of the learned counsel for the parties. What we have to determine is the fate of the appeal in the face of the crying shame of the absence of the entire trial court record.

To begin with, we wish to confirm Mr. Mongo's submission that the Registrar of the High Court was enjoined by Rule 71 (1) of the Rules to prepare the record of appeal as soon as practicable after the appellant had lodged his notice of appeal. The record in the instant appeal ought to have complied with the dictates of Rule 71 (1) and (2) (a) to (h) and (j) of the Rules. For clarity, we wish to extract the relevant parts of Rule 71 (1) and (2) thus:

"71.-(1) As soon as practicable after a notice of appeal has been lodged, the Registrar of the High Court shall prepare the record of appeal.

(2) For the purposes of an appeal from the High Court in its original jurisdiction, the record of appeal shall contain copies of the following documents in the following orders-

(a) an index of all documents in the record with numbers of the pages at which they appear,

showing also under the reference to the trial Judge's notes and under the reference to the transcript, if any, or shorthand notes, the names of the witnesses and the pages of the record at which their evidence appears;

- (b) the information, indictment or charge;*
- (c) the proceedings on and after the sentence;*
- (d) the record of the proceedings;*
- (e) a list of all exhibits put in at the trial;*
- (f) all documentary exhibits, photographs and plans put in at the trial and all depositions read in consequence of the absence of intended witnesses; but the Registrar of the High Court may in his discretion omit copies of documents which are of great length or other exhibits which are difficult to reproduce or may include copies of the relevant parts only of any of those documents;*
- (g) the summing up to assessors, if there is a record of it, or of the Judge's notes on which he based his summing up and the opinions of the assessors;*
- (h) the judgment;*
- (i) [omitted]*
- (j) the notice of appeal."*

It is so upsetting on our part to confirm that except for the notice of appeal, none of the above core documents is included in the record placed before us. As a matter of fact, even the notice of appeal on record is not the one the appellant supposedly lodged on 14th February, 2000, seventeen days after his conviction on 28th January, 2000, because that too is missing. What is on the record is the notice of appeal lodged on 11th October, 2018 after the appellant was granted a requisite extension of time, more than eighteen years following his conviction. It is upon that notice that this appeal is anchored. The rest of the documents on the record are correspondences exchanged between key stakeholders in this matter including the appellant, the Registrar of the High Court, the prison authorities and the offices of the DPP revealing an effort to search for the missing record.

Undoubtedly, the absence of the entire trial court record has hampered the progress of the appeal. It has impeded the appellant's quest for justice and freedom for more than twenty-one years. In terms of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, Cap. 2 R.E. 2002, the appellant has the right of appeal and an entitlement to a fair hearing. For him to exercise his right of appeal fully and receive a fair hearing on his appeal, the record of appeal before us ought to have complied with the dictates of the above-cited Rule 71 (2) (a) to (h) and (j). In this regard, we would cite with approval the

holding made by the South African Supreme Court of Appeal (as per Brand, J.A.) in **The State v. Chabedi** 2005 (1) SACR 415 para 5 that:

"[5] On appeal, the record of proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to conviction and sentence be set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal, not that it must be a perfect recordal of everything that was said at the trial."[Emphasis added]

Within our sub-region, the Supreme Court of Uganda in **Omiat v. Uganda** [2003] 1 EA 226 at 229 took more or less the same stance as it held that:

"An Appellant is entitled to have at his or her disposal, the entire record of proceedings under which his or her conviction is founded. Only on this basis is the Appellant availed all opportunities to challenge every step and aspect leading to his or her conviction and sentence. Moreover, appellate court would be unable to satisfy themselves that the trial court was correct in reaching its decision"
[Emphasis added]

We have read our decision in **Nasoro s/o Mussa** (*supra*) referred to by both counsel. In essence, its stance mirrors the position we had taken in our earlier decision in **Robert Madololyo v. Republic**, Criminal Appeal No. 486 of 2015 (unreported) that there cannot be a uniform course of conduct for all courts faced with the disturbing situation of missing records since the circumstances of each case may vary widely. Citing with approval a decision of the Constitutional Court of South Africa in **Phillip Daniel Schoombe v. The State** [2016] ZACC 50, we held in **Robert Madololyo** (*supra*) that the scales of justice demand that efforts to trace the missing record be made and exhausted by involving all actors in the criminal justice system. The essence of the direction, as it related, in that case, to the missing records of Bariadi District Court (the trial court) and the High Court at Tabora (the first appellate court), reads thus:

"... the scales of justice demand that in the reconstruction of the missing record, the Deputy Registrar must inevitably get cooperation of the appellant himself, the Resident Magistrate in Charge of Bariadi District Court, office of the Director of Public Prosecutions (Tabora and Shinyanga), the Police investigation files, and the Prison Department, who should come forward and supply all the case documents in their respective possession or custody."

In the instant case, we agree with both learned counsel that although the relevant functionaries of the High Court searched for the missing trial court record, no definitive declaration has been made whether the record is lost or destroyed, and if so, whether its reconstruction has been attempted, exhausted and concluded to be totally unfeasible. We have scanned the correspondences between the registrars of the High Court and other stakeholders on the record before us. For all that these correspondences are worthy, they reveal a disturbingly uncoordinated and ephemeral search for the missing record. Like Mr. Masanja, we are, for instance, disconcerted that no effort was made to pursue the lead given by the State Attorney in Charge at Songea that his office's record on the case was transferred to the offices of the DPP at Mbeya. We are aware that periodically inactive public records are dispatched to the National Archives but in the instant appeal that fact has not been ruled out to be the case. The above apart, we had expected the Deputy Registrar to explain by affidavit the details of the searches so far done to retrieve or reconstruct the missing record but none was deposed and filed. Thus, the status of the missing record remains a matter of conjecture. In the premises, we hold that it is too premature to conclude that the entire record is irretrievable or that it cannot be reconstructed. It is, therefore, imperative

that a speedy, resolute, collaborative and coordinated effort be made to retrieve the missing record.

In guiding the way forward, we have taken into account that although the appellant was tried and convicted by the High Court sitting at Iringa in Criminal Sessions Case No. 9 of 1995, his case originated from the High Court, Songea District Registry where it was registered. Furthermore, we are mindful that some of the records on the matter were allegedly dispatched to the High Court, District Registry at Mbeya as well as the offices of the DPP at Mbeya.

Based on the foregoing, we, at first, order the Deputy Registrar, High Court, District Registry at Songea to prepare the record of appeal in accordance with the dictates of Rule 71 (2) of the Rules. Bearing in mind that this appeal is a long-drawn-out matter, as it has clocked more than twenty-one years in pendency, firstly we direct the Deputy Registrar to comply with this order within sixty days of the date of delivery of this ruling.

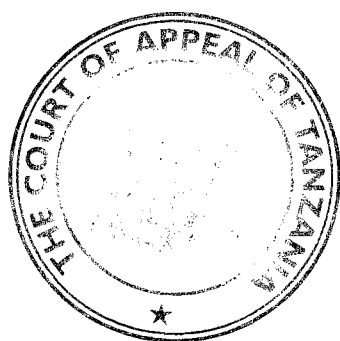
Secondly, in the event that the trial court record is proven to be lost or destroyed, we order the Deputy Registrar, High Court, District Registry at Songea, acting in collaboration with his counterparts in the District Registries at Iringa and Mbeya, to make an exhaustive effort to reconstruct the missing record by involving all stakeholders. The stakeholders that we envisage are the

appellant, the offices of the DPP (at Songea, Mbeya and Iringa), the Police investigation files at Songea, the Prison Department and the National Archives. We direct each of them to come forward and supply all relevant documents on the case in their respective custody.

In consequence, we adjourn the hearing of the appeal to a date to be fixed by the Registrar so as to allow the Deputy Registrar, High Court, District Registry at Songea to comply with the above orders.

It is so ordered.

DATED at IRINGA this 28th day of April, 2021



G. A. M. NDIKA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The ruling delivered this 28th day of April, 2021 in the presence of the appellant in person linked via video conference at Iringa Prison, Mr. Jally Willy Mango, Advocate for the Appellant and Ms. Elizabeth Mallya, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.


B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL