IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 104 OF 2011

MARUNA PAPAI..APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Morogoro)

(Mwaikugile, J.)

dated 08th day of April, 2011
in
Criminal Sessions Case No. 20 of 2007

JUDGMENT OF THE COURT

19th & 30th April, 2021

MUGASHA, J.A.:

The appellant was charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE. 2002. It was alleged by the prosecution that on 11/4/2005 at Milama village within Mvomero District in Morogoro region, the appellant did murder one Aaron Joseph Swai. After a full trial, he was on 8/4/2011 convicted and sentenced to death by hanging. Aggrieved, the appellant lodged a notice of appeal on 11/4/2011. Subsequent to the filing of the notice of appeal, in terms of Rule 71 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the Registrar of the

High Court was obliged to prepare the record of appeal and avail it to the appellant as soon as practicable so that he could prepare a memorandum of appeal containing the grounds of appeal in terms of Rule 72 (1) of the Rules.

As the record of appeal was not forthcoming, on 27/8/2018, the appellant wrote to the Registrar of the High Court complaining about not being supplied with the record of appeal and that it was impossible for him to pursue an appeal. Although no response was availed to the appellant, this was an eye opener on the missing record of the trial and as such efforts to trace the same commenced. In this regard, between November and December 2018 there were several correspondences between the Registrar of the High Court, the District Resident Magistrate of Morogoro District Court, the Regional Crimes Officer of Morogoro; learned counsel for the prosecution and defence and the prison authorities whereby the Officer Incharge of Ukonga Prison on 5/12/2018 supplied the Registrar with a copy the notice of appeal. Others informed the Registrar that the record could not be found as the Morogoro Regional Crimes Officer (the RCO) in his letter Ref. MRG/CID/A.12/2/VOL.II/III notified the Registrar that nothing was found considering that the office was shifted to another building,

whereas the learned defence counsel swore an affidavit deposing that the trial proceedings and the judgment were not availed to them.

With the said stalemate, on 25/4/2019 the appellant lodged a Memorandum of Appeal containing three grounds of appeal as follows:

1. That, the aggregate of records relating to the instant appeal are missing, thus deny the court an advantage to re-hear and adjudicate the appeal as its obligation in law.
2. That, the learned trial judge erred in law for not recording the court proceedings properly and/ or without complying with the provisions of the Criminal Procedure Act Cap 20 RE.2002 governing the manner of recording evidence as well as the manner prescribed for the trial of offences by the High Court.
3. That, the learned trial Judge grossly misdirected himself in law and in facts in convicting the appellant against the weight of evidence upon a conviction could be founded.

When the appeal was called for hearing, the appellant was present and he had the services of Mr. Oscar Epaphra Msechu, learned counsel. The respondent Republic was represented by Ms. Aziza Mhina and Ms. Sabina Ndunguru, learned State Attorneys.

Apparently, in the absence of the trial proceedings and the impugned judgment, it was impracticable for the parties to address the Court on the

2nd and 3rd grounds of complaint. Thus, Mr. Msechu rose to inform the Court that, although on two previous occasions, that is on 19/7/2019 and 19/2/2020 the Court had directed the parties to trace and reconstruct the record of appeal, the same bore no fruits regardless of efforts of the parties to do so. He submitted, it is on that account, the Registrar of the High Court has sworn an affidavit confirming that indeed the entire record of the trial is missing. On account of the missing record of the trial, the learned counsel argued that, since there is no evidence on the appellant being responsible with the disappearance of the record of the trial and considering that though he was convicted in 2011, has remained behind bars for the past sixteen (16) years from the date of arrest in 2005, the best interests of justice demand that, the trial proceedings be nullified and the conviction and the sentence be quashed and set aside. Moreover, he submitted against an order of a retrial on account that since the RCO has admitted that the police case file could not be traced, a repeated trial will prejudice the appellant. To support his propositions, he cited to us the case of **JOHN KARANJA WAININA VS REPUBLIC**, Criminal Application No. 61 of 1993 (Unreported).

On the other hand, apart from the learned State Attorney supporting the course taken by the appellant's counsel, she added that, the efforts to trace the missing record bore no fruits despite reaching out the State Attorneys who were involved in the prosecution before the trial court. On the way forward, he urged the Court to quash and set aside the conviction and the sentence, release the appellant and leave the matter to the wisdom of the Director of Public Prosecutions.

Before we make our decision, it is crucial to point out that, the only documents in the record of appeal relating to the present appeal are the information laid against the appellant, the autopsy report of the deceased, illegible depositions of the intended prosecution witnesses, the warrant dated 8/4/2011 committing the appellant to prison and notice of appeal to the Court. It is from the said documents we could discern that the appellant was charged and convicted of the offence of murder and in a bid to pursue an appeal to the Court he lodged a notice of appeal and later a Memorandum of appeal. However, the trial proceedings and the judgment are missing despite the two Court Orders directing not only the parties but also those involved in the investigation to trace and reconstruct the record of appeal.

We are aware that in terms of Rule 71 (4) of the Rules, the record of appeal must contain documents relating to the proceedings in the trial such as the petition of appeal; the record of the proceedings, the judgment and the order if any. Thus, on account of this unsatisfactory state of affairs, in the absence of the trial record and available scanty documents related to the trial, the question to be answered is what is the way forward? In our determination, we shall be guided by the decisions within the Region and what the Court has of late decided on the subject matter.

In the case of **HAIDERALI LAKHOO ZAVER VS REX [1952] 19 EACA**, the Eastern African Court of Appeal was faced with an appeal against the retrial order by the High Court following reversal of the sentence because the trial records were lost. It gave the following statement of guidance:

> *"The Courts must in this matter try to hold the scales of justice evenly between the parties and, whilst no wholly satisfactory solution can be expected for such an unsatisfactory state of affairs as this appeal discloses, we think that the course followed by the learned Judges on first appeal was on balance the fairest and most just, and is only solution which offers an opportunity for a judicial determination on the merits of the case.*

Moreover, it is in accordance with precedents which are at least persuasive authority. Rex v. Abdi Moge & Others, (1948) 15 E.A.C.A 86, was a case where part of the record was missing and this Court expressed the view that a re-trial would have been ordered but for the fact that the appellants had served the whoie or almost the whoie of their sentences."

The case of **HAIDERALI LAKHOO ZAVER VS (supra)** was relied upon by the Court in the case of **ROBERT MADOLOLYO VS REPUBLIC,** Criminal Appeal No. 486 of 2015 (unreported) whereby, although the appeal was scheduled for hearing the entire proceedings of both the trial and first appellate courts were missing and the District Registrar swore an affidavit to the same effect. In determining the way forward, the Court said:

> *"It seems to us that the defining phrase for our purpose is – "The Courts must try to hold the scaies of justice evenly between the parties".* ***This implies that there is no one general rule on the way forward when courts face missing record of proceedings and, every case involving missing record, should invariably be determined on the basis of its own special circumstances."***

[Emphasis ours]

On the methods of reconstructing the missing record which can be utilised by the Deputy Registrars in Tanzania, the Court relied on guidance offered by the constitutional court of South Africa in the case of **PHILLIP DANIEL SCHOOMBE VS THE STATE [2016] ZACC 50** and stressed the following:

> *".... Depending on different circumstances of cases; there are different procedures for a proper reconstruction of court records.* ***It is also emphasized that the obligation to conduct a reconstruction of the court records does not entirely fall on the court. The convicted accused, their learned counsel, the prosecution, and even prison department holding custody of the appellant, all share the duty to assist in the reconstruction."***

[Emphasis supplied]

Ultimately the Court adjourned the hearing of the appeal with an order that the missing record be reconstructed.

In the present case it is glaring that when the appeal was scheduled for hearing on two previous occasions, on account of the missing record of the trial, the Court could not proceed with the hearing and it directed that

more efforts be made to trace the missing record and reconstruct the record of appeal. However, apart from assembling scanty information, the entire trial proceedings could not be found as per the affidavit sworn by the Registrar. In this regard, on the way forward, although learned counsel from both sides, urged the Court to quash and set aside the conviction and sentence, they parted ways on the ultimate fate of the appellant. While the appellant's counsel prayed that the appellant be released because there is no base on which the prosecution can be recommenced, the learned State Attorney urged us to leave the matter in the wisdom of the Director of Public Prosecutions.

In the present appeal we are also faced with unsatisfactory situation considering the circumstances surrounding the missing record and efforts exerted to trace the same. On our part, as we said in the case of **MADOLOLYO** (supra), every case involving missing record, should invariably be determined on the basis of its special circumstances. Moreover, the obligation to conduct a reconstruction of the court records cannot solely be shouldered by the court. The convicted accused, their learned counsel, the prosecution, and even prison department holding custody of the appellant, all share the duty to assist in the reconstruction.

In view of the said role of the stakeholders, we begin by appreciating relentless efforts demonstrated by the District Registrar and the Officer in charge of Ukonga Prison having successfully traced the warrant which committed the appellant in prison and the notice of appeal. As earlier stated, this has enabled the Court to know that; firstly, the appellant who is now behind bars was charged and convicted for the offence of murder has appealed to the Court seeking to demonstrate his innocence. Secondly, on the part of the appellant, we had the opportunity to see in the record some notes by learned counsel on the trend of preliminary hearing and the trial as depicted by advocate Benjamin for the appellant. On this, we could discern that while the preliminary hearing was conducted by Aboud, J, trial was presided over by Mwaikugile, J, On the part of the prosecution, we have gathered a postmortem report and illegible depositions of the intended prosecution witnesses and the probable conclusion is that committal proceedings were conducted prior to the trial before the High Court. With such scanty information what should be the way forward? In the case of **JOHN KARANJA VS REPUBLIC** (supra) the Court of Appeal of Kenya was confronted with an almost similar scenario and having

considered as to whether or not to acquit the appellant or order a retrial, the Court said:

> *"In such a situation as this, the Court must try to hold the scales of justice and in doing so must consider all circumstances under which the loss occurred. Who occasioned the loss of all the files? Is the appellant responsible" Should he benefit from his own mischief and illegality".* ***In the final analysis, the paramount consideration should be whether the order proposed to be made is the one which serves the best interest.*** *An acquittal should not follow as a matter of course where a file has disappeared. After all a person like the appellant has lost the benefit of the presumption of innocence given to him by section 77 (2) (a) of the Constitution he having been convicted by competent court and on appeal the burden is on him to show that the court which convicted him did so in error. Thus, the loss of the files and proceedings may deprive him of ability to discharge that burden, but it by no means follows that he must of necessity be treated as innocent and automatically acquitted. The interest of justice as a whole must be considered.*
>
> *The appellant has been in prison for about 15 years. We cannot say that he is responsible for the disappearance of all files, proceedings and documents relating to the charge*

against him. A retrial is not feasible in the circumstances. It would be quite useless to attempt to do so. Above all no appeal now can be prosecuted before us. Records cannot be reconstructed as none exist.

We have carefully considered the matter before us. We would place this on an exceptional category. In the circumstances, we quash the conviction and set aside the sentence of death. The appellant is set at liberty unless otherwise lawfully held".

In another case of **JOSEPH MAINA KARIUKI VS REPUBLIC** [2008] eKLR, the Court of Appeal of Kenya was faced with an identical encounter whereby the trial proceedings and judgment were lost. However, although the Court was satisfied that, there was no evidence that the appellant was involved in the loss of all the trial and appellate courts records, it gathered that the appellant was supplied with a copy of proceedings of the courts below. As such, it declined to quash the conviction and set the appellant at liberty having concluded that, the appellant was not blameless for disappearance of all the documents which were supplied to him. Thus, the Court directed that parties to exert more efforts to search the missing record.

We discern from the said cases that, circumstances surrounding the missing records which are not always similar, are pertinent in determining the resultant order on the fate of an appeal which must embrace what is in the best interests of justice. Here at home, we have not been spared from the calamity of disappearance of the trial proceedings as demonstrated by the following cases. In the case of **JUMA MKANGAMO VS REPUBLIC VS REPUBLIC**, Criminal Appeal No. 177 of 2016 (unreported) the Registrar of the High Court swore an affidavit as he could not trace the missing record despite making all sorts of efforts in that regard. The Court held:

> *"On our part, we have also keenly considered the scenario at hand. We appreciate 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. Kombamkono's proposition that the appellant be released with a leeway for the DPP to determine the action to take, if he so wishes."*

In another case of **NORBERT RUHUSIKA VS REPUBLIC**, Criminal Appeal No. 573 of 2017 (unreported), the Court was confronted with an

appeal whose trial and first appellate court proceedings and judgment were missing. The Court observed that, possibility of misplacement of the documents was highly probable pursuant to change in registries on which records preserved in Mbeya High Court Registry had to be transferred to Iringa High Court Registry. The Court said:

> *"... taking into consideration that the appellant has served 18 years in jail and efforts to trace the missing record have proved futile, for all fairness and for the best interests of justice the release of the appellant will be the most and fair approach for us to consider in the circumstances of the case......."*

In the present case, from the deposition of the Registrar, it is vivid that the missing record of the trial cannot be found. Taking into account the surrounding circumstances, there is no evidence to show that the appellant was involved in the loss of the documents in question and he was not supplied with the copy of the impugned judgment and the trial proceedings.

In the circumstances, what should be the fate of the appeal before us? We are aware that on appeal, the record of the trial proceedings is of cardinal importance as the record forms the basis of the rehearing by the

Court. This spirit is embraced under Rule 36 (1) (a) of the Rules, whereby the Court sitting on an appeal is mandated to re-appraise the evidence and draw inferences of fact and it has discretion if satisfied to take or direct that additional evidence be taken by the trial court. Can the Court perform such task in the wake of the missing trial proceedings and the impugned judgment? Our answer is in the negative because without the said proceedings and judgment, as earlier stated, it is impossible to determine the two complaints of the appellant in respect of the alleged procedural irregularities and the misapprehension of the evidence which was adduced at the trial. Besides, apart from the order of a retrial being impracticable in the absence of the trial proceedings, we cannot discern if the trial was either illegal or defective to necessitate the quashing of the conviction, it is probable that the witnesses who testified earlier would not be found and yet the prosecution could utilise such opportunity to fill gaps in its earlier evidence. Finally, leaving the matter in the wisdom of the DPP will serve no useful purpose because since the RCO has intimated to the Registrar of the High Court that the police file which had the investigation documentation could not be found, there is no material upon which the prosecution can be recommenced.

Therefore, in view of what we have endeavoured to discuss the first ground of appeal is merited and it is allowed. In the premises for all fairness and in the best interests of justice we invoke Rule 4 (2) (a) and (b) of the Rules, to nullify the proceedings and judgment, quash the conviction and the sentence and order the immediate release of the appellant from custody.

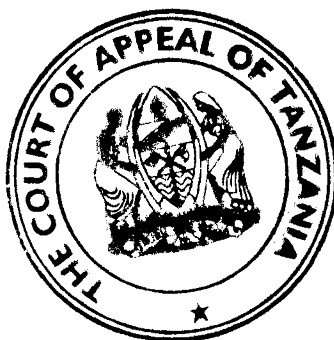
DATED at **DAR-ES-SALAAM** this 28th day of April, 2021.

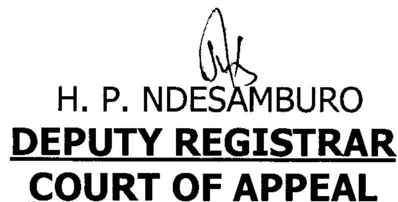
S. E. A. MUGASHA
JUSTICE OF APPEAL

W. S. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgement delivered this 30th day of April, 2021 in the presence of the appellant and Mr. Oscar Epaphra Msechu, learned counsel for appellant and Ms. Grace Lwila, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.





H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL