**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**(CORAM: NDIKA, J.A., FIKIRINI, J.A. And KIHWELO, J.A.)**

**CRIMINAL APPLICATION No. 70/08 OF 2020**

**JOSEPH NYAKIHA DAUD.....APPLICANT**
**VERSUS**
**THE REPUBLIC .....RESPONDENT**
**(Application from the Judgment of the High Court of Tanzania, at Mwanza)**

**(Rweyemamu,J.)**

**dated the 24th day of April, 2006**
**in**
**Criminal Appeal No. 352 OF 2004**
.....

**RULING OF THE COURT**

13th & 16th July, 2021
**KIHWELO, J.A.:**

The applicant was arraigned before the District Court of Mwanza, Mwanza Region for the offence of armed robbery in Criminal Case No. 1192 of 2000. He pleaded not guilty to the charge after which a full trial ensued. At the end of the trial he was found guilty as charged, convicted, and sentenced to a prison term of thirty (30). He appealed to the High Court of Tanzania at Mwanza in Criminal Appeal No. 352 of 2004 and after hearing, the appeal met a dead-end as the High Court (Rweyemamu, J.) dismissed it.

As it shall become apparent shortly, the attempt by the applicant to appeal further to this Court was frustrated by the failure of the Registrar of the High Court of Tanzania at Mwanza to supply the applicant with record of appeal despite the allegation that applicant filed the notice of appeal in this Court.

To pursue further his quest for justice by appealing against the conviction, the applicant made another two attempts before the High Court at Mwanza vide Criminal Application No. 23 of 2018 (Maige, J.) and Criminal Application No. 239 of 2019 (Mdemu, J.) both of which were withdrawn by the applicant in anticipation that the jigsaw puzzle will be resolved in this Court.

When this matter came up for hearing, the applicant appeared virtually in person through a video link from Butimba Central Prison fending for himself while Mr. Juma Sarige, learned Senior State Attorney appeared for the respondent Republic.

In his brief submission in support of the application, the applicant blamed the High Court Registry at Mwanza for the failure to supply him with records of appeal which he informed this Court that they were nowhere to be seen and the Deputy Registrar High Court Mwanza swore an affidavit to

that fact. He prayed that in the absence of court records his conviction be quashed, sentence be set aside and that he be released from custody because the Registrar has failed to fulfil his duty of preparing and serving record of appeal on him.

In response Mr. Sarige submitted that in essence the applicant seeks to argue that he filed a notice of appeal before the High of Tanzania at Mwanza but the Registrar did not supply record of appeal and nor did the other stakeholders here records of the case and therefore he pressed this Court to quash his conviction, set aside sentence and release him forthwith. Mr. Sarige categorically opposed the applicant's prayer and argued that the applicant's affidavit in support of the appeal did not contain annexures supporting the applicant's assertion. To support the proposition, he cited to us the case of **Robert Madololyo v. The Republic,** Criminal Appeal No. 486 of 2015 (unreported). In particular, he referred to page 8 and more specifically paragraph 2 of the typed decision where the Court referred with approval to the decision from the Republic of South Africa in **Edward Mogorosi v. The State** (**4100/10**) [2010] ZASCA 147 in which the court found out that there was no adequate and satisfactory explanation for the delay because the appellant did not attach annexures to his affidavit. Mr.

Sarige further argued that there was no affidavit of a prison officer to attest to the fact that the applicant made the alleged efforts.

When probed by the Court if attempts to make exhaustive efforts to reconstruct the missing record were done, apart from making a concession that efforts were not fully attempted, he reiterated his earlier submission that the applicant did not attach the requisite annexures apart from the attached documents including the notice of appeal which does not show whether it was received by the Court and is not dated either.

In rejoinder the applicant submitted that as a prisoner serving term in prison, he added, he had no personal control over his documents which are kept by his custodian the prison department. He emphasised that his prayer for quashing his conviction, setting aside the sentence and his immediate release from prison be granted.

We have considered the rival arguments by the applicant on one hand and Mr. Sarige, learned Senior State Attorney on the other hand. The issue before us and which cries for our determination is the fate of the applicant in view of the prevailing circumstances where record that would have enabled him lodge the appeal has not been supplied to him by the Registrar of the High Court in terms of Rule 71 of the Tanzania Court of Appeal Rules,

2009 ("the Rules"). Our starting point would be restating what the law provides in relation to the responsibility of the Registrar to prepare record of appeal and the importance attached to the notice of appeal in moving the Registrar:

> *"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.*
>
> *(4) For the purposes of an appeal from the High Court in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial corresponding as nearly as may be to those set out in sub-rule (2) and contain also copies of the following documents relating to the appeal to the first appellate court-*
>
> *N/A*
>
> *(5) Notwithstanding the provisions of sub-rule (1), the Registrar of the High Court shall not prepare the record of appeal where-*
>
> ***(a) the notice of appeal has been lodged out of time, until he has been notified that time has been extended*** *by order of the High Court or the Court unless the Chief Justice directs otherwise;"* [Emphasis added]

Such is the position of the law as it stands and thus, it is, presently, entirely upon the party wishing to appeal to lodge a notice of appeal that will keep the wheels of justice in motion. We shall, at a later stage of our ruling, revert to this aspect regarding the notice of appeal.

It is not in dispute that the applicant is before this Court seeking to move this Court to quash the conviction, set aside the sentence and release him from prison on account that the Registrar of the High Court has failed to fulfil his duty of preparing record of appeal in terms of Rule 71 of the Rules. Mr. Sarige, on his part has strongly challenged the application for the reason that the applicant did not annex in his affidavit the alleged annexures and in particular, he singled out the notice of appeal and challenged it because it was loosely accompanied with the application not as an annexure but apart from not forming as part of the annexures of the affidavit he challenged the said notice of appeal for not qualifying to be a notice of appeal since it lacked an endorsement by the Court and also it did not bear any date. He also challenged the application for lack of an affidavit of a prison officer who would have confirmed his averments? deposition?. He implored the Court to find the submission and prayer by the applicant to be

misconceived and without any merit. The applicant on his part submitted that as a prisoner he had no control over his documents which are kept by the prison department as such he had nothing he could have done other than submission of the documents to the prison officer for transmission to the Court.

Before we dwell onto the determination of this aspect it seems desirable that we, first, point out at the outset that, the right of the applicant to appeal and to a fair hearing on appeal is a fundamental constitutional right which is clearly spelt out in Article 13(6)(a) of the Constitution of the United Republic of Tanzania, Cap. 2 R.E 2002. However, for the applicant to exercise his right of appeal fully and receive a fair hearing he must first of all lodge a notice of appeal in terms of Rule 68 of the Rules. The Registrar therefore cannot start the preparation of records of appeal in the absence of a notice of appeal which as hinted earlier on above puts in motion the wheels of justice by way of an appeal. Rule 68(1) is couched in mandatory terms;

> *"68(1)* ***Any person who desires to appeal to the Court shall give notice in writing****, which shall be lodged in triplicate with the Registrar of the High Court at the place where the decision against which it is desired to appeal was given, within thirty days*

*of the date of that decision,* ***and the notice of appeal shall institute the appeal.*** *"* [Emphasis added]

It is upon lodging the notice of appeal in terms of Rule 68 of the Rules that the Registrar of the High Court will prepare the record of appeal as required by Rule 71 of the Rules which requires the Registrar of the High Court to prepare record of appeal after notice of appeal has been lodged. In this regard, we are keenly aware that the applicant being a prisoner serving term in prison is covered by the provision of Rule 75(1) of the Rules. For clarity, we wish to extract the relevant parts of Rule 75(1) thus:

*"75(1)Where the appellant is in prison, he shall be deemed to have complied with the requirements of rules 68,72,73 and 74 or any of them by filling Form B/1, Form C/1 and handing over to the officer-in-charge of the prison in which he is serving sentence his intention to appeal and the particulars required to be included in the memorandum of appeal or statement, pursuant to the provisions of those rules."*

It is not in dispute that there is glaring on record a notice of appeal bearing a right thumb print presumably of the applicant and a signature of the officer in-charge of Butimba Central Prison indicating the year 2006. The

notice is neither endorsed by the Court to signify that it was duly received by the Court nor does it bear the date when the prison officer in-charge signed and the applicant thumb printed. This raises a million-dollar question as to whether the notice of appeal actually did exist upon which to direct all the blame to the Registrar of the High Court for not preparing record of appeal in terms of Rule 71. In any case, the applicant is not blameworthy assuming for the sake of argument that the notice was handed over to the officer-in-charge of the prison as it appears to suggest given the undated signature in the alleged notice of appeal. The reason for exonerating the applicant from the blame is because the applicant was serving a prison term and in terms of Rule 75(1) of the Rules he is deemed to have complied with the requirement of the law the moment he hands over the requisite documents to the officer in-charge of the prison.

It is instructive to interject a remark, by way of a postscript that the notice of appeal on record has a lot of infractions since it does not bear any date upon which to rely when exactly was it handed over to the prison officer in-charge for purposes of reckoning the time. Furthermore, the applicant did not file any affidavit of the prison officer and there is no affidavit of the

Registrar to confirm that records of the case file cannot be retrieved and that all stakeholders have failed to reconstruct records.

In view of the foregoing position, it cannot be safely said that the application is accompanied with a valid and proper notice of appeal upon which to act in this instant application. We think, with respect, also the argument that the application should be dismissed at this stage is untenable as the applicant is entitled to exercise his right to a fair hearing on his appeal subject to availability of the record of appeal before this Court. The scales of justice demand that Courts should do all it takes to dispense justice and this is one of the occasions where we are compelled to ensure that justice is done to the applicant and more in particular in the circumstances where this Court is not certain about the notice on record and because notice is what institutes an appeal which is the basis of putting to task the Registrar of High Court who was duty bound to supply record of appeal to the applicant.

The applicant has prayed that since original court records cannot be traced, the only option available in these circumstances is to acquit him, set aside sentence and release him from prison because he has already served a substantial part of his sentence. The issue of missing record has been

settled now although there is no uniform way of addressing this problem as we stated in the case of **Robert Madololyo v. Republic** (supra) thus:

> *"There cannot be a single way forward for all courts faced with problems of missing record of proceedings. As judicial officers, Deputy Registrars should always learn how case laws in Tanzania or case laws from other jurisdictions have dealt with similar problems of missing records, and different modalities of reconstructions of court records."*

In this case there was missing record of Bariadi District Court (the trial court) and the High Court at Tabora (the first appellate court).

The practice obtained now when it comes to missing record is for all functionaries of the High Court to search for the missing trial record in order to make a definitive declaration whether the record is lost or destroyed, and if so, whether its reconstruction has been attempted, exhausted and concluded to be totally unfeasible. See **Yusuph Mbululo v. The Republic**, Criminal Appeal No. 405 of 2018 (unreported). In doing so the courts must try to hold the scales of justice evenly between the parties. All in all, there is no one general rule on the way forward as it was religiously stated in the case of **Robert Madololyo v. Republic** (supra) when courts faced missing record of proceedings and, every case involving missing record, should

invariably be determined on the basis of its own special circumstances. The Court stressed that in the reconstruction of the missing record, the Deputy Registrar must inevitably get cooperation of the appellant himself, the trial court and the appellate court(s), office of the Director of Public Prosecutions, the police investigation files, and the Prisons Department, who should forward and supply all the case documents in their respective possession or custody.

Based on the foregoing, we at first, order the Deputy Registrar, High Court, District Registry at Mwanza to trace the notice of appeal allegedly filed by the applicant within sixty days of the date of delivery of this ruling.

Secondly, in the event it is confirmed that the notice was filed, we order the Deputy Registrar, High Court, District Registry at Mwanza, to prepare as reconstruct the record of appeal in accordance with the dictates of Rule 71(2) of the Rules and relevant case law on the matter. Mindful of the fact that this matter has taken too long, we direct the Deputy Registrar to comply with this order within another sixty days from the date of service of record of appeal on the applicant.

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

It is so ordered.

**DATED** at **DAR ES SALAAM** this 15th day of July, 2021.

G. A. M. NDIKA
**JUSTICE OF APPEAL**

P. S. FIKIRINI
**JUSTICE OF APPEAL**

P. F. KIHWELO
**JUSTICE OF APPEAL**

The ruling delivered this 16th day of July, 2021 in the presence of the applicant in person linked via video conference at Butimba Prison and Ms. Georgina Kinabo, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. Herbert
**DEPUTY REGISTRAR**
**COURT OF APPEAL**