IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 190 OF 2017

SAID SALUM @ KIWINDU.....APPELANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam

(Mutungi. J.)

dated the 20th day of April, 2017
in
HC. Criminal Appeal No. 71 of 2016

.....

RULING OF THE COURT

19th & 26th September, 2022

LEVIRA, J.A.:

It can be discerned from the record of appeal particularly, the judgment of the District Court of Mkuranga at Mkuranga (the trial court) that the appellant, Said Salum Kiwindu was arraigned before the trial court facing the charge of rape contrary to sections 130 (1), (2) (e) and 131 of the Penal Code, Cap16 R.E 2002. The particulars of the offence alleged that, on 17th day of September, 2014 at about 09:45 hours at Kilungule Mwandege village within Mkuranga District in Coast Region the appellant did unlawfully rape a girl of 9 years old, a pupil of standard three at Mwandege Primary School. For the purpose of concealing her identity the victim shall be referred as Z.I. Upon a full trial, he was

convicted and sentenced to serve thirty (30) years imprisonment and ordered to pay compensation of Tshs. 1,000,000/= to the victim. That was on 26th November, 2015. Aggrieved by that decision, on 3rd December, 2015 he lodged a notice of appeal with intention to challenge it before the High Court.

It appears the appeal was heard and determined by the High Court and as it can be discerned from commitment warrant, the appellant's conviction was sustained and the sentence was enhanced to life imprisonment. Still aggrieved, the appellant filed a notice of appeal to this Court against that decision of the High Court on 3rd May 2017. The said notice is found at page 43 of the record of appeal, where it is shown that his intention is to challenge both the conviction and the sentence.

We wish to note, at the outset, that the record of appeal placed before the Court for hearing for the third time after two unsuccessful occasions on account of missing records of appeal all along which impeded the hearing of the appeal. The missing records are the charge sheet, PF3 (Exhibit P1), the proceedings and judgment of the High Court. On 11th July, 2022 the parties appeared before the Court for the second time and upon perusing the record of appeal, it transpired that on 16th February 2021 the Court had directed the Registrar of the High

Court to trace the missing records and include them in the record of appeal. It was further directed that should the efforts of tracing the documents fail, the Registrar of the High Court should contact the following stakeholders; namely, the Prisons Department, the National Prosecution Office, the Police and the appellant to facilitate the reconstruction of the record of appeal. However, when the appeal was set for hearing on 11th July, 2022, the Court gathered that its earlier order was not complied with as the missing documents were not included in the record of appeal. As such, the Court further ordered compliance of its earlier order before the appeal is scheduled for a hearing.

In compliance with the Court's order of 11th July, 2022, the Deputy Registrar of the High Court, one Joseph Dieter Luambano on 15th September, 2022 swore an affidavit to the effect that the efforts to trace missing records bore no fruits save for the judgment and proceedings of the trial court and notices of appeal to the High Court and the Court together with warrants of commitment of both the trial and High Court. Nothing else was retrieved from other stakeholders despite more efforts being made through other Deputy Registrars of the High Court to date. This is evident in paragraphs 19 and 23 of the Deputy Registrar's affidavit where he deposed as follows:

"19. That I managed to obtain warrant of commitment of the lower court Mkuranga District Court and the warrant of commitment of the High Court. The documents form part of this affidavit.

23. That, the same date the Registrar, brought a letter to the appellant Said Salum Kiwindu dated 11/8/2022 with Reference No. AB.70/74/01/136 who replied via a letter dated 13/9/2022 with Reference No. 110/DAR/1/XXIII/32 that he has proceedings and judgment of Criminal Case No. 71 of 2014 of the District Court of Mkuranga together with the Notice of Appeal of the High Court. The letter form part of this affidavit."

In this appeal, the appellant has presented the following grounds:

1. *That, the learned 1st appellate Judge erred in law and fact by sustaining the appellants conviction in a case where the prosecution failed to prove its case beyond reasonable doubt against the appellant.*
2. *That, the learned 1st appellant Judge erred in law by sustaining the appellant conviction in a case where there was change of Magistrate but the successor magistrate failed to record the reasons as to why the assigned to him contrary to procedure of law.*
3. *That, the learned 1st appellate Judge erred in law and fact by sustaining the appellants conviction relying on the un-procedurally procured oral evidence of PW1.*

4. *That, the learned 1st appellate Judge erred in law and fact by sustaining the appellants conviction in a case where the prosecution failed to probe that USTATH KINDAMBA as mentioned by PW1 is one and the same person as the appellant and worse still that name doesn't appear in the charge sheet.*

5. *That, the 1st appellate Judge erred in law and fact by sustaining the appellants conviction in a case where the age of the victim (PW1) was not proved as mere mention in the charge sheet or by trial magistrate before recording evidence of a witness is not prove of the same.*

6. *That, the learned 1st appellate Judge erred in law and fact by sustaining the appellant's conviction in a case where there was material contradictions in the incredible oral evidence of PW1 and PW3.*

7. *That, the learned 1st appellate Judge erred in law and fact by sustaining the appellants conviction relying on the un-procedurally tendered and admitted Exhibit P1 (PF3) and the unreliable evidence of PW5.*

At the hearing of the appeal, the appellant appeared in person, un represented, whereas the respondent Republic was represented by Mr. Emmanuel Maleko, learned Senior State Attorney and Ms. Elizabeth Olomi, learned State Attorney.

Following the state of affairs regarding the record of appeal as narrated above, the Court engaged the parties in a brief dialogue. The appellant argued that he was neither supplied with the copies of the

proceedings and the judgment of the High Court nor the record of appeal and as such, he cannot be blamed for failure to produce them upon request by the Registrar and for the loss. Basing on the fact that the High Court record cannot be retrieved, the appellant urged us to set him free.

In reply, Mr. Maleko opposed the appellant's prayer to be set free. He went on stating that personally, he participated in tracing the missing record in vain, as the charge sheet, exhibit P1 (the PF3), the proceedings and the judgment of the High Court could not be retrieved from his office. He argued that, since the judgment of the trial court is available, the offence with which the appellant was charged can be discerned from the first paragraph of that judgment to cover what was provided in the charge sheet which is missing as it has been done herein. In the wake of missing proceedings and judgment of the High Court and in the interest of justice, he urged the Court to dispose of the appeal by nullifying the proceedings, quashing the judgment and set aside the sentence imposed by the High Court and remit the case file to the High Court for it to rehear the appellant's appeal. He cemented his prayer by citing the decision of the Court in **Wambura Kiginga v. Republic**, criminal Appeal No.301 of 2018; and **Maruna Papai v. Republic**, Criminal Appeal No.104 of 2011 (both unreported).

The appellant had nothing to add in his rejoinder except to reiterate his earlier prayer.

We have carefully examined the record of appeal and followed closely the submissions by the parties. We are satisfied that the efforts have been made to trace the missing records by both the High Court and stakeholders which eventually, led to retrieval of the warrants of commitment, proceedings and judgment of the trial court together with the notices of appeal to the High Court and the Court from the prison and appellant, respectively.

We are aware that what should be contained in the criminal record of appeal is stipulated under Rule 71(4) of the Rules, which reads:

> *"For the purpose of 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 shall contain also copies of the following documents relating to the appeal to the first appellate court*
>
> *(a) the petition of appeal;*
>
> *(b) the record of proceedings;*
>
> *(c) the judgment;*
>
> *(d), the order, if any, ...*

However, in the absence of the impugned judgment of the High Court as a second appellate Court, we do not find any possibility of determining the appellant's appeal without considering what was determined by the High Court which is unfortunately missing.

As to the question on what should be the way forward, we were addressed by the parties and we agree with Mr. Maleko's position. In the state of affairs pertaining to this appeal, we are glad that at least the trial court's record is available. We must admit that this is not the first time the Court is facing the situation almost akin to the present where on account of missing documents in the record of appeal, the Court managed to deal with that situation. In **Robert Madololyo v. Republic** Criminal Appeal No. 486 of 2015 (unreported) the Court dealt with the issue of missing documents in the record of appeal where the entire proceedings of the both, the trial and first appellate court were missing and the Registrar swore an affidavit to that effect, as in the present case. In determining the way forward, the Court borrowed a leaf out of the decision of the Court of Appeal of Eastern Africa (the EACA) in **Haiderali Lakhoo Zaver v. Rex** (1952) 19 EACA 244. In the said case it transpired that, when the appeal came up for hearing in the High Court of Uganda, the records of the District Court of Mengo were missing. In the absence of the records, the two presiding judges of the

High Court, ordered that the finding of the trial court and the sentence appealed from, be reversed, and the appellant be retried by the Resident Magistrate, Mengo District. The appellant was not satisfied by that decision and thus appealed to the EACA, where it was held that:

> *"**The courts must in this matter try to hoid 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 **the only solution which offers an opportunity for a judicial determination on the merits of the case".*** Emphasis added]

In the light of the above decision, the Court capitalized on the phrase that *"courts must try to hold the scale of justice evenly between the parties"* and it came up with the conclusion that *"there is no one general rule on the way forward when the 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 added].

In the circumstances of the present case where efforts to trace the missing records with the view of reconstructing the record of appeal bore no fruits, we think, we cannot determine the appellant's grounds of appeal which seeks to impugn the decision of the High Court which is not before us. On the way forward, since the trial court's proceedings and judgment are intact, the offence which the appellant was arraigned can be gathered in the respective judgment which addresses the missing charge sheet. Also, with the trial proceedings containing the evidence adduced by the prosecution and the defence, that is sufficient material upon which the High Court can rehear the appeal. Thus, we are of the considered view that the appellant will not be prejudiced if we order rehearing of his appeal before the High Court in the absence of Exhibit P1. Besides, we take note that the appellant has been in prison for over six years and there is no proof that he is responsible for the disappearance of the missing records; which in essence, are kept under the custody of the court Registrar. However, we decline the suggestion to set him at liberty for the time being for we do not know what had transpired before the High Court.

In the upshot, having considered the peculiar circumstances of this case and holding evenly scale of justice between the parties, we find no other option except to order a rehearing of the appeal before the High

Court. Consequently, we invoke our revisional power under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 and hereby nullify the purported proceedings, quash the purported judgment and set aside the life imprisonment sentence meted out on the appellant by the High Court. We remit the case file to the High Court for it to rehear appeal and the appellant should be allowed to file a petition of appeal. In the meantime, the appellant shall continue to serve his thirty (30) years imprisonment sentence pending appeal process in the High Court.

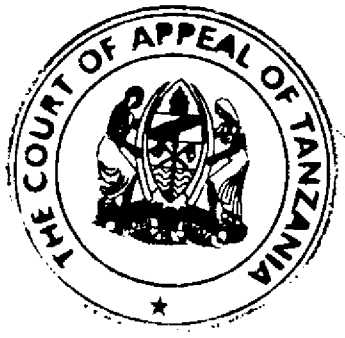
DATED at **DAR ES SALAAM** this 23rd day of September, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M.C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 26th day of September, 2022 in the presence of the appellant in person, and Mr. Tumaini Maingu Mafuru, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL