

IN THE COURT OF APPEAL OF TANZANIA

AT SONGEA

(CORAM: JUMA, C.J., NDIKA, J.A. And KEREFU, 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. 09 of 1995

JUDGMENT OF THE COURT

17th & 21st August, 2023

JUMA, C.J.:

More than twenty-three years ago, on 28/01/2000, the High Court at Iringa (Mwipopo, J.) in Criminal Sessions Case No. 9 of 1995, convicted the appellant YUSUPH MBULULO of murder and sentenced him to suffer death by hanging. Before us today, the appellant, who has so far spent thirty years in custody, is still waiting for the Registrar to supply him with the record of appeal.

Today is the fifth attempt by the appellant to reach this apex Court to seek his fundamental right to appeal against his conviction on 28/01/2000.

He first reached up to the Court on 30/05/2018, looking for an extension to file his notice of appeal to this Court. We sent him back to the High Court to apply for this extension. He returned to us on 19/04/2021, 24/10/2022, 13/03/2023, and today, 17/08/2023. On all the previous occasions when the appellant appeared before us, we invariably adjourned the hearing because of the missing trial court proceedings. We also allowed the Deputy Registrar time to go out and prepare the appeal record. We also asked the Deputy Registrar to collaborate with stakeholders to reconstruct the appeal record.

At the hearing of this appeal on 17/08/2023, the appellant, who was present in Court, was represented by Mr. Eliseus Ndunguru, learned counsel. Mr. Tumaini Kweka, Principal State Attorney, assisted by Mr. Kauli Makasi, Senior State Attorney, represented the respondent Republic.

Mr. Ndunguru referred us to the previous order of this Court dated 17/03/2023, when this Criminal Appeal No. 405 of 2018 came for a hearing at Iringa. Before adjourning the hearing, the Court directed the Deputy Registrar, High Court at Songea to consult and request the criminal justice stakeholders to help in the reconstruction of the record of the trial court.

within sixty days. The learned counsel for the appellant further referred to the affidavit in which Ms. Elizabeth Nyembele, Deputy Registrar, swore to notify the Court that the reconstruction this Court ordered had not yielded the core documents specified under Rule 71(2) (a) to (j) of the Rules, which are mandatory required before this Court can sit as a first appellate court to rehear and reevaluate the evidence that formed the basis of the appellant's conviction for murder by the High Court at Iringa.

Before we hear the arguments presented by Mr. Ndunguru, learned counsel for the appellant, and Mr. Kweka, the learned Principal State Attorney, it is appropriate we first put together the following chronology of correspondences and events leading up to this appeal.

From the chronology, we learn that following his conviction on 28/01/2000, the appellant handed over his intention to appeal against his conviction to the officer-in-charge of Iringa Prison. The prison authorities 20/03/2000 moved the appellant from Iringa Prison to Isanga Central Prison in Dodoma, where he continued to wait for the record of trial court proceedings. Correspondences are silent about what transpired for the next ten years, between 2000 and 2011.

In a correspondence dated 25/02/2011, the officer in charge of Isanga Prison Dodoma reminded the Deputy Registrar of the High Court at Songea that the appellant was still waiting for the record of proceedings concerning his conviction by the High Court at Iringa.

The affidavit of Ms. Elizabeth Nyembele, the Deputy Registrar High Court Songea, shows that Mr. W.P. Dyansobera, the then Deputy Registrar wrote a letter dated 08/04/2011 to confirm that on 14/10/1997, the Resident Magistrate of Songea Magistrates Court, sent the PRELIMINARY INQUIRY (PI) FOR MURDER CASE FILE NUMBER 16/1993 (REPUBLIC VS YUSUPH MBULULO) to the Registrar of the High Court at Songea. In a letter dated 08/04/2011, the Deputy Registrar of the High Court at Songea (W.P. Dyansobera) promised that he was still trying to find the whereabouts of that PRELIMINARY INQUIRY (PI) file.

Dissatisfied with the answers from the High Court registries, on 04/05/2011, the Officer in Charge of Isanga Prison complained to the Principal Judge (Jaji Kiongozi) about the way Deputy Registrars of the High Court at Iringa, Mbeya, and Songea avoided responsibility over the missing record of trial proceedings which the appellant needed to prepare his

appeal. He informed the Principal Judge that he sent a prison officer to Iringa to check out at the High Court Registry. That officer learned that at the time of the appellant's conviction, Iringa did not have a High Court centre, and the trial Judge travelled from the High Court Registry at Mbeya. The officer in charge of Isanga Prison wrote to the Registrar High Court at Mbeya to ask for the record of proceedings to enable the appellant to exercise his right of appeal. The Registrar High Court at Mbeya referred him to Songea High Court Registry. The Songea High Court Registry referred them back to the Iringa High Court Registry, where they began.

After realizing that the Deputy Registrars of Iringa, Mbeya, and Songea were responding in cycles and shifting blame over the missing files, the officer in charge of Isanga prison wrote to the office of the Chief Justice for intervention. He also referred the appellant's complaint to the Commission for Human Rights and Good Governance Chairman. The Commission Chairman contacted the Registrar of the High Court at Mbeya Registry, who referred the Chairman to the Registrar of the Songea High Court.

The appellant decided to restart the process of filing a fresh notice of appeal. On 20/10/2015, he applied to the High Court at Iringa for an extension of time to file his notice of appeal. In his supporting affidavit, he complained that over fifteen years had passed since the High Court at Iringa convicted and sentenced him to suffer death; the Registrar had not yet supplied him with the record of appeal to prepare his grounds of appeal to this Court. He expressed his suspicions that prison authorities did not file his earlier notice of appeal after all. He emphasized that as a convict who solely depended on prison authorities who controlled all his correspondences, he had no control over the delays.

It is unclear from available correspondences what came from his 20/10/2015 application to the High Court to file his notice of appeal. But it appears that the appellant applied to the Court of Appeal to grant him an extension to file his belated notice of appeal. He failed. On 31/05/2018, the Court of Appeal struck out the appellant's CRIMINAL APPLICATION NO. 1B OF 2015 for an extension of time to file his notice of appeal. The Court reasoned that section 11(1) of the Appellate Jurisdiction Act, Cap 141 (the AJA), which the appellant used to move this Court, gives the High Court power to hear the appellant's application for extension of time.

After his setback at the Court of Appeal, he returned to the High Court at Iringa on 11/06/2018, where he filed MISC. CRIMINAL APPLICATION NO. 20 OF 2018, praying for an extension of time to file his belated notice of appeal. In his supporting affidavit, the appellant reminded that immediately after his conviction on 28/01/2000, he notified the officer in charge of Iringa Prison of his intention to appeal. On 10/10/2018, Banzi, J. granted the appellant the extension of time. Finally, on 31/10/2018, the appellant filed his notice to appeal at the High Court Registry at Iringa to manifest his intention to appeal to this Court.

Upon filing a Notice of Appeal, it became a mandatory obligation on the Registrar to prepare the record of appeal containing copies of documents specified under sub-rule (1) and (2) of Rule 71 of the Rules, which the appellant needs to lodge his appeal. These core documents specified under paragraphs (a) to (j) of Rule 71(2) are— (a) an index of all documents in the record with the page numbers at which they appear; (b) the information, indictment, or charge; (c) the proceedings on and after the sentence; (d) the record of 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; (g) the summing-up to the assessors, and the

opinions of the assessors; (h) the judgment; (i) the order, if any, granting leave to appeal; and (j) the notice of appeal. Without a record of appeal prepared and certified by the Registrar or the Deputy Registrars and containing documents specified under Rule 71(2) of the Rules, there can be no criminal appeal for the Court to hear on merits.

Rule 72 (1) of the Rules expected the appellant to file his memorandum of appeal within twenty-one days after receiving the record of appeal from the Registrar. The appellant did not meet this twenty-one-day threshold because the Registrar of the High Court did not and has not supplied the appellant with the appeal record, which he needed to prepare a memorandum of appeal.

Lack of appeal record notwithstanding, on 31/08/2020, the appellant filed a Supplementary Memorandum of Appeal, through which he presented his main complaint over the failure of the Deputy Registrar to supply him with the record of appeal.

At the hearing of the appellant's appeal in Iringa on 27/4/2021, the Court adjourned the hearing because all the core documents specified under Rule 71(2)(a) to (h) and (j) of the Rules were missing from the

record of appeal. Before adjourning, the Court directed the Deputy Registrar to make a definitive declaration on the search for the missing trial record and to state whether that record is lost or destroyed, and if so, whether stakeholders involved have attempted to make reconstruction of the trial court record.

The Registrar next set 25/10/2022 as another date for the hearing of the appellant's appeal in Iringa. However, because the record of trial proceedings was still missing and there was uncertainty over whether the Deputy Registrar at Songea had complied with the Court's order of 28/4/2021, the hearing did not proceed. The record of appeal, which the Deputy Registrar of the Court of Appeal certified on 10/03/2023 as a copy of the original record, except for a copy of the notice of appeal, missed all other core documents required under sub-rule (2) of Rule 71 of the Rules.

Inevitably, when the Court convened to hear this appeal on 17/03/2023, it found the record of the proceedings in the trial court required under sub-rule (2) of Rule 71 of the Rules still missing. The Court directed the Deputy Registrar of Songea to consult the stakeholders involved in this appeal and collect the missing trial court documents in their

respective possessions. And after that, the Deputy Registrars should reconstruct the trial court record within sixty days of 17/03/2023.

On 28/03/2023 Deputy Registrar of Songea Zone of the High Court contacted the stakeholders, the Offices of the National Prosecutions Service of Songea, Mbeya, and Iringa; Regional Crimes Office Songea; Deputy Registrar of the High Court at Iringa; Regional Prison Officers for Songea and Iringa. The Deputy Registrar asked the stakeholders to submit to the High Court at Songea any document each may have relevant to the appellant's appeal to this Court.

On 24/04/2023, the Deputy Registrar sent a similar request to the appellant through the Officer in charge of Iringa Prison, Deputy Registrar of the High Court at Mbeya, and to the National Archives in Dodoma. The Songea Deputy Registrar's efforts bore insignificant results. Only the Officer in charge of Iringa Prison turned over a warrant committing the appellant to prison and a copy of the appellant's notice of appeal. All other stakeholders, including the appellant, did not have any information or document to assist in reconstructing the missing trial record proceedings.

To facilitate the hearing of this appeal today, the Deputy Registrar of the Court of Appeal has once again certified a record of appeal. Like other certified records of appeal, the instant one, except for a Notice of Appeal, lacks all other mandatory documents specified under Rule 71(2) of the Rules. It contains a Certificate from the High Court committing the appellant to prison to serve his sentence of death following his murder conviction.

Ms. Elizabeth Nyembele, the Deputy Registrar of the High Court at Songea, swore an affidavit to prove her efforts to contact criminal justice stakeholders to assemble documents and information relevant to this appeal. She finally declared that records for the Criminal Sessions Case No. 9 of 1995, the subject of this appeal, are lost and untraceable.

After the chronology, let us revert to the oral submissions by Mr. Ndunguru, the learned counsel for the appellant, and Mr. Kweka, the learned Principal State Attorney for the respondent.

Mr. Ndunguru submitted that the missing documents and record of trial court proceedings are an essential constituent of the appellant's right to a fair hearing which he can only have when this Court has such core

documents like the charge sheet, the record of proceedings, exhibits put in his trial and a copy of the judgment which Mwipopo, J delivered on 28/01/2000 convicting and sentencing him to suffer death by hanging. Mr. Ndunguru underscored that the loss or misplacement of the core documents required for this appeal was not of the appellant's making, and the appellant should not suffer by being denied his fundamental right to a fair hearing of his appeal by this Court.

The learned counsel for the appellant submitted that this Court faced similar circumstances of missing trial court proceedings in **MARUNA PAPA V. R** [2021] TZCA 180 TANZLII. In **MARUNA PAPA V. R**, despite two Court orders directing tracing from stakeholders of missing documents and reconstructing the appeal record, the trial proceedings and the trial court's judgment were still missing when the Court reconvened to hear the appeal. The learned counsel for the appellant urged us to follow the way forward which the Court in **MARUNA PAPA V. R** (supra) followed, that is, to nullify the trial court proceedings and judgment, quash the conviction and set aside the sentence and order the immediate release of the appellant from prison.

In urging us to avoid ordering a retrial, Mr. Ndunguru reminded us that the appellant has been in prison for thirty years since his arrest in 1993. He has spent twenty-three years since his conviction on 28/01/2000 waiting for trial court records to lodge his appeal. He also invited us to consider the appellant's advanced age of 73. He concluded by urging that appellant's freedom from prison will, in the circumstances, serve the best interests of justice.

In reply, Mr. Tumaini Kweka, the learned Principal State Attorney, raised two preliminary issues that he reckoned could lead to the striking out of this appeal.

On the first preliminary issue, he submitted that the notice of appeal to this Court, which the appellant filed from 11/10/2018, is not supported by proceedings to show how the appellant obtained an extension of time to file it outside the thirty days of 28/01/2000 when the High Court Iringa convicted him. The learned Principal State Attorney abandoned this preliminary issue when we showed him the Miscellaneous Criminal Application No. 20 of 2018, through which, on 10/10/2018, Banzi, J. granted the appellant extension of time to file his notice of appeal.

In his second preliminary issue, Mr. Kweka referred to the appellant's letter dated 25/04/2023 to the Deputy Registrar. He wondered why the appellant failed to supply his copy of the judgment of the High Court, which convicted and sentenced him to death. When we showed that the appellant was not referring to the High Court decision that convicted him but to a Ruling of this Court in Criminal Appeal No. 405 of 2018, Mr. Kweka also abandoned this preliminary issue.

Mr. Kweka impressed on us that the reconstruction of the appeal record aims to ensure the Court gets all the mandatory documents required for an appeal to replace those that are lost or misplaced, stolen or otherwise destroyed by water or fire. He impressed us further that the records kept, certified and issued by Court's main and sub-registries constitute the best in reconstructing the appeal record.

On the substantive appeal, Mr. Kweka began by highlighting that the ultimate responsibility over integrity, availability, custody, and maintenance of court-related documents fall on the Registrars and Deputy Registry. He added that the most genuine court document or court record is what the Registrar or Deputy Registrars issue after certification. Even where other

stakeholders supply documents to help the Registrar reconstruct the record of proceedings, appeal record or replace a missing copy, the Registrar, Mr. Kweka added, must certify all documents received to create a genuine record.

Mr. Kweka next referred us to the affidavit of Ms. Nyembele, the Deputy Registrar, and information she gathered during her reconstruction efforts and the response she received from the main actors like the Police, Prisons, the National Prosecution Service, the National Archives, and other High Court Registries of Mbeya and Iringa.

The learned Principal State Attorney strongly argued that the Deputy Registrar's reconstruction of the record of the trial court proceedings is still not exhaustive enough for the Court to determine the fate of this appeal today without another adjournment. He faulted the similarity of letters that the Deputy Registrar sent out to the stakeholders to request the missing documents. The Deputy Registrar should have specified what she wanted from each stakeholder, Mr. Kweka submitted. He suggested we give the Deputy Registrar at least 120 days to return to the criminal justice stakeholders involved in this appeal with more specific requests considering

their different roles in the arrest, investigation, trial, conviction, and sentencing. He thus urged us to adjourn the hearing.

The learned Principal State Attorney argued that in our decision in **MARUNA PAPAÏ VS R.** (supra), we underscored the need for the Court to hold the scales of justice. Relating that decision to the present appeal, he argued that this Court must first direct the Deputy Registrar to complete an exhaustive reconstruction of records. He added that the scales of justice demand that we also consider the seriousness of the deceased's life, which was lost under the appellant's hands, making the years the appellant has spent looking for his right to appeal insignificant compared to the deceased's life.

In his rejoinder submissions, the learned counsel for the appellant opposed any further adjournment of the hearing to give the Deputy Registrar 120 days to carry out yet another bout of reconstruction of appeal records. Instead, the learned counsel found the Deputy Registrar's letters exhaustive enough for the stakeholder to know the request for any information they had regarding Criminal Sessions Case No. 9 of 1995 involving Yusuph Mbululo, which the Deputy Registrar was reconstructing

on this Court's orders. He urged the broadly worded request was best suited to get more information. He insisted that any attempt to narrow and tailor the letters to suit specific stakeholders would narrow the catchment area to documents. He argued that reconstruction also included requests for any information that may assist the reconstruction of the appeal record.

Mr. Ndunguru reminded us that sub-rule (1) of Rule 71 of the Rules places on the Registrar of the High Court the duty to prepare the appeal record specified under Rule 71 (2) of the Rules. He added that the Registrar failed to supply the appellant with the appeal record he needed to file his memorandum of appeal. Failure to deliver the appeal record, he went on, has prevented the appellant from challenging his conviction of death, thus curtailing his right to a fair trial. Mr. Ndunguru rounded up his rejoinder by urging us to nullify the proceedings and judgment, quash the conviction, and set the appellant free.

From the eloquent submissions, both learned counsel for the appellant and the Principal State Attorney are unanimous, and rightly so, about the incompleteness of the record of this appeal. We agree with them that the Deputy Registrar's reconstruction efforts did not result in a proper record of

appeal containing mandatory documents specified under sub-rule (2) of rule 71 of the Rules.

The record of appeal before us is unique in that it is incomplete. It has a certificate from the High Court dated 28/01/2000 informing the Regional Superintendent of Iringa Prison that the High Court had convicted the appellant of the offence of murder and sentenced him to suffer death. It has a Notice of Appeal which the appellant filed on 11/10/2018. The record of appeal does not carry the charge sheet with the statement of offence and particulars of murder. The judgment of the trial High Court which convicted and sentenced him to death is also missing. Without a charge sheet, we cannot at very least know, the nature of the unlawful death the appellant caused or where and when he caused it. We do not even know the deceased's name for whose death the High Court at Iringa convicted the appellant.

The unanimity of the learned counsel for the appellant and the learned Principal State Attorney went as far as the incompleteness of the record of appeal which the Deputy Registrar reconstructed.

While Mr. Kweka urged us to adjourn the hearing and give the Deputy Registrar at least 120 days to consult the stakeholders to reconstruct the record, Mr. Ndunguru insisted that we should go along with the affidavit of the Deputy Registrar and her declaration that the records in respect of Criminal Sessions Case No. 9 of 1995 are lost and cannot be traced.

Again, although the learned counsel for the appellant and the learned Principal State Attorney both agreed with our earlier decision in **MARUNA PAPA V. R** (supra) to the effect that in the circumstances like this appeal is in, the Court must try to hold the scales of justice, they differed with the way forward. They also differed in whose favour the scales of justice should tilt. Mr. Kweka robustly argued that the seriousness of the offence of murder and its capital punishment favours an order of the Court to adjourn and direct the Deputy Registrar to carry out a further reconstruction of the record of appeal. Mr. Ndunguru on the other hand argued that the scales of justice should favour the 73-year-old appellant, who has spent thirty years in custody and more than twenty three years searching for the right to appeal to the Court of Appeal.

We have closely considered the articulate and focused submissions of the learned counsel for the appellant and the learned Principal State Attorney on the way forward and how to balance the scales of justice in circumstances where the record of appeal lacks all the core documents specified under Rule 71(2) of the Rules.

We must pause here briefly to reflect on another way forward, which neither Mr. Ndunguru nor Mr. Kweka touched on in their oral submissions, but which we find appropriate to direct to the Registrar and Deputy Registrar to undertake. These senior judicial officers in charge of court registries must promptly take to modernize Court registries by deploying technology and digitizing court records.

The Supreme Court of India, in a decision handed down on 24/04/2023 in the case of **JITENDRA KUMAR RODE VS UNION OF INDIA** [2023] 4 S.C.R. 512, stood out for two critical matters relevant to the present appeal before us. Firstly, the Apex Court faulted the High Court of Judicature at Allahabad for upholding a conviction of the trial court where the record of trial court proceedings was missing. Secondly, the

Supreme Court of India prescribed digitization of court records as a way forward to prevent loss or misplacement of court records and proceedings.

The Supreme Court emphasized the use of technology, digitization of documents, and an online data tracking system to keep track of all the data transferred from the trial to appellate courts. The Apex Court of India issued directions to Registrars of the High Courts of India to ensure that the digitization of records duly takes place promptly at all District Courts in all cases of criminal trial and civil suits. The relevant paragraphs of the Supreme Court in **JITENDRA KUMAR RODE VS UNION OF INDIA** (supra) state:

"39. Before parting with the present leave petition another important issue must be dealt with, i.e., the digitization of records. Technology has, in the present time become increasingly enmeshed with the systems of dispute resolution and adjudication with the trends leading to all the more interplay, both supplementary and complimentary between technology and law.

*40. On 24.9.2021, the learned E-committee of the Supreme Court of India issued a **STANDARD OPERATING PROCEDURE** (an SOP) for digital preservation. Step-by-step implementation of the*

digitization process involves eighteen steps therein. Primarily, it requires all High Courts to establish Judicial Digital Repositories (JDR) as well as the standardized system therefor; A digitization cell at each of the High Courts is to be established to monitor the progress on day to day basis; It is the work of the cell to manage contracts with vendors for specialized services; an online data tracking system to keep track of the data transferred to the High Courts and to facilitate the receipts for each set of transferred records to the District Courts as well; District Courts to have backups of all data transferred to the High Court on a monthly basis while maintaining an independent record thereof.

***41.** It cannot be doubted that had there been properly preserved records of the Trial Court, the issue in the present appeal as to whether the High Court could uphold a conviction having not perused the complete Trial Court record, would not have arisen. Judicial notice can be taken of the fact that, in accordance with the SOP issued, private entities providing specialized service have been contracted, and therefore considering the importance and essentiality of such record, a robust system of responsibility and accountability must be developed and fostered in order to ensure the proper protection and regular updation of all*

records facilitating the smooth functioning of the judicial process.

42. Therefore, this court finds it fit to issue the following directions:

1. The Registrar General of the High Courts shall ensure that in all cases of criminal trial, as well as civil suits, the digitization of records must be duly undertaken with promptitude at all District Courts, preferably within the time prescribed for filing an appeal within the laws of procedure.

2. The concerned District Judge, once the system of digitization along with the system of authentication of the digitized records is in place in their judgeship, to ensure that the records so digitized are verified as expeditiously as possible.

3. A continually updated record of the Register of Records digitized shall be maintained with periodic reports being sent to the concerned High Courts for suitable directions.

4. Interlocutory application(s), if any, shall stand disposed of.”[Emphasis added].

The appellant Yusuph Mbululo's 23-year delayed right to appeal to this Court on account of missing appeal record is an urgent wake-up call to the Chief Registrar of the Judiciary of Tanzania, Registrar of the Court of Appeal, High Court Registrar, and all the Deputy Registrars. The Chief Registrar should ensure that Registrars and Deputy Registrars all heed the Supreme Court of India's directives to the Registrar General of the High Courts of India. They should realize that technology and digitalization are a way forward for Court registries in Tanzania on how to eliminate or - minimize incidents of missing court records. They should realize directives The Supreme Court of India's directives to the Registrar General of the High Courts of India Technology and digitization is a way forward for court registries in Tanzania on how to eliminate or minimize incidents of missing court records.

The Caribbean Court of Justice website describes court registries as engine rooms (<https://ccj.org/about-the-ccj/court-registry/>). For Tanzania, the Registrars, Deputy Registrars, and all registry staff who work in the engine rooms of the courts must digitize their registries to maintain public trust in the administration of justice in the digital age. The website of the Caribbean Court of Justice states:

"The Registry is the 'engine room' of the Court. It manages all cases from filing to disposition. It is responsible for the receipt, transmission and custody of documents filed in the Registry and sub-Registries. It is the conduit for the flow of information between the Court and the parties before it. The Registry is also responsible for service of all documents filed in the original jurisdiction. To provide greater access to justice documents may be filed in the sub-Registries and transmitted to the Registry."

<https://ccj.org/about-the-ccj/court-registry/>

Now back to the appeal before us. As for the way forward, we do not favour tilting the scales of justice and ordering a retrial or another round of reconstruction of the missing trial court records and proceedings. The chronology of events we narrated earlier shows the futility of trying any further search for the missing record of appeal. The affidavit of the Deputy Registrar of the High Court at Songea supports our conclusion that the record of the trial court's proceedings is lost, and further reconstruction is impossible.

Again, in exceptional circumstances like in the present appeal, where the event leading up to the appellant's conviction for murder and sentence of death occurred thirty years ago in 1993, any retrial is likely to face the challenge of the unavailability of witnesses capable of recalling the details of what happened so many years ago.

The appeal before us is similar to what we faced in **CHARLES RAMADHANI V. R** [2020] TZCA 1871 TANZLII, where the appellant was convicted of gang rape and sentenced to life imprisonment. In his second appeal, this Court realized that the records of the trial and the first appellate court were missing. The only documents on record were warrants of the trial court and first appellate court committing the appellant to prison and his notice of intention to appeal against the District Court judgment. According to the affidavit of the Deputy Registrar of the High Court at Tabora, the efforts to trace the missing records in that second appeal were unsuccessful. Similarly, stakeholders who Deputy Registrar requested to turn in any documents had failed. After considering the twenty years, the appellant served in prison; we opted against a retrial. We nullified the proceedings and judgments of the trial and first appellate courts and ordered the appellant's immediate release.

In consequence of what we have outlined, we quash the proceedings before the High Court, the judgment, and the resulting conviction and set aside the death sentence. We order the immediate release of the appellant from prison unless he is in custody for some other lawful cause.

DATED at **SONGEA** this 19th day of August, 2023.

I. H. JUMA
CHIEF JUSTICE

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

This Judgment delivered this 21st day of August, 2023 in the presence of Appellant appeared in person and Mr. Edga Luoga, learned Principal State Attorney assisted by Ms. Sabina Silayo, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "G. H. Herbert", written over a set of horizontal lines.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL