

IN THE HIGH COURT OF TANZANIA

AT SONGEA

MISCELLANEOUS CRIMINAL APPLICATION NO. 14 OF 2013

**(Originating From Songea District Court Criminal
Case No. 5 of 2004)**

JOSEPH LUOGA APPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

RULING

24/7-12/8/2013

KWARIKO, J.

The applicant brought this application for grant of Note of Inspection of the record in Criminal Case No. 5 of 2004 of the district court of Songea. The application has been made in terms of **Section 44 of the Magistrates' Courts Act** and **Sections 390 (1) (b) (2) and 391 of the Criminal Procedure Act**. Also, this application is supported by the applicant's affidavit.

In his affidavit the applicant deponed that he stood charged before the trial district court of Songea with the offence of **Rape c/s 130 and 131 of the Penal Code Cap. 16 of the Laws** and was convicted and sentenced to thirty

(30) years imprisonment. That after conviction he was incarcerated at Songea prison and in the same day he expressed his desire to appeal against the decision of the trial court. However, in 2005 he was transferred to Ukonga Prison in Dar es Salaam where he applied to the trial court to be supplied with copies of judgment and proceedings but in vain. That, while still in Ukonga Prison the Magistrate at Songea district court assured him that efforts were being made to avail him with copies of judgment and proceedings but he waited and nothing was forthcoming.

During the hearing of this application the applicant reiterated his affidavital evidence and went on to submit that after several follow-ups of the copies of judgment and proceedings in 2011 he received a letter from Songea district court to the effect that his case record had been lost. That, in that situation he left to this court to issue any order it will deem fit.

In response to the foregoing Mr. Medalakini learned State Attorney appeared for the respondent Republic where he submitted that it is clear that the said record has been lost as evidenced by the affidavit of the Resident Magistrate In-charge of Songea which was sworn on 27/10/2009. Thus, the applicant could not appeal in the absence of the original record. Mr. Medalakini submitted that if the record is lost then he prayed this court to order a retrial of the case. The cases of **ANDREA NDIBALEMA VR [1967] H.C.D. no. 291** and **MISANA VR [1967] EALR 334** were referred to cement the foregoing.

Further, Mr. Medalakini learned State Attorney contended that since the said record had disappeared in doubtful circumstances he prayed this court to call upon investigation in order to unearth source of the problem.

After hearing the parties the issue to decide is what should be this court's order in this application.

As it has been clearly proved the record in the applicant's case vide criminal case No. 5 of 2004 has been lost in view of the affidavit sworn on 27/10/2009 by the then Resident Magistrate In-charge of Songea one **Hon. BATISTA MHELELA**. Therefore, the court cannot fruitfully order Inspection of the record as it is the applicant's application. As rightly argued by Mr. Medalakini learned State Attorney and the precedents, to order a retrial has been the course taken where original records are confirmed to have been lost. For instance in the case of **FATEHALI MANJI VR [1966] EALR 343** the principle upon which a court could order a retrial was explained in the following terms;

"In general a retrial will be ordered only when the original trial was illegal or defective; It will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial

court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it".

Indeed each case should be treated according to its own peculiarities, facts and circumstances. In the present case there is no original record where the court could examine whether there is insufficient evidence, or whether the trial was defective or illegal. Thus the question to be asked here is for what purpose would a retrial be ordered and whether any justice will be served. The applicant was sentenced to thirty (30) years imprisonment in 2004 and he has now served almost nine years which in my view is relatively long time. It is not known whether his conviction would have been upheld on appeal. In these circumstances it is my considered opinion that the order of retrial will not serve any justice, instead it will occasion injustice to the applicant. Also, in the case of **AHMED ALI DHARAMSI SUMAR V R [1964] EA 481** it was held in the like terms thus;

"Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should

***only be made when interest of justice
require it and where it is not likely to
cause injustice to the accused”.***

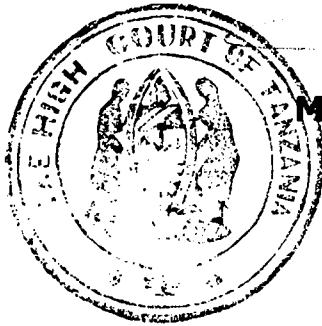
[Emphasis supplied].

Further, the courts have refrained to order retrial on consideration of the circumstances of the case like the age of the victim of the offence and what a retrial would do to her/his life.

In the case of **HASSAN KINGAMA VR [2000] TLR 200** the court decided not to order a retrial as it was likely to cause injustice to the accused. And in the case of **JUMA MHAGAMA VR**, Criminal Appeal No. 71 of 2011, Court of Appeal of Tanzania, at Iringa, (unreported) the court refrained to order a retrial when it considered the age of the victim and that the same would have revived horrible moments in the victim's life. The court also took into account the interest and welfare of the child as per **UN Convention on the Rights and Welfare of the Child (CRC)** which has been domesticated in Tanzania vide **The Law of the Child Act, No. 21 of 2009**.

Similarly, therefore, in the present case where the applicant has been serving his sentence for almost nine (9) years now, a retrial will definitely revive horrible moment of the victim and it will be difficult to trace the witnesses, I hereby decline to order the same. For this instead, I quash the applicant's conviction and set aside the sentence and any orders thereto. The court thus

orders the applicant's immediate release from custody unless otherwise lawfully held. It is ordered accordingly.

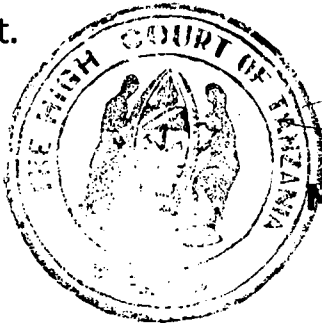



M.A. KWARIKO

JUDGE

12/8/2013

Ruling delivered in court today in the presence of the applicant and Mr. Nkoleye learned State Attorney for the Respondent Republic. Ms. Harriet court clerk present.




M.A. KWARIKO

JUDGE

12/8/2013