

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT SHINYANGA**

**(DC)CRIMINAL APPEAL NO. 96 OF 2016**

*(Original Criminal Case No. 30 of 2003 in the District Court of Maswa District )*

**KOMBA S/O MAGABANYA----- APPELLANT**

**VERSUS**

**THE REPUBLIC -----RESPONDENT**

**JUDGEMENT**

*Date of last order: 03.12.2018*

*Date of judgment: 05.12.2018*

**Ebrahim, J.:**

The appellant, Komba Magabanya was charged and convicted of the offence of rape contrary to **Section 5(1)(2)(e) and 6(1) of SOSPA No. 4/1998**. He was arraigned at the District Court of Maswa at Maswa in 2003 vide Criminal Case No. 30/2003. He was sentenced to 30 years imprisonment.

In 2016, the appellant preferred an appeal in this Court, Criminal Appeal No. 96/2016. It also appears from the records that the appellant before filing the present appeal he filed an application, Miscellaneous

Criminal Application No. 100 of 2014 under Article 13(6)(a), 30(1)(2)(a), (3),(4) and (5) of the Constitution and Section 393 of the Criminal Procedure Act, Cap 20 RE praying to be acquitted from the offence that he is charged with.

Beginning with the application, records of the proceedings shows that from 29.09.2014, this court issued an order to call for records. The case was further mentioned on various dates. State Attorneys who were in conduct of the matter prayed to be supplied with copies of judgement and proceedings. It is obvious here that from 2014, both the Court and the Office of State Attorney were aware of the non-availability of the proceedings and judgement. On 15.04.2015, Mr. Mkandara, State Attorney prayed for adjournment of the matter so that DRM i/c could depone an affidavit on the missing of the court records. The prayer was granted.

Coming to the present appeal; it was filed on 12.07.2016. In the absence of records of leave to file the appeal in 2016, I am compelled to assume that there were orders of the court to that effect.

The appellant filed before this court four grounds of appeal basically challenging the evaluation, weight and misapprehension of evidence.

Apparently from the date when the matter started to be attended, there was presence of the State Attorney. It was until 11<sup>th</sup> October 2018 when parties appeared before me after re-assignment.

The issue of concern was that the State Attorney had no copies of judgement and proceedings and thus prayed to be availed with another hearing date so that she can "***work on the procedure of dealing with such kind of files***". Moreover, she acknowledged the presence of affidavits from the court on the loss of the original file. The appellant told the court that he has not been availed with the copy of proceedings since he was imprisoned on 21.04.2006. He prayed for the assistance of the court as the file is lost.

Court adjourned the matter and availed time to the State Attorney to do the needful in looking for the records and the case was then scheduled for hearing on 28.11.2018. The matter could not proceed on the scheduled date and it was called for hearing on 03.12.2018.

At the hearing date, the learned State Attorney, Ms. Gloria Ndonde narrated at length and acknowledged that she was tasked to make follow up with their Simiyu office on the file pertaining to the reconstruction of records. Ms. Ndonde said that she contacted the in-charge one Mafuru and informed him of the appeal before this court and the need to trace the file. She said to have called him in several occasions in making follow ups and it was on 29.11.2018 when she wrote a letter requesting for feedback. She further referred the Court to the Court of Appeal decision on the case of **Nasoro Mussa V R**; Criminal Appeal No. 414 of 2015 where it was held that in the situations like the present one, the court in conduct of the matter has use its discretion depending on the circumstances of each case. The Court of Appeal however urged to take the disappearance of the records seriously hence further initiatives must be taken into consideration. Thus the Office of Attorney General and Investigation must work together. She prayed for another adjournment.

The appellant was very adamant to the request by the State Attorney; understandably so. He told the court that he was convicted and sentenced for rape on 21.04.2006. He is serving 30 years sentence. He

appealed since 2016 and all that time there is no progress and he is told the file has not been found. He recounted from the period when he was reprimanded to have been in custody for 15 years. He thus prayed to be released.

Ms. Ndonde rejoined that there is no effort that has been exerted by the court or the appellant. She was of the view that the file could be constructed and insisted to be allowed more time.

Indeed the disappearance of records of proceedings of court file is a very unusual and alarming situation. Associating myself with the concern of the Court of Appeal in the cited case of **Nasoro Mussa (supra)**; *"it does not only lead to lengthy delays, but besmirches the trust which the Judiciary craves from the general public"*. Undoubtedly, in the absence of the original records, the appeal cannot be acted upon on merits. Here comes the question what next?

Faced with the similar situation, my brother Judge Masoud in the case of **Mohamed Zuberi V Republic**, (DC) Criminal Appeal No. 30 of 2016 (Unreported – Tanga), visited various authorities outside our

jurisdiction (cases of **Lakhoo Zaver V R** [1952] 19 EACA 244; **Mulewa and Another V Republic** [2002] 2 EA 487 (CAK) and **Dauids V S** [2013] ZAWCHC 72). While of the strong views that in case of disappearance of files acquittal should not be automatic; he considered the circumstances of the case before him. The circumstances considered were the fact that the records cannot be sufficiently reconstructed in the manner that would not occasion miscarriage of justice, the disappearance of the file did not seem to implicate the appellant on such disappearance and the State Attorney was not instructive on the existence of police file used for the investigation and prosecution of the case in case retrial is ordered. He also considered time the appellant has spent in prison. The same stance was taken by my sister Judge Makani in the case of **Paul Magumba V R**, (DC) Criminal Appeal No. 11 of 2015 (Unreported- Shinyanga). In the cited case, Hon, Makani, J was faced with a situation where the file could not be traced or recovered or reconstructed for the purpose of appeal and the appellant has already spent 18 years in jail.

In our present case, relying on the cited case of the Court of Appeal, **Nasoro Mussa(supra)**; Ms. Ndonde argued that no efforts has been

shown by the court or the appellant in reconstructing the file. With respect, Ms. Ndonde is trying to shift the blame to cover their dilatory conducts in this matter.

Earlier on I narrated the sequence of events leading to the present situation which shows that the office of the State Attorney had the knowledge of non-existence of the file since 2014. As for the court upon tracing the file in vain, the District Court In-charge of the District Court Maswa on 04.05.2018 deponed an affidavit stating that the court exerted efforts but could not find the file in respect of Criminal Case No. 30/2003. Initially on 11.05.2016, the Principal Office Assistant of Maswa District Court deponed an affidavit that despite the efforts exerted, the file could not be found. The ball was now with the office of the State Attorney who prayed before the court to be availed time to work on the file. Instead when she appears before the court she is full of stories of calling the incharge of Simiyu in vain and that they should be availed more time. I am saying so because, as the records would show, the letter to the said in-charge was written on 29.11.2018 while in essence they were supposed to provide answers from the order of 11.10.2018 on 28.11.2018.

This shows that the State Attorney in conduct of the matter either did not work on the matter at all until she became aware of the hearing date or there is poor communications which means no time is enough for that office to work on the matter. Worse enough the State Attorney did not even indicate the time frame to show commitment of working on the issue. She simply asked in blanket to be availed more time.

I fully subscribe to the position of the Court of Appeal of Tanzania on the seriousness of disappearance of the court proceedings; and that acquittal is not automatic. However, I am mindful of the holding of the same Court that it is within the Courts discretion to determine the way forward depending on the special circumstances of each case. My understanding of the wisdom of the Court of Appeal is that in considering each circumstance, paramount consideration is timely delivery of justice. Ms. Ndonde places a duty to the appellant to show the efforts of looking for the proceedings; seriously I am astonished by her proposition considering that the appellant has all that time been in custody requesting to be availed with the copies of proceedings and judgement. What could be gathered here, infact there is no indication that the non-availability of

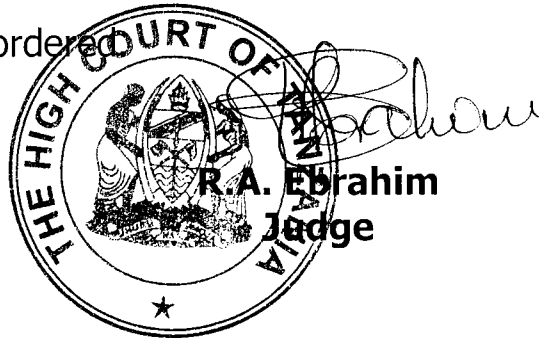


the proceedings has any doing of the appellant who infact in all that time been desperate and in anxiety to pursue his legal right of appeal.

The appellant has been in custody since 2003 i.e. 15 years from when he was first arrested and it is 12 years and eight months counting from conviction and sentence. However in the absence of the original proceedings or at least a copy of judgement, hearing of appeal on merits is impossible. The Court as per the affidavits exerted efforts to look for the file in vain and expected cooperation of the Office of the State Attorney which is not forthcoming. That being the case therefore, I am of the firm view that ordering a re-trial after the passage of 15 years would not serve ends of justice. Again, it is not a guarantee that further waiting of the Office of the State Attorney until they are ready to work, would not cause more delay which would occasion miscarriage of justice on part of the appellant. That being said therefore, I find that this is one of the special circumstances envisaged by the Court of Appeal for the court to exercise its discretion judiciously.

From the above findings, I am settled that an order of quashing the conviction and setting aside the imposed sentence would serve ends of justice. I accordingly do so for different reasons other than those set on the grounds of appeal presented by the appellant. The appellant is to be released from prison forthwith unless he is otherwise lawfully held.

Accordingly ordered



**Shinyanga**  
**05.12.2018**

**Date:** 5/12/2018

**Coram:** Hon. S. P. Mwaieseje, DR

**Appellant:** Present in person

**Respondent:** Ms. Gloria, State Attorney for the Respondent

**B/C:** Fatma, RMA

**Court:** Judgment delivered in chamber today 05<sup>th</sup> of December 2018. In the presence of the Applicant, Ms. Gloria, State Attorney for the Respondent and Fatma, RMA

Right of Appeal fully explained.

**S. P. Mwaieseje**  
**Deputy Registrar**  
**05/12/2018**

**Respondent:** Your Honor we intend to appeal at the Court of Appeal of Tanzania.

**Court:** Noted.

