

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SLAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 396 OF 2016**

**Original Criminal Case No. 104 of 2007  
(In the District Court of Kilosa at Kilosa)**

**MOSES MLAWA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

**MURUKE, J.**

The appellant Moses Mlawa, was charged with two offences namely Rape contrary to section 130 and 131, and Unnatural offence contrary to 154 of the Penal code respectively. He was convicted and sentenced to serve 30 years imprisonment. It seems the Appellant was not happy with the trial court's decision and so appealed to this court basing on the ground advanced in his petition of appeal.

This court ordered trial court records to be forwarded to this court. The hearing was adjourned for several times waiting for the same. On 29<sup>th</sup> November, 2017, Hon. Sundi Bennett Fimbo, the Resident Magistrate Incharge of Kilosa District Court swore

an affidavit confirming that original court records cannot be found.

The learned State Attorney, Debora Mushi submitted that, It is a principle that court records must be availed for appellant to pursue an appeal. She further stated that the absence of the trial court record, no appeal can be heard.

**What should be done in this situation?** The courts have devised mechanisms and these include: **one**, the issuance of orders of retrial, **two**, issuance orders of reconstruction of the lost file, **three**, or an automatic acquittal. In generally where it is apparent that the records will never be traced the matter is left to the court for appropriate orders. I must admit that this is not the first time the court is confronted with such a frustrating situation. In **JUMA SAIDI RASHIDI & YUSSUF SAIDI SHIROGWA v THE REPUBLIC, Misc. Criminal Application no. 44 & 45 of 2011**, High Court (Sumari, J), Mwanza (unreported) the court held that:-

subsequently as correctly pointed out by the Republic in this case the applicants have already served half of the sentence i.e 15 years, a substantial part of sentence of 30 years awarded. It would therefore be not in the interest of justice for them to undergo a new trial as the served

sentence is enough punishment for them to get a lesson. I therefore quash the conviction on the ground that as the record of the original case is not traceable and it is impossible for it to be obtained. The sentence also is set aside since the party served sentence seems to be just on both sides. Applicant's conviction is quashed and the remain part of sentence unserved is set aside. The applicants are therefore entitled to freedom as from now. Let them be set free forthwith unless otherwise lawfully held.

**In The Republic v Wambura Chacha, Criminal Revision no. 2 of 2008**, High Court (Masanche, J. unreported) the court quashed the conviction and set aside part of the un-served sentence on reason that the applicants had served a substantial part of their thirty years imprisonment sentence and it was in the interest of justice which required the applicants not to undergo a fresh trial.

Elsewhere in India, in the case of **GOOROO DYAL SINGH v DURBAREE LAL, 7 WR 18, 1867**, the records of the Trial Court were lost in transit from the first Court to the second. The High Court held that the Court had to choose between directing the Court below to receive such secondary evidence of the contents of the original records as will be forthcoming or to direct an

entirely new trial. However, it is settled that in ordering so, the court must always have regard to the questions whether the trial was defective, whether the interest of justice so requires and whether the order won't prejudice the accused. In **FATEHALI MANJI v THE REPUBLIC [1966] 1 EA 343**, the court held at page 344:

"... in general a **retrial will be ordered only when the original trial was illegal or defective**; it will not be ordered where 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 particular facts and circumstances and **an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.**"

Likewise, it was held in **AHMEDI ALI DHARAMSI SUMAR v REPUBLIC [1964] 1 EA 481** at page 483 that:

"Each case must depend on the particular facts and circumstances of that case but an order for **re-trial should only be made where the interests of justice require it,**

**and should not be ordered where it is likely to cause an injustice to an accused person."**

More considerations of what a court should do in a situation like the one we have now were stated in **WAINAINA v REPUBLIC [2004] 2 EA 349**. The court held at page 350:

"In such a situation as this, the Court must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss has occurred. Who occasioned the loss of all the files? Is the appellant responsible? Should he benefit from his own mischief and illegality? **In the final analysis, the paramount consideration must be whether the order proposed to be made is the one which serves the best interest of justice.** An acquittal should not follow as a matter of course where a file has disappeared. After all a person, like the appellant, has lost the benefit of the presumption of innocence ... he having been convicted by a competent court and on appeal the burden is on him to show that the Court which convicted him did so in error. Thus, the loss of the files and proceedings may deprive him of ability to discharge that burden, but, it by no means follows that he must of necessity be treated as innocent and automatically acquitted. **The interest of justice as a whole must be considered."**

Coming to the case at hand, it is undisputed that the appellant has been in prison since 3<sup>rd</sup> May, 2007. It cannot be said, in such circumstances, that they are responsible for the loss of the trial court's records. There is no indication that the trial court's decision against the applicants was ever nullified in appeal or revision. In that situation, and taking into account the fact that the lower court's records are missing, it cannot safely be held that the original trial by the RM's court was illegal or defective to warrant this court to issue an order for retrial. The holding doesn't mean that the applicants are innocent so as to be acquitted automatically. But, it is undeniable fact that absence of records has deprived the applicants of their right to appeal enshrined under article 13(6)(a) of the Constitution of the United Republic of Tanzania which provides:

"When the rights and duties of any person are being determined by the court or any other agency, **that person shall be entitled** to a fair hearing and **to the right of appeal or other legal remedy** against the decision of the court or of the other agency concerned."

In my opinion, justice in this case demands immediate release of the Appellant who has been in prison for over **eleven years** following the trial court's decision which was appealable, but for

loss of the records, the applicants have been unable to appeal and there is no indication that they will be able to do so in the future. Ordering retrial at this point in the absence of proof that the trial court records were defective or illegal will be contrary to the principle in **FATEHALI MANJI v THE REPUBLIC** *supra* and the established rule of law that a man shall not be vexed twice for one and the same cause which is embraced in a Latin maxim *nemo bis vexari debet pro eadem causa*. In the final result, this appeal is allowed, the Appellant's conviction is quashed and the un-served part of the sentence is set aside. The Appellant, unless lawfully held, is forthwith set at liberty. It is so ordered.



Z.G. Muruke

**JUDGE**

**14/02/2018**

Ruling delivered in the presence of Appellant in person and Debora Mushi State Attorney for the respondent.



**Z.G. Muruke**

**JUDGE**

**14/02/2018**