IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 147 OF 2019

(Arising from criminal case No.67 of 2000, the District Court of Kahama)

MAYALA LUBINZA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

REASONS FOR DECISION

20/4 & 15/5/2020
G. J. Mdemu, J;

This appeal came for hearing on 20th day of April , 2020. The Appellant was represented by Mr. Jacob Somi, learned Advocate. I heard him through his advocate. I also heard the Respondent Republic under the service of Mr. Nestory Mwenda, learned State Attorney who supported the appeal.

Having heard the two counsels, I was satisfied that, there was no reason to continue holding the Appellant in custody. I thus quashed the judgment of the trial court dated 29th day of January, 2001 in criminal case No.67 of 2000 and set aside the sentence of thirty (30) years prison term thereof for the offence of rape met to the Appellant and ordered release of the Appellant from prison, unless held lawful for some other lawful causes. I however reserved my reasons for that decision which I now give.

According to the judgment of the District Court of Kahama dated 29th of January, 2001, the Appellant was charged with the rape of **Joyi Nkwanguja**

contrary to the provisions of section 130(1) (2) and 131(1) of the Penal Code, Cap.16 as amended by section 5 (e) and section 6 of the Sexual Offences (Special Provisions) Act, No.4 of 1998. In the particulars of offence as per the judgment, it was on 5th of March, 2000 in Mgandu Village within Kahama District when the Appellant had carnal knowledge of the said Joyi Nkwanguja without her consent. At the trial, Ntunga Ncherenkanya (PW1), mother of the victim and the only prosecution witness, testified to have observed unusual movement to the victim and when inquired, PW1 was told by the victim to have been raped by the Appellant.

PWI then inspected the victim and reported the matter to police where the victim was issued with a PF3 for treatment. The PF3 was admitted in court as exhibit P1.With this evidence as found in the judgment, the court on 29th of January 2001 found the Appellant guilty of the offence of rape, convicted him and subsequently was sentenced to a prison term of thirty (30) years.

The Appellant was aggrieved by this decision. The record is silent until 2016, in criminal application No.31 of 2016 when this court (Kibella J.) heard him and extended time to lodge the notice of intention to appeal. The application got granted on 30th of November, 2017. Unfortunately, this court (Mkeha J.) on 20th of November, 2019, did struck out the appeal of the Appellant for being preceded by lodgment of notice of intention to appeal in a wrong registry. The Appellant however was granted leave to approach the proper registry, hence this appeal on the following grounds:

1. *That, the trial court erred in law and in fact in basing its conviction in uncorroborated hearsay evidence adduced by the prosecution*

sole witness one ***Ntunga Cherekakanya(PW1)****-the victim's mother*

2. *That, the trial court grossly misdirected itself in admitting PF3 as an exhibit tendered in court by the said victim's mother (PW1) who was nevertheless not the maker or author of the same.*
3. *That, the trial court occasioned a serious miscarriage of justice in its failure to evaluate, consider or give weight to the accused/Appellant's* ***evidence that he did not rape PW1's daughter one Joyi Kwangulija*** *who never appeared in court to testify to that effect.*

On 24th of March 2020, this appeal came for hearing. However, hearing could not proceed as scheduled for want of the original record which in the words of Mr. Mwenda who represented the Respondent Republic, there is unofficial information on loss of the record. He thus adviced the Registrar to verify those information, the position acceded by Mr. Somi who had the service of the Appellant. Hearing of the appeal had thus to be adjourned with an order that, the Deputy Registrar to confirm regarding loss of the record.

On 20th of April 2020, the session resumed. As was earlier on, the Appellant had the service of Mr. Jacob Somi, learned Advocate whereas the Respondent Republic enjoyed the service of Mr. Nestory Mwenda, learned State Attorney. This time, filed in the file, was an affidavit of one Eugenia Gerard Rwujahuka, Deputy Registrar such that the file cannot be located. With this fact, and also on the availability of the judgment of the court convicted and sentenced the Appellant. Parties had thus to address the court.

Mr. Nestory Mwenda submitted to have been served with the affidavit of the Deputy Registrar confirming loss of the original record subject of this appeal. With this, citing the case of **Shaban Mfaume vs R, Criminal Appeal No.194 of 2014** (unreported) observed that, where there is clear evidence on loss of record , the court may not proceed with anything save for quashing the proceedings of the lower court and that, subject to the amount of sentence served, the court may order release of the Appellant.

In the instant appeal, the learned State Attorney was of the view that, according to the judgment of the trial court, the court convicted the Appellant for the offence of rape basing on the evidence of a single witness, that is, the mother of the victim. To the learned state Attorney, this contravened the principles stated in **Seleman Makumba v. Republic (2006) TLR 376** requiring the best evidence in sexual offences to be that of the victim, which in the instant appeal is lacking. It was his view therefore that, the appeal has overwhelming chances of success and in view of the substantial part of the sentence served, he proposed the release of the Appellant.

Mr. Jacob Somi, learned Advocate did not have much to submit apart from sharing the same position with that of the learned state Attorney. He also stressed on the likely hood of success of the appeal and that, the 18 years term of sentence served by the Appellant certifies for his release from custody. This was all as guided by the parties.

Having considered submissions of the parties and also having gone through the record at hand, I am in all fours with the two counsels that, the original file in respect of this appeal cannot be traced and that there is no way,

according to the affidavit of the Deputy Registrar, the said record may, by any means, be traceable. I also share their concern that, following loss of the record, the Appellant herein may not have his appeal determined. I again agree with them, as in the cited case of **Mfaume Shaban Mfaume** (supra) that, the court of law is not devoid of any remedy, as in circumstances of this appeal where the original record is missing and also that the Appellant has been in custody for almost 18 years from 2001 when the court sentenced him to thirty (30) years prison term.

In the case of **Mfaume Shaban Mfaume**(supra) the court made the following observation at page 6 regarding the remedy open to the Appellant:

> *Having quashed the proceedings of the two courts below, and set aside the sentence meted out to the Appellant, what then should be the way forward? This question has greatly tasked our minds. We have considered the peculiar circumstances in this matter particularly the facts that the Appellant has been incarcerated for about sixteen (16) years from the date of conviction and sentence, thereby serving a substantial part of his sentence, that the effort to trace the record of proceedings from the court and other stakeholders have proved futile and that a retrial of the Appellant cannot be ordered without occasioning injustice.*

This principle was also invoked in the case of **Juma Saidi Rashidi & Yusuf Said Shirongwa vs R, Misc.Criminal Application No.44&45 of 2011**(Sumari J.) and **R.vs. Wambura Chacha ,Criminal Revision No.2 of 2008**(Masanche J.) In either case as to loss of files, courts have been invoking the following remedies as stated in the case of **Sadick Maonezi &Saul Ntambwe vs. R, Misc. Criminal Revision No.9 of 2013**(unreported) as at page 3:

> *"It is worth noting that, the disappearance of files in courts has become a serious and frustrating impediment to dispensation of justice. In a bid to cure this malady, the courts have devised various mechanisms and this include: the issuance of orders of retrial, issuance orders of reconstruction of the lost file, or an automatic acquittal"*

On the three devised mechanisms above; ordering a retrial will not work out in that, following want of record , there is nothing on record to ascertain irregularities or illegality in the original trial making it defective as to require a new or fresh trial as stated in the case of **Fateheli Manji v R. (1966) EA 343.** As stated by the two counsels, the trial court convicted the Appellant on the evidence of a single witness, the mother of the victim. The victim did not testify. This being the case, and taking into account that in sexual offences, the best evidence is that of the victim as held in **Seleman Makumba v.R** (supra), ordering a retrial will afford opportunity to the prosecution to put their house in order. Again, given that the evidence is, as it

is in the judgment that, only the mother of the victim testified, the appeal is likely to succeed especially for want of the evidence of the victim.

As to the reconstruction of record, the affidavit of Euginia Rujwahuka sworn on 20th of April 2020 certified that, all efforts, not only to trace the file but also to have any record from within and to stake holders have proved futile. The least is to say; even reconstruction of record will not be possible. The only option therefore in my considered view, and in the language of Mruke J. in **Sadick Maonezi** (supra) is an automatic acquittal.

It is from the foregoing circumstances and reasons as alluded, I acquitted the Appellant by setting aside the sentence of thirty (30) years prison term and made an order that, he be released from prison, unless lawful held. It is so ordered.

Gerson. J. Mdemu
JUDGE
15/5/2020

DATED at **Shinyanga** this 15th day of May, 2020

Gerson J. Mdemu
JUDGE
15/5/2020