

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 11 OF 2017

(Original Criminal Case No. 138 of 2014 of the District Court of Nzega at Nzega)

KASWIZA S/O KASHINDYE.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

*Date: 14/2/2022 & 4/3/2022*

**BAHATI SALEMA, J.:**

This appeal is peculiar since the court is required by exceptional circumstances to take a special option in determining the appeal. The historical background will shed some light as to why this court has decided to take such action. The appellant, **Kaswiza s/o Kashindye** was convicted in 2015 by the District Court of Nzega (Ngomero, JK -RM) of armed robbery contrary to Section 287A of the Penal Code, Cap.16 [R.E 2019]. At the end of the trial, he was found guilty, convicted and sentenced to serve thirty years in prison.

Dissatisfied with such a conviction and sentence, he preferred an appeal, but before lodging his notice of appeal, he was already out of time. Undeterred, the appellant filed Misc. Criminal Application No. 245 of 2016 in the High Court for an extension of time to file his appeal out of time. On 15 February, 2017 Rumanyika, J. (as he then was) granted the application for an extension of time. He dutifully complied with the order of the court.

Initially, the appeal was called for hearing on 3 May, 2017. However, the hearing could not proceed for reasons that the documents including the charge sheet and the proceedings of the trial court, which the appellant was pursuing in the court to enable him to get access to this court were missing.

When the court detected that the proceedings of the trial court and some of the vital documents that were essential for the determination of the appeal were missing, it directed the Deputy Registrar to make follow-up on the same. In the affidavit sworn by the Deputy Registrar of the High Court of Tanzania at Tabora, Beda Nyaki on July 25, 2019, it is shown that the efforts to locate the missing records in the court registry proved futile. Not even the appellant, the Republic, the trial court, and the prison office, who were contacted, had the missing record.

In other words, the position of missing file was not changed despite the order for an adjournment pending exhaustive efforts towards the reconstruction of the record of the appeal after engaging other stakeholders.

That being the case, on the hearing date, I invited the Senior State Attorney to address me on the way forward due to the incompleteness of the record.

Mr. Miraji Kajiru, learned senior State Attorney who appeared for the Republic, conceded that those documents were indeed missing. He submitted further that there were efforts made to reconstruct the records, but they were unsuccessful. He prayed to the court to consider all the efforts made by the appellant for quite a long time in pursuing the appeal and, in the interest of justice, the learned senior State Attorney proposed necessary orders.

In reply, the appellant, being a layman prayed to this court to consider his appeal.

Having heard from both parties, as stated earlier, this court, having found in such a situation, made efforts to see the precedence on this issue that had cropped up in this court. Having examined it in other places, the court found the circumstances of this appeal are not unique

in our jurisdiction. The Court of Appeal in **Norbert Ruhusika v R.** Criminal Appeal No. 573 of 2017, was faced with the same situation. In this case, the court had three options: first, reconstruction of the record where it is practicable; second, ordering a retrial, only if other factors allow; and third, releasing the appellant. In that appeal, the court found it wise to release the appellant.

As stated in the first option, that is; reconstruction of the record. This option is not practicable because due efforts were made by the Deputy Registrar but could not bear fruits. The second option which is ordering a retrial is also not a viable option since retrial is only necessary where the trial was illegal or defective. In the absence of the record, it cannot be established that the case be retried and practically, it will not be possible to get witnesses who had earlier on testified because it is almost 8 years since the crime took place. Also, the possibility of the prosecution filling up the gaps in its evidence cannot be overruled. The last option is to release the appellant.

From the record it is noted that the appellant was convicted on 24/2/2015 and sentenced to thirty years on a charge of armed robbery, as rightly pointed out by the State Attorney. Taking into consideration that the appellant had served seven years and efforts to trace the missing records had proved futile, especially since the fact that the

missing record was not his fault, this court found authority in the case of **Charles Ramadhani v R**, Criminal Appeal No. 429 of 2015) at Tabora where it was held that there is no general rule in our jurisprudence on the way forward when the court is faced with the problem of missing records of the lower courts, as the one in the appeal under scrutiny. When the court was faced with a similar scenario as it was in the case of **Robert s/o Mdololyo v R**, Criminal Appeal No. 486 of 2015 (Unreported). It was the view of the court that the other viable means of remedying the situation was for the Deputy Registrar to involve other stakeholders in the administration of justice in reconstructing the records.

According to the record of the court, it is shown that the procedure indicated in the case of **Robert Mdolodyo** (supra) was adopted whereby all stakeholders were requested by the Deputy Registrar to avail her with any available records so that she could reconstruct the record of appeal, but to no avail as to this instant matter. In a similar vein, the Court of Appeal in **Nassoro Musa v R**, Criminal Appeal No.404 of 2015, conducted thorough research on the best guiding principles to solve future occurrences. The Court of Appeal partly held that;

*"We think that any loss or misplacement of any court record is a serious matter that requires Deputy Registrars of the High Court to*

*not only particularize the concrete efforts that they have made to trace or restore the missing record, but to show what concrete efforts beyond mere words they have made to reconstruct or restore the record before scheduling the matter for hearing by either the High Court or this Court."*

Again on 14<sup>th</sup> February, 2018 the Court of Appeal in the case of **Robert Madololyo vs. R**, Criminal Appeal No.486 of 2015. In both appeals, the Court of Appeal ended up adjourning the hearing to allow the Deputy Registrar to satisfy the mentioned legal requirements.

Based on the guidance outlined by the Court of Appeal, it is clear that missing documents are vital in the determination of the appeal, and without them, the appeal cannot proceed on merit. It should be noted that the loss or missing of court records is an unprecedented event and when it occurs it should be taken as an unusual circumstance. Specific efforts must be made to satisfy the appellate judge or judges that a satisfactory effort has been made beyond mere words in the form of an affidavit.

As indicated earlier, the proceedings of the trial court are missing. Efforts to trace them from the stakeholders have not been successful, as can be discerned from the affidavit of the Deputy Registrar.

For my part, loss of court records is an embarrassing legal dilemma which although it is not a new phenomenon has never ceased to be incomprehensible. There could not be a satisfactory solution to such unsatisfactory state of affairs. I have given due consideration to the submission made by the Senior State Attorney in respect of necessary orders in determining the appeal. In the same vein, failure by the court to get the records that could have assisted in fairly and objectively determining the appellant's fate and regard being put to the period that the appellant has already served in prison. That period of seven years may not be as substantial compared to **Mfaume Shaban Mfaume v R**, Criminal Appeal No 194 of 2014 which faced a similar situation compared to 10 years but I do not consider that it is in the best interest of justice hold the appellant indefinitely in prison in the absence of any guarantee of the availability of the proceedings which will pave way for hearing of the appeal and taking into account the endless struggle he made up to this stage and the fact that the missing record is not his fault.

In the same vein, the failure by the court to get the records of the lower court, which could have assisted in fairly and objectively determining the appellant's appeal and regard to the period that the appellant has already served in prison, I am of the view that even though his sentence

was for 30 years, prudence dictates that justice will prevail if I quash the proceedings and set aside the sentence. As a result, I hereby set aside the conviction and sentence imposed by the trial court against the appellant and I hereby discharge the appellant forthwith unless otherwise held for other justifiable cause.

Order accordingly.



**A. BAHATI SALEMA**

**JUDGE**

**4/3/2022**

Judgment delivered under my hand and seal of the court in the Chamber, this 4<sup>th</sup> day of March, 2022 in the presence of the appellant only.



**A. BAHATI SALEMA**

**JUDGE**

**04/03/2022**

Right to appeal is hereby explained.



**A. BAHATI SALEMA**

**JUDGE**

**04/03/2022**