

IN THE COURT OF TANZANIA

AT SHINYANGA

CRIMINAL APPEAL NO. 72 OF 2021

NDALAHWA S/O MAYALA..... APELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

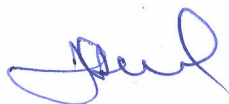
*(Appeal arising from the decision of the District Court of Bariadi
at Bariadi in Criminal Case No.23 of 2013 dated 30th August, 2013)*

RULING

5th & 7th October, 2022

L. HEMED, J.

At Bariadi District Court, the appellant herein was convicted on four (4) offences namely, unlawful entry into a National Park; unlawful possession of weapon in the National Park, unlawful hunting in a National Park and unlawfully possession of Government trophies, contrary to sections (21(1) and (2), 24(1(b) & (2); 23(1) of the National Parks Act, [Cap 282 RE 2002] and section 86(1)(2) & (2) of the Wildlife Conservation Act, [Cap 283 RE 2002] respectively. He was sentenced to serve 20 years in prison. The appeal at hand started rolling in this Court since the 1st day of October, 2022. It has been difficult to commence hearing of the matter because the original records of the trial court have



never been brought to this Court despite several orders on calling for original records. From the available records of the matter at hand I have noted the presence of an affidavit deposed by one **CAROLINE EUGENE KILIWA** the Resident Magistrate in charge of the District Court for Bariadi where she has stated thus, among others:

"... Ni kweli shauri la uhujumu uchumi namba 25/2013 lilifunguliwa katika Mahakama hii nahata katika rejesta limo na lilifunguliwa tarehe 4/7/2013 na kumalizika kusikilizwa tarehe 18/10/2014 likiwa mbele ya Mh.AIDAN HENRY MWILAPWA (SDRM)...

3. Katika kiapo hiki nathibitisha kuwa jalada la Economic nambari 25/2013 Jamhuri dhidi ya Ndalakwa Mayala halionekani mbali na jitihada nyingi zilizofanywa na watumishi wa ofisi hii kulitafuta"

I have noted that on 25/05/2022 my brother Hon. Kulita, J ordered that State Attorney Incharge for Simiyu Region, the Prison Officer Incharge for Shinyanga Prison and the RCO Simiyu Region should bring to this Court all necessary documents which are in connection with this matter for purposes of creating the duplicate file. There are also several



other orders in the file of the matter at hand which were made for purposes of ensuring that duplicate file is reconstructed so that the matter is determined. The last order for reconstruction of duplicate file was made on 29th September, 2022.

When the matter was called on the 5th day of October, 2022, Ms. Wapumbulya Shani, learned State Attorney, reported that efforts to collect necessary documents for reconstruction of duplicate file have proved failure. When she was asked what should be the way forward in the circumstance, she stated to leave everything to the Court to decide. The Appellant being a lay person who at all the material time has been appearing in person, stated to be confident with his appeal. He asked the Court to release him from prison.

What stands for the Court to deliberate and determine in view of the circumstances pertaining to this appeal as alluded to above, is the issue as to what should be the way forward in resolving the matter at hand.

It is apparent in the light of the affidavit deposed by **CAROLINE EUGENE KILIWA** the Resident Magistrate in charge of the District Court for Bariadi, that the efforts to trace the missing records in the appeal at hand, have proved futile. In the case of **Robert s/o Madololyo Vs the**



Republic, Criminal Appeal No. 486 of 2015 (unreported), the Court of Appeal of Tanzania 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 after having visited the practice obtained in other jurisdictions, it was of the view that the other viable means of remedying the situation, is involving other stake holders in the administration of justice, to reconstruct the records.

According to the circumstance of the matter at hand, it is indicated that the procedure proposed in the case of **Robert s/o Madololyo** (*supra*), was adopted whereby, all stake holders were requested by the Deputy Registrar to avail him with any available records concerning the original case and the appeal, so that he could reconstruct the record of appeal but to no avail.

The efforts to reconstruct duplicate file having failed as reported by the learned State Attorney, Ms. Shani, I have to look for other possible means in which this Court can deal with the appeal at hand for the triumph of justice. I have tried to think the option of ordering retrial of the matter, but re-trial, involves consideration of some factors amongst which include, availability of witnesses, the nature and seriousness or complexity of the offence under which the appellant was convicted of, and the time in which the appellant has spent in custody.

The present case was concluded at the District Court – Bariadi on 18/10/2014, almost eight (8) ago. This means that the appellant has also spent 8 years in prison by now. Another question will it be possible to avail witnesses taking into account the time lapsed. It is obvious that the prosecution will suffer difficulties in procuring witnesses.

Basing on the circumstances which have been highlighted above, the right course to take is to invoke the revisional powers of this Court to subordinate courts to nullify the proceedings and judgments of the court below and quash the conviction and sentence imposed on the appellant. In the case of **Charles Ramadhani vs. Republic**, Criminal Appeal No.429 of 2015, the Court of Appeal of Tanzania facing the same situation had this to say:-

"In the same vein, the failure by the Court to get the records of the lower courts which could have assisted ... to fairly and objectively determine the appellant's appeal before us and regard being put to the period which the appellant has already served in prison that is; about twenty years we think, even though his sentence was for life, prudence dictates that justice will triumph if we invoke our revisional powers.."

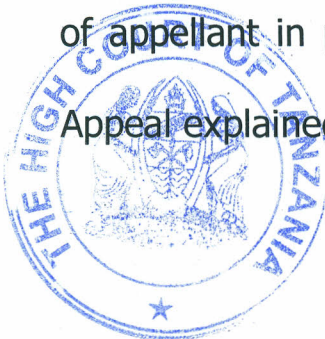
From the fore going, I invoke the provision of section 31 of the Magistrates Courts Act, [Cap 11 RE 2019] and section 373 of the Criminal Procedure Act [Cap 20 RE 2019] to quash the proceedings of the District Court of Bariadi in Economic Case No.25/2013. I do hereby set aside the conviction and sentences that were meted down against the appellant and order for his immediate release from prison.

Order accordingly.

DATED at SHINYANGA this 7th day of October, 2022.


L. HEMED
JUDGE

The Ruling is delivered this 7th day of October, 2022 in the presence of appellant in person and Ms. Shani, learned State Attorney. Right of Appeal explained.




L. HEMED
JUDGE
07/10/2022