

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY**

AT MWANZA

MISCELLANEOUS CRIMINAL APPLICATION NO. 33 OF 2022

*In the matter of an Application for Powers of the High Court on **REVISION***

And

*In the matter of an intended Application for Appeal in the High Court without
accompanied with a copy of proceedings and judgment*

And

*In the matter of an Application for POWER of the High Court to order an ACQUITTAL to
the Applicant basing on the missing original file*

And

*In the matter of the decision(s) of the District Court of Geita at Geita in Criminal Case
No. 194 of 2018 dated 29/7/2019.*

BETWEEN

EMMANUEL SIMON-----APPLICANT

VERSUS

THE REPUBLIC-----RESPONDENT

RULING

Last Order: 19.09.2022

Ruling Date: 24.10.2022

M. MNYUKWA, J

The applicant in this application, one Emmanuel Simon has moved this court through chamber summons and affidavit deposed by him. The application is preferred under section 264, 372 and 373 which is to be read together with section 249 and 313 of the Criminal Procedure Act Cap 20 R.E 2019 now R.E 2022. The applicant prays this court for the following orders;



- i. Order for granting an Applicant's Application.*
- ii. Order an acquittal and released from prison to the applicant if the original file is missing.*
- iii. Order for redress upon the Applicant denied and deprived his fundamental right to appeal against the decision of the district court of Geita at Geita in Criminal Case No. 194 of 2018.*
- iv. Any other order(s) and remedy as this honourable court deemed fit to grant.*

During the hearing of this Application, the applicant appeared in person, unrepresented, while the respondent was represented by the learned State Attorney, Ms Sabina Choghoghwe. This application was heard and argued orally. The applicant being a lay person, chose the learned state attorney to firstly submit.

In her submission, Ms. Sabina Choghoghwe started off by pointing out that, the applicant has moved this court under section 264, 372 and 373 of the Criminal Procedure Act Cap. 20 R.E 2022, which reads together with section 249 and 313 of the Criminal Procedure Act Cap 20 R.E 2022, praying this court to set him free, after the lower court's record seemed to be missing. She went on that, the applicant also prayed for this court to quash and nullify the decision of the Geita District Court in Criminal Case No. 194 of 2018 and any other order the court deems fit to grant.



Ms. Sabina went on and examine the Applicant's affidavit accompanying his application, and pointed specifically paragraph 5 and 6 of the affidavit, in which the applicant prayed this court to revise the trial court's proceedings and quash the conviction and set aside the sentence imposed upon him. Ms. Sabina further submitted that, the preferred provisions to move this court, that is section 372 and 373 are misconstrued as the provisions are used to move the court in doing revision.

Ms. Sabina prayed for her counter affidavit to form part of her submission. She then went on that, the reasons advanced for this application are purely grounds of appeal as the applicant prays this court to revise the trial court's proceeding and set aside the sentence on the reason that, the applicant has been denied his constitutional right of appeal.

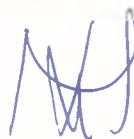
She went on that, section 359 of the Criminal Procedure Act, Cap 20 R.E 2019 now [R.E 2022], requires a person who is aggrieved by the lower court's decision to file his petition of appeal attached with notice of appeal. That the records are the court's duty to supply and therefore the application is misplaced and it has denied this court an opportunity to give reliefs as the applicant has not met the mandatory requirement of filing an appeal to this court.



Ms. Sabina cited the case of **Robert Madololyo vs R**, Criminal Appeal No. 486 of 2015 on page 4, where the Court of Appeal held that, where there is no valid record of the criminal appeal from the lower court, the court cease to have jurisdiction to proceed. She finalised her submission by arguing that, this application is misplaced and it is required to be struck out as it is the duty of the court to find the records of the lower courts for Deputy Registrar to reconstruct the same.

Responding to the Respondent's submission, the applicant averred that, he did not appeal because he was not supplied with the copy of judgement as he was told that, the magistrate who heard his case met his demise. That, it is almost two years and some months since he was convicted, he therefore prays to be supplied with a copy of judgement. That marks the end of both parties' submissions.

After hearing both parties' submissions on application at hand, it was hard to construe Ruling on the matter without knowing the status of the lower court's record alleged to be missing. Therefore, I ordered the Deputy Registrar to swear an affidavit if the records are truly missing. I decided to make an order for the Deputy Registrar to swear an affidavit after issuing call for records from the date when the matter was filed on 11/07/2022



without success. Responding to the Order, the Deputy Registrar swore an affidavit on 16th September, 2022 to the effect that, the records could not be traced as the District Resident Magistrate in Charge of Geita District Court has sworn an affidavit that, the records are lost and incapable of being found by any means.

Now, the question for determination is whether this application is merited. From the Chamber Summons filed, the applicant requires this court to redress his deprived fundamental right to appeal, acquit and release him from prison as the original file is missing. First of all, I do not subscribe to the respondent's counsel assertion that, the cited provision of law to move this court which are section 372 and 373 of the Criminal Procedure Act Cap 20 R.E 2019 are wrongly invoked. The reason for my standing is, although it's true that, the lower court record that are sought to be revised are missing, this court is empowered to regulate its own practise in administering justice as it is provided for under section 264 of the Criminal Procedure Act Cap 20 R.E 2019, as it is provided that;

264. *The High Court may, subject to the provisions of this Act and any other written laws, regulate its own practice in the exercise of its criminal jurisdiction.*



And therefore, the court can even revise the trial court decision which is missing when it is practicable for the administering of justice.

However, from my observation the law is silent as to what should be done when the court's records are missing, that renders other actions as appeal or revision to be available to the aggrieved party. Providentially, this is not the first time that court has encountered the same situation that records are missing. There are different case laws, that has given light as to what has to be done when records are missing.

To start with, I would like to borrow the wisdom in a recently case of **Jackson John vs Republic**, Misc. Criminal Revision No. 06 of 2018, HCT at Dar es Salaam, my learned Brother Ngwembe J, when facing the same situation of missing record, he insisted that:

"...it is clear that, loss or missing of court records is unprecedented event, and when occurs should be taken as unusual circumstance. Specific efforts must be taken to satisfy the appellate judge that in fact satisfactory efforts have been taken beyond mere words in a form of affidavit. "

The court went further to show different redress of the matter in which three kinds of redresses have been taken by the court, depending on the



circumstances of each case. Those redresses are, reconstruction of records, retrial and release of convicted accused person.

In the first redress of reconstruction, I agree with the cited case of Robert **Madololyo vs Republic**, Criminal Appeal No. 486 of 2015, as rightly submitted by Ms. Choghogwe, the Court of Appeal, did recognise that, the issue of missing records have to be determined on basis of each case own special circumstances. The court went further to hold that, in case of missing record, the Deputy Registrar who is the custodian of court records must reconstruct the missing record. Further, the obligation of reconstructing the missing record does not fall entirely on the court but it extends to the convicted accused, their learned counsel, the prosecution and the prison department holding custody of the convicted accused person.

In another case of **Said Salum@ Kiwindu vs R**, Criminal Appeal No. 190 of 2017, the Court of Appeal ordered retrial of the matter, after reconstruction was not successful for the failure to retrieve the trial court's judgement. And the court was of the view that, retrial would not prejudice either party as the convicted accused had already spent 6 years in jail. From the above decision then, the court made a conclusion that, if reconstruction



totally fails then retrial can be ordered, taking into consideration of the surrounding circumstance of each case at hand.

Lastly, the court can order release of the convicted accused if it in the opinion that, retrial would not serve the purpose of justice as it was held in the case of **Charles Ramadhan vs R**, Criminal Appeal No. 429 of 2015 when the accused person had already served a long period as part of his sentence.

Reverting back to our case at hand, the applicant insisted to be set free as the records are missing, while the respondent, prayed for the reconstruction so that the missing record to be reconstructed. From the sworn affidavit by the Deputy Registrar, it implies that, the only efforts made was to issue calling for records which was fruitless as the District Magistrate in charge swore an affidavit that, the record could not be traced as the presiding magistrate met his demise soon after pronouncement of the judgement. That means, no other stakeholders were involved in making sure that all efforts were made to retrieve the missing records.

On that accord, it is my opinion that, the Deputy Registrar must now compose a reconstruction team by involving all stakeholders, such as the office of National Prosecution Service, the Prison, Investigator, OCCID, the



applicant who is the convict and any other stakeholder who was involved in one way or another who can help in retrieving of any necessary document for the reconstruction.

Consequently, this application is hereby struck out, and I hereby order the Deputy Registrar to reconstruct the records by involving the stakeholders necessary for reconstruction.

It is so ordered.




M. MNYUKWA
JUDGE
24/10/2022

Court: Ruling delivered in presence of the applicant and in absence of respondent's counsel.


M. MNYUKWA
JUDGE
24/10/2022