THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF DAR ES SALAAM)

AT PAR ES SALAAM

MISC. CRIMINAL REVISION NO. 06 OF 2018

(Original from District Court of Kilosa in Criminal Case No. 183 of 2008)

JACKSON JOHN ..... APPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

RULING

Hearing date on: 10/03/2022

Ruling date on: 16/3/2022

NGWEMBE, J:

This application for revision is made after several attempts of the applicant to seek and obtain copies of the trial court's records, but in vain. According to the available records from the applicant, he was charged for unnatural offence in year 2008, subsequently on 3rd February, 2009 was convicted and sentenced to life imprisonment. Since then to date, the applicant has been requesting for copies of judgement and proceedings, but in vain.

Evidently the applicant attached several letters addressed to the District Court of Kilosa requesting for copies of judgement and proceedings with a view to appeal unsuccessful.

The record provides further that, in year 2015, he applied for extension of time to appeal out of time, same was granted by this court on 13th

July, 2015. However, failed to actualize his intention for lack of original records. At the end and after serving some good number of years in prison, on 30 January, 2018 instituted this application seeking, among others an order to call for the original records of criminal case No. 183 of 2008 and revise it appropriately. Also prayed to quash the conviction and set aside the sentence for failure of the trial court to release its records.

The application was supported by an affidavit of the applicant whose contents is lamentations for failure of the trial court to give him the required documents to enable him to appeal against his conviction and sentence.

Noted that the application has been pending in this court since 2018 undetermined due to the absence of original records. The court tirelessly ordered production of original records, but in vain. After several adjournments, the District Registrar Ms. Kisongo, 7/9/2021 recorded in the file that the trial court's records were submitted in Dar es Salaam District Registry in year 2013, but they are lost therein, same cannot be found. In such circumstances, this court could not endlessly adjourn this application. Thus, invited both parties for hearing. The applicant did not procure legal assistance from learned advocate, while the Republic was represented by learned State Attorney William Danstan.

In arguing his application, the applicant through Video Conference, while at Ukonga Prison, argued and insisted that he tirelessly requested for copies of trial court's documents, since the date of his conviction and sentence to date, but failed. Thus, made this application for orders in

chamber summons. Otherwise, this court be pleased to release him from prison.

In turn the learned State Attorney, did not argue on the contents of the application, rather insisted that the application is unmaintainable for citing inapplicable provision of law, which is section 373 (1) (2) of Criminal Procedure Act.

Further argued that, the prayers in the chamber application cannot be granted for the court cannot grant what is prayed for. Therefore, the prayer to quash conviction and sentence meted by the trial court, due to absence of the original records can not be granted. This court should refrain from entering into that danger of quashing the original judgement without having it. However, he failed to guide the court on what should the court do in the circumstances of this application.

Having summarized the arguments of both parties, it is clear that in this case, there is no single valid document related to the original case as if it never existed. However, the applicant is still serving life imprisonment. To appeal against the trial court's decision is both a natural right (Right to be heard by a superior court) and is a constitutional right. To frustrate the convict from exercising his right to appeal by hiding or destroying original court records is illegal, unjust and intolerable in a court of 21st century.

Moreover, missing of any court document, leave alone, the whole original records as in this matter, is unusual and should be taken seriously by superior courts. To embrace it has serious negative consequences to a long-built integrity of the judiciary to our society.

More seriously, the circumstances of this application are unique in our jurisdiction. Most precedents I have revisited involve loss of one or some documents, but loss of the whole record of trial court is unusual. For instance in **Criminal Appeal No. 573 of 2017**, **Norbert Ruhusika Vs. R,** the Court of Appeal was confronted with a situation of loss of documents. The Court provided three options; **first** reconstruction of records where it is practicable; **second,** to order retrial, only if other factors allow; and **third**, to release the appellant/applicant. In that appeal, the Court found wise and workable option is to release the appellant.

In similar vein, in **Criminal Appeal No. 404 of 2015 Nasoro Mussa Vs. R,** the Court made a thorough research on the best guiding principles to solve future occurrences of loss of documents, at the end they held:-

> *'We think that any loss or misplacement of any court record or part of court proceedings 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 back or restore the missing record, but to show what concrete efforts beyond mere words they have taken to reconstruct or restore the record before scheduling the matter for hearing by either High Court or this Court'*

Undoubtedly, concrete efforts must be shown on reconstruction of records. They have to look those records from the custody or possession of prison department; police investigation; and from the prosecution. In this application, the situation is worse, first, the cause of action occurred in year 2008 and the applicant was convicted and sentenced

for life imprisonment in year 2009, simple mathematics indicates that the applicant has already spent thirteen (13) years in jail; second, the Deputy Registrar in her note in the file, indicate that the original file was called and submitted to Dar es Salaam District Registry in year 2013, but to date is unknown where it is. Therefore, frustrating the applicant's intention to appeal against his conviction and sentence.

Above all, the applicant has attached several letters beginning with year 2009, requesting for copies of judgement and proceedings with a view to appeal against his conviction and sentence, but all along his request was turned down. Even by assumption, prior to year 2013 the original records were still in the custody of the trial court (District Court of Kilosa), yet the trial court failed or deliberately denied the applicant access to those copies of judgement and proceedings, which in any event is his right to have them.

Having failed all his efforts to obtain those copies of judgement and proceedings, opted to file this application for revision, which under strict law is unmaintainable for citing inapplicable section of law. Yet considering the predicaments facing the applicant and bearing in mind the efforts he made, I find this court should entertain the application based on justice, equity, logic and commonsense.

Similarly, the court of appeal in the case of **Robert Madololyo Vs. R, Criminal Appeal No. 486 of 2015** was confronted by similar circumstances that when the appeal was scheduled for hearing, the court realized that the entire proceedings of both the trial and first appellate courts were missing and the District Registrar sworn an

affidavit to the same effect. In determining the way forward, the Court held:-

> *"This implies there is no one general rule on the way forward when courts face missing record of proceedings and, every case involving missing records, should invariably be determined on the basis of its own special circumstances"*

I fully subscribe to the holding of their lordships, in this application, it is not only missing proceedings of the trail court, rather there is no record at all from the trial court. There is neither charge sheet, nor proceedings nor judgement and nor committal to the prison, save only his letters requesting for those documents and the order for extension of time. In such circumstances, I would apply guidance of the Court of Appeal in **Criminal Appeal No. 104 of 2011 between Maruma Papai Vs. R,** where they cited the South African case of **Phillip Daniel Schoombe Vs. The State (2016) ZACC 50** held:-

> *"It is also emphasized that the obligation to conduct a reconstruction of the court records does not entirely fall on the court. The convicted accused, their learned counsel, the prosecution, and even prison department holding custody of the appellant, all share the duty to assist in the reconstruction"*

Based on the guidance alluded by the Court of Appeal, it is clear that loss or missing of court record 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 an affidavit. Such effort of reconstruction of records must involve tracing them from the

Prosecution offices, Police investigation department, prison offices and defence counsels, if the appellant was represented by an advocate during trial. I would therefore, order an adjournment to another hearing date, with a view to allow the Deputy Registrar to apply the guidance pronounced by the Court of Appeal on the cited precedents.

However, in this matter, any order which may be made by this court for reconstruction of the records may not serve the best interest of justice. The applicant has been in prison for thirteen (13) years, I cannot say that he is responsible for the disappearance of the whole file and documents relating to the charge against him. Either party to that trial is responsible.

In the circumstance of this application retrial may be opted, yet it is not feasible in the circumstances of this case whose event occurred fourteen years ago. It would be quite useless to attempt to do so. Similar scenario occurred in **Criminal Appeal No. 573 of 2017 between Norbert Ruhusika Vs. R,** the Court was confronted with an appeal whose trial and first appellate court proceedings and judgements were missing. The court held:-

> *"Taking into consideration that the appellant has served 18 years in jail and efforts to trace the missing record have proved futile, for all fairness and for the best interests of justice the release of the appellant will be the most and fair approach for us to consider in the circumstances of the case"*

I find no better words than what the Court in that case said. In the prevailing circumstances of this case, the best interest of justice does not lead to decide otherwise than to grant the third prayer. Since the

trial court failed to grant him any relevant document since 2009 to date, and since he has served a total of 13 years in jail, while struggling to obtain copies of the trial court's documents, and that there is no possibility of reconstructing same for the court use, then justice demand this application must be granted.

Though I am well aware that the applicant came in this court by way of an application for revision, yet this court is mandated to correct or direct or quash the decisions of subordinate courts. Accordingly, I proceed to quash the conviction and set aside the sentence of life imprisonment meted by the trial court, and order an immediate release of the applicant unless lawfully held.

It is so ordered.

Date at Dar Es Salaam this 16th March, 2022.

P.J. NGWEMBE

JUDGE

16/3/2022

Court: Judgement delivered at Dar es Salaam this 16th day of March, 2022 in the presence of the Applicant through Video Conference while at Ukonga Prison and Mr. Dastan William State Attorney for the Republic/Respondent.

Right to appeal to the Court of Appeal explained.

P.J. NGWEMBE

JUDGE

16/03/2022