IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM SUB REGISTRY)

AT DAR-ES-SALAAM

CRIMINAL APPEAL NO. 291 OF 2020

(Originating from Criminal Case No. 167 of 2015 Ilala District Court)

ISSA FAISAL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT ON APPEAL

S.M. MAGHIMBI, J:

Vide Criminal Case No. 167/2015 at the District Court of Ilala ("the trial court"), on the 22nd day of April, 2016, the appellant herein was convicted of the offence of Armed Robbery contrary to Section 287A of the Penal Code, Cap 16 R.E.2002. He was then sentenced to the statutory sentence of 30 years imprisonment. Aggrieved by both the conviction and sentence so passed, he embarked on efforts to appeal against the decision of the trial court. However, his efforts to pursue his right of appeal to this court are a long hustle that will soon be apparent.

It started with the delay in being supplied with the necessary documents to lodge his appeal. The delay led to his filing before this court a Misc. Criminal Application No. 181 of 2020 seeking extension of time to file notice of appeal. The application was granted by this court (Hon. L.E. Mgonya, Judge) on the 23rd day of November, 2020. He subsequently lodged his notice of appeal on the 02nd day of December, 2020 after submitting the said notice to the prison's officer in charge of Ukonga prison on the 25th day of November, 2020. His appeal was subsequently lodged on the 18th day of December, 2020. It is pertinent to note that at the time of lodging his appeal, the appellant had not yet been supplied with the requisite copies of proceedings. He had only a copy of the judgment that appeal was sought for in hand. In his memorandum of appeal, the appellant had lodged 14 grounds of appeal as hereunder:

1. That the trial court grossly erred in convicting the appellant on the basis of the defective charge where the particular of offence did not disclose the alleged stolen properties.

2. That the trial magistrate erred by holding that appellant was in the prime perpetrator of the crime where none of the police officer(s) to whom the victim (PW1) first reported the offence were called to testify to that effect.

3. That, the learned trial magistrate erred in finding the appellant guilty where the prosecution failed to lead direct investigatory evidence as to how he was apprehended in connection with the crime.

4. That, the learned trial magistrate grossly erred in holding that appellant was found with the alleged stolen properties where no certificate of seizure dully signed by both parties was tendered in compliance with mandatory provisions of criminal procedure Act Cap 20 RE 2002.

5. That, the learned trial magistrate erred in holding to the alleged extra judicial identification of the stolen properties by the victim as exemplified by PW2 a reflected at page 3 of the typed judgment where the victim was not led to identify the same before court for verification.

6. That, the trial court erred by taking into account the un – reliable and un procedural visual identification led by PW1 and the statement of un- procured witness against the appellant at the LOCUS IN QUO, where PW1 was accorded opportunity to see him upon his apprehension before he was arraigned in court.

7. That, the trial court grossly erred in placing reliance on PF3 admitted un – procedural where there was serious none compliance with mandatory provisions of section 240 of criminal procedure Act Cap 20 RE 2002.

8. That, the trial court erred in failing to assess validity of caution statement obtained by PW2 contrary to mandatory provisions (s) of criminal procedure Act Cap 20 RE 2002.

9. That, the trial court erred by holding to statement of un – procured witness obtained contrary to mandatory provision of Tanzania evidence Act Cap 6 RE 2002 as same did not meet condition stipulated under section 34B of the Act.

10. That, the trial court grossly erred by failing to realize that. PW2 played double role by recording appellants caution statement and statement of un – procured witness he did not guilty to be impartial and objective witness which was a fundamental irregularity that resulted into miscarriage of justice to the appellant.

11. That, the learned magistrate erred by convicting the appellant based on un – justified corroborated prosecution evidence.

12. That, the learned trial magistrate erred in convicting the appellant in a case which was poorly investigated and prosecuted.

13. That, the trial magistrate erred in failing to appraise objectively the credibility of the prosecution evidence before relying on it's as basis for conviction.

14. That, the learned trial magistrate grossly erred in holding that the prosecution proved its case against the appellant beyond reasonable doubt as charged.

His prayer was for this court to allow the appeal, quash the conviction and set aside the sentence and acquit the appellant.

However, from December 2020 when this appeal was lodged, it has never proceeded for hearing due to the loss of the original records of the trial court. Unfortunately, the applicant was also yet to be supplied with the copy of those proceedings. On their part, the respondent admitted not to have their original case file that is always kept in the custody of police force, which too was nowhere to be found. The matter had been adjourned ever since, but until when? A decision has to be made otherwise justice delayed is justice denied.

When the matter came before me on the 14th day of February, 2023 it was scheduled for hearing on the 28th February, 2023. On that date, since it appeared impossible to locate the original case file of the trial court, I ordered the Hon. Deputy Registrar to make follow up on the records and in case the same is still not found, a decision has to be made on the fate of the records and this appeal before me. The matter was adjourned to come for necessary orders on the 14th of March 2023. The matter came of several times as the efforts where ongoing and on the 20th day of April when the matter came for mention, parties were informed that no document pertaining the appeal at hand has been found and were both asked to provide the way forward and the hearing proceeded. On that day, Ms. Lilian Lwetabura, learned Senior State Attorney, represented the respondent, the Republic while the applicant, as always, appeared in person and unrepresented.

On her part, Ms. Lwetabura submitted that she has looked at the nature of this appeal and the missing documents and that there are document which the respondent would have wished to have in hand before she could make any reply to the grounds of appeal. For instance, she submitted, one of his grounds of appeal is that the charge sheet was defective, Ms. Lwetabura admitted that the respondent does not even

have a copy of the charge sheet to enable them to make that reply on the defects of the charge sheet, if any.

She was however quick to point to the court that the Court of Appeal has made a decision which allows parties to look at the copy of the judgment to see if the charge sheet was reproduced therein. In this case, she pointed out that they have looked at the charge sheet to see what properties were not mention and at page 1 of the judgment, the trial magistrate reproduced those facts and did not mention those stolen properties as so alleged by the first ground of appeal.

Mr. Lwetabura also directed the court to ground 9 of the appeal, it is a complaint on contravention of Section 34 of the Evidence Act, Cap. 6 R.E 2002, that it was not properly followed. She admitted that under the circumstance where she had no copies of the proceeding, and looking at the judgment, the trial magistrate explained that a notice of 10 days was issued properly (at page 3) meaning it was complied with; however, she was not sure if the other conditions were properly followed.

On the 8th ground, Ms. Lwetabura pointed out that the appellant complained that the cautioned statement was received contrary to the law, a point which she said she could not argue without having a copy of judgment. She further pointed the court to page 4 of the judgment where

the trial magistrate explained on the stolen properties but again if one continues to read, it will be revealed that the confession was made at police. Under the circumstance, she submitted, they could pray for a retrial of the case. She however cautioned that the prayer might not be possible because they have no police case file and hence they have no charge sheet or any facts from their lost file for that reason. That their only way to rescue the situation may be to follow procedure and find the victim of the offence. Although, even on this one, she submitted that they have no case file to enable them to trace her. she

On his part, the appellant submitted that from the circumstance of this case, his prayer is that he is set free because he wrote several letters so that he could be supplied with necessary document for appeal in vain. He revealed that he started writing the letter's timely and even the letters from prison authorities are there. He pointed out that there is a letter from prison officers demanding for copies of proceedings for about 70 people and he was No.8 and it was not until the year 2018 that the was supplied with a copy of the judgment. Thereafter he alleged to have sent a notice of appeal and extension of time and was granted and he then lodged a notice of appeal but until now he has not been supplied with any document. He hence prayed for justice to prevail by him being set free.

Having heard the parties, the court went further to satisfy itself whether the missing records may be rescued. Several directives were made and having proof of affidavits from the trial court, the Hon. Deputy Registrar of this court and letters from the National Prosecution Service, the Prison's Authorities and the Appellant himself that the records of the trial court are nowhere to be found and there is no piece of document available to assist the court to reproduce the said records, my duty here is to make one of the most crucial which is to see, in the interest of justice, what is the way forward on the fate of this appeal. In doing so, I will be guided by several decision of the Court of Appeal when they were faced with the same situation of the lost records of the lower courts.

It is important that I make it clear this point that the basis of the decision under these circumstance is on the case to case basis. This position was held by the Court of Appeal of Eastern Africa (EACA) in **Haiderali Lakhoo Zaver V. Rex (1952) 19 EACA 244** where the court held:

> " *the courts must in this matter try to hold the scales of justice evenly between the parties and, whilst no wholly satisfactory solution can be expected for such an unsatisfactory state of affairs as this appeal discloses, we*

think that the course followed by the learned judges on first appeal was on balance the fairest and most just, and is the only solution which offers an opportunity for a judicial determination on the merits of the case."

On that basis, the court further held that:

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

From the above principle, it is important that one situation should not be treated or equated to the other as by doing so, it may create a mayhem and people might seek to escape the hands of justice by having their records mysteriously lost. I will therefore treat the current situation in its own very peculiar circumstances which includes the fact that the records are lost, the police case file is lost, the NPS file and the charge sheet is lost. This will be considered in line with the grounds of appeal that were raised, to be looked upon in relation to the information that is available in the impugned judgment. Fortunate for me, the situation like

the one at hand has occurred in this court and the court of appeal hence there is no shortage of jurisprudence on what to be done in cases where the records of appal are completely lost.

As stated earlier, in all those situation the courts have handled the matter in a case to case basis depending on the circumstances on each peculiar case. For instance, when the court of appeal was faced with the same situation in the case of **Said Salum @ Kiwindu Vs Republic(Criminal Appeal No. 190 of 2017) [2017] TZCA 580 (26 September 2022);** the court well elaborated on how the situation should be tacked when it so held.

> *" We must admit that this is not the first time the Court is facing the situation almost akin to the present where on account of missing documents in the record of appeal, the Court managed to deal with that situation. In Robert Madololyo Vs Republic Criminal Appeal No. 486 of 2015(unreported) the Court dealt with issue of missing documents in the record of appeal where the entire proceeding of the both , the trial and fist appellate court were missing and the Registrar swore an affidavit to the effect, a in the present case.*

In our current case, after the efforts to find the records proved futile, the Hon. Deputy Registrar, Hon. Joseph Luambano swore an affidavit to the effect that following the affidavit of the Hon. Resident Magistrate Incharge of the District Court of Ilala where the accused was convicted explaining that the records were remitted to the High Court, those records were lost at the High Court Dar es Salaam District Registry. There are also letters from other stakeholders including the National Prosecution Offices for both Dar es Salaam and Coast Region to the effect that they also have no record of the case. The same was the case of the Officer in Charge of Ukonga Prison who could only provide the court with the warrant of remand to Prison from the trial court. At this juncture, the efforts to find any pieces of the missing records so that we could at least patch them and come up with useful piece, apart from the judgment, are futile. The question is on the way forward.

In determining the way forward, in the cited case of **Said Salum @ Kiwindu** (supra) the Court borrowed a leaf out of the cited decision of the Court of Appeal of Eastern Africa in the case of **Haiderali Lakhoo Zaver** (Supra) and held:

> "*in the circumstance of the present case where efforts to trace the missing records with the view of*

reconstructing the record of appeal bore no fruits, we think, we cannot determine the appellant's grounds of appeal which seeks to impugn the decision of the High Court which is not before us."

The way forward that was taken by the Court of Appeal under the circumstance since the trial court's proceedings and judgment were intact, the Court found that the offence which the appellant was arraigned could be gathered in the respective judgment which addresses the missing charge sheet. The court further noted that the trial proceedings containing the evidence adduced by the prosecution and the defence was intact and found that to be sufficient material upon which the High Court could rehear the appeal. The court hence quashed and set aside the judgment of the High Court and the sentence metted therein and remitted back the file to the High Court for rehearing the appeal. Again, as stated in the cited case of **Haiderali Lakhoo Zaver** (Supra), each situation has to be dealt with in its own peculiar situation.

On my part, the only piece that is available is judgment of the trial court. The particulars of the charge sheet are challenged by the appellant to the effect that the stolen properties were not itemized in the charge sheet. In her submissions when the matter came before me, Ms.

Lutaburwa submitted that the court can look at the copy of the judgment to see if the charge sheet was reproduced therein. She pointed to the impugned judgment and admitted that although the particulars of the charge sheet were reproduced, but as alleged in the petition of appeal, the stolen properties were not mentioned. As for ground 9 of appeal, Ms. Lwetabura submitted that the same is a complaint on contravention of Section 34 of the Evidence Act. She however surrendered that under the circumstances where we have no copies of the proceedings, looking at the impugned judgment, the trial magistrate explained that a notice of 10 days was issued property (at page3) meaning it was complied with ; however, the court is not sure if the other conditions were properly followed. She also admitted that on the 8th ground where the appellant complained that the "cautioned statement was received contrary to the law" we cannot argue without having a copy of proceedings pointing out that at page 4 of the judgment, the trial magistrate explained that the accused stole the properties but again if you continue you will find that the confession was made at police.

On the way forward, Ms. Lwetabura submitted that under the circumstance, they may pray for a retrial of the case, however, she submitted they have no police case file and hence no charge sheet or any

facts from their file for that reason. On following procedure to find the victim, she also admitted the impossibility of that option owing to the fact that they have no case file to enable them to trace her.

Under the circumstances elaborated by the respondent, I find the the only option best to be resorted to is ordering a retrial of the appellant before another magistrate of competent jurisdiction. Owing to that, I hereby quash the judgment and set aside the sentence meted to the appellant herein. Having so quashed the judgment and set aside the sentence, I order a retrial of the appellant at an expedited speed given the time that he has spent in prison custody. In a case of a subsequent conviction, the time that he has spent serving his previous sentence must be considered while serving his sentence.

It is so ordered.

Dated at Dar es Salaam this 27th day of April, 2023.

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S.M. MAGHIMBI
JUDGE