

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

MISCELLANEOUS CRIMINAL APPLICATION NO. 32 OF 2022

*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 the decision(s) of the District Court of Magu at Geita in Criminal Case
No. 180 of 2012 dated 30/10/2013.*

BETWEEN

MAWAZO MATHIAS-----APPLICANT

VERSUS

THE REPUBLIC-----RESPONDENT

RULING

Last Order: 20.02.2023

Ruling Date: 23.02.2023

M. MNYUKWA, J

The applicant in this application, one Mawazo Mathias has moved this court through chamber summons and affidavit deposed by him. The application is preferred under section 361(2) and 264 of the Criminal Procedure Act, Cap 20 R.E 2019. The applicant prays this court for the following orders;



- i. The applicant is permitted to present a petition of appeal in the High Court (T) Mwanza against the above mentioned Judgement without accompanied by the copy of Judgement or Proceeding and/ or*
- ii. Other decision in favour of the applicant as the Court observed under circumstances of the case.*

During the hearing of this Application, the applicant appeared in person, unrepresented, while the respondent was represented by the learned State Attorney, Ms Rehema Mbuya. This application was argued orally.

In his application, the applicant being a layman was very brief. He prayed to adopt the chamber summons and his affidavit as part of his submission. He prays for the Court to set him free as he was not supplied with the copy of the Proceedings and Judgement that could enable him to appeal against the decision of the trial court as he was dissatisfied with that decision. The applicant lodged the notice of appeal to show his intention to appeal against the said decision. In his affidavit, the applicant tried to show different attempts to get the records including writing a letter to the Trial Court and Prison Authority to request the copy of the Proceedings and



Judgement but in vain as he was informed that the records were not available.

Responding, Ms. Rehema Mbuya, the learned senior state attorney relied much on the affidavit filed by the Deputy Registrar and the District Resident Magistrate in- charge of Magu District Court which shows different efforts employed to get the records. It was her submission that, it is the constitutional right for the appellant to appeal against the decision of the trial court. In exercising his right to appeal, the appellant is entitled to be supplied with the copy of the proceedings and the Judgement so as to enable him to prepare his grounds of appeal.

Ms. Mbuya went on that, as the affidavit sworn by the deputy registrar and the district resident magistrate in-charge shows that, there are some efforts employed to get the records including involving key stakeholders like the office of the RCO but still the efforts did not yield the fruitful results. She therefore prays the court to decide on the application before it.

Ms. Mbuya refers to the case of **Robert Madololyo vs R**, Criminal Appeal No. 486 of 2015 as a landmark decision where the Court of Appeal gives guidance on what should be done incase there is missing records. She



insisted that, as the application was pending before this court since on 27/06/2022 and the affidavits sworn shows that different efforts were employed to find the records of the trial court but in vain, the court is now left to decide on the matter.

Re-joining, the applicant did not submit anything useful as he join hands the submission done by the learned state attorney, Ms. Mbuya.

It is the practice of the Court to get the records of the lower court before hearing the application. In this case several court orders for calling the records were issued without good response. 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 27/06/2022 without success. Responding to the Order, the Deputy Registrar swore an affidavit on 20th February, 2023 to the effect that, the records could not be traced as the District Resident Magistrate in Charge of Magu District Court has sworn an affidavit that, the records are lost and incapable of being found by any means after involving the key stakeholder, that is RCO office.



Now, the question for determination is whether this application is merited. From the Chamber Summons filed and his oral submission, the applicant requires this court to redress his deprived fundamental right to appeal, acquit and set him free as the original file is missing. Ms. Mbuya was of the view that, it is the constitutional right for the appellant to challenge the decision of the lower court and in so doing, he should be supplied with the copy of the proceedings and the judgement so as he can prepare his grounds of appeal.

As I have earlier on noted, the applicant brought his application under the provision of section 264 of the Criminal Procedure Act, Cap 20 R.E 2019 which empowered this Court to regulate its own practise in administering justice. The section 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.*

From the above provision, it is clear that, 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. Providentially, this is not the first time that court has encountered the same situation that



records are missing. There are different case laws which have 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. Mbuya, the Court of Appeal, did recognise that, the issue of missing records have to be determined on basis of each case on its



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 is 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 prayed to be set free as the records are missing, while the respondent leave for the Court to decide on the application as a key stakeholders who is the RCO office was involved but still there is no good response on the missing records. From the sworn affidavit by the Deputy Registrar, it implies that, the efforts were made by the District Resident Magistrate in-charge to find the records and that there was no any trace of the records relating to the file in question from stakeholders. On his affidavit the deputy registrar deposed that, on the basis of the affidavit sworn in by the District Resident Magistrate in-charge of Magu District Court, he had all reason to believe that the file got lost and cannot be tracked by any reasonable means.

On that accord, it is my opinion that, the Deputy Registrar as the custodian of the records deposed that, there is no means for the missing records to be available as all means were employed to get the same in vain. As the applicant in this case was convicted since on 30th October 2013 as shown in the chamber summons which is also supported by the notice of appeal that was presented for filling on 31st October 2013 and stamped on 5th November 2013, it shows that the appellant is in remand for ten years now waiting a copy of Judgement and Proceedings to appeal against the



5th November 2013, it shows that the appellant is in remand for ten years now waiting a copy of Judgement and Proceedings to appeal against the decision of the Magu District Court which convicted him for the offence of rape.

Consequently, I allow the application by ordering the applicant to be immediately release from prison unless he is lawfully held for any other offence.

Order accordingly.




M. MNYUKWA
JUDGE
23/02/2023

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


M. MNYUKWA
JUDGE
23/02/2023