

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 120 OF 2023

(Originating from the District Court of Mbarali at Rujewa, in Criminal Case No. 48 of 2020)

PATRICK MHAGULE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 25/03/2024

Date of Judgment: 30/04/2024

NDUNGURU, J.

The appellant, Patrick Mhangule is serving 30 years imprisonment for a charge of unnatural offence contrary to section 154 (1) (b) of the Penal Code Cap. 16 R.E 2022. He was convicted of the offence on his own plea of guilty by the District Court of Mbarali District in Criminal Case No. 48 of 2020. Dissatisfied by the conviction and sentence, the appellant preferred the instant appeal.

To ascertain and justly consider the appellant's complaints arising from his own plea of guilty, call for lower court records was issued.

Unfortunately, the records of the trial court were nowhere to be found. Thus, the honourable Resident Magistrate in charge sworn an affidavit to that effect. It was then ordered by this Court on the prayer by Mr. Bashome, learned State Attorney that the record be reconstructed. However, the process of reconstructing the record on the available documents also proved futile as per the information of Ms. Lyimo, learned State Attorney for the respondent/Republic given on 25/03/2024.

As to the way forward of the instant appeal on unavailability of the trial court record and considering that the appellant is challenging the conviction and sentence on his own plea of guilt, Ms. Lyimo prayed for this Court to order retrial of the case. On his part, the appellant who was unrepresented prayed his grounds of appeal to be considered.

Though the lower court record is not in place, there is a typed copy of proceedings accompanying the appellant's petition of appeal. It is stated in the conviction paragraph in the proceedings that the appellant was convicted of carnal knowing of a goat. The appellant in his grounds of appeal states that the trial court recorded a plea of guilty while he admitted that he was found in possession of the alleged stolen goat. That, his plea was wrongly construed and that the trial court

recorded different from what he actually stated. Further that the trial court erred when it admitted exhibits without reading their contents.

The appellant's grounds of appeal, nevertheless, cannot be dealt in the absence of the lower court record. Lost of the record of appeal is not a new phenomenon though it needs to be condemned and discouraged. Addressing the situation, the Court of Appeal of Tanzania in different occasions has given different orders such as, reconstruction of the record, quashing and setting aside the conviction and sentence and order for retrial, quashing and setting aside conviction and sentence and releasing the appellant, quashing and setting aside conviction and sentence and releasing the appellant leaving the matter to the wisdom of the Director of Public Prosecution. See, for example, **Robert s/o Madololyo vs Republic** (Criminal Appeal 486 of 2015) [2018] TZCA 346 (19 February 2018), **Samwel Gitau Saitoti Saimoo & Another vs Republic** (Criminal Appeal 5 of 2016) 2018 TZCA 199 (27 September 2018), **Charles Ramadhani vs Republic** (Criminal Appeal 429 of 2015) 2020 TZCA 1871 (25 November 2020), **Maruna Papai vs Republic** (Criminal Appeal 104 of 2011) [2021] TZCA 180 (30 April 2021) (all cases from Tanzlii).

It should be considered, however, that an appropriate order when there is missing or lost record depends on the circumstances of each case. This was observed in the case of **Robert s/o Madololyo vs Republic** (supra) that:

*"It seems to us that the defining phrase for our purpose is -
"The Courts must try to hold the scales of justice evenly
between the parties" **This implies that there is no one
general rule on the way forward when courts face
missing record of proceedings and, every case
involving missing record, should invariably be
determined on the basis of its own special
circumstances."***

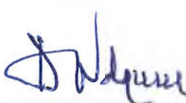
Moreover, in the case of **Maruna Papai vs Republic** (supra) proceedings and judgment were nullified conviction and sentence quashed and set aside and the appellant released from prison on the reason that not only the lower courts' record was nowhere to be found but also the police file which had the investigation documentation could not be found. Therefore, that there was no material upon which the prosecution can be recommenced.

In the matter under consideration, the learned State Attorney held the view that, the case be ordered for retrial. Nonetheless, I do not find if justice will be served. This is because, in the absence of the trial court's record, the charge sheet which is the bases of any proceedings in criminal cases is not there. It was also stated by the learned State Attorney that reconstruction of the record became impossible which means the prosecution file containing statements of witnesses is untraceable. How now, retrial can be possible under those circumstances. In fact, the appellant has already served only three years imprisonment out of 30 years sentence meted on him. Had the circumstances been different from the present, retrial would have been appropriate.

Owing to the above observation and reasons, I invoke section 371 (1) (a) of the Criminal Procedure Act, Cap. 20 R.E 2022 to nullify the proceedings, quash the conviction and the sentence and order the immediate release of the appellant from custody.

Ordered accordingly,




D.B. NDUNGURU
JUDGE
30/04/2024