IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 187 OF 2019

CHIEF EXECUTIVE, TANZANIA NATIONAL ROADS AGENCY (TANROADS).....APPLICANTS

VERSUS

JONES KIBOGOYO.....RESPONDENT

RULING

Date of last Order: 08/06/2020
Date of Ruling: 12/06/2020
Z.G.Muruke, J.

This is fairly old dispute, started five years, way back at CMA. After several orders of calling for records, ultimately officer incharge of the Commission for Mediation and Arbitration forwarded an affidavit dated 18th March, 2020 to the effect that CMA records has been misplaced, and requested for more time to locate the same. It is now three months, same has not been forwarded. Mr. Usaje Mwambene moved this court, to quash proceedings and set aside award and order retretrial, because there is no proceeding for this court to refer to in the cause of hearing. Mr. Abdallah Kazungu for the respondent objected the prayer, saying that trial denovo will not be appropriate order, instead, parties be ordered to go back to CMA and compose proceedings, for CMA to harmonize the same, then forward to this court. When asked if he has a copy of trial CMA proceedings, his answer was no. However, Mr. Kazungu insisted that, respondent case is for unfair termination, respondent has been denied

right to work by applicant chief executive, therefore this court being the court of Equity should act accordingly.

It is worth noting that the disappearance of files in courts has become a serious and frustrating impediment in dispensation of justice. In a bid to cure this malady, the courts have devised various mechanisms and these include **one;** the issuance of orders of retrial, **two;** issuance orders of reconstruction of the lost file, or an automatic acquittal in criminal cases. In generally, where it is apparent that the records will never be traced the matter is left to the court for appropriate orders. I must admit that this is not the first time the court is confronted with such a frustrating situation. **In JUMA SAIDI RASHIDI & YUSSUF SAID SHIRONGWA VS. THE REPUBLIC, Criminal Application No. 44 & 45 of 2011**, High Court (Sumari, J) Mwanza (Unreported) the court held that:-

> Subsequently as correctly pointed out by the Republic in this case the applicants have already served half of the sentence i.e. 15 years, a substantial part of sentence of 30 years awarded. It would therefore be not in the interest of justice for them to undergo a new trial as the served sentence is enough punishment for them to get a lesson. I therefor quash the conviction on the ground that as the record of the original case is not traceable and it is impossible for it to be obtained. The sentence also is set aside since the party served sentence seems to be just on both sides. Applicant's conviction is quashed and their main part of sentence unserved is set aside. The applicants are therefore entitled

to freedom as from now. Let them be set free forthwith unless otherwise lawfully held.

In the Republic Vs. Wambura Chacha, Criminal Revision No. 2 of 2008, High Court Mwanza Masanche, J (unreported) the court quashed the conviction and set aside part of the un-served sentence on reason that the applicants had served a substantial part of their thirty years imprisonment sentence and it was in the interest of justice which required the applicants not to undergo a fresh trial.

Elsewhere in India, in the case of **GOOROO DYAL SINGH VS. DURBAREELAL, 7 WR 18, 1867,** the records of the Trial Court were lost in transit from the first court to the second. The High Court held that the court had to choose between directing the Court below to receive such secondary evidence of the contents of the original records as will be forthcoming or to direct an entirely new trial. However, it is settled that in ordering so, the court must always have regard to the questions whether the trial was defective, whether the interest of justice so requires and whether the order won't prejudice the accused. In **FATEHALI MANJI VS. THE REPUBLIC [1966] 1 EA 343,** the court held at page 344:

> "... in general a **retrial will be ordered only when the original trial was illegal or defective,** it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not

necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and **an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.**"

Likewise, it was held in **AHMEDI ALI DHARAMSI SUMAR VS REPUBLIC [1964]1 EA 481** at page 483 that:

"Each case must depend on the particular facts and circumstances of that case but an order for **re-trial should only be made where the interest of justice require it, and should not be ordered where it is likely to cause an injustice to an accused person."**

More considerations of what a court should do in a situation like the one we have now, was stated in **WAINAINA VS. REPUBLIC [2004]2 EA 349,** the court held at page 350:

"In such a situation as this, the Court must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss has occurred. Who occasioned the loss of all the files? Is the appellant responsible" Should he benefit from his own mischief and illegality? In the Final analysis, the paramount consideration must be whether the order proposed to be made is the one which serves the best interest of justice. An acquittal should not follow as a matter of course where a file has

disappeared. After all a person, like the appellant, has lost the benefits of the presumption of innocence....he having been convicted by a competence court and on appeal the burden is on him to show that the Court which convicted him did so in error. Thus, the loss of the files and proceedings may deprive him of ability to discharge that burden, but, it by no means follows that he must of necessity be treated as innocent and automatically acquitted. **The interest of justice as a whole must be considered."**

It is undeniable fact that absence of records has deprived the applicant of his right to revision enshrined under article 13(6)(a) of the Constitution of the United Republic of Tanzania which provides:

"When the rights and duties of any person are being determined by the court or any other agency, **that person shall be entitled** to a fair hearing and **to the right of appeal or other legal remedy** against the decision of the court or of the other agency concerned."

In **NDYANABO VS. ATTORNEY GENERAL [2001] 2 E.A 485,** it was held that

In Tanzania a person's right to unimpeded access to court "can be limited only by a legislation which is not only clear but which is not violative of the provisions of the constitution." We have no law barring courts from providing litigants with copies of court proceedings during the course

of the trial so as to enable them to conduct an effective defence or to file an appeal.

What was requested by the applicant before me, was within the powers of the trial tribunal to meet CMA. The applicant needed the proceedings for her be heard on revision. This, in my considered opinion, would have helped further the interest of justice. It is settled law which binds us, that fair trial must be observed and respected from the moment the case is filed at CMA, until the final determination of the Revision or appeal to the Court of Appeal as the case may be. So, a fair trial, first and foremost, encompasses strict adherence to the rules of natural justice, whose breach would lead to the nullification of the proceedings. Court of law have a constitutional obligation to dispense speedy, quality and equal justice. Court, should not "unduly allow any of the parties to tactly introduce delay or be a clog on the wheel of progress of justice, or unduly deny any party his right to prosecute, defend, or file revision and or appeal as the case may be. Commission, Tribunal and all courts of law, must ensure that records are ready available and forwarded once required on appeal or revision for furtherance of interest of justice.

It sounds unfair and inequitable, in my considered opinion, for a party to criminal/civil litigation to be punished for an error committed by the court and more specifically where the error is within the domestic affairs of the court. Throughout history, courts of law have assumed the position of custodians of justice. It therefore comes as a surprise and indeed it lowers down the reputation and respect of the court when parties submitting themselves to the jurisdiction of the court delay their cases for

wrongs committed by court. Courts of law should ensure that it's records are in place and ready available for furtherance of interest of justice.

I have considered, injustice to the parties if any. I see none, much as case will be delayed, but right of being heard is so fundamental to both applicant and respondent.

In my opinion, interest of justice in this case demands, quashing of proceedings and setting aside award in labour dispute number CMA/DSM/KIN/R.110/15/795. Dispute to start a fresh after sixty days from today, by applicant filing CMA form number one if still interested.

Z. G. Muruke

JUDGE

12/06/2020

Judgment delivered in the presence of Mr. Usaje Mwambene for the applicant and Mr. Abdallah Kazungu for the respondent.

Z.G.Muruke

JUDGE

12/06/2020