

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MMILLA, J.A., MZIRAY, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 175 OF 2011

SAID SHABANI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the conviction and sentence of the High Court of Tanzania
at Arusha)**

(Mwakibete, J.)

dated 6th day of June, 1985

in

HC. Criminal Session Case No. 44 of 1984

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RULING OF THE COURT

25th & 28th September, 2018

MMILLA, J.A.:

This appeal was slated for hearing on 25.9.2018, and all the parties were in attendance. While Mr. Elvaison Maro, learned advocate, appeared for the appellant who was also present in Court, the respondent/Republic enjoyed the services of Ms Tarsila Gervas who was assisted by Mr. Azaeli Mweteni, learned State Attorneys.

At the commencement of hearing, Mr. Maro informed the Court of the predicaments of this appeal because the record of the trial High

Court cannot be traced, the effect of which the appellant has not been supplied with the proceedings and judgment to enable him to file the appeal. In view of that unusual situation, on behalf of the appellant, he filed an application in which the Court's indulgence is sought to grant the orders expressed in the notice given in terms of Rule 4 (1), (2) (a) and (b) of the Rules which was filed on 30.11.2017. In that notice, the appellant is asking us to quash the judgment and convictions entered on 6.6.1985, set aside the sentence and release him from prison.

Mr. Maro recounted that in 1985; the appellant was charged with and convicted of the offence of manslaughter contrary to section 195 of the Penal Code. As already pointed out, he was on 6.6.1985 sentenced to life imprisonment term. He did not readily appeal because after he was sent to prison, he was disturbed by the various transfers to different prison centers in the country and lost the track. In 2011 however, he successfully applied for extension of time within which to file his appeal. Subsequent to that, he applied to be supplied with the record of appeal, but has to date not been supplied with the same as envisaged by Rule 71 of the Tanzania Court of Appeal Rules 2009 (the Rules). The reason being advanced is that efforts to trace the record

have proved futile. He pointed out that the Registrar has filed affidavits to that effect.

According to Mr. Maro, they first appeared before the Court on 4.12.2017, but the appeal could not be heard on account that the record was not found. On that day however, the Court directed the Registrar of the Court of Appeal to instruct the Deputy Registrar of High Court, Arusha Registry, to step up efforts to trace the record. That was done, but so far they have not succeeded to recover the missing record. He therefore asked the Court to allow them submit on the merits of the notice given in terms of Rule 4 (1), (2) (a) and (b) of the Rules.

On their part, Mr. Mweteni held the view that not enough efforts have been made by the Deputy Registrar, Arusha Registry, to trace that record. He pointed out that in paragraph 7 of the affidavit affirmed by Seif Mwishehe Kulita; the Deputy Registrar of the High Court at Arusha, the deponent has not given evidence to show that he indeed communicated with the DPP's office here in Arusha, nor the police. He also referred us to the various letters which were written between the Registrars of the High Court, Dar es Salaam, the Court of Appeal and the High Court at Arusha on various dates which is clear

evidence of the communication which was made, but that there was no evidence of such nature/communication between the Registrar's office at Arusha and the DPP's office, as well as the Prison.

On another point, Mr. Mweteni submitted that the letter referenced 110/AR/1/II/173 of 19.3.2015 from the Prison Officer In-charge of Arusha Central Prison showed that the case which is the subject of this appeal involved two persons; the appellant and one Leiyo Msele, who was also convicted and sentenced to a term of 12 years imprisonment. He claimed that there was need for the Deputy Registrar of the High Court at Arusha to interview the appellant to find out from him if Leiyo Msele could be of any assistance to the problem we are facing.

He similarly submitted that he inquired at their office if there was any communication between them and the Deputy Registrar, Arusha Registry, on the matter. He alleged to have been informed that they were not contacted. In the circumstances, he urged the Court to grant the adjournment and re-direct the Deputy Registrar, Arusha Registry, to make further communications with all the other stake holders in this regard.

In a brief rejoinder, Mr. Maro referred the Court to paragraph 6 of the 2015 affidavit which was sworn by Wilbard Richard Mashauri, the then Deputy Registrar, Arusha Registry, in which he had deposed that the office of the DPP, Arusha Zone, was contacted but were informed that they had no documents of that case. He argued that after seeing that affidavit, that office had duty to assist if they had those documents. He recapped his prayer for the Court to order and direct that the appeal proceeds to hearing.

We have intensely considered the competing arguments of the counsel for the parties in this matter. The issue is whether or not it will be proper to further adjourn the hearing of this matter in the circumstances herein obtaining.

Admittedly, the missing record has seriously clouded the progress of this appeal. We hasten to point out that could be the period that has elapsed since 1985 when the appellant was convicted and sentenced and this time around when it is being sought to be appealed against counts for the difficulties being experienced in tracing it. Unlike the view held by the Republic, we wish to appreciate the efforts so far made by the Registrars from all Registries of courts; the Court of Appeal of

Tanzania and the High Court at Dar es Salaam and Arusha Registries. This is born out of the correspondences contained in the Record of Appeal which include the letters which were exchanged between the Registrars themselves, and those which were written to the prison officials. Also, this is born out the affidavits herein availed; those of Wilbard Richard Mashauri and Seif Mwishehe Kulita, all of which were aimed at tracing the whereabouts of the record which is the subject of appeal.

We likewise wish to point out that the DPP's office, Arusha Zone, knew that the record of the present appeal was missing since they had seen the affidavit which was sworn by Mr. Wilbard Richard Mashauri as afore-pointed out. On the basis of that, we agree with Mr. Maro that they had duty to volunteer information in that regard if they had any documents in that connection. We also find it improper to uphold the suggestion advanced by Mr. Mweteni that the Deputy Registrar, Arusha Zone, ought to have communicated with all the prisons to which the appellant had the occasion to be harboured as a convict. In our firm decision, it was sufficient to communicate with the Prison Office In-charge of Arusha Central Prison on the belief that the

latter had duty to communicate with all other prison centers to which the appellant sojourned.

That said and done, we find that enough efforts have so far been made to trace the missing record, but that lucky did not stand in the appellant's way. We similarly find that it will be unfair to the appellant for the Court to continue adjourning this matter, as to so goes contrary to the principle of fair administration of justice. As the old adage goes, justice delayed is justice denied. Consequently, we order and direct that the matter comes up on 10.10.2018 for hearing of the matters expressed in the said notice.

DATED at ARUSHA this 27th day of September, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is true copy of the original.


B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL