

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**CRIMINAL REVISION NO. 20 OF 2019**

**PAULO LUCAS ZAKAYO @ DOX ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

15/9/2022 & 13/10/2022

**ROBERT, J:-**

The applicant, Paulo Lucas Zakayo @ Dox moved this Court to revise and issue appropriate orders against the decision of the District Court of Nyamagana in Criminal Case No. 601 of 2011 through which he was convicted of armed robbery c/s 287 of the Penal Code, Cap. 60 R.E. 2002 and sentenced to thirty years imprisonment. The application grounded on the reasons stated in the affidavit filed in support of this application.

According to the application, the applicant was sentenced on 22<sup>nd</sup> day of April, 2013. Immediately thereafter, he lodged a notice of appeal and began to pursue Court record in order to prepare his grounds of appeal. As the record was not forthcoming he filed this application imploring this Court to quash the conviction and set aside his remaining sentence due to failure

of the trial Court to provide the record of the case which made it impossible for him to pursue his appeal.

This Court having received the applicant's application directed the trial Court on 11<sup>th</sup> March, 2020 to trace and avail the original records in Criminal Case No. 601 of 2011. The trial Court commenced efforts to trace the missing record and on 25<sup>th</sup> April, 2022. Eventually, the Resident Magistrate In-charge of Mwanza through a sworn affidavit informed the Court that having searched the said file in the registry of the Resident Magistrates' Court of Mwanza and from different stakeholders including the National Prosecution Office, Tanzania Police Force and the Prison Office, they failed to find the record of the said case and believes that the said file is lost and incapable of being found by any reasonable means.

On account of the missing records in criminal case No. 601 of 2011 at Nyamagana District Court and failure to reconstruct the missing records, the Court directed the Deputy Registrar to write to the Officer In-charge of Butimba Prison where the applicant is being held to enable the Court to know details in respect of the offence with which the applicant was convicted, the sentence imposed and served and the remaining sentence. Information received from Butimba Prison revealed that applicant was convicted for

armed robbery and sentenced to thirty years imprisonment on 22<sup>nd</sup> April, 2013.

At the hearing of this application, the applicant appeared in person without a legal representative whereas the Republic was represented by Ms. Maryasinta Lazaro, Senior State Attorney.

Submitting on this application, the applicant simply stated that he implores the Court to consider the time he has spent behind bars and discharge him from this offence.

On her part, the learned State Attorney submitted that, based on the letter from Butimba Prison dated 8/9/2022 which is attached to the warrant of commitment, the applicant has served his prison sentence for more than ten years. Since the offence charged was not bailable he must have been in custody since the year 2011 when he was arrested and charged. She submitted that, in deciding this matter the Court should consider the following; that we do not have records which can be used to reconstruct the records of appeal, the amount of time the accused has been in custody and the gravity of the offence in question.

She argued further that, since there is no legal guidance on how to treat cases with missing records or where records cannot be reconstructed, she urged the Court to be guided by decided cases to make a determination of this application. From the submissions and circumstances of this application, the question left for this Court to determine is what should be the fate of the matter before this Court.

In the case of **Maruma Papai vs Republic, Criminal Appeal No. 104 of 2011**, CAT, Dar es salaam (unreported), the Court of Appeal of Tanzania quoted with approval the persuasive decision of the Court of Appeal of Kenya in the case of **John Karanja Wainaina vs Republic**, Criminal Application No. 61 of 1993 (unreported) where the Court of Appeal was confronted with similar scenario and having considered as to whether or not to acquit the appellant or order a retrial the Court said:

*"In such situation as this, the Court must try to hold the scales of justice and in doing so must consider all circumstances under which the loss 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 should be whether the order proposed to be made is the one which serves the best interest. 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 benefit of the presumption of innocence given to him by section 77(2)(a) of the Constitution he having been convicted by competent 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 may by no means follow that he must of necessity be treated as innocent and automatically acquitted. The interest of justice as a whole must be considered.*

*The appellant has been in prison for about 15 years. We cannot say that he is responsible for the disappearance of all files, proceedings and documents relating to the charge against him. A retrial is not feasible in the circumstances. It would be quite useless to attempt to do so. Above all no appeal now can be prosecuted before us. Records cannot be reconstructed as none exist.*

*We have carefully considered the matter before us. We would place this on an exceptional category. In the circumstances, we quash the conviction and set aside the sentence of death. The appellant is set at liberty unless otherwise lawfully held”.*

In the present case, from the depositions of the Resident Magistrate In-charge of Mwanza, it is clear that the missing records of the trial Court cannot be found. Information obtained from the Officer in-charge of Butimba Prison has enabled the Court to know that the applicant who is still serving his custodial sentence was convicted for armed robbery and sentenced to thirty years imprisonment on 22<sup>nd</sup> April, 2013 which means he has now served almost 10 years of his custodial sentence. There is no evidence which indicates that the applicant was involved in the loss of the Court records or that he was supplied with the copy of judgment and proceedings of the trial Court. The question that this Court has to grapple with is what should be done with this flimsy information in the wake of missing Court records. It is impracticable to make a determination on any perceived irregularities or evidence in respect of the decision of the trial Court and the order for retrial is also not feasible after more than ten years since the alleged crime took place and in the absence of trial proceedings which indicates if the trial was either illegal or defective. For all fairness and for the best interest of justice the release of the applicant will be the fairest approach for this Court to consider in the circumstances of this case.

On the foregoing, I hereby nullify the proceedings and judgment of the trial Court, quash the conviction and sentence and order for the immediate release of the applicant from custody.

It is so ordered.



  
K.N. ROBERT  
JUDGE  
13/10/2022