

TANZANIA / JUDGMENT

KULWA PAULO CHAKONKO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA TABORA SUB-REGISTRY AT
TABORA DC CRIMINAL APPEAL NO. 61 OF 2023 (Originating from the District Court of Tabora in
Criminal Case No. 48 of 2021) KULWA PAULO @ CHAKONKO APPLICANT VERSUS
THE REPUBLIC RESPONDENT

RULING

Date of Last Order: 22/07/2024 Date of Ruling: 29/07/2024 KADILU, J. The appellant herein named Kulwa Paulo @ Chakonko was charged and convicted for the offence of rape contrary to sections 130 (1), (2) (e), 131 (1), and (3) of the Penal Code, [Cap. 16 R.E. 2019]. He was sentenced to life imprisonment by Tabora District Court. Aggrieved by the decision, he wished to appeal to the High Court, but he found the prescribed time to lodge notice and petition of appeal had lapsed. He applied for and was granted an extension of time to lodge both notice and petition of appeal. He, thus, filed a notice and petition of appeal in this court praying for the court to allow the appeal, quashing out the conviction, setting aside the sentence, and ordering his release from custody allegedly because:

1. That, the prosecution case was not proved against the appellant to the standard required by the law.
2. That, the age of the victim of the offence was not cogently established.
3. That, Section 127 (2) of the Evidence Act was not complied With before the victim testified in court. i
4. That, the learned trial Magistrate erred in law and fact for failure to properly resolve the identity of the rapist.
5. That, the learned trial Magistrate did not address his mind to the issue of whether the appellant was arrested on the disclosure of the offence by PW1 or otherwise, given the testimonies of PW2, PW3, DW1, and DW2.
6. That, the learned trial Magistrate erred in law and fact for failure to address his mind to the issue of whether sexual assault as testified by PW7 is the same thing as rape.

7. The prosecution did not cogently establish penetration as required by Section 130 (4) of the Penal Code. As the record was not forthcoming from the trial court, on 06/05/2024 when the case came up for necessary orders, the appellant brought to the attention of this court his dissatisfaction about the delay in supplying him with the proceedings of the trial court. He complained that he was wondering why a delay while the case was heard by the District Court of Tabora which is in the same building as the High Court. Although this court calmed down the appellant, this was an eye-opener on the missing record of the trial, and as such efforts to trace the same commenced. In this regard, between May and July 2024, there were several correspondences between the Deputy Registrar of the High Court, the District Resident Magistrate in Charge of Tabora District Court, and the Regional Prosecution Services Office, However, the District Resident Magistrate in Charge notified this court that nothing was found considering that the office was shifted from Miemba where the court carried on its business temporarily during the renovation of the current court's premises. When the appeal was called on for hearing, the appellant appeared in person as he had no legal representation. The respondent was represented by Ms. Upendo Florian, the learned State Attorney. Ms. Upendo informed the court that they had been served with an affidavit from the trial court stating that the entire records of the court in Criminal Case No. 48 of 2021 are nowhere to be seen. When probed by the court if the parties could assist the Deputy Registrar in reconstructing the records, the learned State Attorney replied that since a long time had passed from when the appellant's case was decided, at present the prosecution has nothing concerning the appellant's case. The court allowed the appellant to submit about the effect of having no case file from the trial court. He directed all his blame to the trial court which, he submitted, should have kept all the records of his case intact. He argued that as a prisoner, he had no personal control over his documents which are kept by the court. He prayed for the court to release him from prison as the loss of records was not his fault. Indeed, the trial Magistrate has filed in this court an affidavit to the effect that he had made efforts to trace the case file from the District Court Registry without any success. Currently, the only documents in the record of this appeal are an incomplete copy of the judgment, the appellant's Chamber Summons supported by his affidavit seeking leave of the High Court to file his appeal out of time, together with the Ruling allowing him to file the notice and petition of appeal. These records show that the High Court granted the appellant an extension of time on 28/07/2023 for him to file notice and petition of appeal. As a result, he filed his notice of appeal on 04/08/2023 and the petition of appeal on 14/08/2023 which, as is now apparent, cannot proceed for want of record of proceedings. 3 Section 362 (1) of the Criminal Procedure Act stipulates that every appeal to the High Court should be made in the form of a petition in writing presented by the appellant or his advocate, and every petition must be accompanied by a copy of the proceedings, judgment or order appealed against. The appeal before me has been filed without accompanying documents hence, the law has not been complied with. Apparently, in the absence of the trial proceedings and the impugned judgment, it is impracticable for the parties to address the court on the grounds of appeal. This court cannot also understand what transpired during the trial of the appellant without having the records. In the case of Maruna Papai v.R., Criminal Appeal No.

104of2011, the Court of Appeal at Dar es Salaam held that circumstances surrounding the missing records which are not always similar, are pertinent in determining the resultant order on the fate of an appeal which must embrace what is in the best interests of justice. Similarly, in Robert Madololyo v. R.f Criminal Appeal No. 486 of 2015, the Court of Appeal at Tabora stated as follows: "It seems to us that..... 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." Ordinarily, after having been satisfied that the entire proceedings of the trial court are missing, there are two alternative and competing orders that this court may make, either to order a trial de novo or to release the appellant. The learned State Attorney urged the court to order a retrial of the appellant. On the other hand, the appellant prayed for his release from prison. I am of the humble opinion that the order of retrial will not serve the ends of justice in the circumstances of this case. I hold this view because the prosecution has categorically informed the court that they have nothing on record relating to the appellant's case. In the circumstances, to order a retrial of the appellant will be tantamount to allowing the prosecution to go back and recharge the appellant after rectifying some defects or filling in gaps at his detriment. Since the appellant is challenging both the conviction and sentence, it is apparent that he is still fighting for his innocence. Through his grounds of appeal, he has tried to raise some doubts in the prosecution case. In Muhammad Ramzan v. The State (PL) 1984 SC 61, it was stated that if the facts and circumstances of the prosecution case are susceptible and amenable to two interpretations, one in favour of the prosecution and the other in support of the accused, then in such eventuality, the benefit of doubt should be extended to the accused. The benefit of doubt as of right, is to be given to the accused when there is equal possibility of the accused being guilty or not guilty. In view of what I have endeavoured to discuss and in the best interests of justice, I quash the conviction and set aside the sentence meted out to the appellant by the District Court of Tabora. I further order his immediate release from custody unless held for other lawful cause. Order accordingly. JUDGE 29/07/2024 5 The ruling delivered in chamber on the 29th Day of July, 2024 in the presence of the appellant and Ms. Suzan Barnabas and Steven Mnzava (State Attorneys) for the Respondent. KADILU, MJ. JUDGE 29/07/2024 6

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