

TANZANIA / JUDGMENT

mashaka marwa vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA CORAM: MKUYE. 3.A. GALEBA. J.A. And RUMANYIKA. 3.A.1 CRIMINAL APPEAL NO. 138 OF 2018 MASHAKA MARWA..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the decision of the High Court of Tanzania at Mwanza) (Gwae. 3.^ dated the 7th day of May, 2017 in Criminal Appeal No. 99 of 2017 RU LIN G OF TH E C O U R T 27th April & 9th May, 2022 MKUYE. J.A.: In the matter before us, the appellant Mashaka Marwa was charged with an offence of rape contrary to sections 130(1) (2) (e) and 131 (1) of the Penal Code, [Cap. 16 R.E. 2002; now R.E. 2019] (the Penal Code) and was sentenced to thirty (30) years imprisonment and corporal punishment of six (6) strokes of a cane. The appellant was further ordered to compensate the victim with Tshs. 4,000,000/=. Upon being aggrieved by that decision, he appealed to the High Court vide Criminal Appeal No. 336 of 2016 but the said appeal was dismissed. i Still protesting his innocence, he has appealed to this Court on three (3) grounds of appeal which, for a reason to be apparent shortly, we do not intend to reproduce them. When the appeal was called on for hearing, the appellant appeared in person and unrepresented; whereas the respondent Republic enjoyed the services of Mssers. Tawabu Yahya Issa and Donasian Joseph Chuwa, both learned State Attorneys. Before the hearing could commence at the earnest, Mr. Issa rose to bring to the attention of the Court on the matter of law he had discovered during his preparation for the hearing of this appeal. He contended that although Rule 71(2) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) specifically requires the charge sheet to be included in the record of appeal, the same is missing from the record of appeal before us. He submitted further that, although item 1 of the Index to the record of appeal shows that the charge sheet is in pages A1 to IB, the same is not there. He added that, their efforts to trace it from the original file proved futile. He therefore, argued that the hearing of this appeal cannot proceed as the record of appeal is incompetent and prayed for an adjournment with a direction to the Registrar/Deputy Registrar that he/she should prepare a valid record of appeal which would include the charge sheet and supply it to parties. To fortify his argument, he referred us to the case of the Director of Public Prosecutions v. Wambura Mahenga @ Kisiroti and 2 Others, Criminal Appeal No. 262 of 2017 (unreported). In reply, the appellant being a lay person in legal aspects, had nothing to comment and left the matter to the Court to determine. On our part, we have considered the submission by the learned State Attorney.

Essentially, we agree with his argument that the charge sheet is missing in the record of appeal and also that his effort to trace it ended up in vain. We, however, note that in the case of Wambura Mahenga @ Kisiroti and 2 Others (supra) the Court was confronted with almost a similar scenario. In the said case, the counsel for the appellant prayed for adjournment because the record of appeal did not contain the vital documents, namely, the written submissions from both sides which were lodged in the High Court while arguing the appeal in the first appellate court. It was argued that, the appellants efforts to trace the same with the Court proved futile. Though the respondent resisted to the application for adjournment attributing such state of affairs to the appellant's negligence, the Court found that the adjournment of the case 3 was inevitable on account of the incomplete record of appeal. In the end the Court stated as follows: "Based on what has been highlighted above, it is evident that adjournment of the hearing of this appeal is inevitable. We are therefore, constrained to adjourn the hearing of this appeal to another date as it will be scheduled by the Registrar. Meanwhile, we direct the Registrar to supply the appellant with complete record of appeal..." We subscribe to the above authority. In the matter at hand, as alluded to above, it is not disputed that the charge sheet is missing in the record of appeal. As was rightly submitted by the learned State Attorney, in terms of Rule 71(2) (b) and

- (4) of the Rules the charge sheet is among the documents which are mandatorily required to be included in the record of appeal. On the other hand, it is notable that item 1 of the Index to the record of appeal indicates that the charge sheet is included at pages A1 and B1 while in reality the said pages are not shown in the record of appeal. It is obvious that, this renders the records of appeal to be incomplete. Thus, applying the principle in the case of Wambura Mahenga @ Kisiroti and 2 Others (supra), we are inclined to agree with Mr. Issa that since the charge sheet which is a vital document in instituting the case is missing from the record of appeal, this court cannot proceed with the hearing. Consequently, we are constrained to adjourn the hearing of the appeal under Rule 38A (1) of the Rules to another convenient session to be scheduled by the Registrar. We further direct the Deputy Registrar of the High Court, Mwanza Registry to furnish the appellant with a supplementary record which will include the charge sheet. It is so ordered. DATED at MWANZA this 7th day of May, 2022. R. K. MKUYE JUSTICE OF APPEAL Z. N. GALEBA JUSTICE OF APPEAL S. M. RUMANYIKA JUSTICE OF APPEAL The ruling delivered this 9th day of May, 2022 in the presence of the appellant in person and Mr. Tawabu Yahya Issa, learned State Attorney for the respondent/ Republic, is hereby certified as a true copy of the original. W - A. L. KALEGEYA DEPUTY REGISTRAR COURT OF APPEAL

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