TANZANIA / JUDGMENT

20180214 TZCA Tabora 1

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' f. 11 . -" IN THE COURT OF APPEAL OF TANzANIA AT TABORA (CORAM: JUMA. C.J .. MJASIRI. J.A. And MUGASHA. J.A.} CRIMINAL APPEAL NO. 486 OF 2015 ROBERT S/0 MADOLOLYO .....-.....APPELLANT VE~US TtfE .REPUBLIC ... ·····••·••·••·••·••·••·····••·••····· ·····••·····•RESPOND'ENT (Appeal from the decision of the High Court of Tanzania at Tabora} (Mwita, J.) dated the 30TH November, 2001 in Criminal Appeal No. 15 of 2001 RULING O.F THE COURT 13th & 1·9 th February, 2018 .lUMA, C.J.: The appellant ROBERT s/o ·MADOLOLYO was on 20/11/2000 convicted by the· District Court of Bariadi of the offence of rape contrary to sections 130 and 131 of the Penal Code, Cap. 16 and was sentenced to life imprisonment. His first appeal in the High Court at Tabora was dismissed by Mwita, J. on 30/11/2001. It was until . 27/05/2015 when the appellant filed a Chamber Application in the 1 . -----·-· ·-··-- .. , ... ,. - ~. -- ..... -~---------···---'" fl High Court at Tabora to pray for leave to file his Notice of Appeal to· this Court out of time. He was on 25/08/2015 granted leave by Rumanyika, J., to file his notice of appeal out of time. When this appeal came up for hearing today, the appellant appeared in person fending for himself while Ms. Upendo Malulu learned State Attorney appeared for the respondent Republic. Ms. ... Malulu rose up to inform the Court that the entire records ·of proceedings of the trial District Court of Bariadi (Criminal Case No, 40 ---------- ----·---- of 2000) and those of the High Court at Tabora (Criminal Appeal No. 14 of 2001) are both missing from the· record of this appeal. The .. learned State Attorney went as far as submitting that the Deputy Registrar of the High Court, who is the custodian of the records of this Court, has sworn an affidavit to confirm that indeed the records of the trial and first appellate courts are missing. With these mandatory part of the record of appeal to this Court still missing, Ms Malulu submitted, Rule 71 (4) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) has not been complied with, and this instant appeal before us cannot proceed. 2 . '(., . When pressed by the Court ·to suggest way forward, Ms Ma lulu ,· :.••' suggested that the Deputy Registrar should reconstruct the lost file beginning from the District Court of Bariadi which tried and convicted the appellant. When his turn came to submit on the consequences which should befall missing records of the trial and appeal proceedings, the appellant directed all his blame to the High Court Reg·istty which, he · submitted, should have kept all the records of his case intact. As a prisoner serving term in prison, he added, he had no personal control · over his documents which are kept by the prison department. Before we make our decision, we find it necessary to confirm Ms. Malulu's submission that the only documents in the record of this appeal are those relating to the application by Chamber Summons supported by the appellant's affidavit to seek

the leave of the High Court, to file his notice of appeal out of time, together with the Ruling allowing the· appellant to file the Notice of Appeal. These records show that when the parties appeared in the High Court at Tabora on 25/08/2016 for hearing of the application for extension of time to 3 ,, . lodge a Notice of Appeal, Ms Malulu, learned State Attorney who appeared for the respondent Republic, did not oppose the application. As a result, the Appellant filed his Notice of Appeal on 3/09/2015 to initiate this appeal which, as is now apparent, cannot proceed for want of record of proceedings. As learned State Attorney has correctly submitted, without a.. complete record of appeal that has been compiled in compliance with Rules 71 (4) and (2) of the Rules, there cannot be a valid record of criminal appeal to vest this Court with jurisdiction to proceed. Sub-rules

(2) and (4) of Rule 71 of the Rules are couched in mandatory language- "71(2)-For purposes of an appeal from the High Court in its original jurisdiction, the record of appeal shall contain.·.···. copies of the following documents in the following · .,.. , -···· orders-" "71 (4) For the purposes of appeal from the High Court in its appellate jurisdiction, the record of appeal shall contain documents relatlng to the proceedings in the trial corresponding as nearly as may be to those set out in sub-rule (2) and shall contain also copies of the 4 . f

- I .. ··, ... f.ollowing documents relating to the appeal to the first appellate court-

(a) The petition ofappeal;

(b) The record of proceedings; (c) The Judgment; 11 {d) The order, if any, [Emphasis added]. Inevitably, the trial and first appellate courts' records missing, the next question is, "what is the way forward?" There cannot be a single way forward for all courts faced with problems of missing record of proceedings. As judicial officers, Deputy Registrars should always learn how case law in Tanzania ,or case law from other jurisdictions have dealt with similar problems of missing records, and different modalities of reconstructions of court records. The Court of Appeal for Eastern Africa (the EACA) faced the problem of missing court records in a case from Uganda in HAIDERALI LAKHOO ZAVER vs REX (1952) 19 EAGA 244. When that appeal came up for hearing in the High Court of Uganda, the s ... records of the District Court of Mengo were missing. In the absence of the records, the two Judges who were presiding in the High Court, ordered that the finding of the trial court and the sentence appealed from, be reversed, and that the appellant be retried by the Resident Magistrate, Mengo District. t ... r The appellant did not take lightly the decision of the High Court. He appealed to the EACA. The statement of guidance from the EACA is illustrative:

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- - - - - - - - --~-- ----------,-- "The Courts must in this matter try to hold the scales of justice evenly between the parties and, whilst no wholly satisfactory solution can be expected for such an unsatisfactory state of affairs as this appeal discloses, we think that the course followed by the learned Judges on first appeal was on balance the fairest and most just, and is the only solution which offers an opportunity for a judicial determination on the merits of the case. Moreove~ it is in accordance with precedents which are at least

persuasive authority. Rex v. Abdi Moge & - -· ... · ... ·.·····. Others, (1948) 15 E.A.C~A. 86, was a case where part of · the record was missing and this Court expres"sed the view that a re-trial would have been ordered but for the fact 6 , ... '

- - . that the appellants had served the whole or almost the whole of their sentences. " It seems to us that the defining paraphrase for our purpose is- " The Courts must try to hold the scales of justice evenly be"tvveen the parties'~ This implies that there is no one general ru·le on the way forward when courts face missing record of proceedings and, every case involving missing record, should invariably be determiried on the basis of its own special circumstances. Decisions from the Republic of South Africa also provide useful guides to Deputy Registrars of Tanzania. In the decision of the Supreme Court of Appeal of South Africa in EDWARD MOGOROSI V THE STATE (4100/10) [2010] ZPSCA 147 the appellant EDWARD MOGOROSI was in 2001 convicted of rape by a Magistrate~s court and . he was sentenced to serve 15 years in prison. Although the applicable law in South Africa required him to appeal within fourteen (14) days of his sentencing, it took the appellant seven years until on 13/03/2009, when he lodged his appeal in the North West High Court (Mafikeng) against his conviction and sentence. In his affidavit to the High Court of Mafeking to explain why it took him so long to file his appeal, he stated: 7 "I have enquired on a number of occasions and later I made an application to the Regional Court to be provided with a copy of a transcript of my record to prosecute an :· appeal (I attach as annexure A/ a copy of my letter dated 31 May 2007) and I was told that my case does not exist (I attach as annexure 8/ a copy of a [letterJ dated 11 October 2007 from Ms Bono/o Mmileng). I wrote to the Department of Justice including the ministry to intervene in assisting me with my records. I requested the Legal Aid Board to assist me in this regard. I could not receive a . positive response from all those institutions... // Those explanations were not deemed adequate. The High Court (Mafikeng) observed that EDWARD MOGOROSI "studiously refrained from disclosing precisely when he caused the numerous enquiries to be made/ or more importantly, when he first applied to the regional court for a transcript of his criminal proceedings. Neither Annexure A nor Annexure B was annexed to his affidavit .. // On 23/10/2009, the Mafikeng High Court dismissed the application on the ground that the explanation for delay was inadequate and unsatisfactory. The Supreme·· Court of Appeal of South Africa while dismissing EDWARD. MOGOROSI's appeal, referred to an earlier statement it made in UITENHAGE 8 ... TRANSITIONAL 'LOCAL COUNCIL V. SOUTH AFRICAN REVENUE SERVICE, 2004 (1) SA 292 (SCA) demanding from appellants seeking the indulgence of the court out of tim.e; to furnish more convincing explana_tions for delays: "Condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and its effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the re'Sponsibility, " From EDWARD MOGOROSI V THE STATE (supra) we can as well draw lessons that when an accused person fails to file his appeal within the time which the law has prescribed, the duty shall be on him if he wants to file his appeal out of time, to give adequate and . satisfactory explanation for the delay. In EDWARD MOGOROSI, High Court (Mafikeng) did not consider as adequate, the

explanations that the appellant had enquired on a number of occasions, or written letters which he did not attach to his affidavit. Another decision of the Constitutional Court of South Africa in PHILLIP DANIEL SCHOOMBE V. THE STATE [2016] ZACC SO 9 illustrates the various methods which can be used by the Deputy Registrars in Tanzania to reconstruct the missing records. This case involved a loss of the record of a criminal trial of an appellant who was found guilty and sentenced to serve the sentence of life imprisonment. The Constitutional Court gave the following guide stressing that, depending on different circumstances of cases; there are different procedures for a proper reconstruction of court records. It also emphasized that the obligation to conduct a reconstruction of the court . records does not fall entirely on the court. The convicted accused, their learned counsel, the prosecution, and even prison department holding custody of the appellant, all share the duty to assist . in the reconstruction: "[20] If a trial record goes missing, the presiding coutt seeks to reconstruct the record. The reconstruction itself is 'part and parcel of the fair trial process. ' Courts have identified different procedures for a proper reconstruction, but have all stressed the importance of engaging both the accused and the State in the process. Practical methodology has differed. Some courts have required the presiding judicial officer to invite the parties to 10 .• i . reconstruct a record in open court. Others have required the clerk of the court to reconstruct a record based 0n affidavits from parties and witnesses present at trial and then obtain a. confirmatory affidavit from the accused. This would reflect the accused's position on the reconstructed record. In addition, a report from the presiding judid_al officer is often required.

[21] The obligation to conduct a reconstruction does not fall entirely on the court. The convicted accused shares the duty. When a trial record is inadequate, 'both the State and the appellant have a duty to try and reconstruct the record./ While the trial court is required to furnish a copy of the record, the appellant or his/her legal representative 'carries the final responsibility to ensure that the appeal record is in order'. At the same time, a reviewing court is obliged to ensure that an accused is guaranteed the right to a fair trial, including an adequate record on appeal, particularly where an irregularity is apparent. N In circumstances like the present appeal before us, where the appellant did not file his notice of appeal within the period of 14 days then applicable under 61 (1) of the Court of Appeal Rules, 1979. (Old Rules), the scales of justice demand that in the reconstruction of the 11 . ,. missing record, the Deputy Registrar must inevitably get cooperation of the appellant himself, the Resident Magistrate-in-Charge of Bariadi District Court, office of the Director of Public Prosecutions (Tabora and Shinyanga), the police investigation files, and the Prison Department, who should come forward and supply all the case documents in their respective possession or custody. In line with what the Supreme Court of Appeal of South Africa stated in EDWARD MOGOROSI V. THE STATE (supra), where the record of proceedings are missing, the appellant must furnish· the Deputy Registrar with adequate and satisfactory explanation why he did not file his appeal within the thirty (30) days prescribed by the Rules. In retrospect, we think in that regard, the High Court at Tabora which:· readily allowed the appellant to file his notice of appeal out of time, • should have

demanded more explanations from the appellant beyond mere allegations which he made in his supporting affidavit where he stated that immediately after the dismissal of his appeal by the High Court he had expressed his desire to appeal and waited for the record of proceedings in vain. 12 --· - .. - ---···----·--·------·-- In the upshot, the hearing of this appeal is adjourned to allow the Deputy Registrar to reconstruct the record of appeal and thereafter the · Registrar of the Court of Appeal shall fix the date of hearing of the · appeal at the earliest date possible in the Court Sessions in 2019. We order.accordingly. DATED at TABORA"this 14th day of February, 2018. I. H. JUMA -/a.:,, .=C.::..::H=IE=F....l....,U....,S"""TI=-=C=E S. MJASIRI · >.:-; JUSTl'CE O.F APPEAL ·.:._:_•' , ../ ~:-,,-E.-A. MUGASHA ' ' JUSTICE OF APPEAL I certify that this is a tr e COP-Y of the original. ;: it~,,.,·L,.,.--:,--AH. M MI DEPUTY REGISTRAR ~··f.-":@URT OF APPEAL ,/ . 13

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