

TANZANIA / JUDGMENT

20160819 TZHC Dar es Salaam

COURT
TZHCDECIDED
19 August 2016

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM
CRIMINAL APPEAL NO. 77 2015 (Originating from the Decision of Bagamoyo District Court in
Criminal Case No. 114 of 2013) M RISHO s/ o ABDALLAH ■ -· APPELLANT
VERSUS THE REPUBLIC RESPONDENT

JUDGMENT

MKASIMONGWA, J. MRISHO ABDALLAH stood before Bagamoyo District Court Charged with Rape Contrary to Sections 130 (2) (e) and 131 (1) and (3) of the Penal Code [Cap 16 R.E. 2002]. It was alleged by the prosecution that: " Mrisho s/o Abdallah @ Nguruko charged on 11th day of May, 2013 at about 15.45 hrs at Kiwangwa area within Bagamoyo in Cost Region did unlawfully carnal knowledge of one Mariam d/o Athuman who is aged 1 year". When the charge was read over and explained to the accused person and asked to plead thereto, the accused is recorded by the court presided by Hon. G. N. Barthy (Resident Magistrate) to have said:- "Ni kweli nilifanya kosa na nilijua ni kosa kisheria" 1 The court recorded entering this as a plea of guilty and the Public Prosecutor was invited by the court to adduce facts when he stated as follows:- "The accused person Mrisho Abdallah aged 22 years and resident of Nianjema. On 11/5/2013 at about 15.45 hrs while he was at Kiwangwa area within Bagamoyo within Costs region, he- had unlawful carnal knowledge with one Mariam Athuman the girl aged one year old. Therefore the accused person was arraigned of rape and brought to this court. The victim was sent to the hospital for further diagnosis. I pray for another date to supply the PF3 as Exhibit". The record shows that the court did ask the accused person if he admits to the facts narrated by the Public Prosecutor, and the accused is recorded to have stated as follows: "I admit all facts to be true". All, the accused, Public prosecutor and the trial Magistrate signed the record followed by the order of the court directing for facts on 27/5/2013 and remanding the accused in custody. On 27/5/2013 the case was called before Hon. U. L. Ngitiri, Resident Magistrate when the Public Prosecutor reported that the matter was coming up for mention and that investigation is complete hence prayed for a date for a Preliminary Hearing. The case was adjourned to 10/6/2013 for Preliminary Hearing on which date the record shows it was not brought 2 ,, before a Magistrate. Instead the same came before a Magistrate 24/6/2013 and this time it was before Hon. L. M. Chamshama, Resident magistrate. It is when the Preliminary Hearing was conducted under the provisions of Section 92 of the Criminal Procedure Act (I think the trial magistrate had Section 192 of the Criminal Procedure Act in mind) and the Public Prosecutor is recorded to have stated the following facts:- "The

Accused name is Mrisho s/o Abdallah, 22yrs, Mzigua, farmer and resident of Kiwanigwa Kibaoni. On 11/5/2013 at noon while at Kiwangwa in Bagamoyo District in Coastal Region at 15.45 hrs you raped Mariam Athuman a girl aged 1 year. That on 11/5/2013 you was (sic) arrested and sent to Bagamoyo Police Station and on 13/5/2013 you was (sic) arraigned before this court" The court then asked the accused if he admits to facts as narrated by the Public Prosecutor and is recorded to have responded that:- "I admit all facts are true". The Public Prosecutor then tendered the accused's cautioned statement and a PF3 as Exhibits. The accused did not object and they were therefore admitted in evidence marked as Exhibit P1 collectively. From the admission, the accused was convicted of the offence and sentenced to life imprisonment and six strokes corporal punishment. He is aggrieved by both the conviction and the sentence imposed, hence preferred this appeal in which he has four grounds shown in the Petition of Appeal. 3 At the hearing of the Appeal before me the appellant appeared in person whereas the Respondent/ Republic was represents by Miss Paulina Fungameza, learned State Attorney. The Appellant had nothing in submission. He only requested the court to consider the grounds of appeal and come to the conclusion of the appeal. On the other hand Miss Fungameza opposed to the appeal. She submitted that the appellant was convicted on his own plea of guilty. As such section 360 (1) of the Criminal Procedure Act bars him from appealing against the conviction based on a plea of guilty the appellant cannot challenge it. He is only allowed to appeal against the sentence. As to the first ground of appeal the learned State Attorney contended that the appellant's complaint is to the effect that the charges were not read and explained to him in the language he understands. She contended that when was asked to plead to the charge, the accused responded in Kiswahili that "Ni kweli nilifanya kosa na nilijua ni kosa kisheria". Miss Fungameza submitted that, the charges were read and explained to the accused person and he understood the offence he was facing in court otherwise he could not be able to plead as such. She invites the Court to find no merit in the first ground of appeal. Coming to the second ground of appeal Miss Fungameza stated that the Appellant complains that the presiding Magistrate being a successor one did not remind him of the charges. She submitted that section 114 (1) of the Criminal Procedure Act requires the successor magistrate, if he/she so finds, to proceed with the matter without seeking the accused's opinion whether to commence the matter afresh or not. In this matter as the 4 former had recorded the accused's plea of guilty it was not necessary that the successor magistrate should have asked the accused person to enter a plea. In respect of the third ground of appeal which faults the court's decision for basing on the PF3 which was not produced under oaths by the Public Prosecutor Miss Fungameza submitted that the ground is devoid of any merit. As stated the accused was convicted on his own plea of guilty. The PF3 was produced when the Public Prosecutor was adducing facts and that the accused did not object. His objection to that effect at this stage of the case is an afterthought. As to the last ground of appeal Miss Fungameza reiterates that the accused was convicted on his own plea of guilty in terms of Section 228 (2) of the Criminal Procedure Act. A question of judgement under such circumstances does not arise. She prays the court that it finds the accused was properly convicted and sentenced and the appeal be accordingly dismissed. The appellant had nothing to submit in rejoinder and that is all from the parties. Going by the record, it is clear that the accused stood before Bagamoyo District Court charged with rape. When the charges were read over and explained to the accused person, before

Hon. Barthy - RM he pleaded guilty to the charges. Facts were partly adduced for the Public Prosecutor could not on that date produce the PF 3 as Exhibit to support the facts. When the matter resumed later, it came before Hon. Chamshama - RM. The later proceeded with the case by conducting a 5 ~reliminary Hearing under Section 192 of the Criminal Procedure Act. From the admission by the accused person of the facts adduced in the Preliminary Hearing, the accused was convicted. Whether the accused person was properly convicted on his own plea of guilty? I think is the question to be answered. A plea of guilty is governed by Section 228 (2) of the Criminal Procedure Act which is in the following words. "If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary'~ The procedure to be followed is that: upon entering the plea of guilty the court has to ask the public prosecutor to adduce to the court the facts that constitute the offence. The facts must reveal all essential elements of the offence with which the accused is charged. At that stage the public prosecutor tenders also all documentary or material evidence that support the charges. Then the accused is asked whether or not he admits to the facts. The court will enter conviction against the accused person if he admits to the facts. Where the accused person does not admit to the facts the court shall then record a plea of not guilty. In the case at hand, as the facts adduced by the public prosecutor on 13/5/2013 were not complete as he was to tender, sometime later a PF3 as Exhibit, it was not correct for the court to ask the accused if he was admitting or not to the facts. Instead, the court (the same presiding 6 magistrate who took the plea and partly recorded the facts) ought to have allowed the Public Prosecutor to complete adducing the facts on the later date as fixed by the court before. This was not done on 24/6/2013 when the matter came before a different trial magistrate. The later continued with the case by conducting the preliminary hearing. Under the law a preliminary hearing is governed by Section 192 of the Criminal Procedure Act. Under a preliminary hearing is held if an accused person pleads not guilty to the charge. The preliminary hearing aims at limiting time and expenses spent in the matter. That is done by the court by identifying matters in dispute and those not disputed. The court at the conclusion of the Preliminary Hearing is obliged under section 192 (3) to prepare a memorandum of matters agreed and read and explain them to the accused person in the language that he understands. The same shall be signed by the parties and then filed. Under section 192 (4) of the Criminal Procedure act, any fact or document admitted or agreed in a memorandum filed under section 192 of the Criminal Procedure Act shall be deemed to have been duly proved. In the case at hand, by conducting a preliminary hearing the court had in mind that the accused had pleaded not guilty to the charges. The record is silent if the accused had at any time, after his plea had been taken on 13/5/2013, changed the plea. Secondly following the preliminary hearing conducted on 24/6/2013 the record does not reveal if the trial magistrate had prepared a memorandum of matters not disputed, read and explained it to the accused and then signed by him, the Accused and the Public Prosecutor and then filed. The court ought to have prepared a 7 Memorandum of Matters not in dispute, read and explain it to the accused and ask both the accused and the public prosecutor to sign it even where the accused makes a general admission to the facts. It is a fact or document admitted or agreed in the memorandum filed under Section 192

(3) of the Criminal Procedure Act that is deemed to have been proved and not otherwise. Going by the facts adduced in the court during the Preliminary Hearing, it is very clear that there was no statement by the Public to the effect that the accused was arrested and interrogated by the police and his cautioned statement recorded. There is no also statement showing that the complainant was referred to the Hospital for medical examination. Although there were no such statements made by the Public Prosecutor in the facts during Preliminary Hearing, the prosecutor at the end produced to the court to be exhibits the accused's cautioned statement and the PF 3 issued to one Mariam d/o Athuman. This is un-procedural. It seems the cautioned statement and PF3 have been imposed and it was not safe for the court to rely on them and keeping in mind that the preliminary hearing is a technical process the accused who was not being represented ought to have been treated as a layman and that is the purpose of Section 192 (2) of the Criminal Procedure Act which provides that: 'In ascertaining such matters that are not in dispute the court shall explain to an accused who is not represented by an advocate about the nature and purpose of the preliminary hearing and may put questions to the parties as it thinks fit. ' 8 It is my considered opinion that in this particular case the preliminary hearing was improperly conducted. In concluding the matter since the procedure to be followed when an accused person pleads guilty was not adhered with in this matter and since the preliminary hearing was not properly held, it was not proper for the court to find the accused guilty of the offence on his own plea of guilty entered on 13/5/2013. As a result, although it is not for the grounds of appeal registered by the Appellant,. I quash the conviction and set aside the imposed sentence by the trial court. Consequently I order for release of the Appellant from jail if he is not therein for other lawful causes. Dated at Dar es Salaam this 19th of August 2016. 0~ E. J. Mkasimongwa JUDGE 19/8/2016 9 Date 19/8/2016 •Coram, Hon. Mkasimongwa, J. For the Appellant Present in person For the Respondent Miss Aziza Mhina (State Attorney) CC: Miss Judith. Court: Judgment delivered in Chambers this 19th of August, 2016 in the presence of Miss Aziza Mhina (State Attorney) and of the Appellant in person. Right of Appeal is fully explained. E. J. Mkasimongwa JUDGE 19/8/2016 10 ----- =ccr- =- ,,,_- - - - - > - - - - - - - - - ~ ~

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/341942/source_file/5a7dea5031b34fa4/20160819_TZHC_Dar_es_Salaam.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/mrisho-so-abdallah-v-the-republic-rape-tzhc-2016>

Prepared on 14 October 2026 · Esheria