

TANZANIA / JUDGMENT

20180321 TZHC Dodoma

COURT
TZHCDECIDED
21 March 2018

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

IN THE HIGH COURT OF TANZANIA (DODOMA DISTRICT REGISTRY) I I AT DODOMA DC.
CRIMINAL APPEAL NO. 89 OF 2017 ,, (ORIGINAL CRIMINAL CASE NO. 223 OF 2017 OF THE
DISTRICT COURT OF MPWAPWA DISTRICT AT MPWAPWA. NATHANAEL
KIFARU APPELLANT VERSUS THE
REPUBLIC RESPONDENT

JUDGMENT

20/12/2017 & 21/03/2018 H. H. KALOMBOLA.: Nathanael Kifarur has three grounds of appeal:-

1. That, your honor judge the trial Court erred in Law and fact when convicted the appellant without considering that the conviction which was founded on the charge which was defective. See the case of MOSES SANJITO VR (CAT) DODOMA Criminal Appeal No. 64 of 2016 (unreported). 1
2. That, your honor Judge the trial -Court erred in Law and fact when did not consider my defense.
3. That, your honor Judge there was no judgment at all since the trial Court did : follow within the requirement of Section 235 and 312 (2) of the Criminal Procedure Act, Cap 20 R.E. 2002 see the case of MATANO MNAMA VRS R. (CAT) DODOMA CRIMINAL APPEAL 361 OF 2014 (unreported) When the appeal came for hearing, the appellant denied to have committed this offence stating that the same is a cooked story because they wanted to till in his shamba. That all the witnesses in the complainant side came from same family. He asked Court to consider his appeal. Ms. Mgoma State Attorney submitted on the 1st ground of appeal that the charge sheet is not defective and this offence was proved by PW2 who witnessed the incident so as the sister to the victim. PW6 who is the doctor corroborated PW2 evidence PW 6 tendered the PF3 as exhibit P1 indicating the victim had habitual sexual behaviour, therefore the evidence supported the charge. On the 2nd ground of appeal it is submitted that at page 3 of the judgment, the Magistrate considered ,both the evidences from prosecution and defence, therefore defence evidence was 2 considered but it was found it did not shake the prosecution ,-. ,:-} -.:,. evidence hence the decision. In regard to the 3rd ground of appeal it is their submission failure of the Magistrate to mention the Section on which he convicted with the accused is not fatal as it does not affect the roots of the case

instead the file may be remitted back to the trial magistrate for rectification. As on the issue that all the witnesses came from one family, it is submitted that is not true because PW1 was a neighbor, PW5 was a street chairman and PW6 was a doctor. They pray the appeal be dismissed. Appellant insisted in rejoinder that PW 1 and the chairman are relatives. Going by the grounds of appeal starting with the 1st ground of appeal, I agree with the State Attorney that the charge which faced the accused person is not defective as from the evidence and the charge sheet the victim's age is 13 years, therefore as per Section 130 (1) (e) of the Penal Code the appellant was correctly charged. In the premises the 1st ground of appeal is dismissed. As on the 2nd ground of appeal that his defence was not considered, the Court has this to say. Looking at page 3 of the typed judgment the Magistrate considered appellant's defence and as he wrote:- "The accused person who is 68 years age defend himself that he is not capable to do the same ..." In the premises I find the 2nd ground of appeal without merit I dismiss it. On the 3rd ground of appeal the appellant stated that Sections 235 and 312(2) of the Criminal Procedure Act, Cap 20 R.E. 2002 were not complied by the Magistrate. I agree with the appellant that the trial Magistrate did not comply with the requirement under Section 312 (2) of the Criminal Procedure Act [Cap 20 R.E. 2002] which provides:- "In case of conviction the judgment shall specify the offence of which, the accused person is convicted and the punishment to which he is sentenced." At page 4 of the typed judgment the trial Magistrate simply stated "I found the accused person guilty and I convict him accordingly." In the circumstance the trial Magistrate did not comply with the required Law. Therefore what is the remedy for this irregularity? The learned State Attorney submitted the irregularity is not fatal as this Court may order the file sent back to the trial Magistrate for rectification of the error. But the State Attorney did not mention to the Court under which Law that the Court may give such order. I understand that Section 312 (2) has been coached in Mandatory order as the word "HALL" is used. I have further perused the trial Court record so as to find out whether there was evidence to connect the appellant with this offence, before deciding on the effect of the irregularity mentioned hereinabove. The witnesses for prosecution to start with PW1 Egra Makasi, it is gathered from her that she saw the appellant and the victim entering inside the house of her neighbor, thereafter she heard the victim's sister raising alarm, the victim and the appellant were locked inside; PW2; Betina William got informed that the appellant and the victim were inside, she went and found them naked sexing. That she raised alarm, the appellant started to wear his trouser. She detained him inside. PW 4 Olivia Ndalulwa said on the incident day she went back home from shamba and got informed by PW1 that the appellant raped the victim. That when the door was opened she saw the accused person and the victim coming outside; PW 5 Ageli Makuya was informed by PW1 of the incident. She went to the scene and found the victim and appellant locked inside. PW6 Mary Maneno examined the victim. She detected no bruises, but that she had habitual sexual behavior, there was penetration and there was no spermatozoon seen. She tendered as an exhibit P1 the PF3. On the appellant's side he testified that he is no longer erecting due to old age and that the place in which it is said he raped the victim was an open kitchen. Going by the evidence at hand it is not clear as to the

place in which this incident occurred. PW2 stated that she locked in the victim and the appellant. She did not say if it was inside a house or room, her evidence is thus shaken by appellant's defence that the place was an open kitchen. Moreover it is only PW2 who testified that she found the appellant naked who thereafter started wearing trouser. If that is so, why didn't she immediately call PW1 who is her neighbor to witness the incident instead she decided to lock inside the victim and the appellant? Moreover PW 6 who examined the victim stated that the victim had habitual sexual behaviour. The appellant could not be found guilty merely because it is said he was locked inside by PW2. There must have been more evidence to prove that the appellant raped the victim on the day in dispute. I am not at one with the Respondent/Republic that there was evidence and that the prosecution case was proved beyond all reasonable doubts following the reasons I have herein before explained. In view of the said explanation, I find the appeal meritorious, it is allowed. ' Consequently the conviction and sentence imposed to the appellant are quashed and set aside; respectively. The appellant is to be set free immediately unless held for a lawful order. Ordered accordingly. H. KALOMBOLA) JUDGE 21/03/2018 7

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/345106/source_file/3d64fe89369fb63e/20180321_TZHC_Dodoma.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/nathanael-kifaru-v-the-republic-defectivechargesheet-tzhc-2018

Prepared on 14 October 2026 · Esheria