

TANZANIA / JUDGMENT

20170629 TZHC Dar es Salaam 1

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TZHCDECIDED
29 June 2017

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IN THE HIGH COURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY AT DAR ES SALAAM
CRIMINAL APPEAL NO 12 OF 2017 (Originating from Mkuranga District Court at Mkuranga
Criminal Case No. 82 of 2013 OMARY ALLY TEGATEGA APPELLANT VERSUS
THE REPUBLIC RESPONDENT

RULING

MKASIMONGWA, J Before Mkuranga District Court the Appellant stood charged with Rape contrary to Sections 130 (1), (2) (e) and 131 of the Penal [Code Cap. 16 R.E 2002]. He was convicted and accordingly sentenced to 30 years imprisonment and pay Tshs. 4,000,000/= compensation. He appeals to this court challenging both the conviction and sentence. Before hearing of the Appeal Miss Christine Joas, the State Counsel raised a point of law that there was change of trial magistrates in the case and no reasons were assigned to that effect. That contravened the provisions of Section 214 (1) of the Criminal Procedure Act [Cap. 20 R.E 2002] - CPA. As such the conviction should be nullified and order for trial denovo to issue. The Learned State Attorney referred the court to the decisions of the Court of 1 . I Appeal of Tanzania in the case of ALLY·JUMA FAIZI @ MPEMBA AND ANOTHER Vs. R: CRIMINAL APPEAL NO. 401 OF 2013, and ELISIMA ONESMO Vs. R: CRIMINAL APPEAL NO. 160 OF 2005 (Unreported) to support her stand. Mr. Chundu, advocate for the Appellant concedes that that there was change of trial magistrate in the matter and that the provisions of Section 214 (1) of the CPA were not complied with. As a consequence, the proceedings, judgment and the sentence imposed are a nullity. Mr. Chundu submitted that trial denovo is pot the only remedy for the situation at hand. The court has discretion upon finding that interest justice so demands to order for acquittal of the accused. He invites the court to consider of the prosecution evidence's weaknesses in the matter which if trial denovo is ordered will be rectified by the prosecution to the deferment of the Accused/ Appellant. The court should therefore acquit the appellant. In a short rejoinder Miss Christine Joas (S/ A) submitted that since the proceedings are a nullity, there cannot arise a question of the prosecution case's weaknesses and rectification of the weakness upon an order for trial denovo. She insists therefore for the prayers made in submission in chief. I have gone through the record of the lower court. It is apparently clear that the case in question was firstly assigned to Hon A. L. MCHOME SRM who recorded the testimony of ZENA ISSAH (PW 1) before it was taken over by Hon. T. BARNABAS (RM) 2 who heard/recorded the testimonies of PW2 - PWS and DW1 - DW3 and eventually wrote the judgment. As noted by the respective learned counsels for the Appellant and

Respondent, the provisions of Section 214 (1) of the CPA were not complied with. The court, that is the second trial magistrate, did not inform as the law mandatorily requires, the accused person his rights to have the prosecution witnesses re-summoned and re-heard if it were so demanded by the accused after being informed of the right. According to the decision of the CAT in the case of ELISIMA ONESMO (Supra) failure by the second trial magistrate to inform the accused such a right was a fatal and incurable irregularity. Secondly the record does not show if there were any reasons given why the predecessor magistrate could not complete the trial. As it was held in the case of ALLY JUMA FAIZI@ MPEMBA (Supra) in the absence of any such reasons a successor magistrate lacks jurisdiction to proceed with the trial and consequently all proceedings following the taking over of a partly heard matter without any reasons assigned thereto becomes a nullity. On the basis of the two authorities, it is my considered opinion that all proceedings in Criminal Case No. 82 of 2013 of Mkuranga District Court that were before Hon T. Barnabas are a nullity and are accordingly nullified. Whether or not the court should order for trial or acquittal I think is another issue to be considered. As the proceedings have been declared null and therefore nullified, an acquittal of the accused cannot arise. This is, in my view, a proper 3 case that this court can order for continuation of hearing (if it is practicable) before Hon A. L. Mchome - SRM as it was on 9/6/2014 or else it be handled over by another magistrate who shall fully comply with the provisions of Section 214 (2) of the CPA. From the above directives, I quash the conviction and set aside the sentence imposed and order that as from now the appellant should be treated as a Remand Prisoner. The lower courts records shall be forthwith returned to the District Court of Mkuranga for continuation of the trial. Dated at Dar es Salaam this 29 th of June, 2017.

~=:~::~:~--- ... ,..... • E.J.~fn~a JUDGE 29/6/2017 4 . " Court: Ruling delivered in Chambers in the presence of Miss Christine Joas (SA) and Mr. Chundu (Advocate) for the Respondent and Appellant, respectively. Right of Appeal -is explained. E.J.~a JUDGE 29/6/2017_, ~- ' 5

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