

TANZANIA / JUDGMENT

20170629 TZHC Dar es Salaam

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TZHCDECIDED
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- I fljj',1 l_ ~"-1 IN THE HIGH COURT OF TANZANIA · . .J (DAR ES SALAAM REGISTRY AT DAR ES SALAAM) AT DAR ES SALAAM. CRIMINAL APPEAL NO. 140 OF 2016 (Originating from District Court of Ila/a Criminal Case No. 325/2013 RASHID HAMADI NYAMHUNGA APPELLANT VERSUS REPUBLIC RES.PON DENT Date of First order : 19/6/2017 Date of Last order : 29/6/2017

JUDGMENT

I.P. KITUSI, l. It is alleged that Rashid Hamadi Nyamuhanga the appellant was a traditional healer and that Eva Emmanuel (PW1) was his patient. Before the District Court of Ilala the appellant was charged for the rape of PW1 contrary to section 130(1) (3) (d) and 131(1) of the Penal Code, the allegation being that on 14th December,2013 at Kitunda area at Tulivu Guest House within Ilala District he had carnal knowledge of PW1 without her consent. The appellant was also charged for obtaining money by false pretences contrary to section 302 of the Penal Code allegedly for obtaining shs. 400,000/= from PW1 by falsely pretending that he was a traditional man capable of providing cure to her, knowing it to be false. 1 I must state at this early hour that all this is gathered from the copy of typed judgmentq,..available, because there is no original record to be referred to in this appeal and so there is no trace of the charge sheet. There is a certificate to the effect that the original record has gone missing and there is no hope for its being retrieved. When I called upon Brenda Nicky, learned State Attorney, to address this point she briefly submitted that the court could make any other order. The appellant(a lay person)did not make any useful submission in that regard. In the case of Mohamed Hassan & Sajali Ally Versus Republic Criminal Appeal· No. 108 of 2005, HC DSM Registry unreported I had an . ·occasion to observe that, "Loss of a court record is an embarrassing legal dilemma which, although it is not a new phenomenon, has never ceased to be mind boggling. " In that case Mr. Katuri learned Senior State Attorney provided three alternative options in resolving the dilemma, citing a case by my sister Muruke, J. Christian Shaban Ngohamana Versus The Republic, Misc. Criminal Application No. 90 of 2015, HC DSM District Registry· (unreported). The options are that the court may make one of the following orders;

- i. Retrial ii. Reconstruction of the record. iii. Outright acquittal of the appellant. 2 Somehow those are the options that were considered proper in the case of Hamis Shaban @ Hamis (Ustadhi) Vs Republic, Criminal Appeal No. 250 of 2010 CAT at Mwanza(unreported). In that case it was held that the duty of the Court in such a situation is to "hold the scales of justice evenly between the parties " In this case I tried to get at least the copy of the charge sheet, a very prime document in criminal proceedings, but that has been impossible. It seems a reconstruction of the record would be illusory if even the charge sheet is unavailable. Therefore I will not make an order. for reconstruction of the record. The second option is an outright acquittal or in this case, to allow the appeal. In the circumstances of this case I am reluctant to take that route for the reason that the appellant has been in prison for a short period considerably and justice requires that this matter be heard on its merits.· Therefore I do not take the second option. The remaining option is an option for a retrial on the side of which the scale of justice in this case is tilted. I thus order a retrial of the appellant within the shortest period. JUDGE 29/6/2017. 3

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