

TANZANIA / JUDGMENT

20070625 TZHC Tabora

COURT
TZHCDECIDED
25 June 2007

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.... ' i: IN THE HIGH COURT OF T.li.NZf.NIA 1~ T Tf~BORA ~:,.~~.....-:=4 APPELL!. TE
 JUra SDI CTI ON (Tabora Registry) (HO) CRIMIJ\TLL t.:P:r}llf.L NO. 53 OF 2003 (Original Criminal
 nase L-Je>" 3lf-6 of 2000 of the · Distri9t Court of Tabora t District at Tabora Be~ore: Mlacha, ESq.,
 Resident Magistrate) TWALIB SHABAN! m::~:i.IJNGU o• •• • - APPELLANT VEHBU:S THE
 REPUBLIC • It •• - RESFONDENT ~'ri~,: : 13.11.20060 1.00.,2007. 25006.2007. Twalib Shabani
 Kim~rungu was convicted upon his own plea of guilty to the charge of rape contrary to sections
 130 and l'.31 of the penal Co{e and sentenced to 30 years imprisonment by the @istrict court of
 Tabora. Aggrieved by both conviction and sentence, Twalib Shabani@ Kimarungu has appealed
 to this Court. f.t the hearing of t.h2 appeal, the appellant argued the appeal in persen. The
 Republic had the services of Mr. Mko ba, learned State P.ttorney • In his plea, the appBllant said:
 tt-rt is true. I had sex with her but I never raped her. I never forced her!) We sgreed and I cen
 explain. I came at their home place to drink beer. She was the seller. She sold beer to me. I celled
 her. She seid that her name wc:s Vale• I demanded to kn'.JVI wbetbGr she 1t1as , ' _.. . 2 a
 student. She seia th~t she had finished school. She said that she was not intending to go for
 further £.' ~ 11dies. I told her that I demanded to marrJ her~ I sent her a letter on the other day to
 the effect. She replied that she hod EJ 6reed,. I wrote her / parents., It 1.vos r2cei vec: tbi~oughb o
 certain womano She oame to me 4 days later to my plaoe of work before the reply of the parenn 1
 s letter~ I am a local medicine man (mganga wa kienyeji). She came at 1.00 p.m. We discussed up
 t:i 5.00 p .. m. She ,stayed there up to 9.00 p.m. She slept with me on my bed. we slept in that
 W8Y"• This was entered cJS c1 plea of guilty to tLe chc'.lrge. The prosecution gave facts as follows:
 llThe accused is a resident of Kasulu, Kigoma., He was li ::_ng at Mihogoni, Taborao •. On
 16/8/2000 at day tJj:ne, the accused took a girl. by the name of Violet PPlus aged 15 years tJ his
 home place. He played sex with her for six deyse Mr. J?ius saw his a3ughter missing for six days
 and reported to the Polioe. The accused was arrested on 22/8/2000 and charged. He agreed to
 have stayed with the girl. The appellant said: "She N:ime to me and refused to go f:Jr all the six
 days soying she could be beaten. I played sex waiting to pay bride price. I do treat stomach poins,
 chest problems etc. - I conduct 11 r".lmlitr and give people 11 mvuto Wc3 biashor~u medicin.es. I
 clo not have sexual medicinessci I however can tre 9t someone to prevent cuts of npsngasn. No
 one cane out him therenfteron On the above facts the trial Mtigistrate made n ruling as follows: "I
 have seen the girl. I have also perused the law. I have c:insidercd the physical appenrance of the
 victim, her age (15), the provisions of s. l30(2)(e) ot the Pennl coae cis omeddet!.: by section 5 of
 Act Noo 4 of 1998 es well as the .f~cts 8nd wo:::ds of t.be accused. 'J:he girl appears young ana

doubtless her age is ~round 15 yeDrs as alleged. The provision£ of s. 130(2)(e) suprat are clear t::i the effect that w.;Jere the vJ.ctir, is u-.1 vietl..rn is under 18 ye:::irs, consent_ is immaterial. The accused says that the victim c,::msented,.. Th0t is no defence uncler the law given he.r c)ge. He els-) says that .b(c: had plans to marry her. That can be the case but .she was not yet legally rni;lrriet to 1.\i\itt. What appears obvious is nm illegal brutnl ect of abducting the girl for six days. The six days sexual marathon amounts to rape ond the plea is unequiv0calc I find the accused guilty DS charged and c,:mvict accordingly.n.e In his petition of eppeeilj one of the grcmnc!s of oppe~l - is to the effect that no evide;;ice was adduced as to the Mr. Mkoba's contentibn is to the effe-.t that there is tlot: dispute that the appellant had sexual interc~!).urse with ttle vict:un. The allegation t.bat she consented is no defence in view o:f section 130(2)(e) of the Penal Code as the victim was under 18.years old. There are two issues tor e:m.sir:ler~tion in this cippeal: · First, whether tbe plea of guilty v~~~, "~~~q~, ~vocal; and seo~nc'l, reasohab~,, - ~. ,.L ..Jl-. whether it was proved bey:incl/doubt/t.hat the victim wss under 18 jlears of age• Before conviction on a plecJ of guilty it is highly ~7 ::::,;5,;~::~: . 1,12 desir\$ble not only that every constituent of the echarge should be explained to the accused butt.hat he should be required to admit or deny every such · co:pe:t~tuentri RANDO S/0 AKUN.AAY Vo R. (1951) i.8 EAC.A ?07; end that what he says should be recorded in a form vrhich will satisfy an eppellate Court that he fully understood the charge and pleaded guilty to every element of it unequivocally: Rei v. Yonasani EGALO and OTHERS (1942) 9 EACA 650 Where every ingredient had not been explainea to the accused, the plea of;; nlt is true" was not sufficient to ~amount to Jplao of guiltity: KATO V. ITEIUDLIC (1971) E.A. In DESAI V· R. (1971) H.C.D. n,. 297 it was held by the Court of Appeal .for East Ji.frica that every cons ti tutent of _the c_barge shoulct be ex-plained to the accused and the acet:tsed should admit every suc.b constituent., Failure to explain every constituent of the charge is an irregularity which is ourable if the statement of facts is accepted by the acouseda 5 In the instant case all the ingredients of the ·offence of rape do not appear to haveb been explained to the appellant. The record does not indicate t.1:::lat he was required to admit or deny every constituent of the charge. The appellant did not fully accept tbe statement of facts. All that the appellant· admitted is that the vietim went to his home ana stayea there for six days and the appellant had sexual intercourse with her ~ent while waiting to pay bribe price. In such circumstances the appellant· s plec1 was equivocal. He was under the :i.ml;ression that he committed no offence because the victim consented to sexual intercourse. 'I·he point thnt whether the victim eonsentea or not it was rape because the victim wes ellegea to be below 18 years ola does not appear to have been explained to him.- The appellant does not appear to h~ve fully unde:v- stooa the charge and to have pleaded guilty to every element of it unequivocally~ No evidence was 13 aaucecl t'J ,rove thst the victim was below 18 years of ageo In such circumstancem- the appellant should h~ve been given the benefit of the doubt and should not have been convicted of rape as the victim should have been presumed to have been 18 or more years old and had consented to sexual intercourse:. The uonviction is accordingly quashed and sentence set aside.- I must now ccmsider w.Jftether it would be in t.he interest of justice to orde~ a retrial. In Fatebali Manji v. Republic (1966) EoAo 34-3 it was held by the Court of Appeal for Eastern Africa thbat in. general a retrial will be ordered only when the origin".ll trial was illegal or defective; it will lJ'.t be orderea· where the conviction i,s set csic:e because of insufficiency ./

6 to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interests of justice require it and where it is not likely to cause an injustice to an accused person: SUMAR v. REPUBLIC (1964) E.A. 481. 5 Where an accused has spent sometime in prison retrial should not be ordered: H. v. S. ALUTUNIJI S/O JVIHOZI (1968) H.C. 11 D. n. 392. In the instant case the trial was defective because conviction was based on an equivocal plea of guilt. The appellant has already spent about seven years in prison. In case retrial is ordered and he is convicted of the offence charged the Court will have no discretion. In terms of

- s. 1 of the Penal Code the minimum sentence for the offence is 30 years. The Court will have no discretion to take into account the period already spent in prison. In such circumstances retrial is likely to cause an injustice to the appellant. For the above reasons retrial will not be ordered. The appellant is to be released unless he is otherwise lawfully held in custody.
- 7 - (OPJ)ER: The District Registrar to read this judgment to the parties, Is it June, 2007. Coram: Hon. s. B. Bongole, District Registrar Appellant: Present under custody. Respondent, the Republic represented by Mr. Mkandawire, State Attorney, COURT: ~~~~ Judgment delivered., DISTRICT REGISTRAR

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