

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**(CORAM: MUNUO, J.A., MSOFFE, J.A., And KAJI, J.A.)**

**CRIMINAL APPEAL NO. 96 of 2004**

**MASHIKU JUSTINE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania  
at Mwanza)**

**(Masanche, J.)**

**dated the 12<sup>th</sup> day of May, 2003  
in**

**HC Criminal Appeal No. 80 of 2002**

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**JUDGMENT OF THE COURT**

**MUNUO, J.A.:**

The appellant, Mashiku Justine was in Mwanza District Court Criminal Case No. 418 of 2001 convicted of attempted rape c/s 132 (1) of the Penal Code, Cap 16 in that on the 3.4.2001 at about 04.00 a.m. at Igoma within Mwanza City, District and Region, he attempted to have carnal knowledge of one Rahel Michael without her consent. The trial court sentenced the appellant to twenty years imprisonment whereupon he unsuccessfully lodged Criminal Appeal No. 80 of 2002 in the High Court of Tanzania at Mwanza before Masanche, J. He

then preferred this second appeal against the conviction and sentence.

It was not in dispute that at about dawn on the 3.5.2001, a stranger dressed like a "ninja" (covered face and head to hide identity), broke into the house of the complainant at Igoma within Mwanza City. The said invader was armed with a panga with which he threatened the complainant and ordered her to undress. He penetrated into the private parts of the victim who passed urine forcing him to retreat. The complainant said she identified the appellant by the scar he had on his face. On the next day at the same hour, 4.00 a.m. the invader returned but he failed to enter the complainant's house because she was awake. On the second occasion, the victim scarred the invader by striking the door with a stick so the said invader ran away. Saying that she identified the invader by the name of Mashiku George Kalugalilo, the complainant reported the matter to the police. PW2 D.3966 PC Onesphory arrested the appellant and charged him with the present offence.

In his sworn defence, the appellant denied the charge. He said that he was arrested at his house on the night of the 5.4.2001 and sent to court for this case.

In this appeal, the appellant filed nine grounds of appeal contending that he was not a party to the offence. He claimed that the complainant did not identify him because the conditions of identification were difficult.

Mr. Mdemu, learned State Attorney did not support the conviction on the ground that the identification of the appellant by name was doubtful because the appellant's name is Mashiku Justine whereas the complainant gave the name of her assailant as Mashiku George Kalugalilo, a different name altogether. The learned State Attorney observed that it is not clear from PW1's evidence whether she identified the appellant by moonlight, torch light or by electric light from Mwanza Steel Mills factory. In view of the poor identification by the complainant, Mr. Mdemu did not support the conviction and sentence.

The record shows that the respondent Republic did not support the first appeal for the same reasons.

The complainant did not say whether there was light in her room which would have enabled her to identify the invader. She apparently identified the invader by moonlight outside her room but given that the said invader had masked his face like a "ninja", it is difficult to say whether he could be identified visually under such facial clothing. The identification of the appellant is also doubtful because the complainant identified the invader by the name Mashiku George Kalugalilo whereas it was agreed at the preliminary hearing that the name and particulars of the appellant are those reflected on the charge sheet. If that is so, then the name of the appellant as shown on the charge sheet is Mashiku Justine, not Mashiku George Kalugalilo as stated by the complainant.

Had the learned Judge considered these discrepancies he would have decided the appeal differently.

In view of the above, we quash the conviction and set aside the sentence. We accordingly allow the appeal. The appellant should be set at liberty forthwith unless otherwise held for other lawful cause.

DATED at MWANZA this 15<sup>th</sup> day of March, 2006.

E. N. MUNUO  
**JUSTICE OF APPEAL**

J. H. MSOFFE  
**JUSTICE OF APPEAL**

S. N. KAJI  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

  
(S. M. RUMANYIKA)  
**DEPUTY REGISTRAR**