

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL REVISION NO. 16 OF 2020

*(Original from District Court of Kilombero at Ifakara in Criminal
Case No. 223 of 2018, Mashabara - SRM)*

SELEMANI MAGANGA MUNGE APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

L. M. MLACHA, J.

This is a revision in respect of the decision of the District Court of Kilombero at Ifakara in Criminal Case No. 223 of 2018. The revision was prompted by my inspection of case files in the routine inspection of the court which is done quarterly. While doing so, I came across a file which had proceedings which appeared very irregular. Despite the irregularity of proceedings as will be shown shortly and its short judgment, Mr. Selemani Maganga Munge (hereinafter referred to as the applicant) appeared to have been found guilty and convicted of Rape c/s 130 (1) (2) (a) and 131 of the Penal code, Cap. 16 R.E 2002 (now R.E 2019) and sentenced to the mandatory

minimum sentence of 30 years in jail. In view of apparent errors, I directed the file to be forwarded to this court for revision. That was done.

The proceedings which provoked me read in part as under:-

PW1: Horogo John Adult sworn and states in Swahili.

XD: by prosecution:

I work at St. Francis Hospital I did attended victim Mary d/o Joseph 23yrs old we was supposed to diagnose the victim if he has raped we did diagnosed I discovered there was bruises on genital parts, we did tested her If has infected with HIV or VDRC we found negative there was no hyman.

I pray to tender as exhibit.

Accused person – No objection.

Court: Exhibit admitted as "P.1".

SGD: B.N. MASHABARA – SRM

13/03/2019

XXD BY PROSECUTION

The genital parts were open. That is all

RXD BY PROSECUTION - Nil

PW2: F.3619 DSgt Abdallah Moslem adult affirms and states in Swahili.

XD by Pros: On material day 20/10/2019 I was on patrol with my fellow policemen DC Manyanya, DC Revo, we were on motorcycle patrol after arriving at Jongo area which has banana trees I had seen shouting Nakufa, Nakufa we hit a target there on their foot we found them holding tight making have about 01:30hrs we did disperse them victim (Mary s/o John) told us accused forced him to make have we took them to Police.

That is all

XXD by the accused.

- When arrested you were naked and found you were having sex with victim.
- There was no shamba of Migamba, no house at nearby from there.

RXD: By Nil

PW3: F.2180 DCPL. Muni XSTIAN adult sworn and states in Swahili.

XD: by Prosecution: I am CID at Ifakara on 20/10/2018 about 11:30hrs 7:30hrs at Ifakara Police station come are sister called marry came policeman including Sgt. Abdallah and others she was complaining to be raped also the suspect was already arrested I gave him PF 3 and she did went to St. Francis Hospital.

I did interrogated him he said she approached her they agreed to go to guest house but it was fully accommodated so she took her on Banana plantation. I do remember said statement (Pointed and Identified by witness. I pray to tender as exhibit.

Accused person: I don't know how to read.

Court: Exhibit admitted as P. 2

SGD: B.N. MASHABARA – SRM

09/10/2019

Court: Statement read over before the court.

SGD: B.N. MASHABARA – SRM

09/10/2019

Tried to summon her he is not realible, I pray to tender under S.34 A of tea Cap.06/2002.

I pray to tender as exhibit.

Accused person: I don't know how I and read.

Court Exhibit: Admitted as "P.3"

SGD: B.N. MASHABARA – SRM

09/10/2019

Court: Statement read over before the court.

XXD: by Accused person:

Victim is not before this court the court will prove if the statement is you are note.

That is all

RXD: By Pros: Nil

P.P.: I pray to close my case.

Court: As per evidence on the record accused person has case to answer.

SGD: B.N. MASHABARA – SRM

09/10/2019

Accused person: I will make sworn testimony but I am not ready to make defence who has been raped is not there. That is all.

Order: 1. Judgment

2. ARIC

SGD: B.N. MASHABARA – SRM

09/10/2019

Both the Republic and the applicant had a chance to address the court before the revision was done. Submitting to the court Ms. Imelda Mushi, State Attorney invited the court to examine two areas. **One**, that the statement of the victim, Mary d/o Joseph Kachima (Exhibit P3) was received contrary to section 34B of the Evidence Act, Cap. 6 R.E 2002 (now R.E 2019). Further, its contents do not show that she was raped. It shows that she consented, counsel submitted. **Two**, that the Magistrate (Mashabara, SRM) erred in convicting the accused using the evidence of a PF₃ (Exhibit P1) and the doctor who said that the victim was a child while in actual sense she was 23 years. The applicant being a layman did not have anything to say. He left everything to the court.

I have considered the submissions of the parties in the light of the records. With respect, I think this is one of the cases which has put the judiciary in a state of embarrassment for acts done by its staff who are not serious with their work. There are several irregularities but I will point out a few. **One**, the record show that this was a case of rape. There was a total of three witnesses but

the victim of rape was not one of them yet there was a conviction. **Two**, the statement of the witness was tendered by PW3, the police who recorded it under section 34A of the Evidence Act but my look at the law does not show that the court has power to act under it. I have tried to imagine as was done by the state attorney, that the magistrate meant section 34B but again no foundation was laid before receiving it. Further to that, as was hinted by the state attorney and will be seen bellow, the statement did not contain any clear element of rape. To the contrary it shows that the parties had decided to go to a guest house to have sex but ended to do it in the bush after missing a room. **Three**, the PF3 of the victim was tendered by PW1 contrary to the procedure. No foundation was laid before tendering it. Neither was it read before the court after admission. **Four**, and worse, the proceedings appear to be too short indicating that a lot of facts were left out by the magistrate. It was the duty of the magistrate to record the proceedings properly because they are the Conner Stone upon which justice is given. All what was said by the witnesses had to be recorded properly. And if the problem was the prosecutor, who did not lead the witness to give details, it was not for the magistrate to sit and see justice being buried. He had a duty to direct the prosecutor to lead his witnesses properly. Failure to have a good record of the evidence which was received

constituted a serious irregularity in this case. **Five**, there was failure to observe the mandatory requirements of section 231 of the Criminal Procure Act. The law requires the accused to be informed of his rights of defence before going to give evidence. That has to be done and be shown on the record. It was not done in this case. Again it is not very clear as to why the magistrate rushed to put the matter to judgment after the accused had questioned on the whereabouts of the woman whom he had raped. The victim of rape did not give her evidence and the applicant had a right to ask. No explanation was offered as to why she did not give evidence instead the matter was rushed to judgment indicating that the magistrate was angry. We should learn to contain our emotions.

Six, the statement which was tendered did not contain the ingredients of the offence of rape. To quite just a few lines, it reads thus;

“Ilipofika majira ya saa 00:30 hrs hivi yule mtu aliye chukua/niliyempatia namba yangu ya simu alinipigia simu tukaongea kwenye simu, **tukakubaliana twende tukalale lodge**tulienda hadi kwenye hiyo lodge, akaingia ndani akaniambia nisubiri nje. Nikasubiri akatoka akaniambia hapa wanazingua twende kwenye lodge nyingine**tulielewana twende**

tukatombane kwa kutumia kondomu na alikubali
.....nikasema sasa hivi ni usiku nirudi nyumbani
.....nakulala hapa hapa.....akanipanua miguu
akaingiza uume wake.....ndipo nikamwambia
naomba nilale vizuri...”. (Emphasis added).

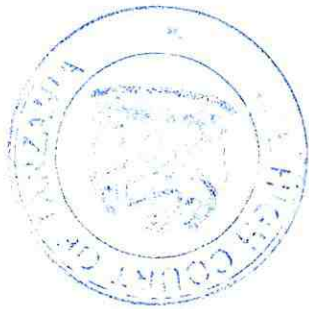
One may wonder if there was any rape in this case. What is apparent is that the parties had an agreement to have sex in a guest house but later moved to have it in the bush after missing a room. The woman appeared to hesitate to sleep in the bush but later agreed and gave co-operation (naomba nilale vizuri). Where is rape here. At most she appeared to hesitate to have it in the bush but later agreed to proceed. No wonder she refused to give evidence when she was requested to do so.

Seven, the magistrate did not take any trouble to have a look at the proceedings after typing. The records contain a lot of typing and language mistakes which could not have been in existence if he had taken trouble to go through them. It was the duty of the magistrate to cross check the record before dispatching the file to the next stage, something which was not done in this case indicating a serious negligence on the part of the magistrate.

Finally, let Mr. Mashabara and others of the like be reminded of the duty to do their work according to the law and the available guidelines.

With all the above short comings, the conviction is found to have been based on wrong proceedings and therefore, bad in Law. I exercise the revision jurisdiction of this court contained in section 44 (1) (a) of the Magistrates Courts Act, Cap. 11R.E 2002 and proceed to revise and vacate the proceedings and decisions of the District Court. The accused must be set free unless lawfully held for some other reasons.

It is ordered so.



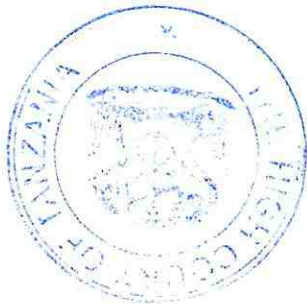
A handwritten signature in blue ink, consisting of a stylized, elongated shape with vertical strokes, followed by a horizontal line.

L. M. Mlacha

JUDGE

05/08/2020

Court: Ruling delivered in the presence of Ms. Imelda, State Attorney for Republic/Respondent and absence of the applicant who will have to be notified and be supplied with a copy of this ruling.



A handwritten signature in blue ink, consisting of a stylized, elongated shape with vertical strokes, followed by a horizontal line.

L. M. Mlacha

JUDGE

05/08/2020