

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO.93 OF 2018

NICKSON SHABAN..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the District Court of Shinyanga, Kato RM)

dated the 26th of June, 2008

In

Criminal Case No.340 of 2008

RULING

11th & 19th February, 2021.

MDEMU, J.:

The Appellant NICKSON SHABAN was convicted of the offence of rape contrary to the provisions of section 130 and 131 of the Penal Code, Cap.16. According to the judgment, the Appellant who was the house servant of the mother of the victim of rape committed the offence in the night of October, 2007. To the conclusion of trial, Kato (RM) found the Appellant guilty and as said, he was convicted and accordingly sentenced to thirty (30) years prison term. This was on 26th day of June, 2008.

After almost ten (10) years, that is on 12th of September, 2018, this Court (Kibella J.) extended time to the Appellant to appeal out of time. This prompted the instant appeal on seven (7) grounds of appeal which I have condensed them into the following grounds: **One** that, the Appellant was not identified in that dark night; **two** that, the age of the victim of rape was not established and **three**, that the trial court did not evaluate evidence properly.

The Appellant appeared before me on 11th of February, 2021 prosecution his appeal. On that day, the Respondent Republic had the service of Ms. Salome Mbuguni, learned Senior State Attorney. As there was an order of the court dated 7th of December, 2020 regarding whereabouts of the record of criminal case No.340 of 2008, Ms. Salome Mbuguni, SSA was invited to address the court regarding compliance of that order. She then submitted that, on 9th of February, 2021, the Deputy Registrar did depose in the affidavit to the effect that efforts deployed in tracing the file proved futile, thus certifying that, the record of the District Court of Shinyanga is at large.

In the circumstances, the learned Senior State Attorney cited the case of **Robert Madololyo vs Republic, Criminal Appeal No.486 of 2015** (unreported) on reconstruction of the record which she thought the contents

of the affidavit of the Deputy Registrar has greatly complied. As there is no record for which she can use to respondent to the grounds of appeal, she thought to be unsafe for her to argue the appeal on the basis of the grounds of appeal.

On that note, she cited the case of **Mfaume Shaban Mfaume v. R Criminal Appeal No.194 of 2014** (unreported) leaving the matter to court to determine the fate of the Appellant basing on the amount of sentence the Appellant has already served. The Appellant associated himself to the position of the Respondent save for the sentence imposed which according to the commitment warrant is thirty three (33) years but the judgment indicates to be thirty (30) years.

I should comment on one item first stated by the Appellant regarding the amount of sentence the Appellant is serving. It is true that in the commitment warrant, the sentence of the Appellant is a term of thirty three (33) years. This was wrong as the judgment indicates that the Appellant was convicted and sentenced to thirty (30) years prison term. My view in this is that, the entries in the commitment warrant regarding sentence are incorrect. The Appellant therefore is serving a prison term of thirty (30) years and not thirty three (33) years indicated in the commitment warrant.

In the light of what Ms. Mbuguni observed, I entirely agree that due to absence of the record of the trial court, is unsafe to proceed with determination of the appeal on the basis of the grounds of appeal. This was also the position taken by the Court of Appeal in **Mfaume Shaban Mfaume v. R** (supra) at page 4 of the ruling that:


Having pondered over the matter, we are in agreement with the learned State Attorney that in the absence of the record of evidence, it is impossible for us to decide the grounds of appeal without offending the ends of justice. That can only be done by evaluating the evidence tendered at the trial.

Having that position in mind, there is nothing to comment on the trial court's judgment for want of evidence upon which the impugned judgment owes its basis. On that stance I invoke revision powers of this court and nullify the proceedings and judgment. The conviction and sentence of the District Court of Shinyanga is thus quashed and set aside. What is the way forward? In the case of **Mfaume Shaban Mfaume** (supra) at page 6 of the ruling, the Court of Appeal observe that:

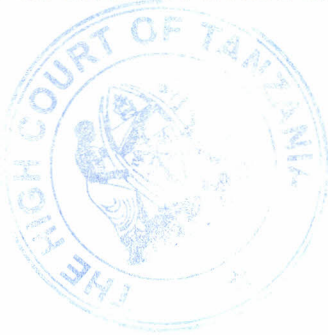
"We have considered the peculiar circumstances in this matter particularly the facts that the Appellant has been incarcerated for about sixteen (16) years from the date of conviction and sentence thereby serving a substantial part of his sentence, that the efforts to trace the record of proceedings from the court and other stakeholders have proved futile and that a retrial of the Appellant cannot be ordered without occasioning injustice. All considered, we think justice will triumph if the Appellant is set free."


In the instant appeal, the Appellant was sentenced to thirty (30) years imprisonment on 26th of June 2008. He has served almost thirteen (13) years. As per the affidavit of the Deputy Registrar and also as per the letter dated 9th of February, 2021 with Ref. No. NPS/J.32/67 from the National Prosecution Services, Shinyanga Office, there is no any record traceable regarding Criminal Case No.340 of 2008. On that stance, even ordering a retrial taking into account the amount of sentence served by the Appellant, won't be in the interest of just. In the end result, justice require the Appellant be set free, as

I hereby order. He be released from prison, unless he is held for some other lawful causes. It is so ordered.


Gerson J. Mdemu
JUDGE
19/02/2021

DATED at **SHINYANGA** this 19th day of February, 2021.




Gerson J. Mdemu
JUDGE
19/02/2021