

LEGAL PRINCIPALS DISCUSSED

| Citation | Parties | Legal Principles Discussed |
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| <p>IN THE COURT OF APPEAL OF TANZANIA AT DODOMA.</p> <p>CRIMINAL APPEAL NO. 160 OF 2008.</p> <p>KILEO, J.A, MASSATI J.A AND ORIYO J.A.</p> | <p>SAMWEL LESILWA VS THE REPUBLIC</p> <p>(Appeal from the Decision of the High Court of Tanzania at Dodoma Kwariko J.)</p> | <ol style="list-style-type: none"> 1. Failure by the trial court to summon and hear out the defense witnesses violated the appellants' right to a fair trial which is provided for under Article 13(6) (a) of the Constitution of the United Republic of Tanzania which provides for the right to be fully heard when the rights and obligations of a person are the subject of determination by a Court or another organ. |

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KILEO, J.A., MASSATI J. A. AND ORIYO, J. A.)

CRIMINAL APPEAL NO 160 OF 2008

BETWEEN

SAMWEL LESILWA..... APPELLANT

AND

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania
at Dodoma

[Kwariko, J.]

dated 12th September, 2007

in

DC Criminal Appeal No. 6 of 2007

JUDGMENT OF THE COURT

10th & 17th March, 2010

KILEO, J. A.

This is an appeal that arises from the decision of the District Court of Mpwapwa in Criminal Case No. 101 of 2004 in which the appellant was convicted of rape and sentenced to life imprisonment. His appeal to the High Court was unsuccessful hence this appeal. The memorandum of appeal can be summarized into three main grounds:

1. That the refusal by the trial magistrate to hear out the appellant's witnesses violated his right to a fair hearing.
2. That there was general insufficiency of evidence in proof of the charge against him
3. That the trial magistrate and the first appellate court erred in arriving at a conviction while putting reliance on the PF3 without the evidence of the doctor who performed the medical examination upon the victim.

The appellant who appeared in person at the hearing of the appeal asked us to adopt his grounds of appeal. The Respondent Republic was represented by Mr. Faraja Nchimbi, learned State Attorney. Though the learned State Attorney was of the opinion that there was sufficient evidence for a conviction he did not however support the conviction for the reason that the appellant was not accorded a fair hearing. The learned State Attorney in the circumstances addressed us only on the above aspect. Referring us to the certified record of appeal at page 21 he submitted that the case was set down for judgment without any indication that the appellant had closed his case and without having his witnesses whom he had listed at the Preliminary Hearing summoned to testify. Mr. Nchimbi asked us, in the circumstances, to nullify the proceedings in both the High Court and the trial court with an order that the case be heard de novo by another magistrate of competent jurisdiction.

After the learned State Attorney had made his submission the appellant submitted that as a matter of fact the trial magistrate dealt with the matter hurriedly and did not accord him an opportunity to call his witnesses as the magistrate was leaving the station and he did not intend to leave the matter pending. The trial court's record shows that the defence case was closed on 30th July 2004 and judgment set for 2nd August 2004 just about four days later.

We have carefully examined the record before us. Indeed the typed and certified record of appeal before us does not show that the appellant ever closed his defence case prior to the matter being set down for judgment. The record shows that immediately after he had testified the matter was set down for judgment. When we perused the original record of the trial court however, we found that there were some proceedings that were not contained in the certified copy of the record. We could not be sure, for reasons that will soon become apparent, if the disparity between the typed proceedings and the original record was a mere typographical error. For better understanding of the matter we find it appropriate to reproduce the missing proceedings hereunder:

"My witnesses have not come. I'd promised to reveal the names to the ct, as directed but I'd forgotten to do so before I left for the remand prison. I close my defence".

The above proceedings are contained on the same page as the order of setting the date of judgment in the handwritten proceedings. It is surprising that the typist could have missed so much of such vital proceedings. Making reference to the absence of defence witnesses in his judgment the trial magistrate stated:

“At the close of the prosecution case, the accused had elected to defend himself on oath and had intended to call in Suligwa Lesilwa, Samson Lesilwa, and Sospeter Lesilwa as his defence witnesses, at the preliminary hearing stage. He had later informed the court that he intended to call in other different witnesses whom he did not disclose, and after his own defence the witnesses were dropped.”

The statement by the trial magistrate that the appellant had indicated to call in other witnesses other than those he mentioned at the preliminary hearing is not borne out by the record. The record more over shows that when the prosecution closed its case on 16/7/2004 the appellant indicated that he had three witnesses to call on his side. The statement recorded by the trial magistrate of the appellant as saying that *“he had promised to reveal the names of witnesses to the court as directed”* therefore comes as a surprise as during preliminary hearing the appellant had indicated that he had three witnesses for his defence. These three witnesses were listed and their addresses were given. After giving an order setting defence hearing on 30/7/2004 the trial magistrate directed that defence witnesses be summoned. No doubt the defence witnesses to be summoned must have been those mentioned at the preliminary hearing stage as there is nowhere in the record showing that the appellant had a change of mind about which witnesses to call for his defence. We have very carefully gone over the proceedings of the trial court and we have arrived at a conclusion that the defence witnesses were not summoned. There are no copies of witness summons in the record so this must mean that they were not summoned. The trial court had a duty to see to it that witness summons were issued especially considering

that the appellant was in remand prison and would not have been in a position to easily contact his witnesses. We are satisfied that the failure by the trial court to summon and hear out the defence witnesses violated the appellant's right to a fair trial. Article 13(6) (a) of the Constitution of the United Republic of Tanzania provides for the right to be fully heard when the rights and obligations of a person are the subject of determination by a court or another organ. In this case we are settled in our minds that the appellant was not fully heard. Since the appellant's right to a fair trial was violated in the trial court, thus making the proceedings a nullity, it follows that the proceedings in appeal in the High Court were vitiated as well.

Mr. Nchimbi asked us, in the interests of justice, to nullify the proceedings in both the High Court and the trial court and order a trial de novo. Given the circumstances of the case we think that this would be the best option to take.

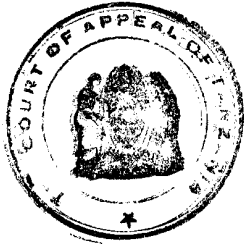
In the light of the above considerations we allow the appeal to the extent that the appellant was not accorded a fair trial. In the circumstances we quash and set aside the proceedings in the High Court and the trial court. The matter is remitted to the District Court for the appellant to be tried de novo before another magistrate of competent jurisdiction.

It is ordered accordingly.

Dated at Dodoma this 15th Day of March 2010.

E. A. KILEO

JUSTICE OF APPEAL



S. A. MASSATI

JUSTICE OF APPEAL

K. K. ORIYO

JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read "E. Y. Mkwizu", written over a horizontal line.

E. Y. MKWIZU

DEPUTY REGISTRAR