

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

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 258 OF 2007

NDAYISENGA KANITE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Tabora)**

(Chinguwile, J.)

**dated the 18th day of May, 2007
in**

Misc. Criminal Application No. 34 of 2002

RULING OF THE COURT

1st & 3RD June, 2010

MASSATI, J.A.

The appellant and another person who is not before us, were charged with and convicted of the offence of attempted rape, contrary to section 132 (2) (a) of the Penal Code (Cap 16 RE 2002) in the Primary Court of Kakonko, in Kibondo District, Kigoma Region. They were sentenced to 30 years imprisonment. Their appeal to the District Court was dismissed. The appellant's attempt to apply for

extension of time to appeal to the High Court was also dismissed. He has now come to this Court for a second attempt.

In Court the Appellant was represented by Mr. Mugaya Mtaki learned Counsel, whereas the Respondent/Republic was represented by Ms. Neema Ringo, learned Principal State Attorney.

When the appeal was called on for hearing, Ms Ringo informed the Court that although she had filed a Notice of Preliminary Objection, she had other more pertinent observations to make. She pointed out that in terms of the First Schedule to the Magistrates' Courts Act (Cap 11 – RE 2002) (the Act) the Primary Court that tried the case had no jurisdiction. Consequently, all the proceedings, up to the High Court were a nullity. She, therefore, asked us to invoke our revisional powers and quash all the proceedings in the lower courts. She was also of the view that since the evidence itself was also shaky, it would be inappropriate to order a retrial. After saying so, Ms Ringo, withdrew her preliminary objection.

On his part Mr. Mtaki agreed with Ms Ringo entirely and urged us to set his client free.

We agree with Ms Ringo's observations. The jurisdiction of Primary Courts is governed by part III of the Magistrates' Courts Act. Section 18 (1) (c) read together with the First Schedule to the Act prescribes what offences under the Penal Code, a Primary Court can try.

The Appellant was charged with the offence of attempted rape contrary to section 132 (2) of the Penal Code. That offence does not appear in the list in the First schedule. So, the Primary Court had no jurisdiction to try it.

In exercise of our powers under section 4 (2) of the Appellate Jurisdiction Act (Cap 143 RE 2002), we hereby quash all the proceedings, convictions and orders of the lower courts, as they are a nullity. We have also given anxious thoughts on whether or not to order a retrial. Considering that the appellant has been in prison since March, 2001, and the nature of the evidence that led to his conviction, we agree with Ms Ringo that to order a retrial would go against the dictates of justice. We therefore order that unless

otherwise lawfully held, the Appellant be released from prison forthwith.

Order accordingly.

DATED at TABORA this 2nd day of June, 2010.

E. K. M. RUTAKANGWA
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL

