IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A. And MANDIA, J.A.)

CRIMINAL APPEAL NO. 10 OF 2008

GODI KASENEGALA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Mchome, J.)

dated the 23rd day of October, 2007
in
(DC.) Criminal Appeal No. 9 of 2007

JUDGMENT OF THE COURT

2nd & 3rd September, 2010

RUTAKANGWA, J.A:

The Appellant was arraigned with the offence of Rape contrary to sections 130 and 131 (1) of the Penal Code. He was tried by the District Court of Iringa District. On being found guilty as charged, he was convicted and sentenced to life imprisonment. He was also ordered to pay the alleged prosecutrix, Tshs. 200,000/= as compensation. Aggrieved by the conviction and sentences, he unsuccessfully appealed to the High Court at Iringa. Still protesting his innocence, he has lodged this appeal.

The memorandum of appeal before the Court, lists seven grounds of complaint against the High Court judgment. Having closely examined them, we are of the settled mind that these can be conveniently reduced to three substantive grounds of appeal. These are that the learned first appellate judge erred in law in: **One**, totally misapprehending the nature and quality of the prosecution evidence against him which did not prove the charge beyond reasonable doubt. **Two,** acting on the uncorroborated unsworn evidence of the prosecutrix and inconclusive close relative evidence. **Three,** imposing on him a sentence of imprisonment when he was below 18 years of age.

Before looking at the circumstances which led to the arraignment and subsequent conviction of the appellant, we have found it highly instructive to, first, make these very pertinent observations. Being charged with the offence of rape the appellant was tried under the provisions of the Criminal Procedure Act, Cap 20, Vol. 1 R.E. 2002 (hereinafter the Act). See section 4 of the Act. Section 177 of the Act vests "every court" with "authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed

within Tanzania..." and deal with him, that is, try him, according to its jurisdiction.

In order to **conduct fair trials and do justice according** to law, when trying accused persons, courts have been given certain powers. One such power is the power to summon witnesses under section 142 (1) and 195 of the Act.

For the proper determination of this appeal we have found section 198 (1) of the Act to be compellingly relevant. It reads thus:-

> " *Every witness in a criminal cause or matter* ***shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation*** *in accordance with the provisions of the Oaths and Statutory Declarations Act."*
>
> *(Emphasis is ours).*

We have learnt that section 127 of the Evidence Act, Cap 6, Vol. 1 R.E 2002,(henceforth the Evidence Act) contains such **explicit** "contrary provisions." The Evidence Act applies to all "judicial proceedings in all

courts, other than primary courts, in which evidence is or may be given ...": see section 2.

Section 127 of the Evidence Act runs thus in subsections (1) and (2):-

> " *(1)* ***All persons*** *shall be competent to testify unless the court considers that* ***they are prevented from*** *understanding the questions put to* ***them,*** *or* ***from*** *giving rational answers to those questions by reason of tender* ***years,*** *extreme old age, disease (whether of body or mind) or any other similar cause.*
>
> *(2) Where in any criminal cause or matter* ***any*** *child of tender* ***years*** *called as a witness* ***does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the***

> ***proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."*** *[Emphasis is ours].*

It is also provided in subsection (5) that for the purposes of subsection (2), the expression "Child of tender years" means a child whose apparent age is not more than fourteen years. So, subject to the mandatory provisions of subsection (2) above, a child of tender years can be a competent and compellable witness in criminal proceedings. The bar from testifying to a child of tender years who does not understand the nature of an oath and is not in possession of sufficient intelligence, which would enable him to discern the difference between right and wrong, is justified on the same basis as the statutory defense of immaturity under section 15 (1) and (2) of the Penal Code for children of almost similar age.

Having made these observations, we find ourselves in a good position to give a brief account of that which led to the appellant's

conviction, and thereafter proceed to conclusively determine the legal issues raised by the appellant.

The appellant together with Stella d/o Luganini, Nelia d/o Chukio, Remija d/o Msungu and Stumai d/o Kasenegala are residents of Igunga Village in Kilolo District. While the appellant testified as DW1 at his trial, his villagemates testified as PW1, PW2, PW3 and PW4 respectively. PW1 Stella is the mother of PW2 Nelia, and PW3 Remija is her sister in law.

On 20th July, 2004 at about 12.00 hours, PW2 Stella came across PW3 Remija along the way. Remija asked Stella of the whereabouts of Nelia. She told her (PW3) that Nelia was playing with her playmates. Remija told her that she had seen the appellant leading Nelia into a maize farm. Stella entered the maize farm wherein she said she found the appellant having sexual intercourse with Nelia. According to Stella both Nelia and the appellant were naked. Stella forthwith got hold of the appellant, raised an alarm to which many people responded. Among these people were PW4 Stumai and one Roza Lulenge. The appellant was sent to Andoseki s/o Kivumba, one of the Village government leaders.

On being examined Nelia was found with a swollen vagina and "whitish fluid on her thighs". After obtaining a PF3 from Ilula Police Post Nelia was taken to Iringa government Hospital for further examination. At the hospital Nelia was attended by PW5 Margreth Gringoyi, a medical doctor. PW5 found Nelia with no hymen and her vagina had bruises and was "reddish." PW5 Magreth tendered the PF3 in evidence as exhibit P1. The appellant was thereafter accordingly charged.

In his sworn evidence, the appellant denied having had any sexual intercourse with PW2 Nelia as alleged. He was arrested by PW1 Stella and PW3 Remija who thereafter sent him to the village office where it was alleged that he had raped PW2 Nelia, he said. All the same, he told the trial court that he had no quarrels with PW1 Stella.

In the determination of the case, the learned trial Resident Magistrate, rightly in our view, found herself facing two issues, one of fact and another of law. These were:

(a) Whether or not PW2 Nelia was raped, and

(b) If PW2 Nelia was raped whether it was the appellant who had raped her.

The first issue was affirmatively answered. This answer was premised on the evidence of PW1 Stella and PW5 Margreth. Their evidence, according to her, was that they found PW2 Nelia "with swollen vagina and bruises on it" as well as "with whitish fluid (semen) **all over her thighs on the material day.**" From these facts she opined that:-

> *"...the girl who was only four years old could not have done anything else with her vagina but being raped."*

The second issue was also answered in the affirmative. This answer was predicated upon the evidence of PW1, PW2 and PW3. She reasoned that PW3 Stumai had seen the appellant "leading the girl to the farm and informed her mother about that suspicious movement." Thereafter, PW1 had gone into the maize farm where she had "found the accused lying on top of the girl, having sexual intercourse with her."

As already indicated herein the appeal of the appellant to the High Court was dismissed. In a one paragraph judgment no attempt was made to subject the evidence to any scrutiny. We shall be forgiven to comment that the said decision, with all respects, had all the hallmarks of a summary rejection order. The evidence of PW2 Nelia was never considered at all either to ascertain if it proved the offence of rape in law or if it was properly received. The learned first appellate judge was satisfied that rape was committed because:-

"The appellant was caught by the victim's mother.

The mother caught him and they fought."

That, in our view, was a very unsatisfactory way of deciding a first appeal which had not been summarily rejected under section 364 (1) of the Act. It behoves us now to intervene and do what the first appellate court failed to do.

We shall begin our discussion with the fourth ground of appeal as listed in the memorandum of appeal. In this ground of appeal the complaint is that the learned appellate judge erred in law in acting on the evidence of close relatives "without warning himself of the danger of

adhering to such evidence." As we have already alluded to herein, PW1 Stella, PW2 Nelia and PW5 Stumai are close relatives. But as correctly argued, by Mr. Vicent Tangoh, Learned Senior State Attorney, for the respondent /Republic, there is no law in this country barring such witnesses from testifying for the prosecution where one of them is a victim of an offence alleged to have been committed. We accordingly dismiss this ground of appeal, although we should not be taken as holding that these were all out witnesses of truth.

The complaint which is the subject of the sixth ground of appeal is that it was wrong for the learned first appellate judge to uphold his conviction in the absence of expert evidence to the effect that PW2 Nelia had been raped.

Indeed, at the trial of the appellant, one Dr. Magreth of Iringa government Hospital testified for the prosecution. Her evidence was that she examined PW2 Nelia on 20th July, 2004. She guardedly said that she found out that PW2 Nelia "vagina had been tampered with" as her hymen was broken. Being an expert that was the best she could tell. It was not

within her province to conclusively tell the court that PW2 Nelia had been raped and if so when. That finding falls within the exclusive preserve of the court after considering all the established facts in the case. If this issue were free of authority may be we would have had to indulge in hairsplitting. But it is not. It is now settled law that the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence. See, for instance, **Selemani Makumba V Republic,** Criminal Appeal No. 94 of 1994, **Alfeo Valentino V Republic**, Criminal Appeal No. 92 of 2006 and **Shimirimana Isaya and Another V Republic**, Criminal Appeal No. 459 and 494 of 2002 (all unreported). Since experts only give opinions, courts are not bound to accept them if they have good reasons for doing so. See **C.D. de Souza V B. R. Sharma** (1953) EACA 41. We dismiss this ground of appeal.

Ground seven of appeal raises a very crucial point of law. This is that the learned High Court judge erred in law in relying on the unsworn evidence of PW2 Nelia. To him, her evidence needed to be corroborated. Such corroboration could not be obtained from the doubtful and therefore

unreliable evidence of PW1 Stella, PW3 Remija and PW4 Stumai who gave contradictory and seemingly implausible evidence, he argues.

As we have already indicated in this judgment, the learned first appellate judge in dismissing the appellant's appeal never considered the evidence of either PW2 Nelia or PW5 Dr. Margreth. He only settled for the evidence of PW1 Stella. But did that evidence prove the offence of rape? The learned first appellate judge, unfortunately, did not direct his mind to this crucial legal issue. But what is rape?

Under our Penal Code rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of eighteen years without her consent. Two, having sexual intercourse with a girl of the age of eighteen years and below with or without her consent (statutory rape). In either case, one essential ingredient of the offence must be proved beyond reasonable doubt. This is the element of Penetration i.e. the penetration, even to the slightest degree, of the penis into the vagina: see, **Masomi Kibusi V Republic**, Criminal Appeal No. 75 of 2005 (unreported).

We have scanned the entire evidence of PW1 Stella. We have failed to glean therefrom an iota of evidence going to prove penetration. The same applies to the evidence of PW3 Remija and PW4 Stumai. Equally, it cannot be stated with any degree of certitude that the opinion evidence of PW5 Margreth proved the essential element of penetration. We are, therefore, left with the evidence of PW2 Nelia, the alleged prosecutrix. Did her evidence prove the offence of rape beyond reasonable doubt? Before attempting to provide an answer to this crucial question, we have found ourselves constrained to reiterate this Court's stance on what we regard as the best evidence in rape cases.

It was stated with sufficient lucidity by this Court in the case of **Selemani Makumba V Republic,** Criminal Appeal No. 94 of 1999 (unreported) that:-

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent,* ***and in case of any other women***

where consent is irrelevant that there was penetration." [Emphasis is ours].

This holding has been consistently followed by the Court in many of its subsequent decisions on the issue. See, for instance:-

(i) **Alfeo Valentino V Republic**, Criminal Appeal No. 92 of 2006;

(ii) **Kayoka Charles V Republic**, Criminal Appeal No. 325 of 2007; and

(iii) **Shimirimana Isaya & Sabimana Fokas V Republic**, Criminal Appeal No. 459 & 494 of 2002 (all unreported).

As we alluded to above, it is also a specific requirement of the law that for there to be rape there must be penetration. We cannot express it more lucidly than the Court did in the case of **Mathayo Ngalya @Shabani V Republic,** Criminal Appeal No. 170 of 2006 (unreported). It said:-

"The essence of the offence of rape is penetration of the male organ into the vagina. Sub-section (a)

> *of section 130 (4) of the Penal Code ... provides;- 'for the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute the sexual intercourse necessary to the offence.'* ***For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence".***
>
> *[Emphasis is ours].*

This long established position of the law has remained unchanged to date, and was recently reiterated by this Court in the case of **Kayoka Charles** *(supra)*.

We have already mentioned in passing that the evidence of PW1, PW3, PW4 and PW5 does not offer proof of penetration. PW3 did not go to the place where the rape allegedly took place. As she put it herself:-

> *"... Later on Stella (PW1) informed me that she* ***found the accused with PW2 in a bush.*** *Then was sent to the village authority ..." [Emphasis is ours].*

PW4 Stumai allegedly found PW1 Stella in "a **maize farm**... fighting with one God" (the appellant). She had to call one Roza to separate them. She went on to say:-

> *"... There were Stella's two kids Nelia and Meshack. The kids were few steps away. Stella told me that she had found the accused with the girl that is why they were fighting.* ***She did not tell me what they were doing ... Nelia had her gown on*** *..." [Emphasis is ours].*

From this undiscredited evidence of PW4 Stumai flows these inevitable questions. If PW1 Stella had found the appellant either having sexual intercourse with PW2 Nelia or on "top of " her as she belatedly told

the trial court, why did she not tell PW4 Stumai so ? The only reasonable inference to be drawn in the circumstances is that she never found the appellant doing any ignominious act. What was Meshack doing there? How and when did he reach the alleged scene of the rape? Why did PW1 Stella and PW2 Nelia, found it convenient to omit placing Meshack at the alleged scene of the crime or mentioning him at all? They were hiding something? PW1 Stella had allegedly found both PW2 Nelia and the appellant stark naked. At what point in time did they get dressed as PW4 Stumai never found them naked? If the alleged rape took place in a maize farm, why did PW1 Stella tell PW3 Remija that she had found the appellant and PW2 Nelia in "the bush"? These unanswered pertinent nagging questions, go to discredit PW1 Stella. In our settled view, had the learned first appellate judge evaluated the evidence and addressed himself to these unsatisfactory features in the evidence of PW1 Stella, he would not have readily taken her as a witness of truth.

That PW1 Stella might have been an untruthful witness is further demonstrated by the undoubted evidence of PW5 Margreth. PW1 Stella

had testified that when PW2 Nelia "was inspected" in the maize farm, she was "found swollen in her vagina and also had whitish fluid on her things".

If PW1 Stella wanted the court to believe that PW2 Nelia was found with semen or whitish fluid on her body, in her bid to prove the rape, then she was belied by PW5 Dr. Margreth. PW5 Margreth who examined PW2 Nelia apparently on the same day, found her with no semen or whitish fluid on any part of her body. Also according to the PF3, exh.P1, PW2 Nelia had no "swollen vagina". She only had no hymen and the vagina had a "redish margin". The evidence of PW5 Margreth is starkly silent on when the hymen was broken/ruptured and/or what could have caused the *"redish margin".* But if the 4 year old PW2 Nelia's hymen had been ruptured on that day as a result of the rape, wouldn't PW1 Stella and PW5 Margreth have seen traces of blood on or in her vagina? Wouldn't PW1 Stella who allegedly found the appellant naked and "on top of" Nelia, have seen blood on his male organs and/or any other part of his body? Mr. Tangoh was at a loss when these implausibilities were pointed out to him. Nevertheless, he maintained his stance of supporting the appellant's conviction.

From the above analysis of the evidence of the four prosecution witnesses, we have found ourselves constrained to conclude that the evidence does not render any assurance to the claim that PW2 Nelia was raped on 20th July, 2004. We are then left with the evidence of PW2 Nelia.

The evidence of PW2 Nelia is not free of difficulties. As is already obvious, PW2 Nelia was a child of tender age. All the same, as earlier said, she was competent to testify in the case provided certain conditions were met.

We have already shown that under Section 198 (2) of the Act, every witness in a criminal case shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation. This means that in a criminal case no witness is permitted to give evidence without being sworn or affirmed unless there is another written law directing otherwise. We have shown already that one such law is the Evidence Act which contains contrary provisions in section 127 (2). This section has been the subject of discussion in many decisions of the Court,

the former Court of Appeal of East Africa and fortunately the Kenya Court of Appeal.

The prevailing view, which is in accord with the provisions of section 198 (2) of the Act and, therefore, harmonizes the mandatory provisions of these two pieces of legislation, was well summed up in the following cases, to choose but a few.

In **Augustino Lyanga V Republic**, Criminal Appeal No. 105 of 1995, the Court emphatically said:-

> *" If we are to paraphrase the provisions of section 127 (2) a court may only receive evidence of a child of tender years who does not understand the nature of an oath if in the opinion of the Court the child is possessed of sufficient intelligence and understands the duty of speaking the truth.* ***These requirements must be recorded in the proceedings... It is our considered view***

> ***that the two requirements are conditions precedent to receipt of evidence from a child of tender years whose evidence has not been received on oath or affirmation."*** *[Emphasis is ours].*

Although the Court made no reference to Section 198 (2) of the Act, and we are not aware of any decision in the past which has attempted to do so while discussing section 127 (2), this construction captures the true intent of the legislature while passing the two provisions.

For this strong reason, the Court stressed the need of strictly complying with this provision (section 127 (2)) in the case of **Justine Sawaki V Republic**, Criminal Appeal No. 103 of 2004 (unreported). It unequivocally said:-

> " *... The Court of Appeal for Eastern Africa, said ... that there was need for strict compliance with the provisions of that section and that* ***non***

compliance might result in the quashing of a conviction unless there was other sufficient evidence to sustain the conviction. We share the view.

In the case before us, the trial judge said she had found that the witness knew the duty of speaking the truth and then proceeded to have her sworn. But she had not found that the witness understood the nature of an oath which is a condition precedent for taking her evidence on oath. In the circumstances there was no basis for taking Coletha's evidence. ***There was also no sufficient justification for even treating her evidence as unsworn because one of the prerequisites had not been met, that is to say there was no specific finding that she was possessed of sufficient intelligence to justify the reception of her evidence*** *..." [Emphasis is ours].*

Under similar circumstances, the Court had, after discounting evidence received without strict compliance with section 127 (2), quashed the convictions of the appellants in many instances. See, for example:-

(i) **Hassan Hatibu V Republic**, Criminal Appeal No. 253 of 2006, delivered on 2nd December, 2008;

(ii) **Jackson Mlonga V Republic**, Criminal Appeal No. 200 of 2007, delivered on 5th December, 2008;

(iii) **Wilbard Kimangano V Republic,** Criminal Appeal No. 235 of 2007, delivered on 26th February, 2020; and

(iv) **Omary Kurwa V Republic**, Criminal Appeal No. 89 of 2007, delivered on 21st July, 2010 (all unreported).

It will be instructive to note that the position taken by the Court on this issue is the same as that of the Court of Appeal of Kenya, a Partner State in the East African Community.

The Court (Kenya) had occasion to elaborate on section 19 (1) of the Kenya Oaths and Statutory Declarations Act (Cap 15) which is almost identical with our section 127 (2) in the case of **Yusufu Sabwani Opicho**

V Republic [2009] eKLR. In that case the trial magistrate had recorded that she had "examined the child and found him intelligent" and thereafter received the child's evidence. On an appeal by the accused to the High Court of Kenya, the appellate judge held that there was sufficient compliance with the procedure.

Disagreeing with the High Court judge the Court of Appeal (Kenya) said:-

> *"... There is nothing novel in what we are about to say as this Court has pronounced itself on the matter many times before. The starting point is section 19 of ... (cap 15) Laws of Kenya..."*
>
> *... The construction of that section is now well grounded in many previous decisions and it is surprising that trial courts still get it wrong. We need only refer to four of them..." [after referring to the case of* ***Nysani s/o Gichana V Republic*** *[1958] EA 190 and* ***Kibangeny Arap Kolil V Republic*** *[1959] EA. 92]*

The procedure for investigation, or preliminary examination of witness ... 'Voir dire' is taken in two steps as summarized in ***Kinyua V Republic*** *[2002] I KLR 256:-*

> *" (a) The court should first ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child witness appears in court. ...*
>
> ***(b) If the child does not understand the nature of the oath, he or she is not necessarily disqualified from giving evidence. The court may still receive the evidence if it is satisfied, upon investigation, that the young person is possessed of sufficient intelligence and understands the duty of speaking***

the truth. This investigation must be done and when done, it must appear on record. Where the court is so satisfied then the court wlll proceed to record unsworn evidence from the child witness.

Further in ***John Muirurl V Republic*** *[1983] KLR 445 this Court re-emphasized, inter alia that:-*

(2) It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

(9) ...The correct procedure for the court to follow is to record the examination of the child witness as to

the sufficiency of her intelligence to satisfy the reception of evidence and understanding the duty to tell the truth." [Emphasis is ours].

After the Court had found that the procedure prescribed above had not been followed, it thus concluded:-

" *Clearly that was flagrant breach of the requirements* ***of section 19*** *of the Oaths and Statutory Declarations Act ...* ***The child was a vital witness in the trial and the failure by the court to comply with the procedure in the reception of his evidence vitiates the evidence*** *..."*

[Emphasis is ours].

This Court has so held and acted in all the cases cited above.

What happened at the trial of the appellant where Nelia was the second prosecution witness? The record of proceedings in the trial court provides us with the answer.

When PW2 Nelia was about to testify, the trial Resident Magistrate first examined her thus to ascertain whether she understood the nature of an oath:-

> *"**Court:** What is your father's name?*
>
> ***Child:** I don't know.*
>
> ***Court:** Where do you pray?*
>
> ***Child:** I don't pray.*
>
> ***Court:** Do you school?*
>
> ***Child:** No.*
>
> ***Court:** Do you you know what is an Oath?*
>
> ***Child:** No.*
>
> ***Court**: After **Voire dire** examination the court is satisfied that the child does not know what is meant by an oath. She will testify without oath."*

Admittedly there was a flagrant breach of the provisions of section 127 (2) of the Evidence Act as well as section 198 (2) of the Act. Under these provisions, the unsworn evidence of Nelia ought not to have been received at all unless and until the trial court was satisfied that she was possessed of sufficient intelligence to justify the reception of her evidence and **further** that she understood the duty of speaking the truth.

We wish to re-emphasize here that these two conditions in the second stage must be satisfied **conjunctively** before the unsworn or unaffirmed evidence of a child witness is received. If, upon a proper examination of the child, either both attributes or any one of them are found wanting, then his or her evidence must be dispensed with, in conformity with the mandatory requirements of both the Evidence Act and the Act. In the light of these clear statutory provisions, unsworn evidence of a child witness received outside the ambit of the provisions of section 127 (2) is as good as no evidence at all in a criminal trial. It should always be discarded or discounted.

On this Mr. Tangoh agreed and urged us to discount it, although he insisted that the evidence of PW1 Stella and PW3 Remija proved the offence of rape. We discount, therefore, the evidence of PW2 Nelia.

Once the so called evidence of PW2 Nelia is discounted, are we left with any other sufficient evidence to sustain the conviction of the appellant? In spite of Mr. Tangoh's pressing that there is such evidence, we regret to say that this being a criminal case we have none on record. We have already given our reasons why we have found the evidence of PW1 Stella extremely wanting in cogency. The evidence of other witnesses does not irresistibly lead to the conclusion that PW2 Nelia was raped and even if she was, that the culprit was the appellant. In short, the guilt of the appellant was not proved beyond reasonable doubt. This disposes of the third and seventh grounds of appeal.

Since the prosecution failed to prove its case beyond reasonable doubt, we hereby quash and set aside the appellant's conviction. Furthermore, as the appellant was admittedly below eighteen years of age the prison sentence imposed, as conceded by Mr. Tangoh, was illegal in

terms of section 131 (2) (a) of the Penal Code. It is also quashed and set aside. The same applies to the compensation order.

In fine, we allow this appeal in its entirety. The appellant is to be released from prison forthwith unless he is otherwise lawfully held.

DATED AT IRINGA this 2nd day of September, 2010.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

J. S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL