IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 90 OF 2008

SUNGULWA LUKELESHA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the RM's Court of Tabora at Tabora)

(Mbuya, PRM Ext. Jur.)

dated the 2nd day of April, 2008

in

Criminal Appeal No. 12 of 2006

JUDGMENT OF THE COURT

22 & 27 June, 2011

MANDIA, J.A.:

On 1/12/2005 the appellant SUNGULWA s/o LUKELESHA appeared before the District Court of Igunga District at Igunga on a charge of Rape c/s 130(1) (2) and 131(1) (3) of the Penal Code as amended by Sections 5 and 6 of the Sexual Offences Special Provisions Act No. 4 of 1998. When the charge was read over to the appellant he pleaded thus:-

"It is true that I raped one Gigwa as I took her at my home and have Sexual intercourse with her of first instance."

The court thereafter entered a plea of "GUILTY." The prosecutor then adduced the facts of the case which tended to show that in June 2005 the appellant made a marriage proposal to one Gigwa d/o Jihihi who was sixteen years old at the time. Gigwa d/o Jihihi told the appellant that she was a std VII pupil and will complete her primary education in November, 2005. The appellant waited until 24th November, 2005 and renewed his marriage proposal. This time Gigwa accepted the proposal and at 8 p.m. on 24th November, 2005, she left her parents' home and went to meet the appellant. The two then left together for the appellant's village called Mwalala. On the morning of 25/11/2005 the parents of Gigwa d/o Jihihi discovered that their daughter was missing from home and they initiated a search for her to no avail. One day after the commencement of the search, that is, on 26/11/2005, the appellant sent his brother Mwanahidi to Gigwa's parents to report that the appellant and Gigwa are now a married couple. Gigwa's parents seem to have been offended by news of the "marriage" and they reported the

matter to the village Executive Officer and thereafter to the police who arrested the "married" couple. The arrest subsequently led to the charge of rape.

When these facts were outlined in court the appellant responded thus:-

"The facts are true and I admit them."

The court of first instance recorded a plea of guilty on the appellant's own admission of the facts and convicted him. The conviction was followed by a sentence of imprisonment of thirty years plus twelve strokes of the cane.

The sentence of imprisonment, spiced with corporal punishment, must have been a shocker to the appellant, who immediately preferred an appeal to the High Court of Tanzania at Tabora. In grounds two and three of the memorandum of appeal which the appellant lodged in the High Court, the appellant clearly showed that he did not understand the charge he was pleading to, and at any rate he did not understand why he should be sent to prison for enjoying conjugal rights with the victim

Gigwa d/o Jihihi with whom he lived as husband and wife. The appeal was heard by L.J. Mbuya, PRM (Extended Jurisdiction) who found the plea of the appellant to be unequivocal despite the appellant raising the question of a traditional marriage. The learned PRM (Extended Jurisdiction) found the appeal devoid of merit and dismissed it. The PRM Extended Jurisdiction ordered the appellant to pay an additional sh. 500,000/= as compensation to Gigwa d/o Jihihi as what he called "nominal compensation." Aggrieved, the appellant lodged this second appeal.

The appellant appeared in person at the hearing of the appeal, while the respondent/Republic was represented by Ms. Lilian Itemba, learned State Attorney. Ms.Lilian Itemba, learned State Attorney did not support the conviction and sentence, arguing that the plea of the appellant seems to be equivocal and also that all the necessary ingredients of the offence were not explained to the appellant. She referred us to the High Court authorities of BUHUMULA MAPEMBE v R (1988) TLR 166. Being decisions of the High Court, the authorities cited cannot be binding on this Court. At best they can be persuasive only.

After all is said and done this Court takes note of the fact that the substantive charge of rape against the appellant was laid under Section 130(2) (e) of the Penal Code which reads thus:-

"(2) A male person commits the offence of rape if he has sexual intercourse with a girl of a woman under the circumstances falling under any of the following descriptions:-

(a) ...

(b) ...

(c) ...

(d) ...

(e) With or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."

When the appellant was asked to plead to the charge, and in these circumstances where he is alleged to have pleaded guilty, the governing

Provisions are Section 228(1) and (2) of the Criminal Procedure Act, chapter 20 R.E. 2002 of the Laws which read thus:-

> *"228 – (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*
>
> *(2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary.*
>
> *(3) N/A*
>
> *(4) N/A*
>
> *(5) N/A*
>
> *(6) N/A*

In a conviction on a plea of "Guilty", all the ingredients of the offences must be admitted – see **BUKENYA v UGANDA** (1967) EA 341. Since the charge is laid under Section 130 (2) (e) of the Penal Code as

amended by Sections 5 & 6 of the Sexual Offences Special Provisions Act, No. 4 of 1998, the appellant should have admitted that he had sexual intercourse with the victim, and that the victim was below eighteen years of age and was not married to him. This is because under SECTION 130(2) (e) if the woman is fifteen or more years of age and is married to a male person and they are not separated, the charge of rape cannot stand.

The facts which the appellant admitted to be true show that Gigwa d/o Jihihi was aged sixteen at the time the offence was alleged to have been committed. The facts also show the appellant made a marriage proposal to Gigwa in June 2005 and was told Gigwa was yet to finish primary school. The facts also show the appellant waited until when Gigwa finished primary school and repeated the marriage proposal. After the proposal it was Gigwa herself who moved to the appellant's house, and the appellant informed Gigwa's parents of Gigwa's action. When he pleaded the appellant was saying Gigwa was his wife. Whether this is true or not is a question of evidence to be established by trial. It is therefore obvious that the appellant did not admit to the ingredients of

the offence of Rape under Section 130(2) (e) of the Penal code. The plea entered was equivocal so a conviction should not have been entered against the appellant. We therefore allow the appeal since there was no plea taken. In the particular circumstances of this case we leave it to the discretion of the DPP on how to proceed further. In the meantime the appellant should be released from custody unless he is held on some other lawful cause.

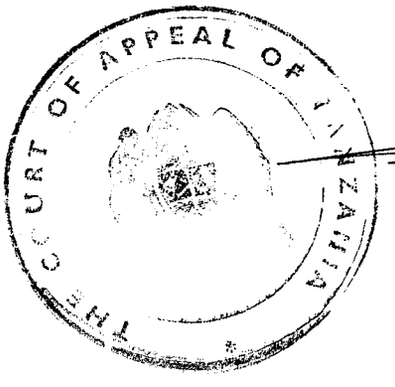
DATED at **TABORA** this 24th day of June, 2011.

J.H. MSOFFE
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.



E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL