IN THE COURT OF APPEAL OF TAZANIA
AT TABORA

(CORAM: MUNUO, J.A., KIMARO, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 250 OF 2007

MISANGO SHANTIEL.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tabora)

(Mujulizi, J.A.)

dated 30th May 2007

in

Criminal Appeal No. 98 of 2006

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JUDGMENT OF THE COURT

28 & 31 May, 2012

KIMARO, J.A.:

The appellant and six others were jointly charged with the offences of armed robbery contrary to section 285 and 286 of the Penal Code in one count , and gang rape contrary to section 131 A(1) of the Sexual Offences Special Provisions Act, No.4 of 1998 in three counts. In the trial court the appellant was the 6th accused. The rest of the accused whom he

was charged with were Paulo Kamana, (first accused), Sengiyumva Geredi (second accused), Manila Telas (third accused), Nzotungwamayo (fourth accused), Ndikumagange Yohana (fifth accused) and Tuisabe Jonace (seventh accused). Except for the seventh accused who was convicted of the offence of receiving stolen property contrary to section 311 of the Penal Code, the rest of the accused were convicted of the offence of armed robbery and each of them was sentenced to thirty years imprisonment. The appellant and fifth accused were also convicted of committing the offence of gang rape to Joyce Charles (PW1) in the second count and each one was sentenced to life imprisonment. The first and second accused were also convicted of committing the offence of gang rape to Winfrida Petro (PW2). For all the accused persons, the sentences in the first count were ordered to run concurrently with the sentences in the second and fourth counts.

Aggrieved by both the conviction and the sentence, all the accused persons appealed to the High Court of Tanzania against their respective convictions and sentences.

In the High Court, the appeal by the other accused persons succeeded. On their part the High Court was satisfied that there was proof of the commission of the offence of robbery and that of gang rape. There was no even evidence of the identification of any of the accused person. Regarding the evidence of being found in possession of property alleged to have been stolen, the learned judge on first appeal said it was scanty and the caution statement of the second accused that was alleged to have implicated the other appellants was discounted. The High Court also corrected the error in the charge of gang rape which was shown to be under the Sexual Offences (Special Provision) Act No 4 of 1998. The offence falls under the Penal Code.

As for the appellant, the High Court sustained the conviction for the offence of armed robbery. The learned judge on first appeal said that the appellant admitted the commission of the offence. Relying on section 286 of the Penal Code the learned judge set aside the sentence of thirty years imprisonment that was imposed by the trial court for the offence of armed robbery and substituted it with the sentence of life imprisonment on the ground that the case was one that called for a deterrent sentence.

He also set aside the order for acquittal for the offence of gang rape to Kabilogila Butati (PW3) and substituted it with a conviction. Because of the age of the appellant which the learned judge on first appeal found to be 18 years, and he was a first offender, the sentence of life imprisonment imposed on the offence of gang rape was set aside. Acting on the strength of section 131(2) (a) of the Penal Code, the High Court sentenced the appellant to eight strokes of the cane for each of the three counts of gang rape that the appellant was found guilty of committing and convicted.

Still aggrieved, the appellant came to this Court in a second appeal. Before us he was represented by Mr. Kamaliza Kayaga, learned advocate. The respondent Republic was represented by Mr. Hashim Ngole, learned Senior State Attorney.

The appellant has three grounds of appeal. In the first ground of appeal the complaint is on the trial. It is contended that the trial was not fair. The second complaint is on misdirection on the part of the learned judge on first appeal to sustain the conviction of the appellant on the

caution statement of the appellant while the procedure for admission of the statement was not followed. Lastly, is a complaint that the sentence that was imposed on the appellant was excessive.

Before going to the submissions made by the learned advocate and the Senior State Attorney to support their respective positions in the appeal, we will briefly give the background to this appeal. There was evidence from Joyce Charles (PW1), Winfrida Petro (PW2), Kaborogila Butatu (PW3) and Meshack Lubehenge (PW4) that on 14th February 2004 at about 23 hours their houses which are located in the same compound were broken into and various items stolen there from. PW1 and PW2 were sleeping in the same house and they were threatened and raped by the bandits who invaded them. The house in which PW1 was sleeping is that of her parents. She was with her sister (PW2). They heard the door of the house being broken. They were asked to open it but they refused. They were threatened to be fired with bullets if they did not open the door. Later the bandits forced themselves in and stole various items. In that process PW1 was taken outside the house and raped by two of the bandits and one of them stabbed her with a knife. The same ordeal befell on PW2

who said after the bandits stole several items from the house they demanded to have sexual intercourse with her. She pleaded with them not to do that because she had only seven days after delivery. However, the bandits did not did yield to her request. One of the bandits raped her and another committed an unnatural offence on her.

PW3 testified that the house she was living in was also broken into, in the same night and her two pairs of "kitenge "stolen. This witness who was aged 50 years was also raped. PW4 also testified that his house was also broken into. He escaped and ran to the neighbourhood to ask for assistance. With their neighbours PW4 went to the other houses which were broken into and met PW1, PW2 and PW3 who explained to them about the theft and the rape that was committed by the bandits. When PW4 returned to his house, he found his two trousers, a panga, blanket and hat missing.

Amos Bulegaya (PW5) the husband of PW2 was not at home when the offences were committed. He returned on the second day and he was informed of it. By then the matter had been reported to the police. On

making a follow up, he was informed that one of the bandits was found selling some of the property that was stolen during the commission of the robbery. That person was arrested and he mentioned the person who sold to him the stolen property. In that process all the seven bandits were arrested. The appellant and the second accused was said to have admitted the commission of the offence and they mentioned the other accused persons who were involved in the commission of the offence. The caution statement was recorded by C. 8272 D/S Charles (PW7).

In their defences all the accused persons denied the commission of the respective offences they were charged with. But as said, the trial court convicted them and sentenced them as aforesaid. Their appeals in the High Court were dealt with as indicated above.

Submitting in support of the first ground of appeal, the learned advocate for the appellant said that the appellant was not afforded a fair trial because the record of appeal shows that when the case was called on for preliminary hearing, the first accused informed the trial court that all

the accused persons did not understand Kiswahili. The case was adjourned to another date for preliminary hearing to enable the trial court to contact the United Nations High Commission for Refugees (UNHCR) for an interpreter. However, the record is totally silent on whether the appellant was afforded services of an Interpreter because the name of the Interpreter is not recorded. It is not even shown whether an Interpreter was sworn to translate to the appellant the proceedings which were taking place. Given this shortfall, the learned advocate argued, the appellant was not in a position to follow up the trial and hence he was denied the right of fair hearing. He cited to the Court the case of **Musa Mwaikunda V R** CAT Criminal Appeal No. 174 of 2006 (Unreported) which sets up the minimum standard of a fair trial.

On his part, the learned Senior State Attorney in responding to this ground supported the conviction and sentence. He challenged the first ground of appeal for being new, not raised as a ground of appeal in the first appellate court. He said it was raised "*suo moto*" by the learned judge on first appeal and he was assured that the appellant had services of an Interpreter. He said even the record of appeal shows that the appellant

was able to cross-examine the witnesses and he gave a long defence in the trial court. The learned Senior State Attorney cited the case of **Charles Banarbas v R** Criminal Appeal No.139 of 2003 CAT (Unreported) to augment his submission and requested the Court to dismiss the appeal.

It is true that the appellant did not raise the issue of an Interpreter as a ground of appeal in the first appellate court. However the learned judge on first appeal raised it and discussed it and was satisfied that the appellant had such services. However, the law regulating the procedure for conducting criminal trials speaks very loudly that everything that takes place in the proceedings of the trial must be on record. This will enable an appellate court to decide fairly any question brought before it challenging the conduct of the trial. The record of appeal does not support the learned Senior State Attorney on this aspect because it does not have any record of Interpreter. To us the conclusion which we reach is that the appellant was not afforded services of Interpreter. In the case of **Musa Mwaikunda** (supra) the Court cited with approval the case of **Regina V Henley** (2005) NSWCCA 126 (a case from New South Wales Court of Appeal) which quoted **R V Prosser (1958) 45 at 48** which set out the minimum

standard the trial court has to comply with, to show that the accused was afforded a fair trial. These are:

1. to understand the nature of the charge;

2. to plead to the charge and to exercise the right of challenge;

3. to understand the nature of the proceedings , namely, that it is an inquiry as to whether the accused committed the offence charged;

4. to follow the course of the proceedings;

5. to understand the substantial effect of any evidence that may be given in support of the prosecution; and

6. to make a defence to the charge.

It is important for any trial court to observe these standards in conducting the proceedings. Since the trial court was informed of the problem which the appellant was facing, it was important for the trial court to record how the problem was finally dealt with. Since the record is totally silent on this aspect, there is no way the Court can ascertain that

the appellant was afforded the services of interpreter. The Court finds this ground has merit.

On the second ground of appeal the learned advocate for the appellant said the caution statement of the appellant which was the sole evidence relied upon by the trial court to convict the appellant was wrongly admitted in evidence. He said although the record shows that it was admitted in evidence without objection from the appellant, the procedure for admission of caution statements was flouted in that it was not read over to the appellant. He prayed that this ground of appeal be granted.

The reply by the learned Senior State Attorney was that the appellant did not raise any objection to the admissibility of the caution statement and he neither retracted it nor repudiated it. He prayed that this ground be dismissed. Although he did not support the conviction for gang rape, he was of the opinion that the caution statement of the appellant proved the offence of armed robbery.

The record of appeal at page 32 shows that PW7 tendered in court the caution statement of the appellant and it was admitted as exhibit P6. However, the rules of admission of documentary evidence requires the document to be read over to the appellant. This was not done. All that PW7 said was:

> "*The 6th accused stated everything and one house were 4 of them, the second, two and last house two. The two suspects had run away. These are the statements of the 6th accused. I pray to tender* in Court as exhibit."

The statement was then tendered in court as exhibit P6. Since the witness did not read the whole statement of the appellant, it is hard to say that the appellant became aware of what was written in exhibit P6 and cross examined on it effectively. Moreover, the learned judge on first appeal observed that the appellant exculpated himself from the commission of the offence of gang rape. Yet the learned judge on first appeal proceeded to convict him, claiming that he confessed to the offence of robbery and in the process, the offences of gang rape were

committed. Under such circumstances it is doubtful to say that the appellant was fairly treated when the statement was used to form the basis of his conviction. It is the principle of law that the prosecution must prove the case against the accused beyond reasonable doubt. See the case of **Matula V R** [1995] T.L.R. 3. What the accused has to do is to cast doubt on the prosecution case. Short of other evidence for the prosecution to rely upon to prove the case against the appellant, the complaint by the appellant that the statement was not read over to him is sufficient to cast doubt on the prosecution case. The appellant is entitled to some benefit of doubt.

Regarding the ground of appeal on the excessiveness of the sentence, both the learned advocate and the Senior State Attorney admitted that the sentence was excessive. Even assuming that the offence of armed robbery could be sustained against the appellant, but with respect to the learned judge on first appeal, we have already said that it cannot, there is nothing on record to justify the imposition of the maximum penalty for the offence of armed robbery which the learned judge imposed. In the case of **Yohana Balicheko V R** [1994] T.L.R. 5 the Court held that:

> *" As a general rule this court will not readily interfere with a sentence imposed by the High Court unless satisfied that the sentence was manifestly execissive, or that the sentencing court failed to consider a material circumstance , or that it erred in principle."*

The appellant was a first offender and this was a mitigating factor in sentencing.

Given the shortfall in the prosecution case, we find the appellant's appeal having merit. We allow the appeal, quash the convictions and set aside the sentences. We order his immediate release from prison unless he is held there for other lawful purposes.

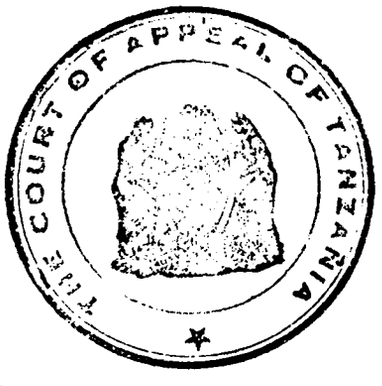
DATED at **TABORA** this 30th day of May 2012.

E. N. MUNUO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I certify that this is a true copy of the original



(Z. A. Maruma)
DEPUTY REGISTRAR
COURT OF APPEAL