

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

(CORAM: LUANDA, J.A., MMILLA, J.A. And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 395 OF 2016

THOMAS MBONIMPA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mujulizi, J.)

Dated the 20th day of August, 2010

in

PC Criminal Appeal No. 9 of 2010

JUDGMENT OF THE COURT

18th & 22nd August, 2017.

LUANDA, JA.:

One of the grounds of appeal in this appeal which was raised by the appellant is that the trial Primary Court of Kibondo sitting at Kifura had no jurisdiction to try the offence of rape c/s 130 (2) (e) and 131 of the Penal Code Cap. 16 (the Code). Ms. Upendo Malulu, learned State Attorney supported that ground of appeal. She said according to section 18 (1) (c) which falls under Part III of the Magistrates' Courts Act, Cap. 11 RE. 2002 (the MCA) read together with the 1st Schedule to the Act, the offence of rape is not one of the offences enumerated therein and thus it is not triable

by Primary Court. The Primary Court had no jurisdiction to preside over the offences of rape. She went on to say that the proceedings of the trial Primary Court as well as the District Court and the High Court are a nullity. She urged the Court to allow the appeal, quash the proceedings, set aside the sentence and release the appellant.

The record of appeal shows very clearly that the appellant was charged in the Primary Court of Kibondo at Kifura with the offence of rape. He was convicted and sentenced to 30 years imprisonment on 6/3/2002. That is to say he is in prison for more than 15 years. His appeal to the District Court was turned down. He went to the High Court, where again he was not successful, hence this appeal after the High Court had certified that there is point of law involved as per the requirement of section 6 (7) (b) of the Appellate Jurisdiction Act, Cap. 141 RE. 2002 (the AJA). The point involved is the issue of jurisdiction of the trial Primary Court in trying the offence of rape.

Section 18 (1) (c) of the MCA clearly stipulates the powers of the primary court in criminal proceedings. It reads:-

"18 (1) A primary Court shall have and exercise jurisdiction-

(a) N/A

(b) N/A

(c) in all proceedings in respect of which is conferred on a primary court by the First Schedule to this Act;"

The offence of rape is not one of the offences enumerated in the First Schedule. Because it is not included in the said Schedule it means that a primary court has no jurisdiction to try the offence of rape. We entirely agree with Ms. Malulu.

The appeal lodged by the appellant is meritorious. We declare that all the proceedings starting from the primary court up to the High Court are a nullity. The appeal is allowed, conviction quashed and the sentence set aside. The question now is whether or not we should order a retrial. Generally, a retrial will be ordered only when the original trial was illegal or defective. But the overriding principle for ordering a retrial is that it should only be made where the interests of justice require. It should not be

ordered where it is likely to cause injustice to the accused person. (See **Fatehali Manji v. R.** [1966] E.A. 343 at 344).

In our case the trial was defective. We noted that the appellant has served a period of 15 years in prison. But the offences of rape are rampant in this part of our country.

Having considered all these, we find proper to leave the matter in the hands of the DPP to decide whether or not to recharge him. In case the DPP decides to recharge the appellant and eventually convicted, the trial court should consider the sentence of 15 years he has already served. Meanwhile, we order the appellant to be released from prison.

Order accordingly.

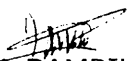
DATED at **TABORA** this 21st day of August, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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


P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL