IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NDIKA, J.A., LEVIRA, J.A, And FIKIRINI, J.A)

CRIMINAL APPEAL NO. 396B OF 2017

SHABANI HARUNA@DR. MWAGILO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Mwingwa, J.)

dated 11th day of May, 2017

in

DC Criminal Appeal No. 69 of 2016

.....

JUDGMENT OF THE COURT

24th Nov & 1st Dec, 2021.

FIKIRINI, J.A.:

The appellant, Shabani Haruna @ Dr. Mwagilo, was charged with and convicted of rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code [Cap. 16. R.E. 2002 now R.E. 2019] (the Penal Code) and sentenced to thirty years imprisonment. He unsuccessfully appealed before the High Court of Tanzania at Moshi in Criminal Appeal No.69 of 2016. The appellant now appeals to this Court. Initially on six grounds of appeal and later supplemented with three other grounds.

What can be gathered from the particulars of the offence when the appellant was arraigned in the Resident Magistrate's court of Kilimanjaro at Moshi is that, on various dates of July – October, 2015, at Kivusini area within Mwanga District in Kilimanjaro Region, the appellant raped one IJ (name concealed to protect her dignity), a girl aged 15 years.

The background to this appeal is that on 14th July, 2015, IJ, who testified as PW1 in the trial court, while on her way to school, solicited a ride from Ally Miraji-PW3, a motorcycle rider whom she knew before. PW3, who had the appellant already as his client, offered PW1 a ride. PW3 dropped the two (PW1 and the appellant) at the same drop-off point, and they both walked to a tarmac road and fetched transport to Bomang'ombe. Unsure of what was going on, PW1 found herself in the appellant's company, moving from one place to another instead of going to school.

At Bomang'ombe, the appellant took PW1 to his father's place, where they stayed for two weeks. During the stay, PW1 shared a room with the appellant's grandmother. After a week, the appellant travelled with PW1 to Arusha and stayed at "Kwa Mrefuu" area in a house belonging to a lady known to the appellant. PW1 claimed that the appellant, with whom they shared a room, forcibly raped her during the night. He started by

undressing her, then undressing himself and raped her by inserting his penis into PW1's vagina. PW1 experienced pain, her defiance to the encounter was unsuccessful, and no one responded to the alarm she raised. From Arusha, the appellant took PW1 to Kifani-Kivusini at Mwanga District. They stayed at a certain old lady's house for a month. At this house, the appellant raped PW1 again. She once more complained to the lady of the house but got no assistance. After a three-month search, the appellant and PW1 were arrested in the old lady's house by Victor Metiame Kimathi, who testified as PW2 in the trial court. That night PW2 and the village leaders went and knocked at the door. The appellant came out, followed by PW1. The appellant was taken to the Kifaru Police post and PW1 to the hospital, where Dr. John Damian, who testified as PW4 at the trial court, examined PW1 and confirmed that she was raped. He filled PF3, which was tendered and admitted as exhibit P1.

In his affirmed defence testimony, the appellant, a practicing witch doctor, who testified as DW1 in the trial court, denied the charges leveled against him, arguing that the case was trumped-up, for having been served with summons for the offence that occurred while he was serving a two (2) year prison sentence for causing violence which resulted from his shouting

when reciting dua to people. Accounting for his contention, he stated that for the present charges he was arrested on 8th May, 2015, arraigned in court, and on 19th October, 2015, he was found guilty, convicted, and sentenced to two years imprisonment.

After a full trial, the trial court was satisfied that the prosecution had amply proved its case beyond a reasonable doubt that on diverse dates and places, the appellant had raped PW1. Consequently, it convicted and sentenced the appellant as highlighted earlier on in this judgment. The High Court upheld the trial court decision hence dismissed the appeal.

The appellant has preferred nine grounds of appeal, six in the initial memorandum of appeal filed on 4th May, 2018, and three in his supplementary, which was filed later. The 1st ground, that the charge was not proved to the standard required in law (this includes the 1st ground of the supplementary); the 2nd ground, that the trial court failed to comply with section 210 (3) of the Criminal Procedure Act, Cap 20. R. E. 2002 [now R.E. 2019] (the CPA); the 3rd ground, that the 1st appellate court failed to re-evaluate the weak, inconsistent, incredible, unreliable, and uncorroborated evidence of the prosecution witnesses, relied on by the trial court (this includes 2ndand 3rd grounds of the supplementary); the 4th

ground, that the charge was at variance with the evidence; the 5th ground that the essential witnesses were not summoned; and the 6th ground that the defence case was not considered.

At the appeal hearing on 24th November, 2021, the appellant appeared unrepresented, whereas Ms. Agatha Pima and Ms. Grace Kabu, both learned State Attorneys, represented the respondent/Republic.

The appellant opted to go first by expounding on his grounds of appeal. He covered the 1st and 3rd grounds at length and addressed the rest generally in the submissions. On the 1st ground on the charge sheet being at variance with the evidence, the appellant faulted the 1st appellate court for failing to detect the flaw, arguing that the charge sheet indicates the offence occurred at the Kivisini area in Mwanga, whereas PW1 in her evidence mentioned three other places, namely, Bomang'ombe, Arusha, and Kiusini, as reflected at pages 13 and 14 of the record of appeal.

The 3rd ground, the appellant complained that the Judge erred for failing to re-evaluate the entire evidence and arrive at his own findings and instead, he relied on weak, inconsistent, incredible, unsupported, and unreliable prosecution witnesses' evidence. The appellant, gave as examples, the following prosecution evidence which he considered to have

not been re-evaluated, but were relied upon arriving at the decision; PW1's evidence that she was a student, but there was no evidence furnished in that regard. Also PW2's evidence, that he did go to school to find out about PW1, but neither the teachers nor students were summoned to testify on that. Also, that as indicated at pages 12-13, PW1 testified that she was the one who solicited for a ride from PW3, which is in contrast, to the evidence indicated at page 21, which PW3 testified by naming the appellant as the one who asked PW3 to give PW1 a ride. Again at page 13, PW1 stated that PW3 left them on the way, which was a different account made by PW3 at page 22 when he said he left them at the stand. Another point raised was PW2's evidence that he was with the village leaders when they arrested the appellant, but none of those village leaders was summoned as witnesses.

The appellant further pointed out that PW2, in his evidence, averred that PW1 was under her mother's custody. Despite that assertion, nowhere in the proceedings it has been shown that PW1's mother reported her daughter's missing to the Police. Since no Police were summoned in relation to the PW1's absence from home, the appellant argued, it was thus uncertain whether the Police investigated the matter or not. Buttressing his submission, he referred us to the case of **Abiola**

Mohamed @ Simba v R, Criminal Appeal No. 291 of 2007 (unreported). On the strength of his submission, the appellant urged us to allow the appeal.

In reply, Ms. Pima learned State Attorney prefaced her submission by informing us that she supported the conviction and sentence and did not support the appeal. She then addressed all the grounds starting with the 1st ground of appeal.

On the 1st ground that the prosecution case was not proved to the hilt, Ms. Pima, contended that the case was proved beyond a reasonable doubt, and the High Court supported the findings, hence upholding the trial court decision. Expounding on this aspect, she explained that in establishing a charge preferred under sections 130 (1) (2) (e) and 131 of the Penal Code, the prosecution needs to prove that the victim was underage and there was penetration, and that PW1's account proved penetration, and PW4's evidence confirmed PW1's claim. Thus with the evidence of PW1 and PW4, the prosecution managed to prove the offence of rape leveled against the appellant, and with the evidence of PW2, PW1's age at the time of the commission of the offence was proved to be 15 years old, argued the learned State Attorney.

The 2nd ground on compliance with section 210 (3) of the CPA, although this point was not raised at the High Court but being a point of law, Ms. Pima took the liberty to address it. She admitted the trial magistrate did not observe the requirement provided under the provision. She, however, contended that the beneficiary of the provision is the witness and not the appellant. The learned counsel submitted further that since PW1, PW2, and PW3, who were supposed to ask their recorded testimonies to be read, testified without seeking for reading over of their recorded testimonies in the presence of the appellant in court, thus there was no way the appellant could argue he was prejudiced by the magistrate's failure to comply to the dictates of section 210 (3) of CPA. She also contended that in any case the anomaly could be remedied by section 388 of the CPA. Fortifying her submission she cited for us the case of **Amani Bwire Kilunga v R,** Criminal Appeal No. 372 of 2019 (unreported), in which the appellant was present in court when the witness testified and the witnesses never asked for their recorded evidence to be read out. The Court did not find the omission fatal.

Ms. Pima further argued that in rape cases, the vital witness is the victim. And that in the present case the High Court Judge analyzed and

evaluated the evidence of PW1 and PW4 and was content with it. For this point, she invited us to be inspired by the case of **Selemani Makumba v R**, [2006] T. L. R. 380, referred in the case of **Eliah Bariki v R,** Criminal Appeal No. 321 of 2016 (unreported).

As to the number of witnesses complained about by the appellant, she submitted that, in section 143 of the Tanzania Evidence Act, Cap. 6 R.E. 2019 (the Evidence Act), it has been clearly stated that no specific number of witnesses is required to prove a fact. Therefore the prosecution summoned only those witnesses it deemed necessary to prove its case. Admitting on PW1's testimony that at pages 12 -16 mentions a grandfather, but that person was not related to PW1. Ms. Pima argued that the grandfather being that of the appellant, it would not have been possible for the prosecution to get him to come and testify against his grandson/appellant.

The 4th ground that the charge was at variance with the evidence adduced and hindered the appellant from preparing his defense case was admitted by Ms. Pima. She contended that the charge sheet, as shown at pages 3-4, mentioned the incident at Kivisini only. Ms. Pima, however, considered that to be at the appellant's advantage. Otherwise, she said,

had the prosecution mentioned all the other places as revealed in PW1's evidence, it would have been detrimental to the appellant.

Picking on the argument on the name Kivisini referred to in the charge sheet and Kiusini later referred in the evidence, she admitted were two different places. She was, however, prompt to urge the Court to consider it a typing error or that possibly the trial magistrate misheard the pronunciation. She thus urged us to disregard the complaint.

On the 6th ground that the defence case was not considered, Ms. Pima admitted, without mincing words, that both lower courts did not consider the defence case. Thus she invited us in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 to step into the 1st appellate court shoes, analyze and evaluate the evidence and make our own findings. Enhancing her argument, she invited us to be inspired by the decision in the case of **Athumani Musa v R,** Criminal Appeal No. 4 of 2020 (unreported).

Despite inviting us to step into the 1st appellate court shoes, she maintained that the defence case as found at pages 27-29, has not been able to raise doubt or discount the evidence that the appellant was not with PW1. According to Ms. Pima, before sentencing on 19th October,2015,

the appellant was out. Therefore during the time stated in the charge sheet that of July-October, 2015, the appellant committed the offence he was charged with presently, It was thus not correct that the present charges were trumped-up charges.

The 3rd ground that the High Court failed to analyze and re-evaluate the evidence which was marred with defects, answering this, Ms. Pima admitted that there were indeed minor discrepancies. Highlighting few examples in PW1's evidence as shown at page 12, that it was PW1 who stopped PW3 and asked for a ride, the account which differed with that of PW3 as seen at page 21, that it was the appellant who stopped PW3 and asked him to give PW1 a ride on his motorcycle. Another evidence challenged was that of PW2, who testified to have arrested PW3 and taken him to Police Himo, while PW1's mother is stated to have also approached PW3. On one hand, Ms. Pima admitted to those discrepancies, and on the other hand, she considered them minor, and did not go to the root of the case. To support her position, she referred us to the case of **Eliah Bariki** (supra). Based on her submission, she prayed for the appeal to be dismissed.

Probed by us on the PW1's evidence, as shown at page 14, that she did not think she could identify the appellant, Ms. Pima discounted that piece of evidence, and invited us to read the whole paragraph, showing that PW1 well identified the appellant.

In rejoinder, the appellant did not have much to say aside from maintaining that he was not properly identified and that the charge was at variance. To sum up, he referred us to the case of **Antidius Augustine v R,** Criminal Appeal No. 89 of 2017 (unreported).

We have duly considered the grounds of appeal and the rival oral submissions. In determining this appeal, we find it more appropriate to deal with the 2nd ground first, on compliance with section 210 (3) of the CPA. The provision of section 210 (3) of the CPA is reproduced herein below for ease of reference:-

> "210 *(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."*

It is apparent from the above reproduced provision, and in reference to the record of the trial court proceedings, the trial magistrate recorded the evidence of PW1, PW2, and DW1, without complying with the requirement of section 210 (3) of the CPA. The record does not indicate there was compliance, and we have no reason to think otherwise. As a matter of principle the trial magistrate is required, after completion of recording each witness's testimony, to follow up with a couple of questions including to ask if the witness wished his/her evidence be read over to him/her and if he/she so elects the same be read to him/her.

The issue we have been asking ourselves is whether the infraction can be remedied. And our answer to that is yes, the infraction is not fatal and can be remedied under section 388 of the CPA. This is asserted based on the fact that although the appellant is the one who raised the concern but he has not challenged the sanctity of the record nor demonstrated how he was prejudiced. In addition to the above, reading the provision between the lines, it is evident that the provision is essentially meant to take care of the witnesses whose evidence is being recorded and not the appellant. Therefore, only those witnesses whose evidence was recorded can exercise that right of calling for their recorded evidence be read over to them, and

they could make comments and not the appellant. See: **Athumani Hassan v Republic,** Criminal Appeal No. 84 of 2013, **Abuu Kahaya Richael v R,** Criminal Appeal No. 557 of 2017; and **Flano Alphonce Masalu @ Sing Criminal and 4 Others v R,** Criminal Appeal No. 366 of 2018 (all unreported). In the **Athumani Hassan** (supra) the Court stated as follows:

> *"..... we do not see substance of the appellant's complaint because it was the witnesses who had the right to have the evidence read over to them and makes comment of their evidence."*

Even though the appellant was also a witness in his defence case, he ought to be informed of his right, which he was not, but in our view, we find the omission by the trial magistrate of not reading his recorded evidence, which he did not ask, did not prejudice him. It is settled legal position that the witnesses have the right to complain that the evidence was not read to them when they asked for them to make comments on the recorded evidence, if any. This ground lacks merit and is dismissed.

After answering the 2nd ground, we now move to the 4th ground on a charge being at variance with the evidence. According to the appellant,

failure to disclose the essential elements in particulars of the offence hindered his defense case preparation. Ms. Pima admitted that the charge sheet had shortfalls, as reflected at pages 3-4 of the appeal record. Admittedly, there are shortfalls in the charge sheet. The particulars of the offence indicate the offence was committed at Kivisini area in Mwanga District; however, PW1, in her evidence, mentioned other places where the rape occurred, as reflected at pages 13-14 of the record of appeal. The appellant also challenged the name Kivisini used in the charge sheet and Kiusini, which appeared at different pages of PW1's evidence. We had the advantage of cross-checking with the original record, and the correct name is Kivisini, as it appears in the charge sheet. However, on a general note, we view the existing defect could be typing error or mispronunciation, as alluded by Ms. Pima. Such is curable under section 388 of the CPA, by relying on good evidence advanced by PW1, that she was raped by the appellant while at Kivisini and those other places she mentioned in her evidence. The prosecution might have opted to stick with the Kivisini incident only rather than charging the appellant on all other areas mentioned by PW1. See: **Jamali Ally @ Salu v R,** Criminal Appeal No. 52 of 2017.

Next to answer are the 1st, 3rd and 5th grounds on failure by the 1st appellate court to analyze and re-evaluate evidence, failure to call an important witness, and whether the prosecution proved its case as required in law. We have thoroughly perused the record, and we have this to comment: **one,** this being a rape case, the court expects evidence proving mainly two things: (i) penetration and (ii) that the victim is underage. In proving this, the prosecution summoned four witnesses. Out of which, PW1, PW2, and PW4 sufficiently advanced the prosecution case. PW1, at pages 13-14, named the appellant as the one who raped her, clearly explaining how the rape occurred. For better appreciation of her evidence, we let the record speak for itself:

> " .....*then I saw Shabaan come with me. I did not ask him why he slept with me. Shabaan came to the bed I slept. I didn't ask him why he came to my room. Then he undressed me. I asked him why he undressed me, he told me to leave him. He then put off his clothes. He then slept on me and raped me; he first held my hand and then lay on me and put aside my legs, and then penetrated his penis into my vagina. I felt pain in my vagina. I told him to leave me, he rejected and told me that he will kill*

me. So after he penetrated his penis into my vagina, he started fucking me."

Apart from PW1's account, there was evidence of PW4, a medical doctor who examined PW1, at the hospital and prepared exhibit P1. PW4's evidence and exhibit P1, added to PW1's evidence that she was raped. Considering the best rape evidence comes from the victim, as illustrated in **Selemani Makumba's** case (supra), we find the 1st appellate court propely analyzed and evaluated the evidence as seen at pages 58-59 of the record appeal.

Proof that PW1 is underage is traceable at page 16 of the record of appeal. PW2, who is PW1's uncle, provided evidence proving that PW1 was 15 years old when the rape occurred. The appellant did not challenge the assertion on PW1's age. It is trite law that failure to cross-examine a witness on a crucial matter ordinarily implies the acceptance of the truth of the witness evidence. See: **Damian Ruhele v R**, Criminal Appeal No. 501 of 2007; and **Nyerere Nyague v R**, Criminal Appeal No. 67 of 2010 (both unreported). On this aspect we find the two lower courts directed themselves properly.

Two, on witnesses credibility in general, it is settled principle that in assessing credibility of witnesses, the court is tasked with the duty of, first, assessing the coherence of the testimonies of each one of them, and second, by considering each witness' account with that of other witnesses. In the present case, it is undeniable that discrepancies existed amongst witnesses as pointed out by the appellant and conceded by Ms. Pima. Few examples are, such as PW1's inconsistent account as reflected at page 14. In her evidence, she claimed to identify the appellant when she spoke to PW3, asking for a ride. This was, however, different from when she testified in court. In court, PW1 showed not to be sure if she could identify the appellant. This sounded awkward, especially for someone she had spent three months with, yet not sure if she could remember him. PW1's credibility is, under the circumstances, could have been questioned.

Similarly, PW2's account varied from that of PW3. Initially, when PW2 arrested PW3, as reflected at page 17, he admitted carrying the appellant and PW1 on his motorcycle. Through PW3's information, PW2 managed to arrest the appellant. PW3's version later changed in court, as shown at page 21, when he declined knowing the appellant before. PW3's denial that he knew the appellant before, while it was through PW3's naming of the

appellant, PW2 managed to arrest him, shakes PW2's credibility on one side but even that of PW3 on the other.

We have been asking ourselves whether the pointed out discrepancies go to the root of the case. Ms. Pima answered the issue in the negative while the appellant strongly argued they did. In our considered view, we find that the discrepancies did not go to the root of the case. We follow our previous decision in the case of **Eliah Bariki** (supra) referred to us by Ms. Pima, faced with the same scenario, we remarked as follows:

> *"In evaluating discrepancies, contradictions, and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."*

Guided by the above decision and in agreement with Ms. Pima, we equally find the experienced discrepancies, contradictions, and omissions did not go to the root as envisioned by the appellant. The 1st, 3rd and 5th grounds all fail and are accordingly dismissed.

The 6th ground that the defence case was not considered, will not detain us long. It is so apparent on record that both two lower courts did not pay attention to the defence case, aside from simply summarizing the defence evidence. We consider failure to appraise the defence evidence as one of the exceptional circumstances warranting interference of this Court to the concurrent findings of the two lower courts. Under the circumstance, we find ourselves obliged to step into the 1st appellate court's shoes and see whether or not the defense evidence raises any reasonable doubt in the prosecution case. Faced with the same scenario, this Court, in the case of **Felix Kichele and Another v R,** Criminal Appeal No. 159 of 2005 (unreported), had this to say:

> *"As already pointed out, the fact that both courts below in the present case did not consider the defence case is in our view a misapprehension of evidence and entitles us to intervene in an endeavour to put matters in their proper perspective. We have sought guidance from our previous decision on the point in* ***Joseph Leornard Manyota v R,*** *Criminal Appeal No. 485 of 2015 (unreported) in which, encountered with a situation like the present, we apparaised the appellant's*

defence and weighed it against that of the prosecution witnesses in relation to the matter at hand."

See Also: **Oscar Justinian Burugu v R,** Criminal Appeal No. 33 of 2017; **Julius Josephat v R,** Criminal Appeal No. 3 of 2017; and **Joseph Saaafari Massay v R,** Criminal Appeal No. 125 of 2012 (all unreported)

Guided by the principle stated above, we analyzed and evaluated the defence evidence. The appellant was arrested on 8th May, 2015, for a different offence. Following the arrest, he was later sentenced to two years imprisonment on 19th October, 2015. Going by the charge sheet in the present case the offense was committed on 14th July, 2015, which falls between May and October, 2015. What appellant insisted that he had another case, suggesting he was not around. Even though it is the prosecution's duty to prove its case, in this instance, since it was the appellant who raised the defence of *alibi*, he had the duty of establishing that fact. The appellant has failed to do so. *First and foremost*, he raised his defence of *alibi* in course of his defence without having given any prior notice in terms of section 194 (4) of the CPA. *Secondly*, he was not able to establish his raised defence of *alibi.*

For failing to observe the requirement under section 194 (4) of the CPA, would have made the lower courts to accord lesser weight to the defence of *alibi* raised. Likewise, his failure to establish that he was in remand custody when the alleged offence subject of this appeal was committed or produce any documentary evidence in that regard, has rendered his defence fruitless. See: **Sijali Juma Kocho v R** [1994] T. L. R. 206; **Kilaga Daniel v R,** Criminal Appeal No. 425 of 2017 and **Rehani Said Nyamila v R,** Criminal Appeal No. 222 of 2019 (both unreported). In **Sijali Juma Kocho** (supra), the Court had this to say:

> *"Admittedly, he was under no legal obligation to prove the alibi, but in the face of the allegations made against him,* ***one would reasonably expect him to call the said uncle to bear him out."*** [Emphasis added]

Moreover, PW2's evidence, as shown at pages 17-18, evidently demonstrates that on the day of the appellant's arrest at Kivusini, he was with PW1, implying he was not in custody as he wanted to suggest in his defence of *alibi*. PW2's evidence, as reproduced from page 17 of the record of appeal, indicated as follows:

"....We went to the house where the accused (Mwagilo) rented. We knocked on the door, the accused came, and the daughter too. Neema was asked if she knew me. She said she knew me; I am her father/uncle. We then took them to Kifaru Police. We left the accused there.....The next day we went to Himo Police station to report that we had already found the accused and our daughter.....the accused was taken from Kifaru to Himo Police station."

The above evidence was never controverted; this is concluded in reference to the relevant part of PW2's cross-examination, as reflected at page 18, which is reproduced below:

".....We arrived at Kivusini at 01.00. The house I found you had one room and a corridor. After we arrested you, left you at Kifaru Police and we went back home.....At Himo, you were sent to lock up...."

From the above excerpts, it is crystal clear that before 19th October, 2015, the appellant was not in custody as he was trying to show; instead he was at some point at Kivisini with PW1. All this weighed together has

made us conclude that the defense of *alibi* raised and the claim that the case against him was fabricated unsupported. This grounds fails.

All said and done, we find the appeal before us devoid of merit and consequently dismiss it entirely.

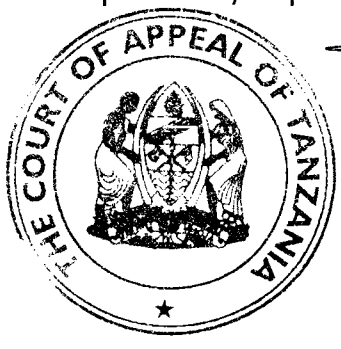
DATED at **ARUSHA** this 30th November, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 1st day of December, 2021 in the presence of the Appellant in person and Ms. Tusaje Samweli, learned State Attorney for the Respondent/Republic, is hereby certified as true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL