to the plaint; whether defect in form made the notice null and void, as to be basis of disposing of the suit is an arguable issue. It is not an issue to be disposed of by way of preliminary objection. I accordingly also dismiss the second preliminary objection. In the result, the preliminary objections of all the defendants are dismissed with costs.

GOODLUCK KYANDO v. REPUBLIC

COURT OF APPEAL OF TANZANIA AT MBEYA

(Mroso, Nsekela and Msoffe, JJA)

CRIMINAL APPEAL No. 118 OF 2003

(From the Judgment of the High Court of Tanzania at Songea, Manento, J., dated 4 March 2003, in Criminal Sessions Case number 5 of 2001)

Criminal Law – Attempted rape – Sentence for attempted rape – Appropriate sentence to be imposed where the accused aged 16 years – sections 131(2)(a) and 132(1) of the Penal Code, Chapter16.

Statute – Interpretation of Statutes – Use of the word "shall" in a statutory provision – Whether the use of the word "shall" always means that the provision is mandatory – section 3(5) of the Children and Young Persons Act, Chapter 13.

Criminal Practice and Procedure – Trial – Juvenile trial – Juvenile trial not held in camera – Whether the trial is a nullity – section 3(5) of the Children and Young Persons Act, Chapter 13.

The appellant, aged sixteen years, was convicted of attempted rape and sentenced to 30 years imprisonment by the District Court. On appeal to the High Court against conviction and sentence, the sentence was reduced to 15 years imprisonment. In his second appeal to the Court of Appeal he appealed against sentence, and also challenged

A the conviction on the basis that his trial was not held in camera in terms of section 3(5) of the Children and Young Persons Act.

Held: (i) Since section 131(2) of the Penal Code as amended by Act number 4 of 1998 introduced a distinction between boys and men, the same concept should be
B reflected in section 132 of the Penal Code by adopting a "purposive" approach in interpreting a statutory provision, whereby the accused being a first offender should be liable to corporal punishment only;

C (ii) The use of the word "shall" does not necessarily mean that the provision in question is mandatory;

(iii) (*obiter*) Since the coming into force of the Interpretation of Laws Act, Chapter 1, on 1 September 2004, the Law on this point may change in view of section 53(2) of
D the Act.

Order accordingly

Cases referred to:

E (1) *Director of Public Prosecutions v. Jaffari Mfaume Kawawa* [1981] T.L.R. 149

(2) *Woolmington v. Director of Public Prosecutions* [1935] AC 162

F (3) *Fortunatus Masha v. William Shija and another* [1997] T.L.R. 41

(4) *Joseph Warioba v. Stephen Wassira and another* [1997] T.L.R. 272

(5) *Nothman v. London Borough of Barnest* [1978] I All ER 1243.

G Statutory provisions referred to,

1. Penal Code, Chapter 16 sections 131 and 132.
2. Sexual Offences (Special Provisions) Act, number 4 of 1998.
3. Children and Young Persons Act, Chapter 13 section 3(5)

H

4. Criminal Procedure Act, Chapter 20 section 388(1)
5. Interpretation of Laws Act, Chapter 1 section 53(2)
6. Court of Appeal Rules 1979 Rule 76(3)

I

Mr. Boniface for the Republic

JUDGEMENT OF THE COURT

(Dated 21 August 2006)

Nsekela, JA: The appellant Goodluck Kyando, aged sixteen years, was convicted by the District Court of Songea of attempted rape contrary to sections 132(1) and 2(a) of the Penal Code as amended by the Sexual Offences Special Provision Act number 4 of 1998 and was sentenced to thirty (30) years imprisonment. On appeal to the High Court against conviction and sentence, the sentence was reduced to fifteen (15) years imprisonment. The appellant has now come before us on a second appeal and that being the position, only matters of law fall for Court consideration.

The appellant preferred four grounds of appeal. The first ground is that the sentence meted out to him was manifestly excessive; the second ground challenged the procedure adopted during the trial of not holding the trial in camera in terms of section 3(5) of the Children and Young Persons Act as amended by Act number 4 of 1998 thus rendering the trial null and void; in the third and fourth grounds, the appellant complained that the prosecution had failed to prove its case beyond all reasonable doubt.

At the hearing of the appeal, the appellant appeared in person unrepresented. He adopted the contents of the Memorandum of Appeal and had nothing useful to add. The respondent Republic had the services of Mr. Boniface, learned Senior State Attorney.

We propose to deal first with the third and fourth grounds of appeal. The evidence adduced in the Trial Court by PW1 showed that the appellant threatened the complainant PW1 for sexual purposes. The nature of the threats can be gleaned from this extract of her evidence. She stated:

> But when I went away about 3 paces from him only to find him has jumped on me and he held me on the neck. He then pulled me away from the road

A .... He then threw me down and one hand he held me on the neck in order that I could not shout for help. He prevented me from shouting out ....

B When the accused dropped me he made me face upward. He sat on my thighs while looking to see if any would be a passer-by ....

The appellant instead of challenging this devastating piece of evidence against him, opted not to cross-examine PW1.

C Peter Murphy, the learned editor of **Blackstone's Criminal Practice** (1992) in the treatise at page 1870 stated that the object of cross-examination is:

D (i) to elicit from the witness evidence supporting the cross examining party's version of the facts in issue;

(ii) to weaken or cast doubt upon the accuracy of the evidence given by the witness in chief;

E (iii) in appropriate circumstances, to impeach the witness credibility.

Without the benefit of cross-examination by the appellant, the testimony of the complainant PW1 stood unchallenged. At the close of the prosecution case, the Trial Court addressed the appellant in terms F of section 231 of the Criminal Procedure Act, 1985 and his response was:

I leave the matter in the hands of Court.

G As stated before, this is a second appeal which originated from the District Court, Songea. Under such circumstances, this Court rarely interferes with concurrent findings of fact by Courts below. In the case of *Director of Public Prosecutions v. Jaffari Mfaume Kawawa* H (1) at page 153, this Court stated as under:

The next important point for consideration and decision in this case is whether it is proper for this Court to evaluate the evidence afresh and come to its own conclusions on matters of facts. This is a second appeal I brought under the provisions of section 5(7) of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this Court only on a point or points

of law. Obviously this position applies only where there are no misdirections or non-directions on the evidence by the first appellate Court. In cases where there are misdrections or non-directions on the evidence, a Court is entitled to look the relevant evidence and make its own findings of fact.

The trial District Court accepted the evidence of PW1 and PW2, a finding which was upheld by the High Court on first appeal. In order to reject the findings of fact by the Trial Court there must be strong and compelling reasons to do so particularly so when the High Court on first appeal, accepted such findings.

The appellant also complained that the police officer who conducted the investigation was not summoned to give evidence. That may well be so. This being a criminal case, the burden lies on the prosecution to establish the guilt of the appellant beyond all reasonable doubt. (See: *Woolmington v Director of Public Prosecutions* (2). This, in our view, is not dependent upon the number of witnesses called upon to testify. (See: section 143, Evidence Act, 1967). It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness. The prosecution called three witnesses, PW1, PW2, and PW3 to prove its case. Their testimony was not challenged. What is important is the credibility and reliability of the evidence and not the number of witness called on to testify.

We now come to the second ground of appeal. The complaint was to the effect that the trial of the appellant was not conducted in terms of subsection 5 of section 3 of the Children and Young Persons Act. Under this provision of the law, the trial was to be conducted in camera but instead it was held in open Court. This non-compliance of the applicable procedure, vitiated the entire proceedings. Mr, Boniface, learned Senior State Attorney, readily conceded that the prescribed procedure was not complied with but submitted that such non-compliance did not occasion any injustice to the appellant and was curable under section 388(1) of the Criminal Procedure Act, 1985. Indeed sub-

section 5 of section 3 of the Children and Young Persons Act as amended by Act number 4 of 1998 provides as follows:

> (5) where a child of less than eighteen years of age is a witness, a victims (*sic*) an accused or co-accused in a case involving a sexual offence, the child shall be *tried* in *camera* and separately from the adult co-accused, or the evidence of the child shall be adduced in Proceedings conducted *in camera* [emphasis added].

It is not in dispute that the appellant who was then a child under the Children and Young Persons Act, should have had his trial conducted in camera as prescribed under the said Act. The preamble to the Sexual Offences Special provisions Act, 1998 is in the following terms:

> An Act to amend several written law, making special provisions in this laws with regard to sexual and other offences to further safeguard the personal integrity, dignity, liberty and security of women and children.

Thus the enactment of Act number 4 of 1998 was against this general consideration. The provisions of the Act were designed to safeguard the personal integrity, dignity, liberty and security of women and children. It is therefore not surprising that in sexual offences, under section 3(5) of the Children and Young Persons Act, such trials are to be conducted in camera so that children as defined under the Act are not, for instance, exposed to publicity which may inhibit a fair trial, subject them to fear stigma and the like. We do understand and appreciate these considerations and others that we have not mentioned. The problem still remains, in case section 3(5) of the Children and Young Persons Act has been contravened, should the trial be declared a nullity? Admittedly PW1, Theresia Kapinga, the victim of attempted rape, was covered by section 3(5) of the Children and Young Persons Act, and therefore the trial should have been conducted in camera. However she gave evidence in open Court. In what way was the appellant prejudiced? It is true that the word "shall" as has been used in section 3(5) referred to above, means that it is mandatory to comply with the said provision. This Court in the case of *Fortunatus Masha v. William Shija and another* (3) had occasion to construe the word

"shall" as used in Rule 76(3) of the Court of Appeal Rules, 1979 and stated as follows at page 43D;

> We think that the use of 'shall' does not in every case make the provision mandatory. Whether the use of that word has such effect will depend on the circumstances of each case.

This Court was of the view that the use of the word "shall" does not necessarily mean that the provision in question is mandatory. We are in respectful agreement with Mr. Boniface, learned senior State Attorney that the omission to conduct the trial in camera did not occasion a failure of justice to the appellant. The defect is curable under section 388(1) of the Criminal Procedure Act, 1985. We would like to point out however, that since the coming into force of the Interpretation of Laws Act, Chapter 1 on the 1 September 2004 vide Proclamation number 312 of 2004, the law on this point may change in view of section 53(2) which provides;

> (2) Where in any written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.

Lastly, we now come to first ground of appeal. We must admit that it has causcd us considerable anxiety. The appellant challenged the sentence imposed upon him as being manifestly excessive. The District Court had sentenced the appellant to thirty (30) years imprisonment. On first appeal to the High Court (Manento, J.) as he then was, reduced the sentence to fifteen (15) years imprisonment. Sections 132(1), (2) and (3) of the Penal Code as replaced by Act number 4 of 1998 provides as under:

> (1) Any person who attempts to commit rape commits the offence of attempted rape, and except for the cases specified in subsection (3) is liable upon conviction to imprisonment for life, and in any case shall be liable to imprisonment for not less than thirty years with or without corporal punishment.

A person attempts to commit rape if, with intent to procure prohibited sexual intercourse with any girl or woman, he manifests his intention by:

(a) threatening the girl or woman for sexual purposes:

(b) being a person of authority or influence in relation to the girl or woman, applying any act of intimidation over her for sexual purposes;

(c) making any false representations to her for the purposes of obtaining her consent;

(d) representing himself as a husband of the girl or woman, and the girl or woman is put in a position where, but for the occurrence of anything independent of that person's will, she would be involuntarily carnally known.

(3) Where a person commits the offence of attempted rape by virtue of manifesting his intention in the manner specified in paragraph (c) or (d), he shall be liable to imprisonment for life and in any case for imprisonment of not less than ten years.

The appellant was convicted under section 132(1) and 2(a) of the Penal Code as replaced by Act number 4 of 1998. The High Court reduced the sentence of thirty (30) years imposed by the District Court to fifteen (15) years imprisonment. The appellant did not manifest his intention either under section 132(2)(c) or (d) which would have attracted a minimum sentence of ten years. Since the appellant was convicted under sections 132(1) and 2(a) of the Penal Code, the sentence imposed by the District Court was the correct one namely, (thirty years imprisonment.)

This is not the end of the matter. Section 131(1) and (2) of the Penal Code as replaced by Act number 4 of 1998 provides as follows

(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty

years with corporal punishment, and with fine, and shall in addition be ordered to pay compensation of an amount determined by the Court, to the person in respect of whom the offence was committed for the injuries caused to such person.

(2) Notwithstanding the provision of any law, *where the offence is committed by a boy who is of the age of eighteen years or less, he shall.* [emphasis added]

(a) *if a first offender, be sentenced to corporal punishment only;*

(b) if a second time offender, be sentenced to imprisonment for a term of twelve months with corporal punishment;

(c) if a third time and recidivist offender, he shall be sentenced to life imprisonment pursuant to subsection (1).

It is evident that from the number 4 of 1998, the punishment for both rape and attempted rape is a minimum sentence of thirty years imprisonment with or without corporal punishment. Under section 131(2)(a), in the case of rape committed by a boy who is eighteen years or less, if a first offender, the sentence will be corporal punishment only. There is no similar provision under section 132 which deals with attempted rape. The appellant herein was sixteen years old when he committed a lesser offence of attempted rape, yet the sentence is a minimum of thirty years imprisonment. A question we ask ourselves, is, was the omission of a comparable provision in section 132, deliberate on the part of the legislature? Its omission certainly leads to an absurd situation! A boy who commits rape under section 131(1) but is under the age of eighteen years is given a sentence of corporal punishment only. A counterpart who attempts to commit rape under sections 132(1) and (2)(a), like the present appellant, is condemned to a custodial minimum sentence of thirty years with or without corporal punishment. This is the anomally which prompted us to pose the question as to whether this was really the intention of the legislature. The language used by the legislature in enacting sections 132(1)

and (2) of the Penal Code as amended by Act number 4 of 1998 admits no ambiguity. In fact there is no comparable provision to section 131(2). Prior to the enactment of Act number 4 of 1998 sections 131 and 132 of the Penal Code were in the following terms:

> 131. Any person who commits the offence of rape is liable to be punished with imprisonment for life with or without corporal punishment.
>
> 132. Any person who attempted to commit rape is guilty of a felony, and is liable to imprisonment for life with or without corporal punishment.

The punishment for both rape and attempted rape was the same for all, men and boys under the age of eighteen years. Since section 131(2) of the Penal Code as amended by Act number 4 of 1998 introduced a distinction between boys and men, it is our considered view that the same concept should be reflected in section 132 of the Penal Code. With respect this we can do by adopting a "purposive" approach in interpreting a stututory provision. This Court endorsed such an approach while construing section 114 of the Elections Act in the case of *Joseph Warioba v. Stephen Wassira and Another* (4). The Court quoted with approval what Lord Denning, M.R. stated in the case of *Nothman v. London Borough of Barnest* (5) at page 1246g as follows:

> The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive' approach. He said so in *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torguay) Ltd* and it was recommended by Sir David Renton and his colleagues in their valuable report entitled 'The Preparation of Legislation'.
>
> In all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose underlying the provision.' It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it.' Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in if necessary – so as to do what Parliament would have done had they had the situation in mind.

In the result, we have decided to adopt a purposive approach in interpreting section 132(1) so as to remove the anomally referred to earlier. To achieve this result, the provisions of sections 131(2)(a); (b) and (c) should be inserted immediately below section 132(1) so that they are equally applicable to boys of the age of eighteen years or less who attempt to commit rape. In view of the glaringly unjust situation and many such boys may be suffering from this inadvertent lacuna in the law, we think this is the only way to promptly arrest the situation while awaiting Parliament to amend Act number 4 of 1998 as appropriate.

In the event, the appeal partly succeeds. We uphold the conviction, but quash and set aside the sentence of thirty years imprisonment imposed by the District Court. Under the purposive approach we have taken, the appellant should have been sentenced to suffer corporal punishment only. However, we have taken into account the fact that the appellant was convicted on the 12 June 2000 and we feel that the term of imprisonment which the appellant has served so far is more than the corporal punishment which would have been imposed on him. We substitute therefore a sentence that would result in the appellant's immediate release from custody unless otherwise lawfully held.