CRIMINAL APPEAL NO. 103 OF 2006- COURT OF APPEAL OF TANZANIA AT ARUSHA- RAMADHANI, C.J., MROSO, J.A. And, KAJI J.A.	**NYEKA KOU Vs. REPUBLIC (Appeal from the Decision of the High Court of Tanzania at Arusha)- HC Criminal Appeal No. 26 of 2004- Rutakangwa, J.-**	Offence of rape contrary to sections 130 and 131 of the Penal Code, Cap. 16 of the Revised Edition, 2002. Slightest Penetration- In law, to have sex with a woman, even with the slightest penetration into the woman's vagina by the male organ, without the woman's consent (where consent is relevant), is rape. Magistrate's knowledge of local area: trial magistrate should not have imported into the judgment his own geographical knowledge of the area to hold that the rape was committed at 6:30 pm rather than at about 7:00 pm.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RAMADHANI, C.J., MROSO, J.A. And, KAJI J.A.)

CRIMINAL APPEAL NO. 103 OF 2006

NYEKA KOU ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Arusha)

(Rutakangwa, J.)

dated the 9th day of November, 2005
in
HC Criminal Appeal No. 26 of 2004

JUDGMENT OF THE COURT

18 & 30 October, 2007

MROSO, J.A.:

The appellant was prosecuted in the District Court of Babati District, at Babati for the offence of rape contrary to sections 130 and 131 of the Penal Code, Cap. 16 of the Revised Edition, 2002. The trial court convicted him as charged and sentenced him to the minimum term of 30 years imprisonment. He was also ordered to compensate the victim of the rape Shs. 100,000/= after completing his prison sentence. His appeal to the High Court against conviction

and sentence was dismissed in its entirety. He has now appealed to this Court, presenting a three ground memorandum of appeal. At the hearing of the appeal the appellant argued it unaided by counsel and the respondent Republic was represented by Mr. Juma Ramadhani, learned State Attorney. We now wish to make a resumé of the case which led to appellant being convicted and sentenced.

On 18th October, 2002 Thomas Bernard (PW3) and his wife Domitila Thomas (PW2) were riding towards home apparently each riding their own bicycle. On the way Thomas' bicycle got a puncture and he had to push it. He allowed his wife Domitila to proceed home on her bicycle and he would follow. While Domitila rode her bicycle ahead of her husband she encountered the appellant who demanded to have sex with her. He then threw her down from her bicycle. Threatening her with a *panga,* he undressed her and himself and began to have sex with her twice. It was then Thomas appeared while still pushing his bicycle. He saw the appellant on top of his wife, Domitila. The appellant also saw Thomas coming and immediately took flight. Thomas tried to chase him in vain.

Domitila reported to the police at Magugu Police Station where she was issued with a PF3 which she took to a health centre to be examined and treated. A Doctor Esther Msuya (PW1) examined Domitila on 21/10/2002 when, according to her, Domitila appeared before her. She observed that Domitila had haematoma on the eye, bruises on the thighs and which extended to the vagina. No sperms were seen.

The appellant was arrested by the village militia on 19th October, 2002. Subsequently, he was charged in court. At his trial he is recorded to have made a very brief, two sentence defence. He was convicted as charged.

In his first ground of appeal it is complained that there was no proof of rape because the Doctor (PW1) did not say she had observed signs of penetration and no spermatozoa were seen. The bruises which were observed on the various parts of complainant's body were not proof of rape.

Mr. Juma countered that complaint by arguing that the absence of spermatozoa at the time Domitila was examined does not mean

that she was not raped. **Secondly**, that the doctor had observed that the bruises on the thigh proceeded to the vagina. **Thirdly,** that Domitila, the victim, said that the appellant had sex with her twice before the husband appeared and the husband, PW3 said he saw the appellant on top of his wife. According to Mr. Juma, all this evidence left no doubt that the appellant raped Domitila.

On our part we agree with the two courts below and the learned State Attorney that there was sufficient evidence which left no doubt at all that Domitila (PW2) was indeed raped. To be thrown down, to be threatened with a *panga*, to be roughed up to the extent of sustaining bruises and to be carnally known without one's consent is to be raped, even in the layman's understanding of the offence of rape. In law, to have sex with a woman, even with the slightest penetration into the woman's vagina by the male organ, without the woman's consent (where consent is relevant), is rape. All this occurred when Domitila was being carnally known but, in this case, it was not a matter of the slightest penetration, but with full penetration during which there was ejaculation twice. We are

satisfied Domitila was raped and the absence of sperms was immaterial. Was it the appellant who raped her?

It was between 6 pm and 7 pm when the rape occurred. Both Domitila and her husband Thomas knew the appellant before that day. He was a village-mate. The appellant even told the High Court during his first appeal, and also told us, that he previously worked for the couple. There is little doubt both Thomas and Domitila would easily recognize him reliably. The appellant has told us that he was not on good terms with the couple and that they implicated him falsely with the crime of rape.

We think this belated defence which was not given as evidence at the trial is an afterthought. Had it been true that the complainant and her husband were settling old scores with the appellant by falsely implicating him in a rape which either did not happen or was committed by another person, the appellant who left us with the impression that he is an extremely argumentative individual, would not have failed to grill thoroughly the complainant together with her husband about the alleged malicious incrimination.

We do not believe the complainant and her husband concocted a false rape charge in order to fix him. We dismiss the first ground of appeal.

In the second ground of appeal it is complained that the two courts below acted on contradictory evidence. This was a reference to the date when Domitila was examined and treated by Dr. Esther Msuya (PW1). The Doctor said in her evidence that Domitila came to her with a PF3 on 21/10/2002. However, Domitila said she went to hospital with a PF3 on 19th October, 2002, which was just a day after she was raped. The PF3 was issued by the Police on 19/10/2002, which date is clearly indicated on the document. The document also shows that Domitila was *"sent to hospital"* on 19th October, 2002. The PF3 shows on its reverse side the doctor's observations. Those observations do not show the date when they were written and the doctor gave her evidence in court on 18/8/2003, which was some ten months after the rape incident.

Considering that the Doctor did not indicate on the PF3 the date she attended Domitila, it is quite possible her memory, unaided,

failed her and she mentioned the wrong date when giving evidence. That likelihood is the more so because even PW3 – Thomas the husband of Domitila – supported the evidence of Domitila by saying that she went to hospital on 19th October, 2002, which was the date the PF3 was issued. We think that whoever was wrong about the date, the discrepancy is not material and did not result in any prejudice to the appellant and he did not make any such claim. We dismiss that ground of appeal.

Finally, there is the third ground of appeal in which the appellant took issue with the trial magistrate who made a finding that the rape took place at 6:30 pm contrary to what is stated in the charge sheet, that the rape was committed at about 19 hours (which is 7:00 pm).

We agree with the appellant that the time 6:30 pm which was mentioned in the judgment by the trial court (and impliedly accepted by the first appellate court) was not mentioned by either PW2 – Domitila – or PW3 – Thomas. But, really, if the rape was committed at 7:00 pm or at 6:30 pm is not a *"big deal"* and the difference in the

time is innocuous. The exact time a rape is committed does not normally matter unless the circumstances of the case are such that it is important to know it. The time *"19:00 hours"* appearing on the Charge Sheet probably was the time mentioned by the complainant when she reported to the police. There is no indication that she had looked at a watch regarding the exact time she was raped, or even that she possessed a watch for that matter. It was estimated time, hence the words used in the Charge Sheet *"at about 19:00 hrs"*.

We agree that the trial magistrate should not have imported into the judgment his own geographical knowledge of the area to hold that the rape was committed at 6:30 pm rather than at about 7:00 pm, but as mentioned earlier, the error is immaterial. It did not affect the finding that it was the appellant who raped Domitila. This ground of appeal is also dismissed.

All in all, we could not find any merit in this appeal. Domitila and her husband Thomas were the only eye witnesses available, so it was unavoidable that they should be the only witnesses who testified about the person who committed the rape. The sentence which was

imposed was legal and needs no interference. The appellant is lucky that the compensation order allows him to pay the money after completing the prison sentence. He could have been ordered to pay immediately. The appeal is dismissed in its entirety.

DATED at ARUSHA this 30th day of October, 2007.

A. S. L. RAMADHANI
CHIEF JUSTICE

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

(F. L. K. WAMBALI)
SENIOR DEPUTY REGISTRAR