CRIMINAL APPEAL NO. 278 OF 2006- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.	**LUDOVICK KISANGA vs. REPUBLIC- (Appeal from the Decision of the High Court of Tanzania at Moshi)- Criminal Revision No. 3 of 2000-Munuo, J.**	**Offence of** rape c/ss 130 and 131 of the Penal Code. **Offence of Rape not** proved- trial District Court was satisfied that the prosecution evidence had established the offence of **indecent assault c/s 135 of the Penal Code**. It accordingly convicted of that offence.- sentenced to pay a fine of Tshs. 40,000/= or eighteen months imprisonment in default. Also ordered to pay complainant Tshs. 50,000/= as compensation. **Revisional jurisdiction invoked-** Complainant dissatisfied by the decision- Judge in charge directed revisional proceedings to be opened.-Judge orders the sentence of Shs.

		40,000/= imposed on the accused quashed and set aside and substituted therewith the mandatory statutory minimum sentence for rape which is 30 years imprisonment. The compensation order is valid and upheld".- The appellant was apprehended and committed to prison. **Legality of Revisional Order**- High Court revised upwards the sentence imposed on the accused on the basis of an offence he was not convicted of the revisional order was a nullity- High Court wrongly invoked its revisional jurisdiction in quashing the sentence of a fine and substituting therefor a thirty-year prison sentence. It is obvious from the revisional order that the learned High Court judge had

		proceeded on the wrong assumption that the appellant had been convicted of rape c/ss 130 and 131 of the Penal Code.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 278 OF 2006

LUDOVICK KISANGA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Munuo, J.)

dated the 5th day of July, 2000
in
Criminal Revision No. 3 of 2000

REASONS FOR JUDGMENT:

RUTAKANGWA, J.A.:

The appellant was arraigned before the District Court of Moshi for raping one Glanisia d/o Sirili c/ss 130 and 131 of the Penal Code. He denied the charge. After a full trial, the trial District Court held that the charge of rape had not been proved. It accordingly acquitted him of that offence. However, the trial District Court was satisfied that the prosecution evidence had established the offence of indecent assault c/s 135 of the Penal Code. It accordingly convicted the appellant of that offence. The appellant was sentenced to pay a fine of Tshs. 40,000/= or eighteen months imprisonment in default. He was also ordered to pay Glanisia Sirili Tshs. 50,000/= as compensation. That was on 20th June, 2000.

The decision of the trial court was not well received by the complainant Glanisia. On 26th June, 2000 she wrote to the Principal State Attorney Moshi expressing her displeasure with the acquittal of the appellant. A copy of the said letter was sent to the District Registrar, High Court Moshi. Acting on the said copy, the judge incharge directed revisional proceedings to be opened. Following this

directive Criminal Revision case No. 3 of 2000 was opened on 5th July, 2000. The matter was determined on the same day.

In her revisional order, dated 5th July, 2000, Munuo, J. (as she then was) observed that the present appellant was charged and convicted of rape c/ss 131 and 132 of the Penal Code. She then proceeded to hold as follows: -

> "Rape is a scheduled offence carrying a minimum sentence of 30 years imprisonment in the present circumstances where the victim is an elderly woman aged 65. The sentence of Shs. 40,000/= is illegal. For that reason the sentence of Shs. 40,000/= imposed on the accused is quashed and set aside and substituted therewith the mandatory statutory minimum sentence for rape which is 30 years imprisonment. The compensation order is valid and upheld".

The appellant was apprehended and committed to prison.

The appellant who, at the time he was sent to prison, was 65 years old as Glanisia, was equally aggrieved by the sudden twist his

case had taken. He accordingly lodged this appeal, which we heard on 15th October, 2007.

At the hearing of his appeal the appellant was unrepresented, whereas the respondent Republic was represented by Mr. Juma Ramadhani, learned State Attorney. The apparently aged appellant had nothing to tell us in elaboration of his eight grounds of appeal, which centred on the impropriety of his conviction by the trial District Court. Fortunately for the appellant, the respondent Republic did not resist the appeal. After hearing Mr. Juma, we allowed the appeal, quashed the High Court's revisional order and the sentence of imprisonment and ordered the immediate release of the appellant from prison. We reserved the reasons for our decision, which we are now giving.

The reasons for allowing the appeal from the above given background should not be hard to come by. In supporting the appeal, Mr. Juma was brief and focussed. He drew our attention to the obvious fact that although the appellant had originally been

charged with the offence of rape, he was not convicted of that offence. Instead he was convicted of the lesser offence under section 135 of the Penal Code, which carries no minimum sentence, he argued. He went on to submit, quite correctly, that a jail sentence for an offence under this section is even not the only punishment available. A person convicted of an offence under section 135 can be sentenced to pay a fine not exceeding Tsh. 300,000/= he pressed. He was, therefore, of the firm view that as long as the appellant was found guilty of an offence under section 135 and not of rape, the trial District Court was perfectly justified in imposing a fine sentence. As the High Court revised upwards the sentence imposed on the accused on the basis of an offence he was not convicted of the revisional order was a nullity which ought to be quashed and set aside and the original sentence restored, he concluded.

Going by the undisputed facts in this appeal, we have found ourselves in full agreement with Mr. Juma. There is no doubt that the High Court wrongly invoked its revisional jurisdiction in quashing

the sentence of a fine and substituting therefor a thirty-year prison sentence. It is obvious from the revisional order that the learned High Court judge had proceeded on the wrong assumption that the appellant had been convicted of rape c/ss 130 and 131 of the Penal Code. Had that been the case we would not have had any difficulties in dismissing this appeal with the deserving contempt. But that was not the case. On the issue of sentence, therefore, the High Court erred in law in sending the appellant to prison for an offence which the trial District Court had exonerated him. The trial District Court had indeed imposed a lawful and appropriate sentence in the circumstances. The High Court sentence in our settled view, was accordingly illegal.

It is for these reasons that we found ourselves constrained to allow the appeal and quash the sentence imposed on the appellant and ordered his immediate release from prison.

DATED at ARUSHA this 23rd day of October, 2007.

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI

JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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

(I. P. Kitusi)
DEPUTY REGISTRAR