CRIMINAL APPEAL NO.218 OF 2005 COURT OF APPEAL OF TANZANIA AT MTWARA (CORAM: RAMADHANI C.J.,MUNUO,JA AND MJASIRI J.A)	DISMAS KABAYA MILANZI ... APPELLANT AND REPUBLIC ... RESPONDENT (An Appeal from the decision of the High Court of Tanzania at Mtwara) (Lukelelwa,J) Criminal Appeal No.14 of 2005)	Whether there is violation of s.240(3) of the Criminal Procedure Act (Cap 20 R.E 2002) which imposes a duty on a court to inform an accused person of the right to call for cross-examination a maker of any medical report, if the results in a PF 3, or any medical document for that matter, goes adverse the case of the prosecution, that is, if it is not prejudicial to the accused person, then even if the provisions of s.240(3) have not been complied with, there is no compulsion of expunging it.

THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: RAMADHANI$_A$, Ca; MUNUO, J.A; And MJASIRI, IA.)

CRIMINAL APPEAL NO. 218 OF 2005

BETWEEN
DISMAS KABAYA MILANZI ... APPELLANT
AND
REPUBLIC ●●● RESPONDENT

(An Appeal from the Decision of the High Court of Tanzania, at Mtwara)

(Lukelelwa, J.)

dated the 26th day of October, 2005
i n
Criminal Appeal No. 14 of 2005

JUDGMENT OF THE COURT

25 & **27 November, 2009**

RAMADHANI, C. J.:

The appellant, Dismas Kabaya Milanzi, was the Village Executive Officer of Mkalango Village, Masasi District, and was the second accused person at

the trial before the District Court of Masasi. His co-accused, Joseph Elias Saidi, a militiaman, jumped bail and has never been seen. We shall refer to Joseph simply as a militiaman.

On 27th May, 2004 at about 2200 hours, Agnes Maleta (PW 1), and her husband, Mambo Simba (PW 2), were returning home from their shamba when they met the militiaman who stopped them accusing them of being thieves and a brawl ensued. PW 1 decided to proceed home leaving PW 2 behind. A few minutes later the militiaman in the company of another

person went to fetch PW 1 with the luggage she had had earlier on, on the way home. When she arrived at the Village Chairman's place she found PW 2 under militia custody.

The Village Chairman called the appellant who, upon arrival and being told of what was the matter, decided to take PW 1 and PW 2 to the Police Station in Masasi. On the way the appellant and the militiaman took turns to rape and sodomize PW 1 in front of the husband, PW 2, and three other persons including Denis Kabaya (DW 2). One of the other three persons, Kaonje, rebuked them for what they were doing. Upon reaching their destination, PW 1 reported to the Police what was done to her and she was given PF 3 which was admitted as Exh. P1.

The appellant, on the other hand, admitted escorting PWs 1 and 2 and to hand them over to the Masasi Police Station but denied having carnal knowledge of PW 1, both naturally and unnaturally. The appellant called his brother Denis Kabaya (DW 2), who was in the team to the Masasi Police Station, and denied seeing any such indecent acts being committed.

The District Court of Masasi believed the prosecution version and convicted the appellant sentencing him to thirty years imprisonment. His appeal to the High Court (LUKELELWA, J.) was dismissed in the following words:

> I'm satisfied that the evidence on record proved the case beyond any reasonable doubt against the appellant, and that he was properly convicted.

The appellant has come to us on this second appeal and he was in person but the respondent/Republic had the services of Ms. Angela Kileo, learned State Attorney, and she supported the conviction. Both parties made elaborate submissions which we do not think it necessary to delve into. There are only three matters which we want to discuss:

First, Ms. Kileo agreed with the bench that it does not appeal to normal reason that the appellant and the militiaman would have done to PW 1 what they are alleged to have done in front of PW 2, her husband, and that he would have taken it as an amusement without taking any action at all. We find it repugnant to PW 2's manhood though he gave evidence reiterating what PW 1 said was done to her.

In the first instance according to PW 1 herself PW 2 was not at all a person to be cowed. When PW 1, PW 2 and the militiaman met the first time that night, according to PW 1, this is what transpired:

> The [first] accused questioned again, do you know that time is a night time? He [PW 2] replied, Yes, we know, but everyone has his personal problems. The 1st accused told us, that we are thieves. We were surprised! He [PW 1] never replied again, he continued to go home, the 1st accused told us: 'Mnanidharau eti? Nasema mimi nanyi mnaondoka' My husband stopped and quarreled with 1st accused, that is why I left him and I went home.

That is PW 2 in his true colours; belligerent. At that time he was alone with the militiaman. Why would PW 2 then leave his wife being humiliated publicly the way they want us to be believe that she was? Admittedly, this

time the militiaman and the appellant were two but one of them would be busy with PW 1 and then there were two other male companions apart from DW 2. Not only that but both PW 1 and PW 2 stated that one of the companions, Kaonje, warned the appellant and the militiaman against what they were doing. But neither PW 1 nor PW 2 said that PW 2 opened his mouth against what was being done to his wife. That beats us completely. It is a most incredible behavior for any man befitting to be called a husband.

The second matter is the PF 3 which was admitted as Exh. P 1. Admittedly, the provisions of s.240 (3) of the Criminal Procedure Act [Cap 20 R. E. 2002] which imposes a duty on a court to inform an accused person of the right to call for cross-examination a maker of any medical report. That was not done in the trial court and Ms. Kileo was very fast to ask us to expunge PF 3 from the record of appeal. We did not acquiesce to that suggestion. We will now say why.

We are very much alive to the fact that we have given a directive in this very session here in Mtwara in Arabi Abdu Hassani v. R., Criminal Appeal No. 187 of 2005 (unreported), that Judges-in-Charge should educate Magistrates in their jurisdictions to observe that provision. Not only that but in all cases in which that provision was violated we ordered PFs 3 to be expunged. But what is the real import of s. 240 (3)? We have no hesitation to say that it has been placed to safe guard the rights of accused persons. If the results in a PF 3, or any medical document for that matter, goes

adverse the case of the prosecution, that is, if it is not prejudicial to the accused person, then even if the provisions of s. 240 (3) have not been complied with, there is no compulsion of expunging it. That is the case here.

PF 3 was given to PW 1 and was acted upon on the same day the offence is said to have been committed. The remarks of the Medical Officer were:

> Lab Results shows NO sperms BUT there soft tissues injury
>
> on Buttocks & both hands

The report is not articulate in certain aspect but it is loud and clear that sperms were not seen. One wonders how that could be when it is alleged that PW 1 was not only raped by two people but each did it twice and then she was examined that same day while there is no information that she had taken a wash after the ordeal. Ms. Kileo also saw that.

The third matter is that apart from the militiaman, the appellant, PW 1 and PW 2, there were three other persons on that trip to Masasi Police. The question is why were they not called by the prosecution to give evidence. Ms. Kileo gave two replies: one, she said DW 2 is the brother of the appellant and so he would have just supported him. But that could equally be said of PW 2 who was the husband of PW 1. Two, Ms. Kileo said that even if the others were called, they would have reiterated what PW 1 and PW 2 said. Ms. Kileo blew hot and cold at the same time in these two replies.

Any way, we may point out here that PW 2 did the same; he reiterated what PW 1 said. But we do not know for sure what the other two would have said. This omission definitely attracts the making of an adverse inference. And we do just that.

For the reasons we have given above we are of the decided view that the appeal should succeed. We, therefore, quash the conviction, set aside the sentence and order the immediate release of the appellant unless there is another lawful order for his detention.

DATED in MTWARA, this 27th day of November, 2009.

A. S. L. RAMADHANI
CHIEF JUSTICE

E. N. MUNUO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

KITUSI)
SENIOR DEPUTY REGISTRAR