CRIMINAL APPEAL NO. 219 OF 2007- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.	**AMANI RAMADHANI MGONJA Vs. REPUBLIC Appeal from the Judgment of the High Court of Tanzania at Moshi- Criminal Appeal No. 36 of 2000-Munuo, J.**	Offence of rape contrary to sections 130 and 131 of the Penal Code Cap. 16, in the District Court of Same in Criminal Case No. 56 of 1996. Sentenced to 20 years imprisonment and 12 strokes of the cane. Section 127 (2) of the Law of Evidence- Whether a 15 year old is not a child of tender age, and there was no necessity of conducting a *voire dire* examination before receiving her evidence. At the time of adducing evidence PW4 was recorded to have been 15 years old. At that age she was not a child of tender age and, therefore, there was no requirement of a *voire dire* test to be conducted before receiving her evidence.

		Section 186 (3) of the Criminal Procedure Act was introduced by section 24 of the Sexual Offences Special Provisions Act No. 4 of 1998 which came into force on 1.7.1998. This section was not retrospective to the time of the commission of the offence which took place in 1996. Preliminary hearing under section 192 (1) of the Criminal Procedure Act is not the same as a partly heard case.- Subsection (5) of section 192 does not require the same judge or magistrate who held the preliminary hearing under section 192 at preliminary hearing to preside at the trial. at that time the offence of rape was not under the Minimum Sentences Act. There was no minimum sentence

		prescribed but only the maximum which was life imprisonment with or without corporal punishment.- The sentencing powers of a subordinate court in 1996 in cases of Rape was limited to five (5) years imprisonment as prescribed by section 170 (1) of the Criminal Procedure Act. The sentence of 20 years imprisonment imposed on the Appellant was *ultra vires* the sentencing powers of the learned trial magistrate. section 366 (4) of the Criminal Procedure Act allows the High Court in exercising its appellate powers to inflict a greater punishment than the punishment which might have been inflicted by the court which imposed the sentence.

		Court of Appeal steps into the shoes of the High Court and quashed the illegal sentence imposed by the trial District Court. The offence committed, of raping his daughter, is horrible. It is quite against modern human civilization. In that regard he deserved to be punished severely. Court of Appeal enhanced the sentence to twenty (20) years imprisonment and 12 strokes.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 219 OF 2007

AMANI RAMADHANI MGONJA..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Munuo, J.)

dated the 30th day of April , 2001
in
Criminal Appeal No. 36 of 2000

JUDGMENT OF THE COURT

19 & 30 October, 2007

KAJI, J.A.:

Amani Ramadhani Mgonja, the appellant, was charged with and convicted of the offence of rape contrary to sections 130 and 131 of the Penal Code Cap. 16, in the District Court of Same in Criminal Case No. 56 of 1996. He was sentenced to 20 years imprisonment and 12 strokes of the cane. He was aggrieved. He unsuccessfully appealed to the High Court. Still dissatisfied he lodged this second appeal.

The facts of the case as reflected in the record are rather pathetic. The appellant and the complainant Neema d/o Amani (PW4) were father and daughter respectively. PW4 had been residing with her grandmother at Gonja for some time.

On 7.5.1996 in the morning, the appellant picked her purporting to take her to Arusha for schooling. They boarded a bus.

On the way, when they arrived at Same, the appellant and PW4 disembarked. The appellant hired a room at Kauli Guest House.

While in the room the appellant stuffed a bedsheet in her mouth, tied her hands at the back, removed her underwear and raped her. Since she had been stuffed with a bedsheet into her mouth she could not cry out for help. Later she pretended to go out to help herself. Once outside she went to Same Police Station and reported the matter. She was issued with a PF3 which she took to hospital where she was medically examined and found with some bleeding in her private parts (vagina) and lacerations per labia minor and vaginal wall (Exhibit P1).

The appellant was arrested and charged as above. He denied the charge. But as indicated above he was convicted and sentenced as above.

In his memorandum of appeal the appellant preferred seven grounds which basically revolve around the burden of proof, non-compliance with sections 127 (2) of the Evidence Act, 1967, 186 (3), 39 (b) and 214 (1) of the Criminal Procedure Act and the possibility

of the case having been a fabrication by his former wife who was the mother of PW4. He preferred the learned State Attorney for the respondent Republic to respond before he could give a rejoinder.

Responding to these grounds Mr. Henry Kitambwa, learned State Attorney, who represented the respondent Republic at the hearing of the appeal, contended that the prosecution proved the act of rape through the evidence of PW4 and the PF3 Exhibit P1. The learned State Attorney maintained that the prosecution proved that it was the appellant who raped PW4 through the evidence of PW4 together with the overall circumstances surrounding the case, such as why the appellant decided to disembark and hire a room at Same and moreover he had told PW4 he was taking her to Arusha for schooling.

Responding on the appellant's complaint that section 127 (2) of the Evidence Act was not complied with, the learned State Attorney pointed out that, since PW4 was aged 15, and therefore not a child of tender age, there was no necessity of conducting a *voire dire* examination before receiving her evidence.

Responding on the appellant's complaint that sections 39 (b), 214 (1) and 186 (3) of the Criminal Procedure Act were not complied with, the learned State Attorney contended that, those provisions are irrelevant in the circumstances of the case.

In a short rejoinder the appellant expressed his concern why in the preliminary hearing the prosecutor did not mention the names of the witnesses he had intended to call for prosecution. He held the view that the prosecution might have used that chance to coach any person and call him as a witness to implicate him. The appellant also complained about why PW4's clothes which were alleged to have had some blood stains were not tendered as exhibit. The appellant questioned the authenticity of the PF3 for having two different dates, that is, 7.5.96 and 11.5.96. Lastly the appellant complained that the Guest House attendant did not give evidence. He urged us to draw an adverse inference against the prosecution.

In this appeal we are proposing to deal with the appellant's grounds of appeal one by one although not seriatim. We will start with ground No. 2. In this ground the appellant is complaining that a

voire dire examination was not conducted before receiving the evidence of PW4. We think the answer is obvious. At the time of adducing evidence PW4 was recorded to have been 15 years old. At that age she was not a child of tender age and, therefore, there was no requirement of a *voire dire* test to be conducted before receiving her evidence. This complaint has no merit and is dismissed.

In ground No. 3 the appellant is complaining that the Guest House attendant who would be an independent witness, was not called as a witness. He impliedly urges us to draw an adverse inference against the prosecution. But going through the record we could not find anything indicating that the Guest House attendant witnessed the rape. Therefore we do not think we have to draw an adverse inference against the prosecution. At any rate the record indicates that efforts were made to secure her attendance but she could not be available.

In ground No. 4 the appellant is complaining that the trial was not held in camera as required by section 186 (3) of the Criminal Procedure Act. The said subsection reads:-

> *Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences shall be received by the court in camera, and the evidence and witnesses involved in these proceedings shall not be published by or in any newspaper or other media, but this subsection shall not prohibit the printing or publishing of any such matter in a bona fide series of law reports or in a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical professions.*

Apparently the appellant had in mind this provision. Unfortunately it would appear he was not aware that this provision was introduced by section 24 of the Sexual Offences Special Provisions Act No. 4 of 1998 which came into force on 1.7.1998. It was not retrospective to the time of the commission of the offence which took place in 1996. Therefore his complaint on this has no merit and this ground is dismissed.

In grounds No. 5 and 6 the appellant is categorically complaining why his clothes and those of PW4 were not tendered as exhibit, and that in his view, this contravened section 39 (b) of the Criminal Procedure Act.

It is desirable that we quote the said provision to see whether it is applicable. That provision (39 (b)) reads:-

> *For the purpose of this Part anything as to which there are reasonable grounds for believing that it will afford evidence of the commission of any offence, shall be deemed to be a thing connected with the offence.*

To us this appears to be a guidance to investigators that in the course of their investigation, they may take anything which they believe will afford evidence of the offence involved. It is up to them to decide which materials to collect and which ones to tender in court. In the instant case, if the prosecution found those clothes to be of little evidential value, and left them out, that was their decision. The appellant's complaint on this has no merit and we dismiss it.

In ground No. 7 the appellant's complaint is that the preliminary hearing was conducted by Mr. Matoke (DM), but the trial was presided over by N.K. Munuo (DM). In his view this contravened section 214 (1) of the Criminal Procedure Act because he was not asked to elect whether the case to start afresh or to proceed from where Matoke had ended. It would appear the appellant took the preliminary hearing under section 192 (1) of the Criminal Procedure Act to be a partly heard case. Subsection (5) of section 192 is very clear that, nothing in this section shall be construed as requiring the same judge or magistrate who held the preliminary hearing under this section to preside at the trial. This being the position of the law, this ground is also lame and is dismissed accordingly.

Lastly is ground No. 1. In this ground the appellant's complaint is that the prosecution did not prove his guilt beyond all reasonable doubts. It is his belief that PW4 conspired with her mother, the appellant's former wife, to implicate him for the reason(s) best known by them. He did not elaborate how they conspired in the circumstances of the case.

We have carefully considered this. But we are far from being persuaded that this was a cooked up case. We say so for the following reasons:-

One, there is nothing indicating that PW4's mother was seen around Gonja or Same at the material time, or that PW4 and her mother communicated on the issue at any time.

Two, there is nothing suggesting that PW4 had been at her mother at Morogoro around the material time. According to the appellant's testimony PW4 had been at her mother's home in Morogoro a long time previously. He went there and found out she had been turned into a house girl. He took her back to Arusha where she continued schooling.

Three, there is nothing suggesting that PW4 had any cause to implicate the appellant, her father, who appeared to have been interested in her educational advancement.

Four, the appellant did not give a plausible explanation why he decided to disembark at Same at around 10 am and hire a room in a Guest House. His explanation that PW4 absconded and later traced

her is naive. He said he traced her at around 1 pm. We ask ourselves: With all the buses from Dar es Salaam or Tanga which travel to Arusha why didn't he proceed with his safari to Arusha at that early time of the day instead of deciding to sleep in a Guest House? The only rational answer is that he had intended to rape his daughter at any cost.

Five, the appellant had testified that he was with Elisante Simon Kiringanya (DW2) all the time. But in a very brief testimony DW2 said:-

> *On 7.5.1996 I was traveling from Gonja going to Arusha. I was traveling alone and I saw the accused and his daughter. At 10.00 am the bus reached Same and I saw the accused getting off from the bus and I didn't know what continued and I proceeded with my journey to Arusha. That is all.*

With this evidence it is quite clear that the appellant was not with DW2 at the time when he was alleged to have committed the offence. The appellant had the opportunity to commit the offence charged, and from the evidence of PW4, PW3, PF3 Exhibit P1,

together with the overall circumstances surrounding this case as demonstrated above, it is apparent that he committed the offence charged.

With all this we are satisfied the prosecution proved the guilt of the appellant beyond all reasonable doubt and he was rightly convicted as charged. In that vein the learned judge on first appeal rightly dismissed the appeal against conviction.

As far as the appeal against sentence is concerned we have painfully checked the sentencing powers of a subordinate court in cases of this nature at the material time. In so doing we have been made to understand that at that time the offence of rape was not under the Minimum Sentences Act. There was no minimum sentence prescribed but only the maximum which was life imprisonment with or without corporal punishment. The amendment effected by Act No. 19 of 1992 did not affect punishment for rape (section 131 of the Penal Code Cap. 16). Section 131 was amended by the Sexual Offences Special Provisions Act, 1998 which was not yet in force in 1996 when the offence at hand was committed. That being the

position of the law the sentencing powers of a subordinate court in 1996 in cases of this nature was limited to five (5) years imprisonment as prescribed by section 170 (1) of the Criminal Procedure Act. As indicated above, the trial court sentenced the appellant to 20 years imprisonment and 12 strokes. That sentence was *ultra vires* the sentencing powers of the learned trial magistrate. Unfortunately this was not brought to the attention of the learned judge on first appeal who held the view that the sentence was mandatory. We are satisfied that had it been brought to her attention she would have quashed it for being *ultra vires*.

But at this juncture we pose and ask: In the circumstances of this case would the sentence of 5 years imprisonment have met the justice of the case? We think it would not. It is a great shame for a father to rape his daughter. We are satisfied that the learned judge on first appeal would not just have quashed the sentence of 20 years imprisonment and substituted it with that of 5 years imprisonment. She would have gone further and resorted to section 366 (4) of the Criminal Procedure Act which allows the High Court in exercising its appellate powers to inflict a greater punishment than the punishment

which might have been inflicted by the court which imposed the sentence.

That section (366 (4)) provides:-

> *Nothing in this section shall be construed as precluding the court from inflicting a greater punishment than the punishment which might have been inflicted by the court which imposed the sentence.*

Since the learned judge on first appeal inadvertently blessed the illegal sentence imposed by the trial court, we step into her shoes and quash the illegal sentence imposed by the trial court. But as we have observed above, the offence which the appellant committed, raping his daughter, is horrible. It is quite against modern human civilization. In that regard he deserved to be punished severely. We enhance the sentence to twenty (20) years imprisonment and 12 strokes. Sentence to run from the date he was sentenced by the trial court, that is, on 14.7.1997.

In the event, and for the reasons stated above, we dismiss the appeal.

DATED at ARUSHA this 29th 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