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| CRIMINAL APPEAL NO. 225 OF 2007- MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A. | LEONARD JONATHAN Vs. REPUBLIC - Appeal from the Decision of the High Court of Tanzania at Moshi- Criminal Appeal No. 53 of 2001- Munuo, J. | Offence of rape contrary to sections 130 and 131 (1) of the Penal Code as amended by the Sexual Offences Special Provisions Act, No. 4 of 1998.<br><br>Sentenced to a term of 30 years imprisonment with 10 strokes of corporal punishment- trial court did not make any order for compensation in monetary terms but directed "the accused person to pay the victim of the rape compensation for rape by *(sic)* instituting a Civil Suit.."<br><br>Section 131 (1) of the Penal Code provides for the person convicted for rape *"shall be ordered to pay compensation of an amount determined by the Court"* to the victim of the rape.- |

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| | | It was not correct, therefore, for the trial court to direct that the victim of the rape was to institute a civil suit to recover compensation unless the amount to be paid as compensation was too large to be ordered in a criminal case.<br><br>The trial court is directed to assess the amount of compensation the appellant should pay to the victim of rape.<br><br>Preliminary hearing under section 192 of the Criminal Procedure Act is different from a preliminary inquiry in committal proceedings under section 246 (2) of the Criminal Procedure Act, 1985.<br><br>In Preliminary Hearing the emphasis is on ascertaining matters which will not be in dispute at the trial so that witnesses |

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| | | will not unnecessarily be called to testify on undisputed evidence. In that connection what is tendered during the preliminary hearing are a statement of the salient facts in the case, a signed memorandum of undisputed facts and undisputed exhibits. All along the objective is to shorten the length, and to reduce the cost, of the trial if there are substantive undisputed facts. Witnesses' statements are not read out to the accused person as in a preliminary inquiry.<br><br>Appellant must show how he was prejudiced by the failure of the trial court to conduct a preliminary hearing under section 192 of the Criminal Procedure Act.<br><br>Whereas it is the duty of the prosecution to bring all necessary |

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| | | witnesses to court who will prove that the accused committed the offence of which they are charged.-Once they fulfil that duty, they are not under any obligation to bring every witness who has evidence to testify at the trial.<br><br>-Where an accused person feels strongly that a particular person, though not listed as a witness at the trial, is necessary to bring to court material evidence, he should request the court to summon such witness.-The court will consider the request and if it appears to the court that indeed the suggested witness is in possession of material evidence it shall require the attendance of such witness by issuing a summons to compel his appearance. That is the purpose of sections 142 and 143 |

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| | | of the Criminal Procedure Act, 1985. |

**IN THE COURT OF APPEAL OF TANZANIA**
**AT ARUSHA**

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

**CRIMINAL APPEAL NO. 225 OF 2007**

**LEONARD JONATHAN ..... APPELLANT**
**VERSUS**
**THE REPUBLIC ..... RESPONDENT**

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

**(Munuo, J.)**

**dated the 21st day of September, 2001**
**in**
**Criminal Appeal No. 53 of 2001**

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**JUDGMENT OF THE COURT**

**17 October & 30 November, 2007**

**MROSO, J.A.:**

The appellant was charged with and convicted for rape contrary to sections 130 and 131 (1) of the Penal Code as amended by the Sexual Offences Special Provisions Act, No. 4 of 1998. He was

sentenced to a term of 30 years imprisonment with 10 strokes of corporal punishment. The trial court did not make any order for compensation in monetary terms but directed as follows –

> "The accused person to pay Amenana Elinkira (the victim of the rape) compensation for rape by (sic) instituting a Civil Suit, in this court."

That direction is curious because section 131 (1) provides that, among other things, the person convicted for rape *"shall be ordered to pay compensation of an amount determined by the Court"* to the victim of the rape. It was not correct, therefore, for the trial court to direct that the victim of the rape was to institute a civil suit to recover compensation unless the amount to be paid as compensation was too large to be ordered in a criminal case. The first appellate court apparently overlooked this wrong direction by the trial court.

The appellant's appeal to the High Court was dismissed in its entirety. He has now resorted to this Court, lodging five grounds of appeal. He did not have the benefit of legal counsel. On the other hand the respondent Republic was represented by Mr. Alexander

Mzikila, learned State Attorney, who supported the conviction and the sentence which the trial court imposed on the appellant.

Before we consider the grounds of appeal, we wish to give brief facts of the case which was before the trial court.

On 16th December, 1999 at about 6 pm a 23 year old girl, one Amini-Anna Elinkira, was with other girls and was going home from church. Suddenly a group of about five young men who included the appellant abducted her and took her to the home of the appellant. The appellant forcibly had carnal knowledge of her. News of the incident reached the father of the girl. The father went to the home of the appellant with a view to rescuing his daughter. As he tried to enter the room where the appellant was with Amini-Anna (PW1) he was hit by the third accused and dropped down unconscious. He had to be admitted to a hospital. Amini-Anna succeeded to escape from the appellant's house. She went to a hospital in Bomang'ombe where she was examined. A PF3 was filled in and produced at the trial as exhibit P1. The appellant was arrested and prosecuted for rape.

In his defence at the trial the appellant admitted he abducted PW1 and that he had sex with her. However, he said Amini-Anna – PW1 – had been his girl friend and they had agreed on marriage. Since church marriage was costly he decided to marry her his own way by doing what he did. Amini-Anna denied that there was any agreement between them to marry or even that she was his friend. She did not consent to sex with the appellant. She said the appellant raped her. The trial court as well as the first appellate court rejected the marriage idea and found the appellant had raped PW1 and sentenced him accordingly.

In his five ground memorandum of appeal the appellant said in his **first** ground that rape was not proved beyond a reasonable doubt. In the **second** ground the complaint is that section 192 (3) of the Criminal Procedure Act, 1985 was not complied with as no Preliminary Hearing was conducted. Section 240 (3) also of the Criminal Procedure Act was not complied with and that formed his **third** ground of appeal. In the **fourth** ground it is said that there were contradictions in the evidence of PW1 – Amini-Anna, PW2 – Neema Mengisen Swai and PW6 – Wilson Nsaro Mwasha on *"who*

*was raped"*. Finally, the **fifth** ground is that sections 142 and 143 of the Criminal Procedure Act, 1985 were not complied with.

At the hearing of the appeal the appellant did not wish to canvass his grounds of appeal but wanted the learned State Attorney to address the Court first and subsequent to the address by the State Attorney the appellant spoke briefly about his grounds of appeal. We now wish to discuss those grounds of appeal.

It will be recalled that the appellant agreed he had sex with Amini-Anna (PW1) on 16th December, 1999. The question is whether that act amounted in law to rape.

Section 130 (2) of the Penal Code as amended by the Sexual Offences Special Provisions Act, No. 4 of 1998 defines rape as having sexual intercourse with a woman or girl in the following relevant circumstance –

> "(a) not being his wife or being his wife who is separated from him without her consenting to it at the time of sexual intercourse".

The appellant's explanation as we understand him was that in having sex with Amini-Anna on that day he was in the process of marrying her in a less costly manner than would be in a church marriage. But Amini-Anna said on oath in her evidence that she had not consented to sexual intercourse with the appellant. She said in fact that she was raped.

The manner in which the appellant secured sexual intercourse with Amini-Anna indeed shows that she had not consented to having sex with the appellant. She was abducted and forcibly taken into the house of the appellant. She was stripped naked by the appellant who was assisted by one Eshiwakwe Justine who subsequently absconded and could not be brought to court to stand trial along with the appellant. This Eshiwakwe assisted the appellant by holding Amini-Anna's legs apart in order to make it easy for the appellant to have coitus with her. She escaped from the room holding her underclothes when she was rescued. In all those circumstances it cannot be said that Amini-Anna consented to sex with the appellant. It is naivé, to say the least, for the appellant to say rape was not proved. It is plain that the appellant had sex with Amini-Anna

without her consent regardless of whether there was agreement between the two to get married which, at any rate, was denied by Amini-Anna. We are satisfied, as were the two courts below, that the appellant raped PW1 on the day he abducted her. Even assuming that there is a custom which approves of such mode of marriage, such custom is anachronistic and cannot be accepted as dispensing with the need for consent to the sexual act. We dismiss the first ground of appeal.

The appellant did not explain in what manner the omission to comply with section 192 (2) of the Criminal Procedure Act prejudiced him. Mr. Mzikila conceded that the trial court did not hold a preliminary hearing as required under section 192 of the Criminal Procedure Act but hastened to say there was no prejudice to the appellant.

As was rightly conceded by the learned State Attorney, the trial court indeed did not hold a preliminary hearing which is intended to expedite the trial. The six prosecution witnesses who testified at the trial did so within a time span of 35 days, from 23rd August, 2000 to

27th September, 2000. The defence case was to begin on 30/10/2000 but it did not because on that day the trial magistrate was indisposed. It started on 13th November, 2000 and was concluded on the same day. It cannot be argued convincingly that there was inordinate delay in trying the case and, in fact, the appellant did not make any such complaint.

The argument by the appellant is that had a preliminary hearing been held it would provide him with the opportunity to know in advance what the prosecution witnesses would tell the trial court and he would prepare his questions in cross-examination more knowledgeably.

It would appear that the appellant may have confused a preliminary hearing with a preliminary inquiry in committal proceedings under section 246 (2) of the Criminal Procedure Act, 1985. Therein part of the committal procedure is as follows –

> "(2) Upon appearance of the accused person before it the subordinate court shall read and explain or shall cause to be read and

> explained to the accused persons the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial".

Under the provision just cited an accused person can know in advance of his trial the kind of evidence and the witnesses who will give that evidence at his trial.

In section 192 of the Act however the emphasis is on ascertaining matters which will not be in dispute at the trial so that witnesses will not unnecessarily be called to testify on undisputed evidence. In that connection what is tendered during the preliminary hearing are a statement of the salient facts in the case, a signed memorandum of undisputed facts and undisputed exhibits. All along the objective is to shorten the length, and to reduce the cost, of the trial if there are substantive undisputed facts. Witnesses' statements are not read out to the accused person as in a preliminary inquiry.

As mentioned earlier, we did not find in this appeal reason to think that the appellant was in any material way prejudiced by the failure of the trial court to conduct a preliminary hearing under section 192 of the Criminal Procedure Act. We dismiss that ground of appeal.

The trial court did not inform the appellant of his right to require the doctor who examined PW1 after the rape to be summoned to appear to give evidence and to be cross-examined as required under section 240 (3) of the Criminal Procedure Act. Presumably, if the doctor were called to give evidence it would be with the view to ascertaining if there was evidence of penetration at the time PW1 said the appellant had sex with her. But there was no need of such evidence from a doctor because there was no dispute that the appellant in fact had coitus with PW1. The failure by the trial court to comply with section 240 (3) is therefore of academic significance only. We need not discuss it any further, and we dismiss that ground of appeal.

The fourth ground of appeal is on alleged contradictions in the evidence of the prosecution witnesses as to *who was raped* (our underlining). We have looked at pages 5 and 11 of the record to which we were referred in the memorandum of appeal for evidence of contradictions as to who was raped. With all due respect to the appellant, we could find no contradictions regarding who was raped. The evidence consistently showed that it was PW1 – Amini-Anna – who was raped and the appellant agreed that he had sex with PW1, only he did not consider it to be rape but mischievously considered it a style of marrying. That ground of appeal is also dismissed.

The final ground of appeal is that sections 142 and 143 of the Criminal Procedure Act were not complied with. Those provisions deal with a situation where it is considered that a particular person who was not summoned has material evidence. The court can compel such person to appear to give evidence or to produce a document which is of material evidential value.

The appellant said that the investigating officer of the case should have been summoned to give evidence at the trial so that he could be cross-examined.

It is true the police officer who investigated the case did not give evidence at the trial and it is not even known who the investigating police officer was. Was it necessary for such officer to give evidence?

It is the duty of the prosecution to bring all necessary witnesses to court who will prove that the accused committed the offence of which they are charged. Once they fulfil that duty, they are not under any obligation to bring every witness who has evidence to testify at the trial. In the case under appeal they did not think the investigating officer needed to testify at the trial. They believed that the witnesses who were summoned sufficed to prove the charge against the appellant. We agree with the prosecution that with the evidence of the six witnesses who appeared at the trial, the charge of rape against the appellant was proved beyond a reasonable doubt.

Although it may have been desirable to have the investigating officer testify, he was not a necessary witness.

There is no indication from the record that the appellant wanted the investigating officer to be summoned to testify at the trial and the complaint in the memorandum of appeal appears to be an afterthought.

Where an accused person feels strongly that a particular person, though not listed as a witness at the trial, is necessary to bring to court material evidence, he should request the court to summon such witness. The court will consider the request and if it appears to the court that indeed the suggested witness is in possession of material evidence it shall require the attendance of such witness by issuing a summons to compel his appearance. That is the purpose of sections 142 and 143 of the Criminal Procedure Act, 1985. Since the appellant did not make any such request and even at the hearing of this appeal he did not say what material evidence such witness would give if he were summoned to the trial court, we find no merit in this ground of appeal and we dismiss it.

It will be seen that all the grounds of appeal filed by the appellant have no merit and have been dismissed. Since the sentence of 30 years imprisonment and 10 strokes of corporal punishment are sanctioned by the law, the entire appeal is dismissed. The trial court is directed to assess the amount of compensation the appellant should pay to the victim of rape.

DATED at DAR ES SALAAM this 12th day of November, 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**

Delivered under my hand and Court Seal in Open Court/Chambers at ..... this ..... day of ..... 2007.

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**DISTRICT REGISTRAR**