CRIMINAL APPEAL NO. 226 OF 2007- MROSO, J.A., KAJI, J.A., And RUTAKANGWA, J.A.	**SPRIAN JUSTINE TARIMO Vs. REPUBLIC Appeal from the Judgment of the High Court of Tanzania at Moshi- Criminal Appeal No. 54 of 2002- Munuo, J.**	Offence of rape contrary to sections 130 and 131 of the Penal Code.- Sentenced to thirty years imprisonment and 12 strokes of the cane. Cross-Examination of Medical Officer tendering PF-3- Mandatory provisions of section 240 (3) of the Criminal Procedure Act, 1985 were not complied with by the trial court after exhibit P1 had been admitted in evidence. -Once the medical report as a PF3 has been received in evidence under section 240 (1) of CPA, 1985 it becomes imperative on the trial court to inform the accused of his right of cross-examining the medical witness who prepared it: See **Kashana Buyoka** v **R, Criminal Appeal No. 176 of 2004 (unreported)** and

		Sultan s/o Mohamed v **R, Criminal Appeal No. 176 of 2003 (unreported)**. The Court has, as a result, held that if such a report is received in evidence without complying with the provisions of section 240 (3) of the CPA, it should not be acted upon. It was a fatal flaw where the contents of Exhibit (PF-3) were not even read out to the appellant- So the appellant was convicted on the basis of evidence he was not made aware of although he was always in court throughout his trial. Evidence of a Relative- Court of Appeal is not aware and was not referred to any law which bars close relatives, family members, etc. from giving evidence in support of the prosecution. What

		counts, after all, is the competence of the witnesses and their credibility and not the degree of their relationship. - If the prosecution case was fundamentally flawed by the alleged contradictions, it means the case was not proved to the required standard-

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 226 OF 2007

SPRIAN JUSTINE TARIMO ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Munuo, J.)

dated the 17th day of December, 2002
in
Criminal Appeal No. 54 of 2002

JUDGMENT OF THE COURT

25 October & 30 November, 2007

RUTAKANGWA, J.A.:

The appellant was convicted by the District Court of Rombo District of the offence of rape contrary to sections 130 and 131 of the Penal Code. He was found to have raped one Selina d/o Silayo on 8th July 2001 at about 13.00 hours. He was sentenced to thirty years imprisonment and 12 strokes of the cane. He unsuccessfully appealed to the High Court at Moshi against the conviction and sentence. Believing he is innocent of any crime he has filed this appeal.

Before we look at the reasons which forced the appellant to come to this Court we have found it appropriate to narrate briefly the evidence which led to his conviction. It was as follows:-

On the material day when Selina (PW1) together with Anna Thomas (PW2) was heading home from church she was whisked off to the home of the appellant by three people who were riding a motor cycle. Once at the appellant's home, she was taken inside and

laid on a bed. Beside the bed was a table on which there was a knife. The appellant slapped PW1 across the face while threatening her with the knife. Then the appellant undressed her and ***"raped"*** her, while she was raising alarm. Then the appellant, on being called, went out of the house and returned later. He locked the door. After a short interval PW1's mother, Renald Valentino (PW3) arrived being accompanied by PW2. They opened the door by force, enabling her (PW1) to escape. PW1 went home and later reported the incident to the police who sent her to hospital for examination. PW1 told the trial court that she felt a lot of pains and bled a lot as a result of the appellant's act. The appellant was arrested and charged accordingly.

The appellant admitted to have had a love affair with PW1 and together they had had sexual intercourse on several occasions prior to the material day. Nevertheless he denied raping PW1 on that day or at all. He claimed that on the day in question he was at Dar es Salaam and he was arrested on 28/8/2001 when he returned to their village. He called 2 witnesses in his defence. Paul Ulrick (DW2) confirmed that PW1 and the appellant were lovers and at times he

acted as their go-between. Joakim Gervas (DW3) told the trial court that he never saw the appellant at his home on the material day although he saw PW3 there.

The trial court rejected the appellant's defence of alibi. The learned trial Principal District Magistrate taking PW1 to be a credible witness whose evidence was found to be corroborated by the PF3 (Exhibit P1) as well as the evidence of PW3 and PW4, held that PW1 was raped by the appellant on 8/10/2001. The learned first appellate judge dismissed the appellant's appeal on similar grounds. She said:-

> *"The PF3 form, exhibit P1 corroborates the evidence of the complainant because it shows that her private parts were bruised and swollen and the hymen was ruptured causing bleeding. Under those circumstances the defence of alibi was not the least probable …"*

In this appeal the appellant who was unrepresented raised eight grounds of appeal. All the same these can be condensed into four, as follows:- **One,** the prosecution failed to prove the case beyond reasonable doubt. **Two,** the prosecution witnesses

contradicted each other and they ought not to have been believed. **Three,** the two courts below erred in relying on the evidence of closely related witnesses. **Four,** there was non-compliance with the mandatory provisions of section 240 (3) of the Criminal Procedure Act, Cap. 20, the Act henceforth.

At first the appellant chose to say nothing in elaboration on these grounds of appeal. He opted to hear first the response of the respondent Republic on the same.

The respondent Republic, which was represented by Mrs. Neema Ringo, learned State Attorney, zealously defended the decisions of the two courts below. Mrs. Neema urged us to dismiss the appeal because as the offence was committed in broad daylight the question of mistaken identity of the appellant did not arise. Furthermore, the complainant (PW1) was found in the appellant's room by credible witnesses, she maintained. Carrying her argument further, Mrs. Neema pressed that the fact that PW1 was raped was put beyond reproach by the PF3 (exhibit P1). However, in response to the court's question, she conceded that the appellant was not

informed of his rights under section 240 (3) of the Act and the contents of the PF3 were not read over to the appellant at the time it was admitted in evidence. Nevertheless, she was quick to point out that even if the PF3 is totally discounted on account of these omissions, the evidence of PW1 was sufficient to sustain the conviction.

The submission by Mrs. Neema provoked a critical response from the appellant. He argued that the case against him was fabricated out of anger because he had cut off the love relationship with PW1, who in June, 2001 had written to him complaining of this situation. The appellant had tendered in evidence PW1's said letter of complaint as exhibit D2. The appellant challenged the submission that his conviction was based on credible evidence. He argued that that was not the case as the prosecution witnesses contradicted each other on vital aspects of the case. He wondered how PW1, who claimed to have been undressed before she was raped, bolted out of his house and went home fully dressed and why the knife he allegedly used to threaten PW1 was never seized and/or tendered in evidence. The appellant further questioned the credibility of the

prosecution witnesses who allegedly found him holding PW1 on the bed, why they never arrested him.

Coming to the grounds of appeal, we accept the conceded complaint that the mandatory provisions of section 240 (3) of the Act were not complied with by the trial court after exhibit P1 had been admitted in evidence. This Court has held on numerous occasions that once the medical report as a PF3 has been received in evidence under section 240 (1) of the Act it becomes imperative on the trial court to inform the accused of his right of cross-examining the medical witness who prepared it: See **Kashana Buyoka** v **R,** Criminal Appeal No. 176 of 2004 (unreported) and **Sultan s/o Mohamed** v **R,** Criminal Appeal No. 176 of 2003 (unreported). The Court has, as a result, held that if such a report is received in evidence without complying with the provisions of section 240 (3) of the Act, it should not be acted upon. The Court, in **Sultan Mohamed's** case went further and found the omission to have flawed the trial and ordered a retrial.

In the trial under scrutiny, omission to comply with section 240 (3) was not the only flaw. Another fatal flaw is that the contents of Exhibit P1 were not even read out to the appellant. So the appellant was convicted on the basis of evidence he was not made aware of although he was always in court throughout his trial. In our settled view, these two serious omissions which, unfortunately, escaped the attention of the learned first appellate judge, wholly vitiated the evidential value of the PF3. We shall accordingly discount it in our judgment. But even if the PF3 had been regularly received in evidence it would not have helped the prosecution in so far as the finding of the two courts below was predicated on the fact that PW1 had a ***"ruptured hymen"***. What would one have expected from a 20-plus year old woman who had had undisputed sex on several prior occasions with, to mention only one, the appellant?

The complaint that the two courts below erred in law in acting on the evidence of witnesses who are closely related, has found no purchase with us. We are not aware and we were not referred to any law which bars close relatives, family members, etc. from giving evidence in support of the prosecution. What counts, after all, is the

competence of the witnesses and their credibility and not the degree of their relationship.

We think that the remaining two grounds of complaints can be properly discussed together. If the prosecution case was fundamentally flawed by the alleged contradictions, it means the case was not proved to the required standard.

That there are contradictions and inconsistencies in the prosecution case was even conceded by Mrs. Neema. She urged us, all the same, to ignore them as they are inconsequential. These inconsistencies, unfortunately, are not few and they seem to us not to be a result of mere memory lapses.

In her evidence PW1 unequivocally told the trial court that shortly after being raped by the appellant, PW2 and PW3 arrived, ***"opened the door by force"*** and she ***"managed to run out"*** and went home. This evidence is inconsistent with that of PW2 who also categorically testified that ***"she remained at the road"*** while PW3 went to the appellant's home. She went on to say:-

> *"….. and not long, Selina (PW1) came running and we went home".*

From the evidence of PW1 it is clear that she went home alone. PW3 had her own version. She said:-

> *"I went and found people gathered at one house and I heard my daughter crying. I kicked the door which opened, then the inner door was also locked and I managed to open it by force. I found accused holding my daughter. She got out and ran away".*

Contradicting PW1, PW3 was categorical that she went to the home of the appellant with Phillip Assenga (PW4).

Contrary to the assertions of PW3, Philip Assenga (PW4) claimed credit for being the person who actually broke into the house of the Appellant. Belying PW3 who had claimed that when she broke into the house she found the appellant holding PW1 by the hand, PW4 testified that he found the appellant holding firmly PW1 on the bed. PW1 testified that when PW2 and PW3 entered the house, the appellant clung to her in order to hold her back. This evidence was contradicted by PW4 who claimed that as soon as he entered the

house the appellant released PW1 immediately and she bolted out of the house. With all these patent contradictions, we pause here and ask ourselves: who amongst these witnesses was telling the truth? It is impossible to tell. That PW1 is a liar was further demonstrated by PW4. In her evidence PW1 told the trial court that she had known the appellant prior to 8/7/2001. However, when she was questioned by PW4 at her home on 8/7/2001, she told him that the appellant was a stranger to her. This was a naked lie, because she had been in love with the appellant for quite some time. All these lies, contradictions and inconsistencies taken together go to impeach the credibility of these witnesses. In our settled view, they go to strengthen the appellant's claims that the rape charge was a frame up.

The prosecution case is further weakened by some other unsatisfactory features. PW1 told the trial court that after being undressed by the appellant and raped, she bled. Since PW4 found PW1 on the appellant's bed and going by his evidence without putting on an underwear, one would have expected to see traces of blood either on the bed or on the floor. But neither PW3 nor PW4

said anything to that effect. Although PW1 said that the appellant threatened her with a knife which was on a table in the room where the rape allegedly took place, we wonder why the said knife was not seized and surrendered to the police and eventually tendered in evidence. Furthermore, if the appellant undressed PW1 before raping her and PW1 was found on the bed being held by the appellant, she would definitely have been found naked. Neither PW3 nor PW4 testified to that effect. At what point in time did PW1 get dressed? Her evidence also is silent on this. We have considered the claim by PW1 that there came a time when the appellant was called and he went out of the house. She never testified that she was chained or something to that effect so as not to be able to move. If she were to be believed that she was taken to the house of the appellant against her will and raped, what prevented her from following the appellant outside and win her freedom? Another nagging question, for which we could get no answer from the evidence on record is why was the appellant not arrested forthwith. The evidence of PW4 is unequivocal on the fact that after the appellant had let free PW1, they all left, leaving the appellant behind

in his house. This is both unbelievable and risible. How could a person who had committed such a heinous crime be left behind? All these shortcomings made the claims of PW1 implausible. Had the two courts below taken these unsatisfactory aspects in the prosecution case into consideration, they would not have readily taken the word of PW1 at its face value.

On our part, we are convinced that PW1 was not raped, otherwise the appellant would not have been arrested on 28/8/2001, nearly seven clear weeks after the day of the alleged rape. We believe the appellant was arrested not because he raped PW1. He was arrested because, as PW4 undisguisedly put it, PW1 Selina d/o Silayo:-

"was taken to be married by force".

This tells it all. PW3 was, of course, anxious to save her daughter from contracting an unwanted customary law marriage. She was entitled to do so but she was not justified in faking a rape as a reprisal.

For the foregoing reasons, we allow this appeal by quashing the conviction and setting aside the sentences imposed on the appellant. The appellant is to be released from prison forthwith unless he is otherwise lawfully detained.

DATED at DAR ES SALAAM this 8th 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.

.....

DISTRICT REGISTRAR