CRIMINAL APPEAL NO. 227 OF 2007-COURT OF APPEAL OF TANZANIA-AT ARUSHA-RAMADHANI, C.J., MROSO, J.A. And RUTAKANGWA, J.A.	**SAIDI HARUNA Vs. REPUBLIC (Appeal from the Decision of the High Court of Tanzania at Moshi)-Criminal Appeal No. 14 of 2002-Munuo, J.**	Prosecution and conviction for the rape of a girl believed to be 15 years old. sentenced to a prison sentence of thirty years and ordered to pay to the victim of the rape shs. 30,000/= as compensation or to suffer distress in default- -Lack of credible and admissible evidence implicating Appellant in the rape charge.- There is doubt in the first place if the Complainant was in fact raped, and, secondly, doubt, if she was raped, the appellant was one of the rapists. The High Court too, made no comment on the alibi which was raised by the appellant. Appeal allowed-Conviction quashed-and the sentence and compensation order set aside.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RAMADHANI, C.J., MROSO, J.A. And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 227 OF 2007

SAIDI HARUNA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Munuo, J.)

dated the 1st day of July, 2002
in
Criminal Appeal No. 14 of 2002

JUDGMENT OF THE COURT

29 October & 30 November, 2007

MROSO, J.A.:

This is one of the many rape cases in the Arusha-Kilimanjaro areas coming on appeal to this Court during the sessions. The appellant was prosecuted and convicted for the rape of a girl believed to be 15 years old. He was sentenced by the trial court to a prison sentence of thirty years and ordered to pay to the victim of the

rape shs. 30,000/= as compensation or to suffer distress in default. In addition, he was ordered to refund to the complainant the sum of Tshs. 30,000/= which was stolen from her at the time of the rape. Corporal punishment was not ordered by the trial court. His appeal to the High Court against conviction and sentence was dismissed. He has resorted to this Court.

His memorandum of appeal contains five grounds of appeal and he did not have additional grounds at the hearing of his appeal.

The five grounds of appeal can be condensed into 3 substantive grounds of complaint. **First,** that there was no credible and admissible evidence implicating him in the rape charge. **Second,** that there was no evidence proving rape and that the complainant's claim that she was raped was not corroborated by the medical evidence which was adduced. **Third,** that all the evidence which was adduced did not prove the charge to the required standard in a criminal case. Before discussing those grounds it is desirable to give a brief background information on the case which resulted in the

conviction for rape against the appellant and another who, it seems, has not appealed.

On 16th February, 2001 at between 17:00 hours and 19:00 hours one Rehema Abdukarim (PW1), a girl of about 15 years of age, was walking from Moshi town to Njoro on the outskirts of the town where she resided with her aunt, Monica Alfonsi, PW2. On the way, in the Njoro forest, some four young men raped her in turns and stole from her 30,000/= which her aunt Monica Alfonsi (PW3) had given her as fees for training as a tailor. She had been tricked into going into the forest by the young men who claimed they could magically make money to multiply.

After she was raped she walked away towards her home but on the way she met a neighbour, one Hamduni Hamza, PW2, who escorted her to her home. At the time she met Hamduni the rapists were following behind and Hamduni claimed to have seen them but could only identify one of them, the first accused in the case at the trial who was convicted in absentia along with the appellant who was the second accused at the trial.

When she reached the home of Monica (PW3) she narrated her ordeal. Monica took her to Majengo Police Station where she was issued with a PF3. She took it to Mawenzi Hospital. She was not attended but was advised to return the following morning. Even so, according to Dr. Kapalala Sanganda (PW4), Rehema (PW1) was not examined by a doctor on 17/2/2001. Only a swab (high vagina swab) was taken for examination for spermatozoa. The Doctor (PW4) saw and examined her on the 19th February, 2001, which was three days after she was raped. The doctor could not see any signs of violence in her genitalia and her hymen was found torn but it was not a recent tear. He could not reach a conclusion that she had recent coitus.

The first accused at the trial was arrested on 29/5/2001 by DC Elirehema (PW5) allegedly because he (1st accused) had absconded after the rape. Curiously, however, on 30th April, 2001 WP Detective Corporal Frida (PW6) took a caution statement from the same 1st accused, suggesting that he had been arrested earlier than 29/5/2001. The assumption would be that after he was arrested he absconded and was re-arrested on 29th May, 2001.

In the caution statement which was recorded by WP Detective Corporal Frida the 1st accused at the trial admitted to raping Rehema (PW1) and that he was with other people including a certain Said. The second name of Said was not given.

According to DC Elirehema (PW5) the appellant (as 2nd accused at the trial) was arrested by undisclosed people after he was pointed out by the complainant – Rehema. That piece of evidence is hearsay because Rehema did not say so in her evidence. The appellant himself did not say when he was arrested although he said the militia arrested him. He explained that on the day of the rape he was away in – *porini* – Mererani in search for minerals. With this background we think it is now appropriate to consider the appellant's grounds of appeal as re-cast by the Court.

Was there credible and admissible evidence which implicated the appellant?

Rehema (PW1) said the second accused was one of the young men who walked along with her as she went in the Njoro direction and subsequently to the Njoro forest where she was raped also by

the *"2nd accused"*. If, in fact, the appellant was one of the people who walked along with Rehema and as it was then around 5 pm which was daytime, it would be possible for Rehema to recall his appearance if she saw him again later. But since there was no claim by Rehema that she knew the appellant before the date of the incident, which means the appellant may have been a stranger to her, there was need for an identification parade but none was staged. If there was admissible evidence that it was she who pointed him out to be arrested as claimed by DC Elirehema (PW5), that might confirm that she was able to remember the appellant. But as already pointed out, that evidence was hearsay. Rehema did not give evidence in that connection and no witness from among the militia people who arrested the appellant gave evidence to explain the circumstances which led them to arrest the appellant. We think this weakness in the prosecution case is a result of poor prosecution of cases in which loose ends are often left untied. We think, therefore, that there is merit in the first ground of appeal as recast.

The second ground of appeal was that there was no proof that Rehema was in fact raped and that her claim that she was raped was not supported by the medical evidence which was given at the trial.

It is true that there is only the word of Rehema that she was raped consecutively by four people including the appellant. Her aunt Monica (PW3) did not, as usually happens, examine her in her private parts to look for any taletell marks of sexual violence. When deep vaginal swab was taken to check for the presence of spermatozoa on the following day, none were found. The Doctor, PW4 – examined her three days later but could not see any bruises around the genitalia and the tear of the hymen was not recent. For a 15 year old person who claimed she had been raped by four young men in turns, it is surprising there would be no bruises on the vagina wall. We also find it naivé that rapists – cum – robbers, after the event would walk following their victim only five meters behind as claimed by Rehema in her evidence. Would they be offering themselves for evidence to people like Hamduni Hamza? We think there is real doubt indeed if rape was in fact committed on Rehema. It may well

be that having been lured into the forest and losing the 30,000/= to tricksters she had to find an explanation to give to her aunt, PW3.

The trial court partly based the conviction of the appellant on the caution statement of the first accused at the trial in which it was written that a certain Said participated in the rape and theft of the money. Apart from the fact that the truthfulness of the caution statement was untested because the first accused did not stand trial to the end, there is no certainty that the Said mentioned in the statement was the appellant Saidi Haruna. The appellant raised an alibi that on the date of the alleged rape he was in Mererani looking for minerals.

The trial court did not at all allude to the alibi but simply dismissed the defence of the appellant *"for lack of support"*. Here presumably the trial magistrate expected the appellant to give sufficient evidence to prove he did not commit the offence. That was a serious misdirection in law because an accused person does not have the burden of proving his innocence.

The first appellate court assumed that the Said who was mentioned in the caution statement of the first accused was the appellant. Since the first accused did not give evidence in which he could have been cross-examined as to which Said he meant, assuming he would have owned that statement, it was a misdirection for the first appellate court to make the assumption it did, taking the caution statement as corroboration of the claim by Rehema that the appellant was one of the four people who raped her. It was not correct, therefore, for the first appellate court to make the bold statement that there was not *"the least doubt that Rehema Abdulkarim ….. was raped by the four gangsters including the appellant"*. As already indicated there is doubt in the first place if Rehema was in fact raped, and, secondly, doubt, if she was raped, the appellant was one of the rapists. The High Court too, made no comment on the alibi which was raised by the appellant. We think that in the absence of clear evidence that the Said who was mentioned in the first accused's caution statement was the appellant, the alibi may well be true.

The learned State Attorney, Mr. Mzikila, could not support the judgments of the two courts below and for the reasons which we have given, the two courts below erred in not acquitting the appellant. We therefore, allow the appeal by quashing the conviction and setting aside the sentence and compensation order. The appellant is to be set free unless held for some other lawful cause.

DATED at DAR ES SALAAM this 21st day of November, 2007.

A. S. L. RAMADHANI
CHIEF JUSTICE

J. A. MROSO
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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

(F. L. K. WAMBALI)
SENIOR DEPUTY REGISTRAR