CRIMINAL APPEAL NO. 218 OF 2007- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.	**ASAEL MWANGA Vs. REPUBLIC (Appeal from the Decision of the High Court of Tanzania at Moshi)- Criminal Appeal No. 86 of 1996- Munuo, J.**	**Offence of defilement** of a child of 4½ years, contrary to section 136 (1) of the Penal Code, Cap. 16 of the laws. That was in 1996 before the enactment of the Sexual Offences Special Provisions Act, No. 4 of 1998. **Punishment for the Offence of Defilement before 1992-**prior to 1992 the sentence for attempted defilement was 14 years imprisonment. However, the law was amended in that year, by Act No. 19 of 1992 which introduced a sub-section (4) to section 136 of the Penal Code, which provided that the sentence for an offence under section 136, which included attempted defilement, was 20 years imprisonment. That was the law in 1996 when the appellant committed the offence.

		Offence of Defilement Abolished in 1998- offence of defilement was abolished by the Sexual offences Special Provisions Act, 1998.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 218 OF 2007

ASAEL MWANGA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Munuo, J.)

dated the 17th day of September, 1997
in
Criminal Appeal No. 86 of 1996

JUDGMENT OF THE COURT:

19 & 26 October, 2007

MROSO, J.A.:

The appellant was charged with the offence of defilement of a child of 4½ years, contrary to section 136 (1) of the Penal Code, Cap. 16 of the laws. That was in 1996 before the enactment of the Sexual Offences Special Provisions Act, No. 4 of 1998. The District Court of Hai at Hai convicted him of attempted defilement contrary to section 136 (2) of the Penal Code because there was no proof of penetration and sentenced him to pay a fine of shillings 20,000/=. The Director of Public Prosecutions was dissatisfied with the sentence which he considered overlenient and appealed to the High Court. The High Court, Munuo, J., as she then was, agreed that the sentence of a fine of Shs. 20,000/= was "manifestly lenient", she quashed it and set it aside. She imposed a sentence of 20 years imprisonment. Although the appellant did not appeal to the High Court against conviction, this time he decided to appeal to this Court, filing six grounds of appeal.

In all the six grounds of appeal nowhere does the appellant complain about the sentence as given by the High Court. Instead, he

complains against the conviction. In the first ground of appeal he alleges that the High Court convicted (sic) him on the basis of "suspicious evidence". In the second ground of appeal he points out that Section 192 (2) of the Criminal Procedure Act, 1985 was not complied with because he was never called upon to "Sign the preliminary hearing", probably meaning that he was not required by the trial Court to sign a memorandum of undisputed facts as required by Section 192 (3) of the Criminal Procedure Act, 1985. He criticizes both the High Court and the District Court for disregarding Section 186 (3) of the same Criminal Procedure Act, 1985. That is a provision which requires the Court to hear a case in camera under the Sexual Offences Special Provisions Act, 1998.

The appellant also complained in ground four in his memorandum of appeal that both courts below erred by "considering circumstantial and hearsay evidence", and in ground five that a *voire dire* test was not conducted when the infant, 4½ year old girl (PW2), gave evidence. In ground six he criticized the two courts below for not considering section 289 of the Criminal Procedure Act, 1985.

That is a provision regarding trials by the High Court; that the High Court should not take the evidence of a prosecution witness whose statement was not read out during the committal proceedings unless there was prior reasonable notice to the accused or to his advocate.

Now, all those grounds, whatever may be their merits, should have been argued in the High Court had the appellant lodged an appeal to that Court. In the event the High Court failed to discuss and decide them satisfactorily, the appellant could resort to this Court. What the appellant is now trying to do is to turn this Court to the first appellate court after the judgment of the District Court.

The appellant seems to have raised some of these complaints in the High Court when the appeal by the Director of Public Prosecutions was being heard. He even reiterated a defence of an *alibi* which he had raised during the trial. The High Court was unable to consider those complaints because there was no cross appeal by the appellant. He explained then that he had failed to lodge an appeal in the High Court because he had fallen ill and eventually found himself time barred to appeal to the High Court. But he could

have applied to the High Court for leave to cross-appeal out of time. Either out of ignorance or for some other undisclosed reasons the appellant did not utilise such procedure.

Mr. Henry Kitambwa, learned State Attorney who represented the respondent Republic, said that if this Court entertained the grounds of appeal which the appellant filed in this Court, it would create an unusual precedent whereby parties to a case in the District Court would sidestep the High Court and appeal directly to the Court of Appeal against the decision of the District Court, if it found such procedure convenient.

We agree entirely with the learned State Attorney. We must, therefore, decline to turn this Court into a first appellate court from decisions of the District Court. In the result, we express no opinion on the grounds of appeal which the appellant brought to this Court.

Although there was no ground of appeal against the sentence which was pronounced by the High Court, the appellant said that the sentence for attempted defilement was 14 years imprisonment and

that if this Court reduced the twenty years imprisonment sentence to fourteen years he would accept it.

It is true that prior to 1992 the sentence for attempted defilement was 14 years imprisonment. However, the law was amended in that year, by Act No. 19 of 1992 which introduced a sub-section (4) to section 136 of the Penal Code, which provided that the sentence for an offence under section 136, which included attempted defilement, was 20 years imprisonment. That was the law in 1996 when the appellant committed the offence. Of course, the offence of defilement was abolished by the Sexual offences Special Provisions Act, 1998. The High Court judge was correct, therefore, to impose the 20 years imprisonment, which was the minimum under the law then.

We dismiss the appeal in its entirety.

DATED at ARUSHA this 23rd 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