CRIMINAL APPEAL NO. 18 OF 2007- COURT OF APPEAL OF TANZANIA AT ARUSHA- RAMADHANI, C.J., KAJI, J.A. And RUTAKANGWA, J.A.	**SHABANI AMIRI Vs. REPUBLIC- Appeal from the Decision of the High Court of Tanzania at Arusha- HC. Criminal Appeal No. 64 of 2003- Sheikh, J.**	Offence of rape contrary to section 130 (2) (e) of the Penal Code Cap. 16, RE. 2002.- **Essential Ingredients of a Judgment are lacking-**The judgment of the trial District court was a one sentence decision that lacked the essential ingredients of a judgment contemplated under section 312 (1) of the Criminal Procedure Act, Cap. 20, R.E. 2002- **Essential Ingredients of a Judgment are lacking-**This 'decision' did not show the points or issues which were to be determined, the decision on those issues and the reasons for the decision thereon. **Essential Ingredients of a Judgment are**

		lacking-The High court, on a first appeal, had the obligation to make good this deficiency as a first appeal is in the form of a re-hearing. **Role of Court of Appeal where Essential Ingredients of a Judgment are lacking and First Appellate Court failed to rectify-** on a second appeal, Court of Appeal has to step into the shoes of the High Court and make a proper evaluation of the entire evidence in order to satisfy itself on whether or not the conviction of the appellant was justified or right: see **D. R. PANDYA v. R [1957] E.A. 336.**

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 18 OF 2007

SHABANI AMIRI.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Sheikh, J.)

dated the 5th day of May, 2005
in
HC. Criminal Appeal No. 64 of 2003

JUDGMENT OF THE COURT

23 & 30 October, 2007

RUTAKANGWA, J.A.:

The appellant was charged before the District Court of Arusha District with the offence of rape contrary to section 130 (2) (e) of the Penal Code Cap. 16, RE.2002. The particulars of the charge read as follows: -

> *"That Shabani s/o Amiri charged on unknown date (sic) and time 2001 (sic) at Mianzini Area within the Municipality, District and Region of*

Arusha unlawfully did have carnal knowledge
of Neema d/o Elisha a girl of 15 years old".

The appellant did deny the charge and the prosecution called five witnesses to prove the charge. The trial court found the charge to have been proven beyond reasonable doubt. It convicted the appellant and sentenced him to a term of imprisonment of thirty years.

The appellant was aggrieved. He appealed to the High Court at Arusha. The appeal was found seriously wanting in merit and was dismissed. Still aggrieved he has lodged this appeal.

The appellant raised four grounds of appeal. These, however, can be neatly condensed into one major complaint. This is that the two courts below erred in law and fact in finding him guilty as charged as a result of failing to objectively evaluate the entire evidence and reaching a finding that the same did not prove the charge of rape even on a balance of probabilities.

The judgment of the trial District court vindicates the appellant on this complaint. It indeed lacked the essential ingredients of a judgment contemplated under section 312 (1) of the Criminal Procedure Act, Cap.

20, R.E. 2002 (or the Act hereinafter). It was a one sentence decision. After a reproducing the evidence of each witness in the case the learned trial Honorary Magistrate held as follows: -

> *"Having studied the evidence adduced by the prosecution and that of the accused and his one witness I am satisfied that the offence has been proved beyond reasonable doubt as required by law and therefore the accused is convicted accordingly".*

This 'decision' does not show the points or issues which were to be determined, the decision on those issues and the reasons for the decision thereon. It was, in short, not a judgment at all. The High court, on a first appeal, had the obligation to make good this deficiency as a first appeal is in the form of a re-hearing.

The High Court on appeal, sustained the conviction of the appellant because:

> "*the trial court had assessed the evidence of PW1 (who was by the time the matter came to trial fifteen years of age), on merits, found it to be credible and truthful before*

> *proceeding to convict the accused. I do not find the appellant's assertion that he was framed on account of a grudge to be credible".*

We think that the 'decision' of the trial court speaks for itself. There is nothing in it to show that the learned trial Honorary Magistrate assessed the evidence at all. This appeal presents us with one of those very rare cases in which this Court, on a second appeal, has to step into the shoes of the High Court and make a proper evaluation of the entire evidence in order to satisfy itself on whether or not the conviction of the appellant was justified or right. That this is permissible was clearly spelt out in the case of **D. R. PANDYA v. R** [1957] E.A. 336 (Court of Appeal). It was held therein that on a first appeal the evidence must be treated as a whole to a fresh and exhaustive scrutiny, (which was not done here) and that failure to do that is an error of law, which can be remedied on a second appeal. That has been the stance of the law since then.

Before we undertake this duty, it is appropriate at this stage to show briefly why, the appellant was prosecuted in the first place.

Neema d/o Elisha (PW1) the alleged prosecutrix was 15 years old when the offence was allegedly committed and was in Std. IV at Ekenywa Primary School. According to her evidence on a certain day in **July, 2001** at about 6.00 pm she was sent by her mother, Susana Elisha (PW3) to buy kerosene. On her way back home, she met the appellant who grabbed her, dragged her into his hair salon, undressed her and had sexual intercourse with her against her consent. Because of the said forced sexual intercourse, she bled from what she called "her private parts" and could not walk properly. On being given Tshs. 100/=, she went home walking with difficulties. When PW3 asked her why she was not walking properly she replied that she was experiencing pains in her legs. She never reported this incident to anybody until November, 2001 when she was taken to hospital, examined and found to be pregnant. According to the PF3 (Exh. P1) the pregnancy was 19 weeks old. That is when she named the appellant as the person who impregnated her. The appellant was then arrested and charged accordingly. It is not insignificant to observe here in passing that this brief background is based on the evidence of PW1 only because her

mother (PW3) and father, Elisha Vayani (PW4) gave a different account generally.

As already indicated above, the appellant vehemently denied having had any sexual relations with PW1 at all. Because neither the charge sheet nor the prosecution evidence pointed out a specific day when the rape took place in the year 2001, the appellant called one witness in his defence. This witness, DW2 Ramadhani supported him in his claim that indeed one day in July, 2001 he had in open air talked with PW1 demanding from her Tshs. 300/= which she owed him for a hair cut. The appellant used to own a salon. He was subsequently attacked by PW4 and his son (now deceased) who had either seen him talk with PW1 or were informed about it. He specifically told the trial court that there existed bad blood between him and PW1's brother.

In this appeal the appellant was unrepresented and had nothing to say in elaborating on his grounds of appeal. The respondent Republic was represented by Mr. Alexander Mzikila, learned State Attorney.

The respondent Republic did not wish to support the decisions of the two courts below. Mr. Mzikila urged us to allow the appeal in its entirety because the entire prosecution case smacks of a concoction.

He was driven to this stance by the irreconcilable and unexplained contradictions inherent in the prosecution evidence. He pointed out that not only the prosecution witnesses fundamentally contradicted each other, but worse still PW1 exposed herself as a liar in her evidence in court and by her conduct after the alleged incident of rape if ever it took place.

We have carefully and dispassionately scanned the entire evidence on record. We have found the prosecution case to be flawed by inconsistencies and contradictions which go to the extent of impeaching the credibility of the three key prosecution witnesses. We shall now demonstrate why we are saying so.

As we alluded to above, the evidence of PW1 on what transpired on the day she was allegedly raped does not tally with that of PW3 and PW4. As aptly argued by Mr. Mzikila, the witnesses differ on the date when the offence was committed. Whereas PW1 vaguely or evasively testified that it was on a certain day in July, 2001 at 6.00 pm, PW3 and PW4 said it was in August, 2001. Regarding the time, PW3 said it was at 7.30 pm; while PW4 said it was at 8.00 pm. PW1 impressed on the trial court that she experienced great pains after the act, such that she

never went to school for two days. She also told the trial court that that was her first sexual experience which she never repeated. However, PW3 contradicted her when she testified to the effect that PW1 had told her when the pregnancy was discovered that she had had previous sexual intercourse with the appellant more than once. Be that as it may, if PW1 was telling the truth we have found no evidence to indicate as to why she did not recollect the exact day when she was allegedly raped. Hence the failure of the prosecution to state the period when the offence was committed.

The evidence of PW3 and PW4 does not show that they witnessed the rape incident. PW3 testified that on that day she was informed by their son that PW1 had been "standing with a certain young man in a lane". The two went to make a follow up. Unfortunately they found PW1 at the shop and the appellant at his hair dressing salon. PW3 left with PW1 for home leaving PW4, who had joined them, behind at the saloon questioning the appellant as to why he was talking with PW1. Once home PW3 asked PW1 why she was talking with the appellant. PW1 told her mother that she owed the appellant some money for a hair cut. PW3 did not believed her.

PW4 had a different story. According to his evidence he was the one who left with their son to ascertain the whereabouts of PW1. After "searching" for her he eventually traced her at a certain shop and ordered her to go home. When he returned home and was informed by PW1 that she had been "standing" with the appellant as she owed him money, he left immediately for the appellant's salon to remonstrate with him. Apart from PW3 and PW4 contradicting each other, their evidence is not consistent with that of PW1 who testified that she went home straight from the salon after the rape and on her own, i.e, being neither ordered by PW4 nor in the company of PW3.

That PW1 contradicted herself is self evident from her own testimony. In her evidence in chief she categorically said that the appellant "got hold of her", dragged her into the salon, totally undressed her, violently threw her on the floor before ordering her to open her thighs and raping her. But she openly belied herself while under cross examination. This time round she told the trial court that the appellant never used any force. He simply requested her to lie on the floor which she gladly did and they then had sexual intercourse. From these diametrically opposed versions, it is very difficult for any

objective judge of fact to discern at what particular stage PW1 was telling the truth. The only option left is to take PW1 as a liar.

That PW1 was lying in her evidence is further demonstrated by her own admission that the appellant never made any attempt to silence her either before, during or after the alleged act. She was only allegedly given Tshs. 100/= for buying a chewing gum. Under these circumstances, if really PW1 was raped by the appellant, one wonders why she never raised any alarm in the first place and secondly why she never complained at all to anybody including her own mother. That she never did so casts genuine doubt on the truthfulness of the entire accusation. It is no wonder that Mr. Mzikila said it smacks of a fabrication.

As already indicated above, PW1 was examined in November, 2001 and found to be pregnant. According to exhibit P1 (the PF3) the pregnancy was in its 19th week. That means she had sexual intercourse before August, and/or July 2001. This finding then goes to discredit the three prosecution witnesses (PW1, PW3 and PW4) and goes to lend credence to the appellant's claims that he was only a victim of a frame up.

With this type of evidence can it be held with certitude that the appellant raped PW1? While believing, on the basis of exhibit P1, that PW1 was raped as she was under 18 years of age, we have found it difficult to believe that she was raped by the appellant. Had the two courts below carried out a judicial evaluation of the evidence they could not have failed to detect these patent contradictions which are bordering on blatant lies. Had they done so they would definitely not have held that PW1's evidence was both "credible and truthful". Indeed her evidence was so fundamentally flawed as above demonstrated that no amount of corroboration would save it.

For the foregoing reasons we have found ourselves in full concurrence with the submission of Mr. Mzikila that the prosecution abysmally failed to prove the charge against the appellant. We accordingly allow this appeal in its entirety by quashing the conviction and setting aside the sentence imposed on the appellant. The appellant is to be released from custody forthwith unless he is otherwise lawfully held.

DATED at ARUSHA this 30th day of October, 2007.

A.S.L. RAMADHANI

CHIEF JUSTICE

S. N. KAJI
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