CRIMINAL APPEAL NO.125 OF 2005 COURT OF APPEAL OF TANZANIA AT MTWARA. (CORAM: RAMADHANI, C.J, MUNUO J.A, AND MJASIRI, J.A)	ISSA HAMIS KIMALILA … APPELLANT VERSUS THE REPUBLIC … RESPONDENT (Appeal from the decision of the High Court of Tanzania at Mtwara) (LUKELELWA J) Criminal appeal No.48 of 2003.	Failure of the trial magistrate to comply with the provisions of Section 240(3) of the Criminal procedure Act, Cap 20 R.E 2002 will render the evidence (PF 3), falling under that section be expunged from the record of the case if so accepted earlier by the Court. When rape is not in dispute, and Section 240 (3) of the CPA ha not been complied with, medical evidence will be excluded and the Court can determine the rape case on the available evidence.

IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: RAMADHANI, C.J.; MUNUO, J.A. And MJASIRI,].A.)

CRIMINAL APPEAL NO. 125 OF 2005

ISSA HAMISI LIKAMALILA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania
at Mtwara)

(Lukelelwa, J.)

dated the 17th day of June, 2005
i n
Criminal Appeal No. 48 of 2003

JUDGEMENT OF THE COURT ----------

12 & **19 November, 2009**

MUNUO, J.A.:

The appellant is challenging the decision of Lukelelwa, J. in

Criminal Appeal No. 48 of 2003 in the High Court of Tanzania at Mtwara. Initially, he was convicted of rape contrary to sections 130 and 131 of the Penal Code in Criminal Case No. 18 of 2002 in the District Court of Newala within Mtwara Region, whereupon he was sentenced to the mandatory minimum sentence of 30 years imprisonment. He unsuccessfully appealed to the High Court. He

then lodged this appeal against the conviction and sentence. The trial court also ordered the appellant to pay sh. 100,000/= compensation to the complainant, Ziada d/o Raisi, a child of 9 years.

On the 21st October, 2001 at about 21.00 hours at Ruvuma Village, Mihambwe within Tandahimba District in Mtwara Region, Ziada was returning home from the neighbourhood where she had been chatting with other children. There was moonlight. On her way home, she met the appellant, Issa Likamalila, who asked her to go to buy cigarettes for him at Dadi Mkumboto's place. The appellant gave PW2 sh. 100/= for buying sportsman cigarettes. PW1 knew the appellant for she used to call him her brother. She swiftly went to buy cigarettes and brought them to the appellant. However, PW2 did not find the appellant at the place she had left him so she called him loudly and he responded saying he was behind her uncle's house. The small girl took the cigarettes to the appellant who then told her to light one cigarette for him which she did, handed over the cigarettes and the change of sh. 20/= she had returned. Suddenly, the appellant seized the victim's hands and fell her on the ground. He removed her underwear and raped her. The small girl raised an

alarm. Fortunately her mother was not far, and upon hearing the alarm raised by her daughter rushed to the scene of crime. PW2 stated that when the appellant saw her mother, he ran away. She narrated to her mother how the appellant had sexually assaulted her.

PW1 examined her daughter and saw blood oozing from the private parts. She then reported the matter to the police whereafter the appellant was arrested and charged with the present offence.

The appellant denied the charge. When defending himself on oath, the appellant stated that he was aged 17 years which prompted the trial magistrate to send him to the hospital for age examination. His PF3, Exhibit P2, shows that he was between 18 and 20 years as of the 28th March, 2002. In his brief defence, the appellant categorically denied the offence and said that he did not know why the complainant said that he had raped her.

The learned judge was satisfied, beyond all reasonable doubt, that the complainant properly identified the appellant because they were familiar with each other:

> PW2 knew him before as her brother. He came in close quarters when he got hold of her and raped her. PW2 gave a description of the appellant and clothing, a pair of white trousers and a red vest. The trial court found PW2 to be truthful, her private parts were observed to be bleeding by PW1 and confirmed by medical evidence, PF3 ....

The learned judge upheld the conviction and sentence imposed on the appellant by the trial magistrate.

Before us the appellant appeared in person. He had filed a memorandum of appeal comprising eight grounds. At the hearing, the appellant produced an additional memorandum of appeal and a handwritten sheet of paper containing more grounds of appeal.

The gist of the memoranda of appeal is that the learned judge erroneously upheld the conviction and sentence because:

1. The evidence of identification adduced by PW1 and PW2 was weak given that the offence was committed during the night when conditions of identification were unfavourable and visibility

poor. See R versus Lusabanga Siyantoni (1980) TLR 275.

2. That the appellant did not know the complainant as alleged by PW1 and PW2.

3. The prosecution failed to tender a sketch map of the scene of crime.

4. The doctor who examined the victim of rape was not called to testify so the PF3, Exhibit P1 should not have been relied upon to ground a conviction for rape.

5. Only family witnesses, i.e. mother (PW1) and the victim of rape, her daughter testified so there was a likelihood of bias.

6. The charge and entire case was fabricated.

7. That the village authorities were not informed of the alleged rape if it ever occurred.

8. That there is no sufficient evidence to sustain a conviction.

In his oral submission, the appellant argued that the courts below wrongly convicted him on weak identification evidence, on

biased evidence concocted by a mother and her daughter for reasons not known to the appellant, and on the evidence of a child of tender years whose *voire dire* examination was not properly conducted by the trial magistrate. For lack of sufficient identification evidence, the appellant urged us to quash the conviction and allow the appeal.

The Respondent Republic was represented by Ms Angela Kileo, learned State Attorney. She supported the conviction and sentence. One, the learned State Attorney observed, the evidence of the small girl was taken after the trial magistrate had conducted *voire dire* examination to satisfy himself that the victim of rape was possessed of sufficient intelligence to testify and she knew the duty to tell the truth.

Two, Ms Kileo pointed out that PW1 and PW2, a mother and a daughter respectively, were witnesses to the rape so although they are family members, in law they were obliged to testify. The victim, the learned State Attorney observed, was sexually assaulted by the appellant and because she raised an alarm calling for help, her mother who was nearby responded to the alarm. When the

appellant saw PW1 rushing to the scene of crime, he ran away. There was no bias on the part of PW1 because she checked her daughter's private parts and saw blood oozing out which confirmed that she had been raped by the appellant.

With regard to identification by moonlight, the learned State Attorney cited Criminal Appeal No. 75 of 2005, Juma Ally versus R at page 3 in which the Court held that where the complainant is familiar with the appellant, as was the case here, identification by moonlight facilitated the identification of the culprit.

Further contending that the identification evidence of PW1 and PW2 was watertight and credible, the learned State Attorney cited the case of Waziri Amani versus R [1980] TLR at page 250 wherein the Court held that in identification evidence, the source of light must be established. Hence in this case, there was moonlight and besides, the complainant knew the appellant before. She identified him when he first sent her to go to buy cigarettes for him, which she did, and when she did not find him where she had left him, she called out his name and he responded so she delivered the

cigarettes and change behind a house during which time the appellant fell her down, removed her underwear and raped her. In those circumstances, the claim of the appellant that the case has been fabricated is devoid of merit, the learned State Attorney contended.

The complaint relating to the omission to call the doctor who examined the complainant is genuine for under the provisions of Section 240 (3) of the Criminal Procedure Act, Cap 20 R.E. 2002, the trial magistrate was bound to explain to the appellant his right to have the medical doctor appear and testify on the PF3, Exhibit Pl, Ms Kileo observed. Section 240 (3) of the Criminal Procedure Act, states verbatim:

> 240 (3) When a report referred to in this section is received in evidence the court may, if it thinks fit, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require that person who made the report to be summoned in accordance with the provisions of the subsection.

Since the provisions of Section 240 (3) of the Criminal Procedure Act were not complied with, the learned State Attorney conceded that the PF3, Exhibit P1, and the evidence relating to it be expunged from the record.

With regard to the sentence of raping the small girl, the learned State Attorney contended that she was below 10 years so the appellant should have been sentenced to life imprisonment.

The issue before us is whether the appellant raped the complainant on the material evening.

We are of the settled mind that in view of the failure of the trial magistrate to comply with the provisions of section 240 (3) of the Criminal Procedure Act, Cap 20 R.E. 2002, the learned State Attorney rightly conceded that the PF3, Exhibit P1, be, and is hereby, expunged from the record. In similar situations, the Court disregarded PF3 forms in the cases of **Prosper Mnjoera Kisa versus The Republic,** Criminal Appeal No. 73 of 2003 (CA) (unreported); and **Meston Mtulinga versus The Republic,** Criminal Appeal No. 426 of 2006 (CA) (unreported); and also in the

case of Shabani Ally versus The Republic, Criminal Appeal No. 50 of 2001 (CA) (unreported) wherein it was held that only when carnal knowledge is in dispute, would medical evidence be required to prove whether rape has been committed on the victim. In this case, it is not in dispute that the small girl, Ziada d/o Raisi was raped on the material night. When rape is not in dispute, and Section 240 (3) of the CPA has not been complied with, causing medical evidence to be excluded, as is the case here, the court can determine the rape case on the available evidence.

Hence, in the present case, the victim raised an alarm calling for help. Her mother, PW1 quickly responded and as she approached the scene of crime the appellant ran away. PW1 checked the private parts of the complainant and saw blood oozing out which confirmed that she had been raped. Even after expunging the PF3, Exhibit P1 from the record, we are left with no doubt in our minds that the appellant, a neighbour and 'brother' of the complainant, raped the latter on the material night.

Like the learned judge, we uphold the trial court's finding that the complainant properly identified the appellant because there was moonlight, she knew him as her brother, and the appellant had sent her to buy cigarettes which she faithfully did and returned to him sh. 20/= change. It appears the cigarette mission was the appellant's trick for trapping the small girl. It was so because the appellant changed positions and the small girl had to call him, and then, per his instructions, she followed him behind the house where she was sexually assaulted by the appellant.

It appears to us that the *voire dire* examination was short but to the point. It enabled the trial magistrate to establish that the complainant had sufficient intelligence to testify truthfully.

With regard to the evidence of the complainant and her mother, the learned judge rightly relied on the said evidence because PW1 and PW2 eye witnessed the rape. It would be irrelevant to call village authorities or other persons who did not witness the commission of the offence.

For the reasons stated above, we find no merit in this appeal. We accordingly dismiss the appeal against conviction. As the age of the complainant was not specifically established by the trial court, the learned judge rightly refrained from assuming that the said complainant was under ten years of age to warrant imposing a life sentence of imprisonment on the appellant. We, therefore, uphold the minimum sentence of thirty years imprisonment imposed on the appellant for the offence of rape contrary to sections 130 and 131 of the Penal Code as amended by the provisions of Section 5 (1) (c) and 6 (1) of the Sexual Offences Special Provisions Act No. 4 of 1998.

DATED at MTWARA this 19th day of November, 2009.

A. S. L. RAMADHANI
CHIEF JUSTICE

E. N. MUNUO
USTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(I. Pr K UST)
SENIOR DEPUTY REGISTRAR