CRIMINAL APPEAL NO.126 OF 2005 COURT OF APPEAL OF TANZANIA AT MTWARA (CORAM: RAMADHANI, C.J, MUNUO J.A, AND MJASIRI, J.A)	ABDALLAH MANYAMBA … APPELLANT VERSUS THE REPUBLIC … RESPONDENT (Appeal from the decision of the High Court of Tanzania at Mtwara) LUKELELWA, J) Criminal Appeal No.18 of 2005	Failure to call a medical doctor to give evidence on the PF. 3 report can not affect the prosecution case since there is other evidence available sufficiently establishing the case against the appellant. The offence of rape must satisfy the requirements of Section 130(4) of the Penal Code as amended by the Sexual offences special Provisions Act, 1998, for the accused to be convicted.

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 126 OF 2005

ABDALLAH MANYAMBA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(L U K E L E L W A , J .)

Dated the 27th day of June, 2005

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Criminal Appeal No. 18 of 2005

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JUDGMENT OF THE COURT

November 12 & 20, 2009

MJASIRI, J.A.:

This is a second appeal. The appellant, Abdallah Manyamba was charged and convicted by the District Court of Newala of the offence of rape contrary to section 130(2) and 131 (3) of the Penal Code Cap 16, R.E. 2002 as amended by the Sexual Offences Special Provisions Act (Act No. 4 of 1998) and was sentenced to 30 years imprisonment. His appeal to the

High Court was unsuccessful. Being aggrieved with the decision of the High Court, the Appellant is now appealing to this Court against both conviction and sentence.

At the hearing of the appeal the Appellant was unrepresented and the Republic was represented by Ms Eveta Mushi, learned State Attorney.

The Appellant filed six (6) grounds of appeal which are summarized as under:

I. The learned trial Judge erred in law and fact in failing to take into consideration that it was not clearly established where the offence of rape was committed, as no sketch map of the scene of crime was produced.

2. The learned trial Judge erred in law and fact in upholding the conviction of the appellant by relying on evidence of PW1 and PW2 which was contradictory.

3. The learned trial Judge erred in law and in fact in upholding a conviction against the appellant when the doctor who prepared the PF3 report was not called to give evidence.

4. The learned trial Judge erred in law and in fact in failing to take into consideration that the evidence available was not sufficient to sustain a conviction.

The background to this case is that the complainant PW1 was returning home from the forest/farm. While she was 60 paces from her home she was accosted by the appellant, who fell her down threatened

her with a knife and raped her. She cried out for help and PW2, her brother in law ran out of the house and caught the appellant in the act. The appellant also threatened to kill PW2, and he then picked up his clothes and ran away. The appellant was their neighbour. In his defence the appellant denied the charge and any involvement with the offence in question.

Ms Mushi opposed the appeal. She submitted that the evidence of PW1 clearly established that the appellant raped her while returning home. PW2's testimony supported the account given by PW1. It was 4.00 p.m. and the appellant was very well known to both PW1 and PW2 as he was their neighbour. The identification of the appellant was therefore watertight. According to her, the absence of a sketch map of the scene of the crime did not mean that the crime was not committed. She further argued that the trial Court found PW1 and PW2 to be credible witnesses and no cause has been given for the Court to challenge their credibility.

With regard to the failure to call a medical doctor to give evidence, on the PF3 report, Ms Mushi readily conceded that the PF3 report was admitted contrary to the requirements of Section 240 (3) of the Criminal Procedure Act RE: 2002. However she submitted that the evidence of PW1 and PW2 was enough to justify a conviction. She further stated that even if the PF.3 evidence was not considered, the prosecution case will not be affected because the other evidence available has sufficiently established the case against the appellant.

After reviewing the evidence on record and the submissions by the appellant and the learned State Attorney, we are of the view that the whole appeal centres on the issue of whether or not PW1 was raped and whether it was the appellant who committed the rape. What needs to be considered is whether or not the evidence on record supports the allegation of rape.

The trial court relied on the evidence of PW1 and PW2 to establish the guilt of the appellant. PW1 gave her account of what transpired. Her testimony was supported by the testimony of PW2 who caught the appellant in the act. Both witnesses clearly identified the appellant. The incident happened during the day at around 4:00 p.m. The appellant was their neighbour and well known to them. Though the doctor who prepared the PF.3 report was not called to testify, there was sufficient evidence to establish the offence of rape. Section 130(4) as amended by the Sexual Offences Special provisions Act 1998 provides as under:-

"penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence"

See **Omari Kijuu v Republic,** CAT, Criminal Appeal No. 178 pf 2004 and **Daniel Nguru** & **Others v Republic,** CAT, Criminal Appeal No. 39 of 2005 (unreported).

In the case of **Ryoba Mariba** @ **Mungare v R,** Criminal Appeal No. 74 of 2003 (unreported), this Court held that it was essential for the Republic to lead evidence showing that the complainant was raped. See

Christopher R. Maingu v R, Criminal Appeal No. 222 of 2004 (unreported).

The lower Courts found all the two witnesses credible and relied on their testimony. The conclusion reached was that the case against the appellant was proved beyond reasonable doubt.

This is a second appeal, the principles to be followed in dealing with the finding of facts and conclusion reached by the lower Courts is clearly set out in various decisions of the Court of Appeal for East Africa. In R v Hassan bin Said (1942) 9 E.A.C.A. 62 it was held that the Court of Appeal is precluded from questioning the finding of fact of the trial Court, provided that there was evidence to support those findings, though it may think possible or even probable, that it would not have itself come to the same conclusion. See also R v Gokaldas Kanji Karia and another, 1949 16 E.A.C.A. 116; Reuben Karari **s**/**o** Karanja v R (1950) 17 E.A.C.A. 146.

In Peter v Sunday Post, [1958] EA 424 it was held that whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial Court should stand, this jurisdiction is to be exercised with caution where there is no evidence to support a particular conclusion or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate Court will not hesitate to decide. See also Salum Mhando v R [1993] TLR 170.

Given the status of the evidence of PW1 and PW2, we are satisfied that such evidence is sufficient to establish the guilt of the appellant and can therefore be relied upon.

For the foregoing reasons, we are satisfied that there was sufficient evidence to warrant the appellant's conviction. We therefore dismiss the appeal against the conviction, and, as the sentence imposed is the statutory minimum, we cannot disturb that.

DATED at Mtwara this 20th day of November, 2009

A.S.L. RAMADHANI
CHIEF JUSTICE

E.N. MUNUO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(I. I/3 **USI)**

SENIOR DEPUTY REGISTRAR