CRIMINAL APPEAL NO.164 OF 2004 – COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM – MUNUO, J.A MSOFFE, J.A AND KILEO J.A	Nurdin Musa Wailu Vs, The Republic (Appeal from the Conviction of the High Court of Tanzania at Mtwara – Criminal Appeal No.6 of 2003 (Mandia, J)	The Court of Appeal will only look into matters which came up in the lower Courts and were decided it will not look into matters which were neither raised nor decided by either the trial court or the High Court on appeal.

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CORAM: MUNUO, J. A. MSOFFE, J. A. AND KILEO, J. A.

CRIMINAL APPEAL NO. 164 OF 2004

NURDIN MUSA WAILU .....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mandia, J.)

Dated the 16th day of May, 2003
in
Criminal Appeal No. 6 of 2003

JUDGMENT OF THE COURT

21st February, 2007 &

MSOFFE J, A.:

In the District Court of Masasi the appellant was convicted of rape contrary to Sections 130 (1) and 3(d) and 131(1) of the Penal Code, Cap 16 of the Revised Laws as amended by Sections 5 and 6 of the Sexual Offences Special Provisions Act No. 4 of 1998. He was sentenced to a term of imprisonment for thirty years. His appeal to the High Court of Tanzania at Mtwara was summarily rejected, hence this appeal. At the hearing of the appeal the appellant appeared in person and the respondent Republic was represented by Ms. Christina Maganga, learned State Attorney.

The appellant filed four grounds of appeal and at the hearing he came up with an additional ground.

The background to the case may briefly be stated. The appellant was a traditional healer at Chakama village in Masasi District. On 12/2/ 2001 he was called to the house of PW3 Hamisi Yusufu to treat the latter's wife for an ailment which was not disclosed. After the treatment the appellant told PW3 that his

daughter, Helena, who was also present, was sick and needed treatment at his (appellant) house. PW3 consulted his brother PW4 Allan Athumani about what the appellant had said. After the consultation they agreed to release Helena to the appellant for treatment. In the testimony of PW1 Helena, at the appellant's house the said appellant asked her to undress and lie naked on a bed. She obliged. The appellant then inserted his penis into her vagina. In all, he made five "rounds" throughout the night. On the next morning the appellant released Helena and told her not to tell anybody about what had happened that night. On arriving at home Helena narrated the incident to her parents. The incident was reported to the police who sent Helena to the hospital for medical examination. The PF3, which was produced and admitted in evidence without objection, showed that Helena was raped. And at the trial when the appellant was called upon to defend himself he said he had nothing to say.

In the first ground of appeal there are two complaints. **One**, that it was wrong to base the conviction on the basis of evidence from members of the same family. **Two**, that it was wrong not to call

for DNA examination with a view to showing whether or not the spermatozoa found in PW1's private parts were those of the appellant. As for the first limb of this ground, we are in agreement with Ms. Christina Maganga that there is no law prohibiting members of the same family from testifying against an accused person. Closely related to this point is the fact that under **S. 143** of the Evidence Act, 1967 no particular number of witnesses is required for the proof of any fact. In this case, as already stated, PW1 was the most important witness at the trial. She gave a full account of what befell her when she was in the hands of the appellant. We have nothing to fault the courts below in their assessment of the evidence of this witness. As for the second limb of the complaint in this ground, again we are, with respect, in agreement with Ms. Christina Maganga that there was no need for DNA test in the light of the credible evidence of PW1. We may add that at best this point is an afterthought because the appellant did not canvass it at the trial. Perhaps, it may interest the appellant to know that the issue of DNA test is one of evidence. So, usually the Court of Appeal will only look into matters which came up in the lower courts and were decided. It will not look into matters

which were neither raised nor decided by either the trial Court or the High Court on appeal.

The second ground of appeal relates to the acceptance in evidence of the PF3 without informing the appellant of his right to require the doctor who completed it to be summoned to explain it or to be cross- examined by the appellant as required by the provisions of **S.240 (3)** of the Criminal procedure Act, 1985. A look at the record will show that it is true that there was a failure to comply with the **subsection** and Ms.Christina Maganga conceded that much. However, in the case at hand the failure did not occasion a miscarriage of justice. We say so for the simple reason that, notwithstanding the failure, there was enough evidence to ground the conviction in question, as already stated.

The third ground of appeal was to the effect that the prosecution side ought to have called PW3's neighbours to testify. In our view, this ground is closely or in a sense related to the first limb

of the first ground. Hence, our reasoning in respect of the first ground of appeal will also apply here.

In the fourth ground, the complaint is that a sketch map of the scene of incident ought to have been drawn and tendered in evidence. Yet again, this ground has no merit. There was no need to prepare a sketch map where the available evidence was credible enough to justify the conviction.

As mentioned at the beginning of this judgment, the appellant gave an additional ground of appeal. The complaint here was that in summarily rejecting the appeal the judge on first appeal did not analyze the evidence. With respect, this complaint is not borne out by the record. On the contrary, the judge did analyze the evidence in summarily rejecting the appeal. We may add that under **S. 364 (1)** of the Criminal Procedure Act, 1985, a judge is entitled to summarily reject an appeal if there is no sufficient ground of complaint. Under the **sub- section**, reasons for summarily rejecting an appeal do not

have to be given. However, as was observed by this court in **Iddi Kondo v R,** Criminal Appeal No. 46 of 1998 (unreported), it is advisable for a judge to give reasons when rejecting an appeal summarily. In the case at hand, the judge on first appeal did exactly that. He gave his reasons for summarily rejecting the appeal.

For the reasons which we have given we hereby dismiss the appeal.

DATED at DAR ES SALAAM this 12th day of March, 2007.

E. N. MUNUO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

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

I. P. KITUSI
Ag: DEPUTY REGISTRAR