**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)**

**CRIMINAL APPEAL NO.269 OF 2009**

**BETWEEN**

**LUCAS MAKINGA @ MADUHU..... APPELLANT**

**AND**

**THE REPUBLIC..... .....RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Mwanza)**

**(Nyangarika, J.)**

**dated the 24th day of September, 2008**
**in**
**High Court Criminal Appeal No. 147 of 2007**

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# JUDGMENT OF THE COURT

30th May & 1st June, 2012

## KILEO, J. A.:

The District Court of Geita sitting at Geita in Criminal case No. 158 of 2006 convicted the appellant of rape contrary to sections 5 (1) (2) (a) and 6 (1) of the Sexual Offences (Special Provisions) Act, (SOSPA) No. 4 of 1998. [These provisions have now been incorporated in the Penal Code, Cap 16 R. E. 2002 as sections 130 (1) (e) and 131 (1) respectively]. He was sentenced to 30 years imprisonment. He lost his appeal to the High Court

and his sentence was enhanced to life imprisonment. He has come before us on a second appeal.

The appellant was convicted on the basis of evidence which was tendered by four prosecution witnesses the gist of which was to the effect that the appellant was found in the act of sexually molesting PW1 and PW2's three years old daughter. The child was seen bleeding from her vagina following the sexual molestation.

On appeal to the High Court it was found that the appellant was properly convicted.

The appellant preferred three grounds of appeal to this Court:

1. *That, the learned judge grossly erred in law and in facts of the case when he convicted the appellant of rape albeit an ingredient of the offence of rape namely, penetration was not established.*
2. *That, the learned appellate judge incurably erred in law when he drew inspirations from the contents and/or findings contained in the PF3 of the complainant although its admission into evidence had*

*contravened the mandatory proviso to section 240 (3) of the Criminal Procedure Act, Cap 20 R. E. 2002*

3. *That, the learned appellate judge had misdirected himself in law being content to believe /accept and subsequently hold that the victim of the offence was aged three years in the absence of conclusive proof.*

The appellant appeared in person at the hearing of the appeal while the respondent Republic was represented by Ms. Revina Tibilengwa, learned State Attorney with the assistance of Mr. Juma Sarigi, learned State Attorney.

The appellant did not have much to say apart from asking us to adopt his memorandum of appeal. Resisting the appeal Ms. Tibilengwa argued that there was ample evidence at the trial warranting conviction of the appellant. She pointed out that the appellant was caught right in the act of defiling the child. On the question of penetration, the subject of the first ground of appeal the learned State Attorney submitted that the fact that the victim was seen bleeding from her vagina was sufficient, in the

circumstances of the case, to establish penetration. We agree with the learned State Attorney. The appellant was found lying on top of the three years old child whose cries had reached her mother as she was going back home from shamba. As pointed out by the learned State Attorney he was found right in the act. Blood was oozing from the child's vagina. He even confessed in the presence of the prosecution witnesses and asked to be forgiven. We are satisfied that there was sufficient evidence to establish penetration and we need not labor on it any further.

On the second ground the appellant complained that the PF3, (exhibit P1) was admitted in contravention of section 240 (3) of the Criminal Procedure Act. The provision enjoins a trial court, where a medical statement is received in evidence, to inform an accused of his right, if he so wishes to have the medical personnel who made the statement to appear in court for cross examination. The learned State Attorney conceded to this ground. She was however quick to point out that even if the PF3 was expunged from the record still there was other independent evidence which sufficiently established the guilt of the appellant. In support of her assertion she referred us to a decision of this Court in **Salu Sosoma v.**

**The Republic** –Criminal Appeal No. 31 of 2006 (unreported). The Court in this case made reference to its earlier decision in **Prosper Mjoera Kisa v. The Republic**- Criminal Appeal No. 73 of 2003 (unreported) where it was held that lack of medical evidence does not necessarily, in every case, mean that rape is not established where all other evidence point to the fact that it was committed. In the present case there was such overwhelming evidence of rape against the appellant coupled with his own confession before witnesses, so even if we expunge exhibit P1 from the record, as we hereby do, the appellant cannot get off the hook.

The third and last ground of appeal assails the learned appellate judge for accepting and subsequently holding that the victim of the offence was aged 3 years in the absence of conclusive proof. This is a vain attempt by the appellant at exonerating himself from liability. In the first place, the evidence regarding the age of the victim was not challenged at the trial. Secondly, this was not one of the grounds of appeal in the High Court. Thirdly, as it was stated in **Salu Sosoma** case, *supra*, a parent is better positioned to know the age of his child.

Having deliberated on the appeal as above, we find it to have been filed with no merit at all. We dismiss it in its entirety. The appellant is to continue serving the life imprisonment sentence that was imposed on him as this is the mandatory sentence for the offence of rape of a child that he was convicted of.

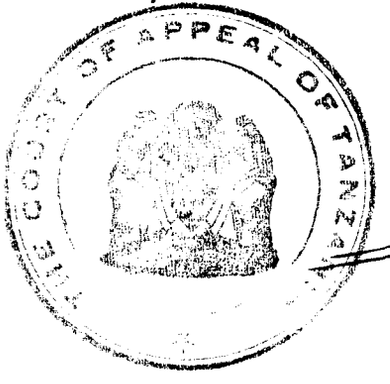
**DATED** at **MWANZA** this 31st day of May, 2012.

E. M. K. RUTAKANGWA
**JUSTICE OF APPEAL**

E. A. KILEO
**JUSTICE OF APPEAL**

K. K. ORIYO
**JUSTICE OF APPEAL**

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



E.Y. MKWIZU
**DEPUTY REGISTRAR**