IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NSEKELA, J.A., LUANDA, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 67 OF 2010

NYERERE NYAGUE ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Sambo, J.)

dated the 17th day of January, 2010
in
Criminal Appeal No. 66 of 2007

JUDGMENT OF THE COURT

11 & 21 May 2012

MASSATI, J.A.:

The appellant was charged with and convicted of raping a 70 year old woman, called PAULINA d/o TAGASINI contrary to sections 130 and 131 of the Penal Code (Cap. 16 – RE 2002) as amended. The District Court of Babati which tried him, convicted him as charged and sentenced him to 30 years imprisonment and 12 strokes of the cane. He unsuccessfully appealed to the High Court, hence the present appeal.

It was alleged that on the 12th day of January, 2006 at about 2.00 hrs at Duru village, Babati District in Manyara Region, the appellant had unlawful carnal knowledge of PAULINA TAGASINI without her consent. PAULINA TAGASINI (PW1) informed the trial court that on that night she was asleep in her house. The appellant sneaked in. She raised an alarm but the appellant covered her mouth to stiffie any sound. She identified the appellant by use of a lamp light. He was her neighbour in the village. The appellant then forcefully undressed her and had sexual intercourse with her, without her consent. He went on to sleep there till the next morning when PW1 informed her children. The appellant was arrested. PW1 was given a PF3 which was later tendered in evidence. In his defence, the appellant denied to have committed the offence but admitted that he made a statement and had no objection to its admission in evidence and the same was admitted as Exh P2. In cross examination by the prosecution, the appellant is recorded to have said:

> *"I know the victim. I had carnal knowledge with her once. I seduced her only once and I raped her once."*

The two courts below found that the prosecution case was proved beyond reasonable doubt, hence the conviction.

In this Court, the appellant appeared in person and presented three grounds of appeal. The **first** was that the trial court wrongly acted on the cautioned statement which was illegally obtained. **Secondly** the two courts below did not properly evaluate the evidence of PW1, and thus arrived at the wrong conclusions. **Thirdly** the lower courts failed to consider the effect of the 2 days' delay in reporting the rape, on the credibility of PW1.

In his elaboration of the grounds, the appellant attacked the credibility of PW1, his identification, and the admissibility of the cautioned statement because it was not listed among the prosecution exhibits during the preliminary hearing. He therefore prayed that the appeal be allowed.

Mr. Massy Bondo, learned State Attorney appeared for the respondent/Republic. At first, he took the view that there was substance in the appellant's complaint about the admissibility of Exh

P2, his cautioned statement. He sought to base his opinion on the provisions of sections 50, 51, and 169 of the Criminal Procedure Act Cap 20 RE 2002) (the CPA). However, on reflection, he abandoned that track, and fully supported the conviction and sentence. He based his new stance on the fact that apart from Exh P2, it was also on record that the appellant confessed to have committed the offence with which he was charged. He thus asked us to dismiss the appeal.

The conviction of the appellant was based on two pieces of evidence. First, the direct evidence of PW1, and secondly, the appellant's own confession both in his own sworn evidence in court, and the cautioned statement (Exh P2).

PW1 testified to the effect that the appellant went to her house, opened and entered her house in the dead of the night. She tried to raise an alarm but the appellant covered her mouth by using her bed sheet. The appellant then:

> *"Undressed me and raped me." The accused stayed in the house till early in morning, when he left. The accused was taken to the police on 15/2/2006."*

Curiously, the appellant did not cross examine this witness.

That the matter was reported to the police on 15/2/2006 is confirmed by PW3, WP 4423 D.C. SOPHIA.

The appellant has now taken exception to this testimony and put PW1's credibility in the limelight. In our view, if this was the only piece of evidence, and but for other reasons below, the appellant would have been entitled to the benefit of doubt; not only from the strange behavior of PW1 allowing her assailant to share her bed and sheet until the next morning; but also, by delaying to report to the police for two days for no apparent reason. Unfortunately, the appellant did not cross examine PW1 on this to shake her credibility. As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness

said. (See **CYPRIAN A. KIBOGOYO v R** Criminal Appeal No. 88 of 1992, **PAUL YUSUF NCHIA v NATIONAL EXECUTIVE SECRETARY, CHAMA CHA MAPINDUZI AND ANOTHER** Civil Appeal No. 85 of 2005 (both Unreported)

But what is more, during his defence, the appellant himself introduced that he gave a cautioned statement to the police. When the prosecutor sought to produce it, the appellant did not object to its production; and so it was admitted as Exhibit P2. He is now seeking to challenge its admissibility in this Court. It was never raised with the first appellate court. Again, as a matter of general principle, an appellate court cannot allow matters not taken or pleaded and decided in the court (s) below to be raised on appeal (See **KENNEDY OWINO ONYANGO AND OTHERS v R** Criminal Appeal No. 48 of 2006 (unreported) But due to the significance of this point we will try to revisit the basic legal principles on the subject.

Objections to the admissibility of confessional statements may be taken on two grounds. First, under S. 27 of the Evidence Act that,

that it was not made voluntarily or not made at all. Second, under section 169 of the Criminal Procedure Act: that it was taken in violation of the provisions of the CPA, such as sections 50, 51 etc. Where objection is taken under the Evidence Act, the trial court, has to conduct a trial within trial (in a trial with assessors) or an inquiry (in a subordinate court) to determine its admissibility. There the trial court only determines whether the accused made the statement at all, or whether he made it voluntarily.

As we understand it, the relevant law regarding admission of accused's confession under this head is this: **First,** a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground, either that it was not voluntarily made or not made at all (See **SELEMANI HASSANI v R** Criminal Appeal No. 364 of 2008 (unreported) **Secondly,** if an accused intends to object to the admissibility of a statement/confession, he must do so before it is admitted, and not during cross examination or during defence (See **SHIHOZE SENI AND ANOTHER v R** (1992) TLR. 330, **JUMA KAULULE v R**

Criminal Appeal No. 281 of 2006 (unreported) **Thirdly,** in the absence of any objection to the admission of the statement when the prosecution sought to have it admitted, the trial court cannot hold a trial within trial or inquiry *suo motu,* to test its voluntariness. (See **STEPHEN JASON AND ANOTHER v R** Criminal Appeal No. 79 of 1999 (unreported) **Fourthly,** if objection is made at the right time, the trial court must stop everything and proceed to conduct a trial within trial (in a trial with assessors) or an inquiry, into the voluntariness or otherwise of the alleged confession before the confession is admitted in evidence (See **TWAHA ALLY AND 5 OTHERS v R** Criminal Appeal No. 78 of 2004 (unreported) **Fifthly,** even if a confession is found to be voluntary and admitted, the trial court is still saddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each case (See **TUWAMOI v UGANDA** (1967) E.A 91 **STEPHEN JASON & OTHERS v R** (supra). And **lastly,** everything being equal the best evidence in a criminal trial is a voluntary confession from the accused himself (See **PAULO MADUKA AND 4 OTHERS v R** Criminal Appeal No. 110 of 2007 (unreported)

But where objection is taken under section 169 of the Criminal Procedure Act, the trial court has absolute discretion not to admit such evidence having regard to the considerations shown under section 169(2). For the sake of completeness, the whole of section 169 is reproduced below:

> *169 (1) Where, in any proceedings in a court in respect of an offence, objection is taken to the admission of evidence on the ground that the evidence was obtained in contravention of, or in consequence of a contravention of, or of a failure to comply with a provision of this Act or any other law, in relation to a person, the court shall, in its absolute discretion, not admit the evidence unless it is, on the balance of probabilities, satisfied that the admission of the evidence would specifically and* ***substantially benefit the public interest without unduly prejudicing***

the rights and freedom of any person. *(emphasis supplied)*

(2) The matters that a court may have regard to in deciding whether, in proceedings in respect of any offence, it is satisfied as required by subsection (1) include:

(a) the seriousness of the offence in the course of the investigation of which the provision was contravened, or was not complied with, the urgency and difficulty of detecting the offender and the urgency or the need to preserve evidence of the fact;

(b) the nature and seriousness of the contravention or failure; and

(c) the extent to which the evidence that was

obtained in contravention of in consequence of the contravention of or in consequence of the failure to comply with the provision of any law, might have been lawfully obtained.

(3) The burden of satisfying the court that evidence obtained in contravention of, in consequence of the contravention of, or in consequence of the failure to comply with a provision of this Act should be admitted in proceedings lies on the party who seeks to have the evidence admitted.

(4) This section is in addition to, and not in derogation of, any other law or rule under which a court may refuse to admit evidence in proceedings

It follows in our view therefore that the admission of evidence obtained in the alleged contravention of the CPA is in the absolute

discretion of the trial court and that before admitting or rejecting such evidence, the parties must contest it, and the trial court must show that it took into account all the necessary matters into consideration and is satisfied that, if it admits it, it would be for the benefit of public interest and the accused's rights and freedom are not unduly prejudiced. In other words there must be a delicate balancing of the interests of the public and those of the accused. It is not therefore correct to take that every apparent contravention of the provisions of the CPA automatically leads to the exclusion of the evidence in question. The decision of the trial court on such matters can only be faulted if it can be shown, that the admission or rejection of such evidence was objected to and that it did not properly exercise its judicial discretion, or at all, in rejecting or admitting it.

As shown above, at first, Mr. Bondo had sought to support the appellant's first ground of appeal, on the fact that on the face of it, the cautioned statement (Exh P2) seemed to have been taken more than four hours after the arrest of the appellant which was contrary to sections 50 and 51 of the Criminal Procedure Act. But the

appellant did not object to its admissibility when it was about to be tendered. So, the trial court and the prosecution were deprived of the opportunity to consider whatever objection the appellant may have had, in terms of section 169(2) of the CPA. This deprives him of the right to complain about its admissibility at this stage.

In that statement the appellant said:

> *"..... Tarehe 12.2.2006, 00.00 hrs nilikuwa natoka shambani nikapita hapo nyumbani kwa Paulina Tagasini. Nikakuta amelala nilibisha hodi na kwa sababu ananifahamu alifungua mlango nikaingia ndani kwake, nikakuta amevua gauni ila chupi alikuwa amevaa, nilimuomba tufanye mapenzi akakubali nilipotaka avue chupi alikataa, nilipombembeleza sana alikataa ndipo nilimkamata kwa nguvu nikamwangusha kitandani kwake nikafanya naye mapenzi kwa nguvu na niliweza kumkojolea mpigo mmoja hakupiga kelele....."*

But, of course, admissibility is one thing. That is the domain of the trial court. The weight to be attached to an admitted exhibit is another. When it comes to evaluating the weight of any evidence properly on record; an appellate court is in just as good a position as the trial court.

In the present case, even if one wanted to doubt PW1's credibility, and believed that she consented, the appellant's own confession shows that she withdrew that consent, and so, in law, any sexual intercourse after this, was rape, even if she did not shout. But what is worse, in his sworn evidence, the appellant confessed that much also in cross examination. So if the cautioned statement needed any corroboration, the appellant's own confession in court provided one. And as the maxim goes: *"a confession made in court is of greater effect than any other proof"* (**BLACK'S LAW DICTIONARY.** 8th ed. **LEGAL MAXIMS** p. 1709.

In the event, we think that the offence of rape was proved beyond any reasonable doubt. The conviction of the appellant

cannot be assailed. The sentence is the statutory minimum. The appeal is therefore dismissed in its entirety.

DATED at **ARUSHA** this 19th day of May, 2012.

H. R. NSEKELA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

(M.A. MALEWO)
DEPUTY REGISTRAR
COURT OF APPEAL