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

**(CORAM: MUGASHA, J.A., WAMBALI, J.A. And SEHEL, J.A.)**

**CRIMINAL APPEAL NO 590 OF 2017**

**HATARI MASHARUBU @ BABU AYUBU..... APPELLANT**
**VERSUS**
**THE REPUBLIC.....RESPONDENT**

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

**(Matupa, J.)**

**Dated the 2nd day of November, 2017**
**in**
**Criminal Appeal No. 254 of 2017**

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## JUDGMENT OF THE COURT

12th & 26th February, 2021.

## WAMBALI, J.A.:

The appellant Hatari Masharubu @ Babu Ayubu appeared before the District Court of Nyamagana at Mwanza in Criminal Case No. 134 of 2014 where he was charged with the offence of rape of a girl aged ten (10) years contrary to the provisions of sections 130 (1) and (2) (e) and 131 of the Penal Code, [Cap 16 R.E. 2002] (The Penal Code). Noteworthy, for the purpose of this judgment, we will refer the girl simply as the victim or PW2.

It was alleged by the prosecution in the charge sheet that on 3rd August, 2014 at Buhongwa area within Nyamagana District in the City and Region of Mwanza the appellant had unlawful sexual intercourse with the victim aged ten years old.

The prosecution fronted four witnesses, namely, Farida Salvatory (PW1), the victim (PW2), Doctor Abigael Mpingo (PW3) and the investigator E4536 D/Cpl. Damian. It is not insignificant to point out that a Police Form No. 3 (PF3) was tendered by PW1 and admitted as exhibit P1. Later, PW3 who examined PW2 was summoned and cross- examined by the appellant. The totality of the substance of the prosecution evidence was to the effect that on the fateful date, that is, 3rd August, 2014, PW2 was raped by no other than the appellant.

On the other hand, in his sworn testimony the appellant denied the allegation. He persistently stated that he was not around the scene of the crime on the alleged date, maintaining that the charges were framed up by PW1 who had sought friendship from him. He added that PW1 was angered when she saw his wife who had specifically arrived to stay with him at the same house where he was a tenant. More importantly, the appellant

contended that the date of the commission of the offence was altered from 28th July, 2014 indicated in the initial charge sheet to 3rd August, 2014 when the charge was substituted on 18th November, 2014.

Be that as it may, at the end of the trial, the trial District Court was fully convinced that the prosecution proved the case to the required standard. In the result, the appellant was convicted of the offence of rape and sentenced to imprisonment for thirty (30) years and to compensate the victim TZS. 400,000/=. Discontented, he unsuccessfully petitioned the High Court to have both his conviction and sentence overturned.

Still dissatisfied, he has approached the Court on the second appeal. His dissatisfaction is vividly expressed in the memorandum of appeal comprising five grounds of appeal. However, at the hearing of the appeal it was observed that essentially his complaints can be compressed into the following grounds:-

1. That the first appellate court erred in fact and law in holding that the victim (PW2) testimony is credible while there was contradiction between her testimony in court and what she stated in her statement recorded at the police concerning the date of the commission of the offence.

2. That the first appellate court did not seriously take note of the fact that the evidence of PW1 and PW2 was shaken by their failure to disclose the reasons behind the release of one Mashaka who was arrested together with the appellant in connection with the same offence.
3. That the PF3 had no evidential value as its content was not read over and made known to him after it was admitted into evidence by the trial court.
4. That the first appellate court failed to adjudicate all the complaints in the appellant's petition of appeal.

At the hearing of the appeal, the appellant appeared in person, and had no legal representation. Essentially, he adopted his grounds of appeal and urged us to consider them in determining the appeal. He also opted to let the learned State Attorney for the respondent Republic reply to his grounds of appeal, but retained the right to rejoin if need would arise.

On the adversary side, the respondent Republic was represented by Ms. Gisela Alex Banturaki who strongly resisted the appeal.

Submitting with regard to the first ground, Ms. Banturaki argued that the complaint of the appellant that there is contradiction in the evidence of PW2 concerning the date of the commission of the offence of rape has no merit. She submitted that the basis of the appellant in arguing that there is

contradiction is the statement PW2 recorded at the police which was tendered by him and was admitted at the trial as exhibit D1. In her opinion, the trial court wrongly admitted the statement as it was tendered contrary to the provisions of section 154 of the Evidence Act, Cap. 6. R. E. 2019 (the Evidence Act). She explained that the said provision provides for cross-examination of the witness on a previous statement made in writing. In the case at hand, she submitted, the statement was tendered and admitted while the appellant was giving his defence without the victim (PW2) being called to be cross-examined on the same as required by the provisions of section 154 of the Evidence Act. To this end, the learned State Attorney invited us to expunge from the record exhibit D1. Moreover, she invited us to find that there is no contradiction in the evidence of PW2 in the record of appeal and that her evidence left no doubt that rape occurred on 3rd August, 2014 and no other than the appellant who committed it. Ultimately, she implored us to dismiss the first ground of appeal.

We have thoroughly examined the evidence of PW2 and we find that she is a credible witness as we have not found any contradiction in her evidence concerning the date when she was raped by the appellant. We say so because, the evidence of PW2 was clear as to what happened on the

fateful day, that is, 3rd August, 2014 and the involvement of the appellant. It is significant to point out that though the appellant was given the opportunity to cross examine PW2, he did not do so on this very important matter concerning the date the crime was committed. If the appellant had felt that PW2's testimony at the trial was contradictory of what she stated in her statement she recorded at the police, he would have cross-examined her on that piece of evidence. Thus, failure of the appellant to cross-examine on the issue of a date left the evidence of PW2 unshaken on what transpired on 3rd August, 2014 and the person who committed the offence.

It must be made clear that failure to cross examine a witness on a very crucial matter entitles the court to draw an inference that the opposite party agrees to what is said by that witness in relation to the relevant fact in issue. In **Damian Ruhele v. The Republic**, Criminal Appeal No.501 of 2009, the Court made reference to its earlier decision in **Cyprian Athanas Kibogo v. The Republic**, Criminal Appeal No.88 of 1992 (both unreported), where it was plainly stated that it is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence.

We are however, mindful of the fact that the thrust of the appellant's argument is that the evidence of PW2 at the trial is contradictory to her statement she recorded at the police which was tendered and admitted as exhibit D1 during the defence case. Nonetheless, as correctly stated by MS. Banturaki, exhibit D1 was wrongly admitted in evidence and relied upon in determining the fate of the appellant. We entirely agree that if the appellant wanted to cross-examine PW2 on the previous statement she made at police against her testimony at the trial, he would have done so when she testified in chief. If that was not possible, as it happened in this case, he would have requested the trial court to re summon PW2 who had already testified for cross examination. As that course of action was not taken, the statement of PW2 could not be properly tendered and admitted into evidence under section 154 of the Evidence Act during the defence case as it was done in this case. For clarity, the said provisions provides as follows:-

> ***"A witness may be cross-examined on previous statements made by him in writing or reduced into writing, and relevant to matters in question****, without such writing being shown to him or being proved,* ***but if it is intended to contradict him by the writing, his attention***

***must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him".***

[Emphasis added]

It is clear from the reproduced provisions that in order for the witness to be contradicted on her previous statement, she must be cross-examined on the relevant part of that statement which was made in writing. As alluded to above, in the present case this was not the case. Exhibit D1 therefore was illegally tendered and admitted into evidence. We accordingly expunge it from the record of proceedings. In the end, having expunged exhibit D1 we do not find any contradiction in the testimony of PW2 concerning the date of the commission of the offence, that is, 3rd August, 2014. Ultimately, we do not find merit in the complaint of the appellant in ground one and hereby dismiss it.

With regard to the second ground, the learned State Attorney submitted that the evidence of PW1 and PW2 could not be shaken for their failure to disclose the reason behind the release of Mashaka who was initially arrested together with the appellant in connection of the offence. She explained that PW1 and PW2 had no that duty because it was the police who

arrested Mashaka and during the investigation they found that he was not involved in the commission of the said offence. She therefore urged us to dismiss this ground for lacking merit.

On our part, we have closely examined the evidence in the record of appeal. However, we have found nothing showing that failure of PW1 and PW2 to disclose the role of Mashaka in the commission of the offence prejudiced the appellant. We note that the charge that was placed at the door of the appellant alleged that only the appellant committed the offence of rape on 3rd August, 2014. Mashaka was not mentioned at all. The duty of PW1 and PW2 therefore, was to prove the charge as alleged. Indeed, we are of the settled opinion that PW2 managed to discharge that duty. PW2 also did not state anything concerning the involvement of Mashaka because her duty was to prove the charge which faced the appellant.

Moreover, according to the record of appeal, the appellant did not cross-examine PW1 and PW2 concerning the involvement of Mashaka and on their alleged failure to disclose his involvement in the commission of the offence. The only witness who explained on the fate of Mashaka is PW4 when he was cross-examined by the appellant. He confirmed that Mashaka

was arrested in connection of the investigation of the offence as he was allegedly left with PW2 at the house. In addition, PW4 emphasized that there is no incident that occurred on 28th July, 2014 except that of 3rd August, 2014. We therefore find the complaint in ground two unfounded, and accordingly dismiss it.

On the other hand, with regard to the third ground, the learned State Attorney conceded that Exhibit P1 (PF3) was not read over after it was admitted for its content to be made known to the appellant. She therefore urged us to expunge it from the record. Nevertheless, she submitted that even after expunging Exhibit P1, the evidence of the Doctor (PW3) remains. She added that PW3 corroborated the evidence of PW2 concerning the occurrence of rape.

We entirely agree that exhibit P1 was wrongly relied on in evidence as its content was not made known to the appellant after it was legally admitted in evidence. Exhibit P1 therefore did not pass the third stage before it could be relied into evidence (see **Robinson Mwanjisi and Three Others v. The Republic**, [2003] TLR 218). It is in this regard in **Jumanne Mohamed**

**and Two Others v. The Republic**, Criminal Appeal No.534 of 2015 (unreported), the Court stated that:-

> *"It is fairly settled that once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court".*

In this regard, since exhibit P1 was legally admitted into evidence but not read over, we disregard it and attach no weight to it.

On the other hand, as correctly stated by the learned State Attorney, despite disregarding exhibit P1 the evidence of PW3, the doctor who examined PW2 remains and is useful in so far as it corroborates the fact the rape was committed. PW3 in his testimony categorically stated that after he examined PW2 he found labia minora torn and blood oozing from the vagina.

Moreover, without prejudice to the above, we must emphasize that, it is not always the case that where there is no medical evidence, it is an assurance that rape was not committed. To this end, in **Lazaro Kalonga v. The Republic**, Criminal Appeal No.348 of 2008 (unreported), the Court stated that:-

> *"We are mindful of the fact 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 (see for example* ***Prosper Mjoera Kisa v. The Republic,*** *Criminal Appeal No.73 of 2003 and* ***Salu Sosoma v. The Republic****, Criminal Appeal No.31 of 2006 (both unreported).*

In the present case, as we have amply demonstrated in our deliberation above, the evidence of PW2 which was not greatly challenged by the appellant during cross-examination bears testimony to the fact that rape was committed by none other than the appellant.

In the result, as the omission to read over the PF3 which was legally admitted into evidence did not substantially prejudice the appellant, the complaint in ground three is partly allowed and partly dismissed.

Lastly, with regard to ground four, Ms. Banturaki similarly conceded that the first appellate judge did not consider all the grounds of the appellant's appeal in the petition of appeal. However, she left upon the court to examine whether the said omission caused injustice to the appellant.

On our part, we have examined the record of appeal and we agree that the learned first appellate judge did not determine all grounds of appeal

in the petition of appeal. However, the most remarkable is ground 5. In that ground the appellant complained that PW2 was forced by her mother (PW1) to implicate the appellant in the commission of offence of rape. On our part, we have examined the evidence of PW2 and we find that there is no indication that PW2 was tutored to testify against the appellant because of the estranged relation with her mother. PW2 testified at length on what transpired on that day and that she knew the appellant well who was their tenant at the house belonging to her mother. As we have alluded to above, the appellant cross-examined PW2 but he did not substantially shake her credibility. Indeed, as earlier on stated, he did not cross-examine PW2 fully on important matters on how rape occurred. PW2's evidence on crucial ingredients of rape therefore remained unchallenged.

In the circumstances, we hold that despite the omission of the first appellate judge to consider some grounds in the petition, the appellant was not seriously prejudiced as the evidence of PW1 who he also claims to be incredible, was not the basis of his conviction and sentence. The trial court and first appellate court greatly relied on the evidence of PW2 who was in better place to disclose what really happened when the appellant raped her. We therefore partly allow this ground and partly dismiss it.

However, we wish to remind first appellate courts to always ensure that unless the grounds of appeal are compressed thereof and the reason given, each ground must be considered and determined to finality.

In the end, on the basis of our deliberation above, save for grounds three and four which we have partly allowed and partly dismissed, we find that the appeal has no merit. We accordingly dismiss it.

**DATED** at **MWANZA** this 25th day of February, 2021.

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

F. L. K. WAMBALI
**JUSTICE OF APPEAL**

B. M. A. SEHEL
**JUSTICE OF APPEAL**

The Judgement delivered this 26th day of February, 2021 in the presence of the appellant unrepresented appeared in person, and Mr. Georgina Kinabo, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.


D. R. LYIMO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**