IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 515 OF 2019

PANTALEO TERESPHORY .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mongella J.)

dated 6th day of December, 2021,

in

Criminal Appeal No. 39 of 2021

JUDGMENT OF THE COURT

6th & 23rd February, 2023

LILA, J.A.:

The District Court of Chunya at Chunya tried and convicted the appellant of the offence of rape contrary to sections 130 (l) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002]. It consequently sentenced him to life imprisonment and to suffer ten (10) strokes of the cane. His first appeal to the High Court was unsuccessful hence the present appeal to this Court.

The charge accused the appellant of carnally knowing a child of 3 1/2 years old whose name we withhold to avoid any further mortification and we shall, instead, refer to her as simply the victim or PW2 so as to disguise her identity. The incident was said to have occurred on 1/5/2020 at Itumbi Hamlet Matundas village within Chunya District and Mbeya Region.

In order to prove the charge, the prosecution lined up five witnesses including the victim who testified as PW2 and Anna Yohana (PW1), the victim's mother, who was married to one Edgar Musa (PW4). The ordeal began with PW1 who was a food vender at the mining area owned by one Mangi and operating in the name of PML taking the victim to her business place on the material date. Thereat, PW1 met many people for whom she prepared food for sale as her customers. She served part of the food to the victim who ate it and proceeded to play with other children. At 16:00 hrs PW1 noted that the victim was missing in that area and her efforts to trace her, including asking the children with whom she was playing, bore no fruits. She also reported the matter and sought assistance from Mangi, other foremen and workers but all was in vain. In the meantime, PW4 went back to Itumbi area where they stayed to look for the victim but was unsuccessful too.

Having noted that the matter was then serious, PW1 raised her voice calling the victim but there was no any response. No sooner had she made the call than she heard the victim crying from the nearby forest to which she rushed and found the victim naked with her clothes lying on the ground and another person who was also naked fleeing from that area. Having noted that, she shouted for help and many people, including PW4, turned up for help and they apprehended that person. PW4 identified that person to be the appellant in court. As is the practice in the villages, that person was taken to the PML office and later to the local leader, the hamlet leader at Itumbi area.

Suspicious of the victim's condition, PW1 inspected her only to find whitish material or fluids oozing from the victim's vagina which suggested that they were spermatozoa, blood and bruises inside and outside the vaginal parts. That condition prompted PW1 to take the victim to Matundas Hospital on that day (1/5/2020) where they were referred to Chunya District Hospital. At Chunya, she first obtained a PF3 from the police station and took the victim to the hospital on 2/5/2020 where she was examined and treated by being given medicine after which John Francis (PW3), the Doctor, filled the PF3 and gave it to her (PW1) for transmission to the police station. PW3 confirmed that he received PW1 and PW2 at Chunya District Hospital on 2/5/2020 and his

examination revealed that the victim's vagina had fresh lacerations caused by a blunt object and whitish material mixed with blood indicative of forced penetration. He tendered the PF3 which was admitted as exhibit PE1 without any objection from the appellant.

The case was investigated by F. 3661 D/CPL Mohamed (PW5) of Chunya District Police Station who recorded both the appellant's statement and the witnesses' statements who told him that they found the appellant at the forest ravishing the victim. He obtained the Clinic Card of the victim which showed that she was born on 1/1/2017 which was admitted as exhibit PE2 without objection from the appellant. Satisfied that he had sufficient evidence to prove that the appellant raped the victim, he charged the appellant in court. The victim's evidence was also taken in court and acted on to which we hold serious reservations to be addressed later in this judgment.

Having satisfied that a case was made requiring explanation from the appellant, the trial court called upon the appellant to defend himself. Exercising that right, he entered his defence without calling any witness. He admitted knowing PW1 from whom he used to take food on agreement of paying later when he got money. Regarding the accusations which culminated in his arraignment, he attributed it with the grudges PW1 had developed against him due to his failure to settle

the bill which amounted to TZS 50000/= due to the Covid 19 pandemic and rains which stopped him from continuing with his mining activities. Besides, he challenged the evidence led against him from various angles. He doubted the credibility of PW1 and PW3 for giving two different dates saying that while PW1 stated that she took the victim to hospital on 1/5/2020, PW3 said he received the victim in hospital on 2/5/2020. He also questioned the nature of bruises the victim sustained that due to her age, if raped she could seriously be injured and the injury would require stitches something which PW3 did not. He disassociated himself with the alleged whitish fluid said to have come out from the victim's vagina claiming that he was also not subjected to medical examination. He, further challenged PW4's evidence as being contradictory for stating that he found him naked but later changed and said he saw him fleeing from the scene of crime. All the same, he admitted, when cross-examined, that he was arrested by citizens or unknown persons on 1/5/2020 at about 18:00hrs at Itumbi area when going home from his working place and also that he did not cross-examine the prosecution witnesses on his being indebted TZS 50,000/= by PW1.

The appellant's story was unacceptable by the trial magistrate. On the evidence on record, the trial court was satisfied that the victim was

a child in terms of section 130 (2) (e) of the Penal Code and the Law of the Child as there was evidence that she was born on 1/1/2017. Relying on the testimonies by PW1, PW2, PW3 and PW4, it found penetration by a blunt object proved as established in exhibit PE1. On the issue who carnally knew the victim, the trial court relied on the victim's testimony who, during her testimony, pointed at the appellant as her ravisher and her testimony was corroborated by PW1 who inspected her immediately after taking her from the forest and discovered whitish fluids and blood in her private parts a fact which was cemented by PW3 who medically examined her and made a finding that the vagina had bruises something which indicated that it was penetrated by a blunt object. The trial court acknowledged at page 59 of the record of appeal that PW1 and PW4 gave contradictory evidence on the state they found the victim and the appellant. Without indicating what PW4 said, it stated that the former said she found the appellant red-handed in the act of raping the victim and later attempted to flee from the scene of crime only to be apprehended a little later. However, the said undisclosed contradiction was found to be minor and inconsequential to the case and the trial court concluded that the appellant was found red-handed by PW1 and PW4 hence there was no need to conduct an identification parade as was held by the court in the case of **Anthony Jeremiah Sorya vs**

Republic, Criminal Appeal No. 52 of 2019 (unreported). He was, ultimately, found guilty, convicted and sentenced as earlier on stated because his defence evidence was found highly implausible for reasons that he never challenged the prosecution evidence by way of cross-examination on the issue of being indebted to PW1 which in law meant he accepted as correct their testimonies and also that he admitted being arrested by citizens on the material date at 18:00hrs. Reliance here was on the Court's decision in **Nyerere Nyague vs Republic**, Criminal Appeal No. 67 of 2010 (unreported).

The appellant was aggrieved. Since the action he took is a subject of appeal before us in ground one (1) of appeal, we shall tell it in sufficient details. He, at first, lodged a memorandum of appeal on 19/4/2021 advancing six grounds of appeal before the High Court seeking to challenge the propriety of the trial court's decision. He subsequently, lodged a supplementary memorandum of appeal on 6/7/2021 containing three grounds of appeal. Not comfortable with the grounds of appeal raised in the two memoranda, on 13/9/2021, he orally sought and was granted leave by the High Court to amend them. As a result, he lodged an amended memorandum of appeal on 28/9/2021 comprising six (6) grounds of appeal. His main complaints centred on **one**; that his conviction was founded on evidence by PW1,

PW2 and PW4 who were family members hence had personal interests to serve, **two**; that the evidence of PW2 (the victim) was wrongly taken for failure to promise to tell the truth before her evidence was recorded she being a child of tender age, **three**; that he was, like the victim, not subjected to medical examination or DNA test so as to prove that the whitish fluid found in the victim's private parts was his, **four**; that not being a parent, PW5 was not competent to tender the clinic card, **five**; failure to call the hamlet chairman to testify rendered the case a frame up one and **six**; the charge was not proved against the appellant beyond reasonable doubt. Unfortunately, all the grounds were found to be unmerited and the trial court decision was sustained.

Still aggrieved, in this appeal, the appellant has raised the following five grounds which may conveniently be paraphrased thus:

1. *That, the first appellate court erred in law when it dismissed the appellant's appeal without having due regard to the petition of appeal filed by the appellant.*

2. *That, the first appellate court erred in law when it dismissed the appellant 's appeal without evaluating the evidence of PW1 as no any witness testified if PW4 heard her alarm and arrested the appellant or saw the appellant at the crime scene raping PW2.*

3. *That, the first appellate court erred in law when it dismissed the appellant's appeal without taking into account that none of the*

persons mentioned by PW1 including the leaders of the area the crime was committed were called as witnesses to support the evidence of PW1 and her daughter (PW2).

4. *That, following the prosecution's failure to tender the clothes of PW2 which were blood-stained, it failed to prove the charge.*

5. *That, the first appellate court erred in law when it dismissed the appellant's appeal without giving due regard to the defence of the appellant.*

Before us the appellant appeared in person when the appeal was called on for hearing. The respondent Republic had the services of Mr. Edgar Luoga, learned Principal State Attorney, Ms Mwajabu Tengeneza, learned Senior State Attorney and Ms Hannarose Kasambala, learned State Attorney.

First to address us was the appellant who had very little to submit in amplifying his grounds of appeal. Central in his argument was that there were inconsistences in the witnesses' evidence. First was that PW1 and PW4 differed on how the victim was handled by the appellant at the time she was being raped. That while PW1 said he had made her sit on his laps (amempakata), PW4 said he was on top of her. Second was that PW1 and PW3 differed on the date the victim was taken to

hospital as the former said on 1/5/2020 and the later said he received the victim at Chunya District Hospital on 2/5/2020.

Ms. Kasambala resisted the appeal on behalf the respondent. She argued the grounds of appeal seriatim.

Ground one (1) of appeal posed no difficult to Ms Kasambala. She was convinced that it is baseless as the record of appeal at pages 96 to 103 contradicts the appellant's contention where it clearly shows that all the six grounds of appeal in the amended memorandum of appeal were considered and determined by the learned judge. Elaborating, she submitted that although the appellant initially lodged a petition of appeal followed by a supplementary petition of appeal, during the hearing he was granted leave by the court to amend them and lodged an amended appeal which was the one the parties argued for and against before the judge.

We need not be detained by this ground. Indeed, the appellant, as demonstrated above abandoned the former two memoranda of appeal and argued on the amended petition of appeal. It is trite law that once a document is amended and another document lodged (amended document), the former is taken not to have ever existed or ceases to exist. This is the stance we took in the case of **Morogoro Hunting**

Safaris Limited vs Halima Mohamed Mamuya, Civil Appeal No. 117 of 2011 (unreported). In that case, the appellant had in her second amended written statement of defence (WSD) included a counter-claim, but in her third amended WSD did not include the counter-claim. A complaint was raised that the counter – claim was not attended to by the judge. That contention was refused by the Court stating that by omitting it in the third amended WSD, the former WSD and the counter –claim earlier raised had ceased to exist. The court stated:

> *"We are saying so for no other reason than the point that upon filing the second amended WSD on 21.7.2007, all the previous WSD, including the first amended WSD of 1.9.2006 which carried the counter claim, ceased to have any effect as they were as good as if they never existed. See the case of* ***Tanga Hardware & Auto Parts Ltd and Six Others v. CRDB Bank Ltd,*** *Civil Application No. 144 of 2005, CAT (unreported) which relied on the persuasive case of* ***Warner v. Sampson & Another*** *[1958] 1 QB 297 in which it was held, inter alia that:-*
>
> > *"...* ***once pleadings are emended, that which stood before amendment is no longer material before the court"***
> > *For this reason, we are not convinced that the appellant's counter claim was erroneously ignored, instead the appellant discarded it. Consequently,*

the eighth ground of appeal lacks merit and we dismiss it."(Emphasis added)

Although that principle was pronounced in a civil case, it equally applies in criminal cases. For similar reasons, by lodging the amended petition of appeal, the petition of appeal and the amended petition earlier on lodged ceased to exist and therefore the learned judge was barred from considering them. Otherwise, our perusal of the record revealed that all the six grounds of appeal as were contained in the amended petition of appeal were considered by the learned judge from page 96 to 103 of the record of appeal and found unmerited. This complaint is, as rightly submitted by the learned State Attorney, baseless and is dismissed.

Next, Ms. Kasambala attacked ground two (2) of appeal as being unworthy of merit. She argued that according to the record, upon the victim missing from the place she was playing with other children, both PW1 and PW4 mounted search of her whereabouts and PW1 was first to hear the victim crying in the forest where she went and found both the victim and the appellant naked and she shouted for help which call was responded to by many people including PW4 who went to the scene of crime and the appellant was pursued and arrested as he attempted to run away. She contended that PW1's evidence was evaluated by the

judge. We entirely agree with her. It should be noted that the appellant's complaint against the two witnesses before the High Court was that, being relatives (members of the same family), they had personal interests to serve when they gave their respective testimonies. In her well- reasoned judgment, the learned judge was firm that they were not barred from testifying in the case and referred to the case of **Edward Nzabuga vs Republic**, Criminal Appeal No. 136 of 2008 (unreported), **Amini Ismail vs Republic**, Criminal Appeal No. 178 of 2015 and **Mustafa Ramadhani Kihiyo vs Republic** [2006] TLR 324 to support her position. In the end she found no reason to discredit them. We endorse that to be the proper position of the law for, in terms section 127 (1) of the Evidence Act, what is important for one to testify is that he must be competent and reliable. As the learned judge was not asked to evaluate the evidence of PW1, what she did was quite sufficient. Besides, she reconsidered her testimony at page 96 of the record and held that she had no interest to serve because she testified on what she witnessed at the scene of crime and was satisfied that the appellant and the victim were found naked and as a result of a hot pursuit the appellant was arrested. This complaint has no merit and we dismiss it.

The appellant raised, in his submission in respect of the same ground, two other issues calling for our determination. First is that PW4 did not explain who gave him clothes when he was sent to the PML office and two, the leader of PML and the hamlet leader of Itumbi area were not called as witnesses to corroborate that evidence. The latter limb of the complaint featured in ground three (3) of appeal hence we reserve it to the time of dealing with it.

Admittedly, the learned State Attorney made an oversight not to respond on the issue where did the appellant get clothes when he was being taken to the PML office. The record is silent on that issue. However, it has no bearing with the commission of the offence. The record of appeal shows that PW1 and PW4 found him and the victim naked and he attempted to flee but he was immediately arrested. We dismiss the complaint for want of relevance in the commission of the offence.

The question of the local leaders of the area not being called to testify which was raised before the High Court as ground five of appeal and determined, featured again in ground three of appeal before us save that, this time, the appellant's complaint has extended to all leaders mentioned by PW1 that they did not testify in court to support what PW1 and PW2 testified. We have no doubt he was referring to PML

leader and the Itumbi hamlet leader. Ms Kasambala countered the argument that, in terms of section 143 of the EA, no certain number of witnesses is required to prove a fact but their credibility and she relied on the Court's decision in the case of **Goodluck Kyando vs R** [2006] TLR 367 to support her argument. She insisted that the prosecution proved the charge through PW1 to PW5 who testified and particularly PW1 and PW4 who found the appellant in the forest naked and PW3 who examined the victim and made a finding that the victim's vagina was penetrated by a blunt object. Definitely, the learned State Attorney's submission is correct. Nothing substantial was done by those leaders that would link the appellant with the commission of the offence. They were therefore not crucial or material witnesses in the case and failure to call them had no serious effects on the prosecution case so as to move this Court to draw an adverse inference on the prosecution case. And, as rightly argued by Ms Kasambala, the strength of the prosecution case was mainly grounded on the evidence by PW1, PW3 and PW4 who were believed by both courts below as being credible. Calling those leaders would therefore add the number of witnesses not substance which this Court had pronounced itself to be of no essence when considering the import of section 143 of the EA in the case of

YOHANNIS MSIGWA vs R, [1990] TLR 148 at page 148 where it held as hereunder: -

> *"As provided under section 143 of the Evidence Act 1967, no particular number of witnesses is required for proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen, and his/her credibility."*

For the above reason, this complaint is baseless and we dismiss it.

In respect of ground four (4) of appeal in which the appellant complained of the allegedly PW2's blood-stained clothes not being tendered in court to prove the charge, without hesitation, Ms Kasambala readily conceded the omission but was of the view that it had no effects to the prosecution case as penetration was sufficiently established by PW3 who medically examined the victim. Much as the stained clothes would add up to the evidence on penetration, but like the learned State Attorney, we find failure to tender them could not displace the fact that the victim was penetrated as was medically established by PW3. The complaint is therefore without merit and we dismiss it.

Failure to consider the appellant's defence evidence forms the crux of the appellant's complaint in ground five (5) of appeal. He, in his written submissions, linked it with the complaint that there were contradictions in the prosecution evidence. The first limb of his

complaint is that his defence evidence that he was indebted to PW1 which raised a possibility of the case being fabricated against him was completely ignored by the learned judge. On her part, Ms Kasambala could not agree with the appellant arguing that both courts below considered the appellant's defence evidence. To be specific, she referred to page 59 for the trial court and pages 101 to 102 of the record of appeal for the High Court. She also urged the Court to discount it for being an afterthought because he did not cross-examine PW1 on that aspect. We agree with the learned State Attorney that this complaint is clearly unfounded. The appellant's defence was adequately considered by both courts below as argued by the learned State Attorney. The record of appeal does not show that the appellant cross-examined PW1 on the allegation of being indebted to her but he raised it during his defence. He thereby missed the boat. The reason is not hard to find that by raising such an allegation belatedly he denied the prosecution witness (PW1) opportunity to offer an explanation about it. Accordingly, we fully agree with the learned State Attorney that this ground of complaint raised by the appellant, as was held by both courts below, was an afterthought. We dismiss it.

We now turn to consider the complaints about the prevalence of the alleged contradictions in the witnesses' testimonies which the appellant thought could allegedly cast doubt in the prosecution case.

The first complaint was that there is a marked difference in the evidence by PW1 and PW4 on how the victim was held at the time of being raped. He pointed out that whereas PW1 at page 9 of the record of appeal claimed that the appellant had held her on his thighs, PW4 at page 30 of the record of appeal said the appellant lay on her top. Ms Kasambala simply discounted the complaint as being not material and does not go to the root of the case which was about the commission of the offence of rape. On our part, we think there is a misconception on the part of the appellant. PW1 never said, in her testimony, what the appellant imputed on her. Page 9 of the record of appeal constitutes facts for preliminary hearing which stated that PW1 found the appellant "akimpakata" the victim on his legs. In terms of section 192 (1) (2) (3) (4) of the Criminal Procedure Act, (the CPA), save for the facts which are recorded in the memorandum of undisputed facts and which the parties sign to acknowledge so, the rest of the facts read out to the appellant during preliminary hearing do not become part of the evidence. It goes without saying that as the appellant denied that fact during preliminary hearing and PW1 never stated so when she testified

in court, that allegation in the facts read during preliminary hearing did not form part of the evidence against which an appeal may lay. The Court clearly pronounced so in **George Claud Kasanda vs Republic,** Criminal Appeal No. 376 of 2017 (unreported) that:

> *"Before we proceed, we find it opportune to remind the courts below and the prosecution that preliminary answers and particulars given prior to giving evidence are not part of evidence as the same are not given on oath (see **Simba Nyagura vs Republic**, Criminal Appeal No. 144 of 2008 (unreported), instead, they serve as general information (see **Nalogwa John vs Republic**, Criminal Appeal No. 588 of 2015 (unreported). On that account, we have no doubt that preliminary answers given during a voire dire examination and facts narrated by the prosecution during preliminary hearing under section 192(1)(2)(3)(4) of the CPA are not an exception unless admitted and listed in the memorandum of undisputed facts which is later signed by all the parties to the case. The reason is that they are also not given on oath..."*

Applying the above legal stand point in our instant case, only PW4's evidence remains that the appellant was found on top of the

victim. Consequently, the alleged contradiction ceases to exist. We dismiss the complaint.

Yet again before this Court, the appellant alleged that he was convicted irrespective of the existence of contradictory evidence on the date the victim was sent to hospital. The appellant had presented same arguments before the High Court for determination. He contended that while PW1 said it was on 1/5/2020, PW3 said it was on 2/5/2020 when he received and attended the victim. Connected with it is a complaint that while PW4 said the victim was admitted in hospital, PW3 never stated so. Ms Kasambala resisted that contention arguing that the evidence on record by both PW1 and PW4 is clear that the victim was first, on 1/5/2020,, taken to Matundasi dispensary for first aid and were referred to Chunya District Hospital where they went on 2/5/2020. Indeed, that is what the record tells and the High Court, on first appeal, rightly held so at page 102 of the record of appeal. We therefore have no reason not to accept the learned State Attorney's submission. Accordingly, the alleged contradiction is non-existent. The complaint is baseless and we dismiss it.

Regarding whether the victim was admitted in hospital for treatment or not, we would let PW1's evidence at page 18 of the record

of appeal tell it all on what transpired when she took the victim to Chunya District Hospital:

> *"Hon. Magistrate, to the Hospital the doctor received me, admitted the victim, she was medically examined and got treatment. I was then discharged with the victim and availed the victim medicine (syrup) and "vidonge" on 02/05/2020. The Doctor filled up the PF3 and given (sic) it to me. I send it to the police station."*

We are not persuaded that the above extract suggests that the victim got admitted and spent a day or days in hospital being treated as the appellant seemed to have construed it. Instead, it is our conviction that the excerpt simply explains that the victim was retained for some time while being examined and treated on the 2/5/2020 and after treatment, PW1 and the victim were let to go home. PW3 was clear in his testimony that he received, examined and treated the victim on 2/5/2020. No contradiction, therefore, existed. We dismiss the complaint.

Another issue raised by the appellant in the written submission and calling for our resolve is that PW5, in his testimony claimed at page 32 of the record of appeal to have had recorded the appellant's

cautioned statement but did not produce it in court as evidence to prove the charge instead, he tendered the clinic card (exhibit PE2) which he was not a competent witness to tender he not being PW1 or PW4 (parents) without explaining where he got it.

We shall begin with the first limb. Unfortunately, the two issues, again, escaped Ms. Kasambala's attention hence she did not submit on it. However, it appears to us that there is a misconception on the part of the appellant. The record of appeal shows, at page 32, that PW5 recorded the statement of the appellant after he had interrogated him. He did not state that the appellant, in the course of interrogation, confessed to the commission of the offence something which would have led to his cautioned statement being recorded. It becomes obvious that what was recorded was not a cautioned statement as the appellant claimed. The appellant's contention thereby collapses.

The second limb of the complaint is about PW5's competence to tender exhibit PE2 and where he got it. This is rather a simple issue to answer. Page 32 of the record of appeal is vivid that PW5 was the investigator of the case and he interrogated two witnesses, recorded their statements and received the clinic card of the victim (exhibit PE2) so as to ascertain her age which showed that the victim was born on 1/1/2017 and therefore was 3 years and five months when she was

raped. Certainly, he got exhibit PE2 from the two witnesses and being an investigator who had possession of it was a competent witness to tender it in court as exhibit. The Court had an occasion to outline the categories of witnesses who can tender exhibits in court in **The DPP vs. Mirzai Pirbakhsh @ Hadji and Three Others**, Criminal Appeal No. 493 of 2016 (both unreported)]. It stated thus:

> *"A person who at one point in time possesses anything, a subject matter of trial, as we said in* ***Kristina Case*** *is not only a competent witness to testify but he could also tender the same. It is our view that it is not the law that it must always be tendered by a custodian as initially contended by Mr. Johnson. The test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time, albeit shortly. So, a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question."*

Since PW5 obtained exhibit PE2 in the course of investigation and possessed it, he was therefore competent to tender it in court. This complaint collapses too and is dismissed.

Lastly, we wish to address the issue we raised *suo motu* at the hearing of the appeal. It was whether the victim's evidence was taken to its completion and the obtaining consequences. Briefly, the victim who testified as PW2, appeared before the trial court to testify on 16/9/2020. She was not affirmed as she did not understand the nature of an oath but, as the law now stands, she undertook the promise to tell the trial court the truth and not lies and started testifying led by the public prosecutor. Somewhere midway, she started crying. As to what followed, we again let the record speak itself:

> *"**Court**: The witness is unable to continue testifying in court, she is crying.*
>
> ***Sgd. O. N. Ngatunga- SRM***
>
> ***16/09/2020***
>
> ***Xxed by Accused***
>
> *The witness told accused she doesn't want answering anything to him.*
>
> ***Rexxed by PP** – Nil*
>
> ***Court**: Section 210 (3) of the CPA, Cap. 20, R. E. 2019, complied with.*
>
> ***Sgd. O. N. Ngatunga – SRM***
>
> ***16/09/2020"***

The above state of affairs prompted us to invite the parties to address us on the propriety of what transpired in court. The appellant, a layperson not trained in law had nothing to contribute. On her part, Ms Kasambala was quick to concede that the evidence by the victim was incomplete and it was improper for the trial court to allow the appellant cross-examine her and if at that was proper, the victim wrongly refused to answer the questions put to her by the appellant during cross-examination. She accordingly invited the Court to disregard that evidence. She did not end up there as she still insisted that, even in the absence of the victim's evidence, there still remained evidence on which the appellant's conviction can be grounded. She stuck to her guns that the charge was proved through the evidence by PW1, PW3, PW4 and PW5.

It is trite law, and we need not cite any authority to that effect, that the prosecution is bound to prove the charge beyond reasonable doubt for it to secure a conviction. It is thus obligated to call witnesses to produce evidence in support of the charge guided by the prosecutor by way of examination of the witness (See section 229 (1) of the CPA). Examination of a witness is therefore a process of obtaining from the witness a complete orderly story from him in his own natural way. (See a book by Benjamin Odoki: **A Guide to Criminal Procedure in**

Uganda, published by Law Africa, Third Edition Page 159). The order of examination of witnesses is provided in sections 146 and 147 of the EA. Section 229 (3) of the CPA imperatively requires each witness to be examined until the prosecution closes the examination before he is subjected to cross-examination by the accused or his advocate. That section provides:

> " *Where the accused does not employ an advocate, the court shall,* ***at the close of the examination of each witness for the prosecution,*** *ask the accused person whether he wishes to put any questions to that witness or make any statement." (Emphasis added)*

From those provisions, it stems out clearly that a witness should be left to give evidence to its conclusion in every case before being subjected to cross-examination.

The excerpt above plainly and clearly shows that the above condition was not met in the instant case. Amidst her testimony, PW2 (the victim) started to cry and the trial court made a finding that she could not continue testifying. Her evidence was not completed. She could, in the circumstances, not be subjected to cross-examination.

We have taken note that the victim was a child of tender age in terms of section 127 (4) of the EA and gave unsworn evidence. But her evidence is not privileged or absolute but may be challenged by way of cross-examination. The rationale is that her evidence may have adverse consequences to accused persons. The Court cautioned so in the case of **Protas Kagaruki vs Republic**, [1987] T.L.R. 152 in which a child witness of eight (8) years was not cross-examined. The Court stated that:

> *"The unsworn evidence of the boy could be cross-examined as well, as a matter of trite law. After all, his evidence as a witness affects the fortunes of the accused person and so must be tested by cross-examination."*

Contrary to the above position of the law, when subjected to cross-examination, the victim refused to respond to the question put to her by the appellant. That conduct amounted to denying the appellant his right to cross-examine her hence a contravention of the mandatory requirements of section 229(3) of the CPA. Her evidence could not therefore form the basis of a decision of the court. It is an illegal evidence hence should be disregarded. Such is the stance the Court took

in the case of **Ex-D. 8656 CPL Senga Idd Nyembo and Seven Others vs Republic**, Criminal Appeal No. 16 of 2018 (unreported).

> *"We must emphasize that a party to court proceedings has the right to cross-examine any witness of the opposite party regardless of whether the witness has given his testimony under oath or affirmation (as the case may be) or not. This right is a fundamental one to any Judicial proceedings and thus the denial of it will usually result in the decision in the case being overturned. Unless, a party has waived his right to cross-examine cannot be taken as legal evidence unless it is subject to cross-examination.* ***Consequently, the testimony affecting a party cannot be the basis of decision of the court unless the party has been afforded the opportunity of testing the truthfulness by way of crossing-examination (See Kabulofwa Mwakalile & 11 Others v. Republic*** *(1980) TLR 144"*
>
> [Emphasis added].

The above is still good law. We subscribe to it. By analogy, we hold that the victim's evidence deserved no consideration in grounding the appellant's conviction.

We, however, fully agree with Ms. Kasambala that, even in the absence of the victim's evidence there still remains evidence on which the appellant's guilt stand proved pointing to the testimony by PW1, PW3, PW4 and PW5. Although the best evidence of a rape case comes from the victim (prosecutrix), it is also settled position of the law that even in the absence of evidence by the victim a charge can still be proved by other witnesses. (See **Ismail Mnyawami vs Republic**, Criminal Appeal No. 337 of 2008 (unreported). For avoidance of doubt, in **Haji Omary vs. Republic**, Criminal Appeal No. 307 of 2009 (unreported) in which tender age of a child witness prevented him from testifying, the Court lucidly stated:

> *"The law recognizes that there are instances where charges may be proved without victims of crimes testifying in court. Take murder for example where the victims are deceased. Senility, tender age or decease of the mind may prevent a victim from testifying in court (See section 127 of the Evidence Act) but this does not mean that a charge cannot be proved in the absence of the victim's testimony. In this case the victim was a four year old child. He was indeed a child of tender age. Though we agree that ideally the reason for the non-taking of the testimony of the victim should have been entered on record however such failure neither weakened the case for the prosecution nor resulted in a failure of justice."*

We, indeed, agree that the charge was proved by the remaining witnesses as rightly argued by the learned State Attorney. It is clear from PW1 and PW4 that they found both the appellant and the victim naked in the forest when they responded to the cry by the victim and upon an attempt to flee, the appellant was arrested by many people who responded to the cry for help. The search for the victim began at 16:00hrs on 1/5/2020. Both witnesses identified the appellant as being the person they saw in the forest and attempted to flee. PW3 examined the victim and established that she was penetrated by a blunt object and PW1 and PW5 as well as exhibit PE2 were loud and clear on the age of the victim that she was born on 1/1/2017 therefore 3 years and five months old hence a child below ten years. The appellant, in his defence, said he was arrested on the same date by persons he did not know at about 18:00 hrs which time closely matches with the time the victim and the appellant were found naked in the forest. That way, we find the defence evidence to have had advanced the prosecution case. Both the evidence by those four witnesses who were believed by both courts below and circumstances point at the appellant as being the ravisher and his defence that the case was a frame up because he was indebted to PW1 was, as demonstrated above, rightly rejected as being an

afterthought. The appellant was therefore properly convicted and sentenced.

Before we conclude, let us, albeit briefly, address one more issue we find pertinent in this appeal although it was not raised as a ground of appeal but may be useful in the future. On our own judgment of the proceedings recited above subsequent to what transpired when PW2 suddenly started crying and could not proceed testifying followed by her refusal to respond to any question put to her by the appellant during cross-examination, presented a novel situation that left the trial magistrate unaware of the proper course to take as a result of which he put himself at guns and presumed that PW2 had closed her testimony and permitted the appellant to exercise his right to cross-examine her. Admittedly, such occurrences are rare and, not surprisingly, our research to look for any authority on it proved futile. However, we find it opportune for us to provide guidance on what we think prudence demanded in the circumstances.

We are not convinced and it does not occur to us, in the first place, that PW2 intentionally refused to testify to which situation section 199 (1) of the CPA would apply by declaring her a refractory witness and deal with her in terms of section 199 (2) of the CPA. Being a child

witness, she must have been either overwhelmed or intimidated by the circumstances she found herself subjected to when testifying. The trial magistrate was thereby obligated to exercise due patience to allow her calm down by briefly adjourning the proceedings or adjourning the same to another date to allow her to calm down and the court to prepare a conducive environment for her to complete her testimony. Unfortunately, the trial magistrate seems to have been impatient and presumed that she had completed her testimony. That was not proper. Courts must exercise patience and courtesy to witnesses appearing before them so as to allow them testify comfortably. It is through their testimonies that the truth is revealed and justice is done.

As for the refusal by PW2 to answer the appellant's questions during cross-examination, the tone of the words reflected on the record, properly gauged, suggests that she was either unhappy with the questions put to her, obtaining atmosphere in the court room and or nature of questions asked or the manner they were put to her. On this, we would advise a magistrate faced with such a situation to, after creating a favourable environment for a child witness to testify, to also adopt and apply the guidelines provided in the The Law of The Child (Juvenile Court Procedure) Rules, 2016, GN. No. 182 published on 20/5/2016 (the Rules) applicable in proceedings before the Juvenile

Court in controlling the conduct of cross-examination to a child witness as provided under Rule 45 (4), (5) and (6) of the Rules:

> *"(4) A person who is cross-examining an accused* ***child or a child witness****, shall,*
>
> *(a) use simple language that the child can understand;*
>
> *(b) ask short direct questions; and*
>
> *(c) avoid confrontation, bullying or hectoring of the child.*
>
> *(5) The court may, during and at the close of each witness's evidence ask the witness questions necessary and desirable –*
>
> *(a) to clarify the evidence;*
>
> *(b) for the purpose of establishing the truth of the facts alleged; or*
>
> *(c) to test the credibility of the witness.*
>
> *(6) The court shall control and guide the conduct of parties to the proceedings by limiting irrelevant questions or needless repetition of questions."*

Much as we acknowledge that the Rules were designed to apply in proceedings before the juvenile courts, we see no harm if they are applied in all our trial courts and we are certain, if they are adopted, applied and strictly adhered to in trials involving children as witnesses in

ordinary courts, it will be easy for the trial courts to efficiently elicit evidence from them and thereby ensure that justice is done.

All said, the appeal fails in its entirety. We dismiss it.

DATED at **MBEYA** this 23rd day of February, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2023 in the presence of the Appellant in person and Mr. Stephen Rusibamayila, learned State Attorney for the respondent/Republic is hereby certified as a true copy of original.

D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL