IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 84 OF 2004
(Original Cr. Case No.555/2003 Kisutu RM's Court)

1. **NGUZA VICKING @ BABU SEA**
2. **PAPII S/O NGUZA**
3. **NGUZA MBANGU**
4. **FRANCIS S/O NGUZA** } .....**APPELLANTS**

VERSUS

REPUBLIC.....**RESPONDENT**

JUDGMENT

MIHAYO, J:

The four appellants, Nguza s/o Vicking @ Babu Sea, Papii s/o Nguza, Nguza s/o Mbangu and Francis s/o Nguza were charged tried and convicted for ten counts of rape contrary to section 130 (2) (e) and 131 A (1) of the Penal Code as repealed and replaced by sections 5 and 7 of the Sexual Offences Special Provisions Act No.4 of 1998 (commonly referred to as SOSPA and hereinafter to be referred as such) and eleven counts of unnatural offences contrary to section 154 (1) of the Penal Code as repealed and replaced by section 16 of SOSPA. They were sentenced to life imprisonment. Each of the appellants was also ordered to pay a compensation of Tanzania shillings two million to each of the ten complainants. They are dissatisfied and have appealed to this court against both conviction and sentence. They are also challenging the order of compensation.

In this court, as in the court below, they were represented by Herbert H. Nyange of Nyange & Co. Advocates. The learned counsel filed a petition of appeal containing 25 grounds. As will be demonstrated shortly, he argued some of the grounds separately, others he argued together and others, he abandoned. The respondent Republic was represented in this court by Mr. Masara, learned Senior State Attorney who was assisted by Mr. Mganga, learned State Attorney.

It was alleged that the appellants, jointly and together on divers days unknown, between the months of April 2003 and 8th day of October 2003 did have carnal knowledge and/or carnal_knowledge against the laws of nature on ten girls aged between six and eight years who were pupils at Mashujaa Primary School, Kinondoni District in Dar es Salaam.

The facts of the case are not very complicated. Although it was alleged that the offences were committed since April of 2003, it was not until on 8/10/03 that the blood chilling discovery began to unfold. Candy David Mwaivaji (PW1) lived at Sinza Palestina with her husband, her son, a house girl called Selina John and Gift Kapwapwa, (PW2) a daughter of her sister in law. PW2 was a class one pupil at Mashujaa Primary School, in Sinza, Dar es Salaam. On this day at 8.30 pm. PW1 was in her room with PW2 and her son. She felt a foul smell coming from PW2 and told her to go and have a bath. Still the smell did not end. As she was tired she decided to deal with this matter on the following day and went to sleep. In the morning of

9/10/03, when PW2 had already gone to school, PW1 asked Selina as to why there was foul smell coming from PW2. Selina narrated that she once saw PW2 with Sh.200/= and on asking her she said she got the money from Babu Sea and on asking who is Babu Sea, Selina said it was Nguza, the musician. This raised her suspicion. She waited for PW2 to came, from school. When the latter came, PW1 asked her as to why Babu Sea would give her money. And on promising that she would not beat her, PW2 narrated what turned out to be a very explosive discovery.

She said one day as she was going to school, Babu Sea who was latter identified to be the 1st appellant called her, asked her where she lived and with whom. He then asked her if she was being given school money, to which she replied that it was not daily. The 1st appellant is alleged to have given her chewing gum and promised that he would be giving her money. Then one day as she was going home from school, the 1st appellant called her, gave her a soda, took her into his room, told her to close her eyes, tied her with a black peace of cloth over her eyes, undressed her, applied an ointment in her private parts and raped her. During the process the 1st appellant also told her to suck his penis, which she did.

She was not alone. She told PW2 that she had gone to the 1st appellant' s house with her friends whom she mentioned. After she had been told this sad story, PW1 did a visual examination of PW2's private parts and found fresh blood and pus oozing there from. Her immediate reaction was to take PW2 to hospital where she was

turned down and told that this was a police case. At around 8.00 pm. of the same date 9/10/03 she reported to Urafiki Police Station, was given a PF3 with which she took PW2 to Mwananyamala Hospital after being referred there from Magomeni Hospital. Examinations revealed that PW2 was infected with gonorrhea. She was treated.

On the following day (10/10/03) PW1 went to see the authorities at the school where PW2 was attending and explained the story as told by her. She requested PW2's class teacher to assist find the truth about the other children mentioned by PW2. On 11/10/03 PW1 went to police to return the PF3 given to her before and then, with the assistance of her house girl she went to show the police the home of the 1st appellant. Latter that Saturday, PW1 left with PW2 when the latter went on identifying the houses of her friends who had been subjected to the same sexual acts, starting with Alisia Lungino (PW3). This exercise spiralled to the ten (10) complainants. As the 1st appellant and his three children were mentioned as the perpetrators, they were all arrested and charged, together with one Sigirinda w/o Ligomboka, who was acquitted.

The appellants, severally and together relied on the defence of *alibi,* after complying with the provisions of section 194 (4) of the Criminal Procedure Act 1985, which says:-

> *"Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case."*

The notice above mentioned is couched in the following language:-

> *"**TAKE NOTICE** that on the 1st day of November 2003 when this case shall be called for hearing and/or any date subsequent thereto to which hearing may be adjourned the Counsel for the accused persons shall pray to be on record that the accused persons intend to rely on the defence of an alibi (sic)."*

Whether this notice was adequate shall be considered latter in this judgment. Suffice it to say that it was the defence of all the appellants that the acts complained of could not be committed in House No.607 Sinza "B" Dar es Salaam (hereinafter referred to as "607" only) because that house was always perpetually with people during the alleged times. The first appellant said in defence that he plays music with Achico Band which does its practices at 607 from Monday to Friday. He said he does not live in 607. The 2nd appellant said he plays music with F.M. Academia which does its daily practices at Chezndemba Club. The 3rd appellant said he is the band leader of F.M. Academia and would also be at daily practices at Chezndemba Club. The 2nd appellant also told the Court of his travels in the regions between August and October of 2003 and how he, with other companions used the car belonging to the 3rd appellant. It appeared common ground that practices at the bands would commence around 8 am. to noon, have a short break and then practice from 3 to 6 pm from Monday to Thursdays and to about midday on Fridays as they would be preparing to perform to mark weekends. The 4th appellant told the court that as a student he would be at school always and would not possibly be at 607 during the alleged times as he left for school in the morning and came back in the evening.

The entire case could stand, or fall, on credibility of witnesses, corroboration and identification. The trial Principal Resident Magistrate found the ten star witnesses credible and believed their testimonies. She also found credence in the evidence of Dr. Petronila Ngulai (PW20) and PW1. She therefore convicted the appellants as charged and acquitted the 5th accused.

In my opinion, this was not a very difficult trial. It was made so by the temperaments of learned Counsel, who pushed the trial magistrate to nearly breaking point. There were complaints of bias, refusal to summon witnesses, rejection of some evidence and even refusal and/or deliberate failure to record some of the evidence! I have carefully gone through the typed transcripts and the handwritten proceedings, I have not been satisfied that the accusations are justified. I will comment further on this when dealing with the last two grounds of appeal.

The petition of appeal was filed on 30th June 2004 together with a letter, addressed to the Registrar with nine annexures which referred to various letters written to the court of Resident Magistrate in respect of these proceedings. I do not think that was proper. Matters which were not tested in the lower court cannot form part of the record. Be that as it may, I have gone through all the letters and documents. They all allege an iron fisted stance on the trial magistrate against the appellants and their counsel. They do not allege serious procedurals irregularities. A magistrate is a human

being capable of losing temper sometimes. A trial magistrate can sometimes be moody. All that is not condoned by the process of the administration of justice but it is to be expected. When it happens, such that it does not please counsel or his clients it cannot be basis for alleging bias against the trial magistrate. The learned counsel should leave wisdom to prevail, submit himself to the authority of the Court and let proceedings move on. I say no more on this.

In dealing with the grounds of appeal filed, I will start with ground number 9 which says:-

> *"The trial court erred in not conducting* ***voire dire*** *as by law required."*

Counsel for appellants argued, with a lot of force, that the failure by the trial Principal Resident Magistrate to conduct *voire dire* examination on the ten young victims vitiated the proceedings. He referred the Court to a string of cases: **Dhahiri Aly v R. [1989] TLR 27; Gabriel s/o Maholi v R [1960] E.A. 159; Nyasani s/o Bichawa v R [1958] E.A 90 and James Bandoma v R. Criminal Appeal No.93 of 1999 C.A. Mbeya Registry (unreported)**.

The learned Senior State attorney for the respondent argued with equal force to the effect that *voire dire* was conducted whereby the trial magistrate recorded her findings. But even if it is found that *voire dire* was not conducted to the required standard, that should not vitiate proceedings. This is because of SOSPA which amended section 127 of the Evidence Act. Mr. Masara went on to tell the court

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that even before the amendment of section 127, where voire dire is found not to have been done, the evidence of the witness is treated as normal evidence. This was the final finding on the issue in the **Bandoma** case. The leaned Senior State Attorney also referred the court to the most recent case of **Deemay Daati, Hawa Durbai and Nada Daati v Republic Criminal appeal No.80 of 1994 C.A. Arusha Registry** (unreported). He concluded by saying that if it is found that no *voire dire* examination was conducted, the evidence of the ten young girls will be just lowered to require corroboration but not to vitiate the proceedings. He said on the strength of the case of **Athumani Ali Maumba v R. criminal Appeal No.95 of 1989** (unreported) there was a lot of corroboration evidence from other witnesses.

Voire dire examination is governed by section 127 (2) of the Evidence Act which has this to say:-

> *"127(2) where in any criminal cause or matter any child of tender years is called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, to be recorded in the proceedings he is possessed of sufficient intelligence to justify the reception of his evidence, and understand the duty of speaking the truth."*

What does this mean? It is settled, through case law, that section 127(2) requires the proceedings of the *voire dire* examination be recorded. All the question and all the answers thereto must be recorded. This settled principle of law is to be found in the **Daati** case (supra) where, on 5th day of October 2004, the Court of Appeal said:

"We also agree that it is apparent the trial magistrate did not comply with the provisions of section 127(1) (sic) of the Evidence Act, 1967. From the record at page 20 of the proceedings it is apparent that when PW2 was called on to testify, it is indicated: "Examined and satisfied the court that can give a sworn evident; sworn and states" Section 127(1) (sic) of the Evidence Act, 1967 provides to the effect that in a Criminal case where a child of tender years is called as witness does not, in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath or affirmation if in the opinion of the court ***to be recorded in the proceedings*** *– he is possessed of sufficient intelligence ..."*

In the present case, what took place before any of the ten young victims gave evidence is not very different with what took place in **Daati.** For example before PW2 (7 years) gave her testimony, this is what transpired:-

"Court: Cross examine her (sic) to know if she knows the difference between the truth and lies and oath

Court: After interrogating/Examining the child I have found out that she knows the difference between the truth and lies but does not how about oath so her evidence is taken without oath in camera."

And before 8 year old Alisia Lungino (PW3) gave her evidence, the learned Principal Resident Magistrate recorded as follows:

"Court: Holds voire dire, and is satisfied that she knows the difference between the truth and lies and what is to swear. She is sworn"

What was recorded before the 7 year old Rehema Mgweno (PW5) gave her evidence is this:

> *"Court: I have conducted voire dire and conclude that she knows the difference between the truth and lies but not oath. Evidence unsworn."*

The rest of the child witnesses are not any different. The *voire dire,* if any was conducted in the same style. This is what the courts have repeatedly held to be improper and to equate it with no *voire dire* at all. The reason for this is not far to get. The conclusions of the trial magistrate recorded after a *voire dire* examination may be challenged with success. This is what happened in the **Bandoma** case. In that case (supra) their Lordships made reference to the case of **Hemed v R. [1987] TLR 117** where the opinion of the judge was successfully challenged in the Court of Appeal of Tanzania which held that the opinion was not reasonably open to him. Mroso, J.A. went on to say:

> *"The Court of Appeal was able to came to that conclusion because it looked at the record of the voire dire examination and noted that although the child was in Std.III he was unable to tell the court the names of his parents and was not even aware that his sister had died. Therefore his evidence should not have been taken."*

On the foregoing, I agree with counsel for appellants that the provisions of section 127 (2) were breached as no *voire dire* examination was conducted on Julieth Mkore 8 years (PW8) Isabela Angonwile (PW9) 8 years, Yasinta Mbele, 8 years (PW11) Dei Jaffari 7 years (PW13) Ageneta Sia Wendeline 6 years (PW14) Amina Shomari 7 years (PW15) and the other three witnesses mentioned above.

What is the effect of that lapse? This is what I now turn to. I can trace the development of the law on *voire dire* examination from the case of **Gabriel Maholi** (supra) where, Sir Alastair Forbes, VP had this to say at page 161:-

> *"In the instant case the learned judge satisfied himself that the child tendered as a witness was sufficiently intelligent to give evidence, but did not, so far as appears from the record satisfy himself that the child understood the difference between truth and falsehood. Such an omission could be fatal to a conviction in a case where the child's evidences is vital."*

This position was repeated twenty nine years latter in the case of **Dhahiri Aly** (supra) where Mushi, J. quoted from the East African case of **Nyasami s/o Bichawa v R. [1958] E.A. 90** and concluded:

> *"In this case, the proceedings do not show that the learned trial magistrate complied with the mandatory provisions of the law with the result that the evidence of PW2 Asha was wrongly admitted and acted upon."*

And nine years after **Dhahiri** the case of **James Bandoma** (supra) was decided. The court seemed to say that where no *voire dire* examination is conducted the evidence is treated like any unsworn evidence of a child of tender years and would, as a matter of practice require corroboration. **Bandoma** did not say the trial is vitiated nor that the evidence so tendered becomes worthless.

The answer to the question I posed is to be found in the **Daati** case (supra) where the Court of Appeal, Lubuva, J.A. had this to say:

> *"It is settled law that the omission to conduct* ***voire dire*** *examination of a child of tender years brings such evidence to the level of unsworn evidence of a child which required corroboration."*

But with SOSPA, the requirement of corroboration is now no longer as necessary as it used to be. Section 127 has been amended by adding sub section 7 which has this to say:

> *"Notwithstanding the preceding provisions of this section where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence and may after assessing the credibility of the evidence of the child of tender years or, as the case may be of the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."*

Therefore, whereas I agree that there was no *voire dire* as known to law, the proceedings were not vitiated. This ground of appeal therefore fails.

Ground of appeal number one complains of the trial magistrate's failure to consider that house 607 was never at any one time conducive to sexual offences being committed therein as it was never vacant. Counsel for the appellant traversed through the evidence of the defence witnesses and concluded that these

witnesses had established that 607 was always and every time with people. He referred the court to the evidence of DW6, DW7, DW8, DW9, DW11, and defence witness number 18. The evidence of these witnesses taken together is to the effect that Achico Band musicians were holding their practices there and that the mother of 1st appellant, one Bernadeta Kaji, a step son of 1st appellant one Francis Elombee and a house girl one Furaha Lesi were staying there. The 1st appellant shifted from 607 in 1999 in obedience of his late wife's wishes and went to live at Sinza kwa Remi with one Farida Abdu (DW10) at the house of one Hadija Saidi @ Mama Kumekucha. It was not also seriously controverted that the 2nd appellant, like most musicians of his generation changed bands frequently. He started his music carrier with Achico Band, then went to Diamond Sounds , then FM Academia, then to F.M. International, then Beta Musica, then to TOT and at the time of his arrest he was back at F.M. Academia and was living at Makumbusho House No.111 with a person he called his wife to be, one Mariam Othman Bongi (DW13). The 2nd appellant told the court that he was arrested at 607 when he had just come from Arusha. The 3rd appellant lived at Sinza C in a house of one Emanuel Peleka Moyo (DW11) with his fiancée one Mirey Mbombo where according to DW11 he shifted out in September 2003. It would appear he went to live at Sinza Block E No. 374 in a house belonging to one Salama Alan Masawe (DW18). The 4th appellant lived in 607 but as a school boy, it was the case for the defence that he could not have been at that house during the alleged times.

The Republic's position was that the presence of such other people in 607 could not stop the alleged offences being committed. Moreover, 607 had two doors leading to the outside such that one entering through the hind door does not have to pass through the veranda. This, Mr. Masara said, was also observed by the court when it visited the *locus in quo*. He argued further that the musical exercises was a version of the appellants never witnessed by Ass. Superintendent Joseph Shilingi (PW22) who was the lead investigating officer in the case. Finally the respondents asked this court to consider the evidence of the victims, who said once they were found in 607 by woman and beaten.

I think this ground of appeal should not detain us long. The answers would be found once we come to deal with the credibility of the prosecution witnesses. But as said by the respondents, taking into account the set up of the house as observed by the trial Principal Resident Magistrate when she visited the *locus in quo*, it was not impossible for such offences to take place even when other people were there. The house is not made up of a single room nor a single entrance. The other people around, if they were there at all, would not be in every room at every time. The possibility to commit sexual crimes was there. I am of the settled opinion that this ground of appeal must also be dismissed. I so do.

The 2nd ground of appeal complains about the trial magistrate failure to consider the appellants' defence of *alibi*. I laid down the nature of the *alibi* when I was giving a summary of the defence case earlier in this judgment. I have also delt with it when giving the

appellants' version of where they lived. Did the learned Principal Resident Magistrate fail to consider this defence? This is what I shall now endeavour to answer.

As said earlier, a notice under section 194 (1) of CPA had been given. This provision was inserted in the law for a purpose. It was not an embellishment. The purpose was to give due time to the prosecution to gather evidence, if any, in rebuttal. Although there was a notice of the *alibi,* I am of the considered opinion that it was not adequate. The respondents did not complain about it, but that cannot stop this court from making this observation. My reading of sub section 4, 5, and 6 of section 194 of the Criminal Procedure Act gives me the impression that it is not enough just to say the defence will rely on an *alibi* without giving the particulars of such *alibi.* Such failure will result in the provisions of section 194 (6) to be invoked. The subsection has this to say:-

> *"If the accused raises a defence of alibi without having first* ***furnished the particulars of the alibi*** *to the court or to the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence."*

Having said that, let me now give out a brief of what the respondents are saying.

The learned Senior State attorney took the view that the evidence taken as a whole does not make it impossible for the appellants to be at 607. All the appellants were arrested there and an attempt to say that the appellants could not meet there has no basis. The 1st and 3rd appellants lived in the vicinity of 607. Although

the 3rd appellant said he lived with DW9, and the latter said they were always together which is humanly impossible, there was possibility for the 3rd appellant to be alone. The *alibi* of the 2nd appellant is very weak, he said. learned Senior State Attorney said the evidence of DW25 did not assist to explain that the 2nd appellant could not be at 607. As to a notebook tendered by DW25 the respondents say its acceptance as exh. D4 was wrong on the strength of the case of **Ezekia v R. [1972] E.A. 427**. The respondents concluded by saying that the evidence on behalf of 2nd appellant does not exclude his being at 607 in Dar es Salaam at most of the times.

I think a defence of *alibi,* like any other defence can be rejected in three ways. First, by considering it against all the evidence on record and rejecting it, secondly by believing the evidence for the prosecution and thirdly by considering the totality of the evidence and making a finding that such defence is not open to the accused persons. If the defence, like in this case, say the appellants could not have been at 607, but the prosecution leads evidence to show that the appellants actually met Mr. X at 607 and the court believes the prosecution, this has the effect of rejecting the defence of *alibi.* Although the court may not say so in open terms, the defence will be somewhere at the back of the mind of the magistrate, or judge. If the court believes the case for the prosecution without legal or factual justification, that would be failure to consider the defence of *alibi* if it had been fronted, and a higher court may interfere. In order that I may answer the complaints under ground 2 properly. I will turn to grounds ten and eleven of the petition of appeal.

The two grounds of appeal are framed as follows:

> *"10. The trial court erred in not finding that the prosecution evidence was falsified.*
>
> *11. The trial court, having correctly found the children's evidence on the 5th accused as being hazy and that it was outweighed by the defence case thus correctly disbelieving it, erred in not discrediting their evidence as unworthy of belief."*

Arguing these grounds, learned counsel for appellants attacked the failure of Dei Jaffari (PW13) to show the toilet where they used to be washed after the sexual acts. He attacked the conflicting dates of the arrests as given. He attacked the evidence of PC Samwel (PW23) in saying that he went to the house of 1st appellant in company of one Selina John who was not called to testify. He attacked the evidence of PW1 and PW2 in relation to the evidence of PW20 who said PW2 was not sexually assaulted. The learned counsel also did complain about the fact that whereas PW5 said she was sexually assaulted and that PW6 supported this in her testimony, PW20 said there was no sexual act committed on PW5. There was also a complaint from learned counsel for the defence on the failure to have an independent witness when a search was conducted at 607.

It did not end there. Learned counsel for the appellants also complained about the evidence of the children as regards to the 5th accused who was acquitted. The children who testified, or some of them told the court that the 5th accused taught them English, an allegation denied by all the teachers. Counsel then asked, if the children lied to court against the 5th accused why not lie against the

appellants? Learned counsel for the appellants made reference to the cases of **Mathias Timothy v R. [1984] TLR 86 and Musa v R. [1970] HCD 278** as authority to what a court should do when there is falsified evidence. He prayed to the court to discredit the evidence of the children against the appellants as the lower court had done in respect of the 5th accused.

The respondents say that was not so. Mr. Masara was emphatic that the evidence for the prosecution against the appellants was credible and it remained so even after very vigorous and rigorous cross examination from the defence counsels. He said failure by PW3 to show the toilet could be a result of a genuine lapse and not falsification. PW13 lead the court through the rooms showing all areas. A person can forget something especially a young child of 7 years. The learned Senior State Attorney referred me to the case of **Evarist Kachembeho v R. [1978] LRT 70** to show that forgetting does not mean lack of knowledge. On the statement of PW.1, there had been complaints from the appellants' counsel that it was not know when it was taken and could therefore, be a falsified one. The respondents said according to the evidence of Dt. Station Sgt Gervas, (DW31) he recorded the statement on 11/10/03.

Responding to the submission that whereas PW1 said PW2 was found infected with gonorrhea, the doctor found no infection, the learned Senior State Attorney said the date of the 1st examination with PW1 present was 10/10/03 but PW20 did examine PW2 on 22/10/03 when the infection could have been treated. He concluded by saying there is enough explanation for that finding by the doctor

and not falsification. On the lack of an independent witness during the search at 607, the respondents said there was one, Mr. Mnzava, and that there was no requirement that he be a ten call leader like in the single party era.

The acquittal of the 5th accused was not because the prosecution witnesses had lied but because there was no evidence of active participation by her. The respondents say that there was no contradiction that the 5th accused taught in class I. The only contradiction was on teaching English. She was charged on aiding and abetting the commission of an offence and under the law in the case of **Makokoi Chandema v. Hassan Mtete CA Mbeya Criminal Appeal No.143 of 1999** (unreported) she could not be convicted. The evidence regarding the non-teaching of English cannot make all the rest of the evidence as fabricated. The respondents made reference to the **Tomothy** case as well.

The learned Senior State Attorney replied further that although there was a lot of submissions by learned counsel for appellants on falsification, there was no statement as to who would falsify the evidence against the appellants and why. There was no explanation as to why 10 children should lie against the appellants. One of the appellants (3rd appellant) said he was framed because he was famous. The respondents said there were other famous musicians, even more famous, but they are never framed, let alone by 10 victims who told such ghastly stories about the appellants. After the incidence was discovered, some of the children were removed from

the school to other schools. The Senior State Attorney prayed that the two grounds be dismissed.

The trial Principal Resident Magistrate analysed the case for the defence and the prosecution. With respect, I think she went too much into the small contradictions on the case for the defence. The law on burden of proof has been long settled. Contradictions cannot form the basis of a conviction. For as it was stated in the case of **Jonas Nkizo v. R [1992] TLR 213** by my senior brother the late Mr. Justice Katiti:

> *"while the trial magistrate has to look at the whole evidence in answering the issue of guilt, such evidence must be there first – including evidence against the accused, adduced by the prosecution which is supposed to prove the case beyond reasonable doubt."*

However, this appears not to have disturbed her mind to a level of shiffing the burden of proof. She turned to the case for the prosecution. After an indepth analysis of the evidence adduced by each of the ten victims, she was certain in her mind that they were telling the truth. For example when dealing with the evidence of PW11, the learned Senior Resident Magistrate said:

> *"Although Gift forgot to mention Yasinta again in her evidence, Yasinta did when she was narrating how she convinced Gift (PW) Alisia (PW3) Juliet PW8) Isabela (PW9) and Dei (PW13) to accompany her to the first accused 607. This omission to me is not fatal in that the substance i.e identification is the key contrary to the defence submissions*

Yasinta (PW1) explained what happened after classes which was the second time during the same day on their way home. The first accused got hold of her while the other male accused caught the rest of her friends Gift, Alisia, Juliet, Isabela and Dei taking them to his room at 607.

After they were undressed they were oiled their private parts, and sexes (sic) both infront and the anus. Some were placed on the mattress on the bed and others on a mattress on the floor. She was put on the mattress on the floor. This peace of evidence is repeated by all the victims. She could tell the subsequent sexes who had sex with her because she said when they went there the second and the other times they were not blind folded. So she identified the four male accused who sexed her. She was more particular in saying that the first accused was the one who told her the names of the second to forth accused person as his children.

Yasinta like her companions was paid money by the first accused after the sex. The first time she was paid 200/= and left. Almost all the victims testified to have been paid after the sex. I have already demonstrated above when analyzing the evidence of Gift. Rehema (PW5) was paid also 200/= Juliet 400/= Isabela 300/= Aza 200/= Dei, Amina and Sia did not mention the money that they were paid. Yasinta described what was in that room in 607: word robes, and money drawers (madroo ya hela) tallying with other victims."

And when she was dealing with the testimony of PW13, the Principal Resident Magistrate said, in part:

> *"Like the others she recounted the period when they were ambushed and beaten in the room in 607 the stick wa "mianzi." Then there were a knock at the door. He dressed up. This lady said "Why am I hearing sounds of children crying! "She saw us and beat us with a stick.*
>
> *She concurred with the others that she was taken by her friends to 607. "Our friends whose name I have forgotten told me "lets go to collect money." True she like the others was paid money after the sex and as she said "I went there several times" (she was still crying) I felt pain. I didn't tell anybody as he used to tell us not to tell anybody as he would kill us or take us to police. (still sobbing)."*

And again when dealing with the evidence of PW12, the PRM said:

> *"To show that Aza was psychologically affected by the repeated sex ordeal when she narrated the ordeal she is shedding tears and could (sic) talk and we had to pause from time to time for her to cool down. This indicated that she was not telling lies."*

The evidence of the rest of the star witnesses for the prosecution was treated the same.

The Learned Principal Resident Magistrate then turned to the evidence of PW20 in respect of the ten complainants. This was also the medical evidence in respect of each one of them. As this evidence was used to assess the credibility of the witnesses, I cannot avoid being a little long. PW20 examined the victims and prepared a report by filling in the relevant parts of the PF.III for each child.

The 1st and 2nd counts against the four appellants charged them for rape and unnatural offences against Aza Hassan (PW12) she was examined by PW20. The medical report (Exh.P3) showed she was found with foul smell, vaginal discharge, the hymen was torn, anal sphincter was lax. PW20 concluded that PW12 had been raped and sodomized.

PW5 had testified that she went to the 1st appellants house whereby he put his penis (mdudu) inside her vagina and her anus and on instructions sucked his penis and licked some piles breaking them open. PW20's report (Exh.P5) showed no signs of sexual abuse as the hymen was intact and the anal sphincter was normal.

Alisia Longino (PW3) was the subject of counts 5 and 6. She had testified to have been taken to the 1st appellant by PW11 to get money. She did go and was "sexed" both per vagina and per anus and the 1st appellant had oral sex with her. Her guardian Aisha Mrutu (PW4) examined her and noticed her vagina and anus had blood stains and pus. She also had a found smell. Clinical examination by PW20 (Exh.P1) showed perianal old bruises and a lax anal sphincter. The hymen was intact. The doctor concluded that the anus was perforated.

Isabela Angonile (PW9) was the subject of counts seven and eight. She testified to have been raped and sodomized. Her mother Mary Chitumbi (PW10) examined her on 11/10/03 and according to her evidence, found her vagina wide with evidence of Semen. The doctors report (Exh.P6) showed she had a torn hymen and old

perianal bruises. She (PW20) concluded that PW9 had been sexually abused.

PW20 also examined PW8, the subject of counts ten and eleven concerning all the appellants. Like her friends she testified that PW11 took her to the 1st appellant after school where the four appellants had raped and sodomized her. This happened for three days consecutively. Her mother PW7 supported her version as on visual examination she found the vagina and anus wide with foul smell. The doctors report (Exh.P4) found a torn hymen and a lax anal sphincter and concluded that PW8 had been sexually abused.

Counts twelve and thirteen were in respect of PW13. This is the girl who led the trial court through the rooms when it visited the *locus in quo.* Brigita Kamenya (PW16) an old lady of 51 years examined her and found foul smell coming from the vagina. PW20 examined this victim and made a report (Exh.P9) which said that there was foul smell, vaginal discharge, hyperemic hymen, the anal sphincter was intact. She concluded that PW13 had been sexually abused.

Counts 14, 15 and 17 were in reference to PW2. She is the nucleus of this case. Her guardian PW1, was the first to detect foul smell from PW2. She was inquisitive, pressed on until PW2 made the horrific revelations which triggered the investigation that lead to the appellants being charged. PW1 had noted pus and fresh blood from the vagina of PW2. The doctor's examination showed that the

hymen was intact, but there were clinical features of sodomy. She concluded in her report (Exh.P2) that her anal was perforated.

The subject of counts 18 and 19 was PW11. She was also examined by PW20 who reported in Exh. P10 that the hymen was torn, there were old healed perianal bruises and the anal sphincter was lax. PW20 concluded that she was raped and sodomized. The story was not very different in respect of PW15, one Amina Shomari who was the subject of counts 20 and 21. The medical report made by PW20 (Exh.7) was to the effect that the hymen was torn and the anal sphincter was lax. She concluded that the child (PW15) had been raped and sodomized.

The last two counts, 22 and 23 were in respect of Agneta Sia (PW14) she had been visually examined by her guardian Lilian Mbawala (PW19) who noted nothing abnormal whereas the doctor (PW20) vide Exh.P8 found and reported that clinically PW14 had a torn hymen, had vaginal discharge and lax anal sphincter. She concluded that the girl had been raped and sodomized.

Again, the trial court delt with the evidence of PW15 in relation to the allegation by the defence that this case was a frame up. After analyzing the evidence of this girl she concluded.

> *"The transferring of this witness to another school waters down the defence thesis that the parents and guardians of the victims framed up the accused. Why would Amina's parent set up the accused by using Amina and then have the trouble of also disturbing Amina's studies?*

In the examination in chief of this witness, she is recorded to have said:

> *"I am in school Mbagala. I used to go to school in Sinza Mashujaa class 1A. I have been transferred to Mbagala by my mother because I have "tabia mbaya" my mother told me I have bad habits with Babu Seyer/Sea (she cries profusely) Babu Sayer/Sea sexed me and put his penis infront and behind (she is still crying very much) in Sinza I live with my aunt. Babu Seya/Sea times at Sinza infront of our school. I used to escort his son Zizel to drink water. Babu Sayer/Sea pulled me then and took me into his room. I saw oil in the room. He then told me to suck his penis I did. He oiled me. He then put me on the bed and put his penis in my vagina. He did the same in my ass....."*

The fact of PW15 being transferred to another school was therefore borne by the evidence on record and could be used to ground an opinion.

The trial magistrate, as stated above, spent a lot of time considering the case for the defence. She analyzed the story of each and every appellant. As stated earlier, the 1st appellant testified that he did not live at 607. The 2nd appellant called in DW12 (Mariam Bongi), Edward Masawe (DW13) Ruge Mutahaba (DW13) and DW25. All the defence regarding this appellant was considered. The learned PRM also analyzed the defence fronted by the 3rd appellant and the 4th appellant noting various contradictions at material areas. The trial magistrate does not appear to have made a specific finding that the defence of *alibi* was not, on the evidence as a whole, available to the

appellants. To me, this was not fatal to the proceedings because after considering the defence she went on to examine the case for the prosecution and believed that the ten victims were telling the truth when she said:-

> *"The counsel submitted that the children were not free witness (sic) I assessed these witnesses and found them credible. The victims gave evidence of the sex from time to time. There are medical exhibits PF.111. I have demonstrated that even those whose medical evidence did not reveal the signs of being raped they were indeed raped both anus and vagina and had oral sex."*

Was the learned Principal Resident Magistrate justified to came to that conclusion?

I have run through the findings of the trial magistrate regarding the violation on the ten children. She had the advantage of seeing these witnesses and assessing their demeanour and the demeanour of PW20 and was satisfied that they were credible. In the case of **Jumanne s/o Bugingo and Another vs. R. (C.A Mwanza) Criminal Appeal No.137 of 2002** (unreported). The Court of Appeal, KAJI, J.A. quoted from the case of **Ali Abdallah Rajab v. Saada Abdallah Rajabu and others [1994] TLR 132** where the court had held:

> *"Where the decision of a court is wholly based on the credibility of the witnesses, then it is the trial court which is better placed to assess, their credibility than an appellate court which merely reads the transcripts of the record."*

The Court went on the quote from another case of **Omar Ahmed v. R [1983] TLR 52**when it had held.

> *"The trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on the record which call for a reassessment of their credibility."*

This has been the law on the issue of credibility. This court is bound by it. And having gone through the record, I am persuaded that the trial Principal Resident Magistrate findings on the credibility of the ten star witnesses was justified.

The medical doctor, PW20 is a specialist pediatric surgeon. By her qualifications, she is very senior. She examined all the victims on 22/10/03. She gave a report on every child as found correct by the trial magistrate. during cross examination by Mr. Ringia, learned advocate who was assisting Mr. Nyange, she said:

> *"My expect knowledge a child whose hymen was torn can walk and do everything, she can get pain but a week or so the pain subsides."*

She concluded by saying:

> *"There are smells which are typical on vaginal discharge. You can tell if the foul smell is infection or cancer. In the above children the foul smell was from infection from unsafe sexual contact. Blunt weapons pennies (sic) test tube or "vidole" I zeroed in on pennies (sic) or vidole. I am sure hundred % that these were done by fingures or pennies (sic). It is not true that a banana is blunt but it is sharp. In my report I didn't say pennies (sic) or fingure but blunt weapon."*

She was believed by the learned trial magistrate that she was a witness of truth. I have no reasons to fault the opinion of the magistrate on this witness.

On the acquittal of the 5th accused person which was a subject of ground 11 of the petition I do not think that the complaint is justified. It is not strange for a person to be acquitted from a group of charged persons. Evidence can be uncertain about one person and very certain about the other. The fact that the children were not certain, or were outright wrong as to what the 5th accused taught does not make them unreliable all through. I would agree with the respondents that a person can forget which does not mean he does not know. In the case of **Mathias Timothy v R. [1984] TLR 86** the late Lugakingira, J (as he then was), quoting **Musa v. R [1970] HCD R.278** said:

> *"... the rejection of part of the testimony of a witness does not necessarily make his whole testimony suspect or discredited."*

The evidence can be discredited only when there is a glaring falsehood against one of the accused persons. In the case of **Timothy**, the court went on:-

> *"In my view, where the issue is one of false evidence, the falsehood has to be considered in weighing the evidence as a whole, and where the falsehood is glaring and fundamental its effect is utterly to destroy confidence in the witness altogether, unless there is other independent evidence to corroborate the witness."*

The PRM did not find falsehoods in the evidence of the ten children in respect of the 5th accused. The evidence looked as a whole justifies the position taken by her. She found the evidence of the children as against the 5th accused as hazy: which, to me, is different from saying that the evidence was a pack of lies. On the reasons I have given. I find that this evidence could not effect the evidence against the four appellants.

In conclusion, for the reasons I have given. I find that grounds 2, 10, and 11 are not genuine complaints and hereby dismiss them.

Grounds four, five and six were argued together. These grounds centre on the issue of penetration. They are inter twined. They say as follows:

> *"4. The trial court erred in absence of evidence to hold that a penis that does not erect can penetrate a female genital organ or anus.*
>
> *5. The trial court erred in view of medical evidence to find that the complainants were penetrated.*
>
> *6. The trial court erred in absence of a description of the penis to find that it was in fact the penis that penetrated the complaints."*

Learned counsel for appellants relied on the evidence of DW1 and DW11. (I think be meant DW10) the latter, a close friend of the 1st appellant who told the court that they tried to get medical help but did not manage. Counsel also insisted that as there was no description of the penis of each of the appellants, which according to him, was necessary, the charges could not stand. He also touched

on the evidences of PW20 where it said some of the children were not penetrated.

The learned Senior State Attorney in reply submitted that on the evidence available, the 1st appellant and his children raped the ten children. He said in charges of rape, you do not require an erect penis or a rapture of the hymen to prove the offence. He referred the court to **The Digest of Criminal Law, Evidence and Procedure, 1993 Edition at Page 187**. The Senior State Attorney also pointed to contradictions on the testimony of the 1st appellant and DW10 regarding the duration of the erecting problem. He then run through the evidence of PW20 in the same way the trial magistrate did as is shown when I was dealing with ground number ten, and concluded:

> *"The totality of all these exhibits evidence is that the children were penetrated by the appellants and that finding some of them with intact hymen cannot remove the fact that they were penetrated."*

And dealing with ground 6 of the appeal, he answered that that was not a requirement of the law. It was enough for the children to say that they were raped.

The trial Principal Resident Magistrate delt with the issue of a malfunctioning penis of the 1st appellant at great detail. She related this fact, if true, to the law under SOSPA. At the end of the day, she rejected that line of defence by saying:

> *"The first accused person said his erection capacity was going down as time goes by. That*

> *did not mean that within the range of the crime he was completely malfunctioning. Even if he was, he could still penetrate slightly and that is why some of the victims above did not suffer vaginal and anus injuries under* ***William W. Becks."***

In dealing with the evidence of PW20 regarding the findings that some of the children had intact hymen, the trial magistrate relied on a book by William **W. Beck, Jr. Obstetrics and Gynecology, "The National Medical Sciences for Independent Study at Page 244** and concluded that "penetration by a penis through elastic hymen may occur without laceration."

Let me start with ground six I agree with the learned Senior State Attorney that it is not a requirement of the law in proving rape for the victim to give a description of the penis that penetrated her. The reason is simple. Every normal male human being (or mammal for that matter) has only one penis. When a victim is raped and she succeeds to give a description of the person who penetrated her, that is enough to prove the offence against that individual. This ground of appeal is a hoax and I dismiss it.

Ground of appeal number five. The medical evidence relied on by the prosecution at the trial came from PW20 and the exhibits she tendered after examining the children. She was cross examined by the defence. She said, inter alia that according to her experience, children who are sexually abused may not show signs of abuse. I have gone through the evidence of the ten children. Only Rehema Mgweno (PW5) was found to be normal, that is the hymen was not

torn and the anal sphincter was normal. However, there is the evidence of PW6 who said:

> *"I interrogated her (PW5) in the presence of Mama Gift. My daughter admitted that they were going to Babu Sayer/Sea taken there by Yasinta where they would be raped and sodomized and given money. I checked her private parts and noted her vagina was enlarged too big."*

On this aspect, the evidence of PW5 went thus:

> *"Yasinta told me, 'let us go there after school" I asked her "where to? "She said "To Babu Sayer/Sea to drink water. I took her and Babu Sayer/Sea told Yasinta "Go and get other children "She brought Gift, Juliet, Alisia, Tabia and Dei. Babu Sayer/Sea took us to his house. There was a mattress on the wall and on the bed. He put me on the bed. He put his penis (mdudu) inside me and in my buttocks. He told me to suck his penis while he sucked my breasts. I did ..... He told me not to tell anybody else he would cut my nose and mouth and take me to police. I felt great pain."*

The medical evidence was and cannot be all conclusive. That the hymen was not torn and the anus appeared normal cannot, I my view, displace the cogent evidence of PW5 and PW6. The respondents also referred me to the Digest of Criminal Law, Evidence and Procedure (supra). In the case of **R v. Nicholls (1847) GLTOS 179; 2 Cox CC 182 where it was held:**

> *"Where a prisoner was indicated of carnally knowing a child under ten years of age, the capital charge will be supported by the evidence of entering the body, without proof*

of perfect and absolute penetration and the absence or presence of any hymen is not conclusive either way."

And in the case of **R. v. Wyles (1839) 3 JP 196** it was stated:

"In a case of rape, if there has been penetration, the jury ought to convict of the capital offence, even though the penetration has not proceeded to rapture the hymen.

The development of our law has not been different. The new section 130 of the Penal Code as provided in SOSPA has this to say in sub-section 4:-

"130(4) For purposes of proving the offence of rape –

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."

The case of **Fundi Omari v R. [1972] HCD 98** which was also quoted by the learned Principal Resident Magistrate is relevant on the position that a tear of the hymen is not the only conclusive evidence to prove rape.

What is more is this. The medical evidence so much elevated under ground five would only apply to one out of the ten victims. So seriously speaking, I do not understand what learned counsel for appellants means when he makes that complaint. The finding by the trial court on the fact that the complainants were, on the evidence available, penetrated was well grounded. I find no merit in ground five of the appeal and dismiss it.

On ground four, there was a lot of noise made regarding the potency or otherwise of the 1st appellant. There was an allegation, in the lower court that the trial court refused to give permission to the first appellant to be examined. All taken together boils down to one question. Did the 1st appellant commit the acts of rape alleged against the ten complainants or any of them? I have explained above how the trial court delt with this line of defence. I have no reasons to differ. The first appellant was the principal actor in the whole horrifying and callous scheme against 'near angels' at a period of the very foundation of their lives. He is a father of several children including the other three appellants. His wife died in 1998 and in 2001 he started living with DW10. On the issue of impotency, she had this to say:

> *"In 2002 the 1st accused had problems with is penis. We started well sexually and at the end of 2002 December I discovered that he was not performing properly sexually."*

She then went to see local medicine men without success. She eventually landed on one Dr. Yogoro of Muhimbili. This doctor told her to see him at Tumaini Hospital Upanga. She was with the first appellant who however did not enter to see this Dr. Yogoro.

The first appellant gave his defence on 9/3/04 and said it was about three years since impotency set in which would mean from around the beginning of 2001. Impotency is a traumatic and stigmatic occurrence. And for a couple living together, one would

expect the dates not to differ too much. The trial magistrate delt with this and concluded that it was not true and even if it was true, it did not matter. She said:

> *"Even if the first accused could not have full erection there being the slightest penetration was sufficient to prove rape as per law established. The victims proved that the first accused put his penis into their vaginas (sic) and anus and they sucked his penis."*

What the trial PRM was saying is that the defence of impotence was inconsistent with the credible and believable evidence of the victims. With respect I think the PRM was justified to come to that conclusion.

All the complainants mention the 1st appellant as the person calling them, manly through PW11. This is what they are recorded to have said in part; beginning with PW2:-

> *"One day Yasinta who is my friend in same class told me 'let us go to Babu Sayer/Sea to be given money but you would see what will be done to you' I went with Yasinta on our way to school to Babu Seya/Sea in the morning."*

And a little latter in her testimony she says:

> *"On the following day on our way to school Babu Seya/Sea saw us and said "Watoto Wazuri njooni nikawanunulie soda" I was with others Aza, Alisia, Rehema, Juliet and Sizel. .... We entered his room and he covered our faces with back cloth..."*

Then there is PW3 who had the following to say in part:-

"I know the accused in the dock with his children but I don't know their names Babu Seya/Sea is the 1st one. They used open and know Babu Sayer/Sea. Our friend called Yasinta told us to follow her to go to a Babu who gives money (anagawa fedha)..... We went to Babu Seya/Sea. Yasinta closed the door of Babu Seya's sitting room. Babu Seya held our hands. He took us to the room. He undressed us. He covered our faces with black peaces of cloth. He placed me on the bed with others. Those who didn't fit would be placed on the mattress on the floor."

Rehema Mgweno (PW5) has been quoted earlier in this judgment.

Juliet Mhavili (PW8) told the following story in part:

"My friends in school Gift, Rehema, Dei, Amina, Sia, Tabia and Alisia. We are in same class 1A. We used to play together. One day we were passing at the school ground. Three men and one lady came to take us. The boys are in class 1B and the girl is in class 1A. I do not how the names of the three boys above. The name of the girl is Yasinta. I was with Gift, Alisia, Dei, Rehema, Sia, Amina, and they took us to Babu Seya/Sea (walitukamata). Babu Sayer/Sea house is very close to the school. It was at 11.00 am when we came from class. We found Babu Sayer/Sea, Papii and two other children of Babu Sayer/Sea. Babu Sayer/Sea took us to his room undressed us and our pants and made us lie on the bed. Oiled our vagina and his penis and he put the same in my vagina. He sucked our breasts. He oiled our vaginas and buttocks. He had sex with us in the vagina and buttocks..."

Then there is the evidence of Isabella Angomwile (PW9) who said:

> *"When we arrived at Babu Sayer/Sea,Babu Sayer/Sea tied our faces with black cloth and he undressed us inside his house. He then oiled in our private parts. Babu Sayer/Sea oiled me. Babu Sayer/Sea had sex with me in my vagina and latter in my buttocks. I felt pain. I didn't do anything although I felt pain. He Babu Sayer/sea also put is penis in my mouth....."*

Yasinta Mbele (PW11) has the following to say regarding the 1st appellant:

> *"They undressed us and tied our faces with black cloth. It was the first accused who tied my face. The first accused put his penis into my vagina after he oiled my private parts infront and behind..... One day Nguza while I went to buy a pencil near our school in a shop, he told me to go and call my friends. I called Gift, Juliet, Alisia, Isabela and Dei. I found them playing in our school compound. I told them "Lets go to one Babu called Nguza who dishes out money...." They asked me the name. I told them the first accused's name."*

Aza Hassan (PW12) said, inter alia:-

> *"I know the accused in the dock. The first accused is Babu Sayer/Sea. I know the rest of the male accused by face but they were doing bad things (walikuwa wananifanya)..... Yasinta tied our faces. Babu Sayer/Sea undressed me. He oiled my private part and others and he had sex with us (anatufanyia tabia mbaya). Then he turned us from behind and oiled us and had sex from behind...."*

Then there is the 7 year old Dei Jafari (PW13). Her part of the evidence is as follows:

> *"... One day he covered my face and undressed me. He told us to suck his penis and would give us money. Then there was a knock at the door. He dressed up....."*

Ageneta Sia Wendeline is recorded to be 6 years. She testified as PW14. She said in part:

> *"One day after school we were taken by the first accused Babu Sayer/Sea and took us to his house. He told us to suck his (first accused pennies (sic) oiled our private parts and put his pennies (sic) in our private parts infront and behind. He told us to lick his breasts..."*

As to Amina Shomari, (PW15) I did quote her statement when I was dealing with grounds 10 and 11 above.

From the above quoted extracts, it is evident that the 1st appellant was at the centre stage of the happenings in 607. The complainants were subjected to very long cross examinations by the defence, after long examination by the prosecution. I have not been able to see anywhere, where the issue of non-erection of the 1st appellants penis was put to these witnesses. This issue came surface very strongly when PW20 took the witness box. Nch child was made to answer on this issue which was highlighted by learned counsel for appellants.

The learned Principal Resident Magistrate appears to conclude that it did not matter whether the 1st appellant could generate an erection or not. I think that was not proper. There was an issue before her. She should have made a finding on it. This being the first appellate court, I am justified to reassess the evidence and make my own conclusions. On the evidence, I find that the defence by the 1st appellant that he could not erect was manufactured. On the evidence of the victims, and failure by the counsel for appellants to bring this issue in cross-examination, I am bound to find that the 1st appellant's erection capabilities were in order. On the foregoing, I find no merit in ground of appeal number four and hereby dismiss it.

Ground of appeal number seven complains that the trial court erred in finding that the appellants and 607 Sinza Palestine were properly identified. Learned counsel for appellants opened his line of arguments by complaining that this Selina who was housemaid of PW1 was not called to testify though she is alleged to have taken PW1 to 607. He said it was not any of the children who identified the house. He said there was a contradiction between the evidence of PW23 and the other witnesses, the former saying PW2 showed the house while the others, like PW1 said it was Selina who identified the house. Learned Counsel also complained as to the date the 1st appellant was arrested in that whereas PW23 and PW2 said it was on 9/10/03 the evidence of DW6, DW7, DW11 and DW18 who said on that day Achico band did perform at Lion Hotel and the 1st appellant was there.

Counsel for appellants also complained on the evidence of PW2, which was recorded by DW23. He said in that statement PW2 said she knew the suspects by name. But if they were not there, what did PW2 use? He answered this by saying PW2 must have been using another source. Learned counsel also did complain on whether there was an identification parade or not. He concluded that there was none in law.

On the identification of the appellants, learned counsel said it was not possible to identify the appellants as the victims were being tied with cloth and undergoing traumatic experiences. In those circumstances, he said, an identification parade was required and necessary. To underscore his point, he referred the court to the evidence of PW21 where she had said:

> *"I saw the 4 men accused at police station. they were tied with handcuffs at police being put in a motor vehicle. Amina and other children were there."*

He referred the court to the case of **Moses Charles Deo v R. [1987] TLR 134** to underscore the necessity of an identification parade in this case.

The Senior State Attorney for the respondents answered that he agreed with learned counsel for appellants on that identification is important and that the case of **Waziri Amani v. R [1980] TLR 250** is the authority on visual identification. But, he said, **Waziri Amani** deals with a situation where there are difficulties in identification. The learned Senior State Attorney said in this case the victims knew the appellants by name and appearances, the house was near their

school, the rape acts were not done once and victims were given big G, soda and money. These were not difficult conditions to require an identification parade. As the acts were done during the day, and the black clothes were not always tried on the victims faces, there would be no need for a parade.

On 607 he said the explanation and evidence did not exclude the possibility that PW2 knew the house. He said learned counsel for appellants is reading too much on the line that the police were taken to 607 by the 'sister' of PW2. The latter may as well have know 607. PW2 gave evidence for two days at the end of which she was very tired. He said it is not true to say the victims never knew 607 because even the trial court was lead by PW13 when it visited the *locus in quo.* He concluded by saying there was no need for identification parade, and 607 was properly identified.

The learned trial Principal Resident Magistrate delt with the issue of identification at great length and detail. She concluded that the victims had ample time and opportunity to identify the appellants. At one stage in her judgment, she said:

> *"More identification of the accused persons and the room in 607 in connection with the sex can be seen when the victims recounted of what was done to them as horrendous. They testified of the sex both in the vagina and anus, the oral sex, even licking the anus like was done by Gift. Even when she was testifying I could note her expression of reality of feeling nauseated.*

At another stage she had this to say:-

> *"Nyange submitted that the victims were blind folded and so they could not identify the accused persons. As shown above the sex took place more than once"*

And again:

> *"Naturally the first accused would not cover the faces of the victims outside his house lest it brings eye brows and the children could have felt suspicious then. So, Gift reply to cross examination that the black peaces of clothes were tied on their faces when they entered the house appears logical..."*

As to the identification of 607, the trial magistrate used the evidence of PW22 and concluded:-

> *"Therefore it is the victims who testified in who (sic) pointed the 607 to this witness and that had no relevance with the identifies of the accused persons who were seen at the police station under hand cuffs as submitted by Nyange. To the contrary, they identified 607 as the house where they were sexed. I do not agree with Nyange's submission that Gift and Candy knew 607 because she was taken there by Selina. I say so in lies (sic) of the reliable testimony of ASP Shilling."*

I would at once say that I agree with the observation of the learned Principal Resident Magistrate. I also agree with what the respondents said that there was a lot of ground for proper identification by the victims of both 607 and the appellants such that no identification parade was required. To sum it all, I am of the considered view that to bring the issue of identification as a defence was a token resistance. Many of the victims who testified said those

hideous acts were done in a long spell of time. For example PW1 wrote a statement and narrated what PW2 to told her:

> *"Akaniambia kuwa kitendo hicho hakuanza siku hiyo ni muda mrefu na huwa anafanya mara kwa mara na kupewa hela Sh.200/= hadi Sh.400/= walimaliza kufanywa huwa anawanawisha"*

The acts were done during the day. The victims would be given money, soda and chewing gum. The house is next to the school the victims attended. There is a shop where the victims would also buy school requirements which was very close to the house. The cloth on the face was not tied every time and throughout. The reason for tying the victims with a cloth on the face would be conjecture, but may be it was one of the ways to reduce shock on the victims.

In **Waziri Amani** the Court of Appeal of Tanzania laid down questions to be asked in disputed identity of a suspect when it said:-

> *"We would, for example expect to find on record question such as the following posed and resolved by him (judge): the time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance, whether it was day or night time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not."*

As can be noted, all the conditions of identification were met more than reasonably in this case. In **Moses Charles Deo** (supra) the Court of Appeal had this to say:

"An extra – judicial parade proceeding is not substantive evidence, it is only admitted for collateral purposes, in the majority of cases, it serves to corroborate the dock identification of an accused by a witness in terms of section 166 of the Evidence Act, 1967."

To me, this means an identification parade is not a requirement in every case. I agree with the respondents that this is one of such cases where it was not necessary to hold one. The identification of the appellants and the house – 607, was more than adequate. With respect the trial court was justified to hold so. This ground of appeal also fails and is dismissed.

Ground No.8 of the petition is a complaint relating to the evidence of PW24 who went to arrest the 2nd, 3rd and 4th appellants. It was the complaint of learned counsel that PW24 said he was shown a table where sex used to be done whereas the victims had all along said sex was done on a bed and on a mattress on the flow. He invited this court to treat the evidence of PW24 as coached.

The respondents submitted that there is no one of the victims who said sex was done on the table. The learned Senior State Attorney said according to PW2 there was a table in that room where there was kept some petroleum jelly which was used to oil private parts before rape but she was raped on the bed. The rest, PW3, PW5, PW8, PW9, PW11, and PW15 said they were either raped on a bed or on a mattress on the floor. PW12, 13 AND 14 were not asked this question as they were crying. Moreover, he said, actually PW24

never said victims were raped on a table. He said he saw a table but didn't say sex took place thereon.

I think this ground of appeal is short. During his evidence in chief, PW24 said:-

> *"The children victims showed me the room where the alleged rape took place. The room was to the right it had a bed with a mattress and mattress leaned on the wall where clothes were hanged. The children victims had said that the sex was done on a bed and on a mattress on the floor so that's why we went inside to see these things."*

During cross examination he said he saw a table "in that house where the alleged crime was taking place." This means a table was in the house not crimes taking place on the table. Latter on he said:

> *"All the children victims told me that they were sexed on the table. I said I saw a table but didn't say that the sex took place on the table. I was told."*

Taking the evidence as a whole, and taking into account what this witness said during examination in chief, this issue of sex done on the table was non existent. Indeed, if PW24 was told so, it was hearsay. The consistence of the victims was that sex was done on a bed and on a mattress on the floor. This ground of appeal must also fail. I dismiss it.

Ground 12 and 13 were argued together. Learned Counsel for the appellant argued with a lot of force that the 4th appellant, being under 18 years of age should have been tried separately under the

provisions of section 28 of SOSPA. He should also have been tried in camera. Moreover, he complained that although this trial was supposed to be held in camera, it was not in fact so, as one Detective Stn Sgt Sabbas, not a guard, not an investigator, was allowed in the trial room.

In reply the Senior state Attorney said section 28 of SOSPA was amending Section 3 Cap 13. (The Children and Young Persons Act) SOSPA did not amend the definition of child in Cap 13, therefore, the law has not been changed in substance. The new section 28 of SOSPA did not start with the words "Notwithstanding" meaning that all other section have been left intact, and if a change in the main Act was envisaged, then the definition of child should have also been repealed. Therefore, a child remains a child under the ruling law, that is Cap 13. As this trial was in camera, it was proper.

On Sgt Sabbas the Senior the Senior State Attorney said in Tanzania, there is no law regulating trials in camera. So even if Sabbas was there, which they deny, the trial could not be vitiated. They denied that Sgt Sabbas was there to coach witnesses as a coached witness cannot stand such rigorous cross examination. The emotions displayed by the victims is not something to be taught, he concluded.

Section 28 of SOSPA amended section 3 of Cap 13 by adding sub-section 5 which says:

"Where a child of less than 18 years of

> *age is a witness, a victim an accused or a co-accused in a case involving a sexual offence, the child shall be tried in camera and separately from the adult co-accused* ***or the evidence of the child shall be adduced in proceedings conducted in camera.*** *" (emphasis mine).*

Section 3(1) of Cap 13 has this to say:

> *"A district court when hearing a charge a child or a young person shall, if practicable, unless the child or young person is charged jointly with any other person not being a child or young person, sit in a different building or room from that in which the ordinary sittings of the court are held."*

Cap 13 defines a child to mean a person under the age of 12 years. But I do not think the definition of child under Cap 13 would find room in sub section 5 because in the latter, it clearly talks of a child of less than 18 years. Moreover, section 3(1) talks of hearing of any charge against a child or young person whereas section 3(5) refers to sexual offences. In my considered opinion, I think the key words in section 3(5) which deal with this case are those which say "***or the evidence of the child shall be adduced in proceedings conducted in camera.***" The framers, in their wisdom saw the difficulties of having two parallel trials where a child is charged together with adults like in this case. So, they inserted a safety catch, as it were. I do not see anything wrong with the trial the subject of this appeal. Ground 12 has no merits. I dismiss it.

As to the issue of Detective Sgt Sabbas, who was the subject of ground 13 of the petition of appeal I would immediately agree with the Senior State Attorney. That this trial was conducted in camera is without question. That we have no law regulating trials in camera is also a fact. A trial in camera would be one where generally the public is shut out. The presence of one individual or two for purpose other than causing disturbance would, in my view, not vitiate the trial. The allegation by the appellants that Sabbas was there to coach witnesses is far fetched and is outright rejected. This ground has no merits and is accordingly dismissed.

Ground 14 of the petition of appeal says:

> *"The trial court erred in lowering the standard of proof for the prosecution and in raising that of the defence."*

Learned Counsel for appellants referred the court to the case of **Maruzuku Hamisi v. R [1997] TLR 1** in supporting his assertion. He argued further that the defence witnesses were enough to raise a reasonable doubt and in fact the appellants raised more than reasonable doubt in their defences. He wondered why they were convicted.

The respondents said the prosecution does not have to prove the case beyond a shadow of doubt but beyond reasonable doubt, a level they attained in this case. He referred the court to the case of **Chandrakant Joshubhai Patel v. R. Criminal Appeal No.13 of 1998 (unreported)** to underscore his point and prayed that this ground be dismissed.

As I said earlier, I went through the record. The trial magistrate analyzed the evidence at great detail, at the end of which she accepted the prosecution case and rejected the defence. She believed the evidence of the victims, the doctor (PW20) the investigator (PW22) the person who made the first discovery (PW1) and gave her reasons for such belief. It is not every defence that should raise a doubt. A defence must be viewed against the evidence as a whole. In the case of **Maruzuku Hamisi v. R.** referred above, it was stated, when quoting **Hassan Madenge V. R Criminal Appeal No. 50 of 1987** (unreported).

> *"An accused's story does not have to be believed. He is only required to raise a reasonable doubt that is to say, his explanation must be within the compass of the possible in human terms.*

Maruzuku did not say that every defence shall raise a reasonable doubt. The explanation must be viewed against all the evidence as a whole and within the compass of the possible in the circumstance.

In the **Patel's** case, (supra) the Court of Appeal, Makame, J.A. had this to say inter alia:-

> *"As this court said in Magendo Paul and Another v. R [1993] TLR 2, 9, quoting Lord Denning's view in Miller v. Minister of Pensions 1947 2 All E.R. 372, also quoted by the learned trial judge in the instant case, remote possibilities in favour of the accused cannot be allowed to benefit him. If we may add, fanciful possibilities are limitless, and it would be disastrous for the administration of Criminal justice if they were permitted to displace solid evidence or*

dislodge irresistible inferences."

This is the position of the law. The learned trial magistrate did not in my opinion, depart from the law on burden of proof. This ground is hereby dismissed.

Ground 15-20 were argued together because they very much relate to each other. They all revolve on an allegation of bias on part of the trial court against the appellants, such that they were not accorded a fair trial. He listed areas of bias in the following order.

1. *Appellants were denied statements of would be witnesses.*

2. *Statements were only given after examination in chief thus denying appellant adequate preparation.*

3. *The denial of the court for the appellants to undergo medical treatment was improper.*

4. *An e mail written by DW22 occasioned failure of justice.*

5. *Appellants were denied calling police witnesses, in contravention of section 166 of the evidence Act and section 34 B thereof which denied the appellants' opportunity to impeach the evidence of the victims.*

In support of his complaints, counsel for appellants referred the court to a string of authorities including **R. V Albert Amour [1985] TLR 20, Tumaini v. R. [1972] E.A 441, Ojede s/o Odyek v R. [1962] E.A 494, Kioko v. R. (1971) HCD 307.**

The respondents countered these complaints by saying that the proceedings do not show any bias as the trial magistrate tried her best to accord the appellants a fair hearing. Under complaint (1) above Mr. Masara said the law under section 9 of the Criminal Procedure Act as amended by Act No.9 of 2002 only requires that, the statement of the complainant who reported the case to the police be given. In this case it was PW1 whose statement was the only one to be supplied.

As to the denial of the appellants being examined, the respondents said that the issue before the trial court was not the lengh of the male organs of the appellants and as to whether they suffered from venereal diseases. Therefore refusal for them to be examined did not prejudice the appellants. And on the email, there is no evidence that the email influenced the trial magistrate, and the person who tendered it was not the recipient. Moreover, TAMWA is a pressure group and no one can limit communication among themselves. So, the respondents submitted that the email did not occasion any injustice to the appellants.

On the denial to call the police officers who recorded the victim's statements learned Senior State Attorney said that the recorder of a statement under police investigations is not the owner thereof. the owner is the person whose statement is being recorded. If the appellants thought there were problems with the statements, the victims had to answer. Under Section 34 of the Evidence act, the writer of a statement can be called to testify only if the author was

not found. Therefore the trial magistrate was not in error to refuse the recording police officers to be called. This is without prejudice to the fact that infact some police officers gave evidence after being called by the defence.

The law on bias was well stated in the **Tumaini** case (supra). In that case, the late Mwakasendo, Ag. J (as he then was/said:

> *"It is of course a well settled principle of law that before an appellate court can nullify a judgment on the ground of bias, there must be proved, to the satisfaction of the court that there was in the case such a real likelihood of bias as would be sufficient to vitiate the proceedings or adjudication. As to what real likelihood of bias will suffice in this regard, one has to be guided by common sense and by certain legal principles which the courts have from time to time laid down as applicable in this type of case."*

And he also quoted from **R. v. Justices of Queen's court [1908] I.R 285, 294** where it was held:

> *"By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reasonable evidence to satisfy us that there was real likelihood of bias. I do not think that the mere vague suspicion of whimsical, capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds – was reasonably generated but certainly mere*

flimsy, elusive, morbid suspicion should not be permitted to form a ground of decision."

Being guided by the principles in **Tumaini** can we say there was bias on the part of the Principal Resident Magistrate so as to vitiate the lower court's proceedings? This is my answer. Criminal trials are governed by the Criminal Procedure Act and the Evidence Act. In my opinion, giving what the other side thinks is an unfair decision does not, of itself exhibit bias. In criminal trials, applications and objections are raised and rulings are given either way rightly or wrongly. It would be naïve for a party, against whom a ruling is given, to complain that there is bias. As it was said by the learned Senior State Attorney, there are objective answers for every complaint.

Starting with paragraph 5 of the complaints as tabulated above, I agree with the respondents that the statements were made by the victims and recorded by police officers. Any contradiction could therefore be extracted from the children victims. I do not think this was a genuine complaint. On the email, I do not see how the email could be attributed to the trial magistrate. This was released by a pressure group for their own reasons very independent of the trial magistrate. I do not see how it could be linked to her.

Refusal to have the appellants' sexual organs examined did not in my view prejudice them. The appellants had desired to use the

evidence from their examination to discredit the evidence of the victims. These girls had been subjected to long cross-examination from learned counsel. The issue of the size and lengh of the male organs does not appear to have been the focus of such cross-examinations. I do not therefore see any bias on such decision from the trial magistrate. Under paragraph two of the appellants complaint, I do not see what was wrong in the court giving the statements of the witnesses to the defence after examination in chief. If they had thought they needed time to study the documents, they should have sought for an adjournment.

The appellants complaint that they were denied statements of would be witnesses was well answered by the respondents. With respect, I am of the view that the respondents are correct. Section 9(3) of the Criminal Procedure Act was amended by Act No.9 of 2002. Now that section reads as follows:

> *"Where, in pursuance of any information given under this section proceedings are instituted in a magistrate's court, the magistrate shall, if the person giving the information has been named as a witness, cause a copy of the information and of any statement made by him under sub-section 3 of section 10, to be furnished to the accused."*

So the statement the appellants were entitled was that of PW1 who actually triggered the investigation leading to these proceedings. They have not specifically zeroed down on this statement. I cannot put words in their mouth.

On the foregoing, I am not persuaded that the trial magistrate was biased in these proceedings. Bias is an issue of evidence. I do not see any evidence, from the record, that would make me agree with what the appellants are alleging. I do not think that the complaints under grounds 15 to 20 were proved. I dismiss them.

Now to ground number 21. The learned counsel for the appellants framed this ground as follows:

> *"The trial court erred in not believing the appellant's version which had only to raise a doubt and which was not disproved by evidence in reply as per section 232 of the criminal procedure Act."*

Arguing this ground of appeal, Mr. Nyange revisited the arguments he had advanced when arguing ground fourteen of the petition of appeal. He pressed further that the appellants had written statements at the police which were not different from the story they gave in court. It was therefore unfair to rule their testimonies in court as an after thought, more so as the prosecution did not move to impeach the appellant's statements given at the police station. Secondly, Mr. Nyange said when an accused person is questioning a witness or giving evidence of character, under section 232 of the CPA, the court can give the other side room to disprove by bringing evidence to the contrary. The prosecution did not ask the court to bring contrary evidence. Mr. Nyange's arguments were in relation of 1st appellant's assertion that he does not erect. Still the prosecution did not bring any doctor to disprove this version.

In reply, Mr. Masara said the prosecution did satisfy the standard of proof required in criminal trials. Under section 232 of CPA evidence in reply can only be brought if there is a matter not covered by the prosecution but brought in by the defence. In that situation the prosecution can then counter it. In this case there was no such need as the prosecution case remained unshaken. On the appellants statements, Mr. Masara said there was no evidence that the appellants gave statements at police station.

I delt with the issue of burden of proof when dealing with ground 14 and concluded that the trial magistrate did not shift the burden of proof to the appellants. So, I will not be long here. Section 232 of the Criminal Procedure Act says:

> *"If the accused person shall have examined any witness or given any evidence other than as to his general character, the court **may** grant leave to the prosecutor to give or adduce evidence in reply." (underlining supplied)*

The word used here is "may" meaning that it is not mandatory.. With respect, I would agree with the learned Senior State Attorney that this can be done only if there is need. If the prosecution thinks that their case is intact even after such evidence has bee given by the accused person, why should they bother? Can they be accused of not doing what they are not obliged to do? I think not. I am satisfied, on the above reasons that this ground has no merit. I dismiss ground twenty one.

In ground number 22, the learned counsel for the appellants complained submitting that it was wrong for the 4th appellant, a first offender child to be sentenced to life imprisonment. He submitted further that since, according to him, the 4th appellant was not properly tried, he was not properly convicted and sentenced.

The respondents said the 4th appellant was sentenced under section 131(3) of the Penal Code as amended by section 6 of SOSPA. They prayed for the dismissal of this ground as well.

To answer this ground of appeal, I will go to the provisions of the law, Section 6 of SOSPA repealed and replaced Section 131 of the Penal Code. The provisions that concern us here are subsection 2 and 3 of the new section 131. They have this to say:

> *"131(2) Notwithstanding the provisions of any law where the offence is committed by a boy who is of the age of eighteen years or less, he shall-*
>
> *(a) if a first offender be sentenced to corporal punishment only;*
> (b) .....
> (c) .....
>
> *131(3) Notwithstanding the preceding provisions of this section whoever commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment."*

All the victims in this case were under the age of 8 years. This ground of appeal cannot detain us further. I dismiss it as well.

In ground number 23 to which I now turn, Mr. Nyange, learned counsel, argued that the law requires that evidence should be adduced before compensation is ordered. And there must be evidence to show that compensation was justifiable. Although the court, has discretion, an important factor is to see if the appellants can pay. He said the compensation ordered was excessive.

The respondents argued, in effect that the order for compensation is discretionary. But, they said, the victims were young children whose life may have been ruined for ever. The compensation of shillings two million is not excessive in the circumstances. They referred the court to the case of **Swalehe Ndungajilungu v. R Court of Appeal (Mwanza) Criminal Appeal No.84 of 2002** (unreported) and concluded that in the circumstances, the compensation ordered was not excessive.

This ground has given me anxious moments but at the end of the day, I have decided not to disturb the order of compensation for the reasons given by the court of Appeal in **Ndungajilungu** (supra). In the circumstances of this case, I do not think the sentence was manifestly excessive. In the circumstances of this case, the order of compensation may appear inadequate, but I do not think that it is manifestly so. The order of compensation was not based on wrong principle nor did the trial magistrate overlook a material factor. And finally the order of compensation is not illegal. Taking all these consideration together, I see no reasons to interfere.

Ground of appeal number 24 and 25 were argued together. They are rather strange. They place serious allegations at the door of the trial Principal Resident Magistrate. For the record, I think it is in the best interest if I reproduced these two grounds in *extenso:-*

> *"24. The record does not contain a whole and true account of what transpired in the proceedings including complaints, objections and statements of counsel for the appellants and the appellants themselves hence the written complaints.*
>
> *25. The record does not contain a whole and true account of answers given by the prosecution witnesses in the course of cross examination."*

Counsel for appellants argued generally and invited the court to look into the record, but did not tell the court as against what other record. He prayed that this court looks into his complaints and gives guidance.

Mr. Nyange then concluded his submissions by pointing out what he thought were areas that needed the court's attention. He pointed to what he thought were areas of contradiction. He complained as to why some of who he thought were material witnesses were not called by the prosecution. He also complained to the failure of some of the victims to identify the 1st appellant i.e. PW14. He also again traveled through the issue of identification and said there was no description of the appellants before they were brought to court. He concluded by saying that this case was full of lies and the appellants were not properly convicted.

Mr. Mganga, learned state attorney who was assisting Mr. Masara replied on the last two grounds and on the conclusion. He invited the court to look at the record and see what it reflects and if it finds that the record reflects what transpired during the trial, these two grounds be dismissed. If any discrepancies are found, these should be weighed to see if they occasioned an injustice.

On whether a court on appeal can impeach credibility of a witness in the lower court, he said as credibility is a matter of the demeanor of a witness testifying, the trial court is best placed. He cited the case of **Adnventina Alexanda v. R Criminal appeal No.134 of 2002** (Court of Appeal at Mwanza – unreported), and concluded that the witnesses for the prosecution were credible. On the issue of impeachment, he said, a witness can be impeached against a statement he made only when he is still in court, under the provisions of sections 154 and 164 of the Evidence Act. Therefore, it was not proper to complain that witnesses statements were not admitted as they had already left court. He cited the **Odyek** case (supra). Mr. Mganga submitted also that it was improper for counsel for appellants to cross examine the police witnesses without leave of the court and the police officers were not competent to tender the statements of the victims as that would offend section 34B of the Evidence Act. These statements under the preceding section could only be tendered by the police if the victims had not been called to testify.

Mr. Mganga argued further that the duty of the prosecution and the defence is to assist the court to reach a just decision and not to

get a conviction or acquittal at any cost. He cited **Mohamed Katindi and Another v. R [1986] TLR 134** in support. On the complaint that no specific date was mentioned when the alleged offences were committed the state attorney said the issue would be whether lack of date would cause an appeal be allowed. He said it was the case for the prosecution that the offence took place between April and October. He concluded by saying that the case for the prosecution was proved beyond reasonable doubt, that the appeal be dismissed, the sentence be confirmed and varied to include strokes of the cane.

As I said before, the last two grounds of appeal are abnormal. No wonder, learned counsel for the appellants merely alleges. He has not given this court any reference. How can this court know that the record it has is not a true reflection of what transpired in court? Our way of recording evidence and all court proceedings is by long hand. We do not have tape recorders that would record everything including loud laughters. The authentic record is the court record that consists of the evidence and any admitted exhibits. In criminal trials, it will start with the charge sheet. Counsel for appellants does not show this court what was left, and why. He does not tell the court which answers by the prosecution witnesses were left unrecorded. This would help the court to see if the appellants were prejudiced.

Not everything said by witnesses should be recorded. Not all objections raised should be recorded. The court records what it

thinks is material to the justice of the case. If counsel thinks the judge or magistrate has not recorded what they think is important, he should request the judge or magistrate to record it. This record of appeal does not contain all and everything that was said- the court does separate the rice from the chaff and retain the former. I have gone through the record of the trial court. I do not see evidence of the allegation under ground 24 and 25. The proceedings, as I said earlier were charged and may be, a little turbulent. These things should not be condoned, but they do happen when sometimes counsel and the court are carried away by emotions.

As long as our mode of taking evidence remains as it is, there is nothing that this court can do but say the court record remains the only authentic record where anything can be extracted from. That is the official document. Impeaching its authenticity will require more than mere assertions. Learned counsel should endeavor and use his legal knowledge to make sure that what he thinks should be on record is put on record. The presumption is that what is on record is there with the knowledge of all parties. I have mostly repeated what I said at the beginning of this judgment because the complaints in annexure A – H appear to have been made the subject under the last two grounds of appeal.

I said the letters and all those documents are not properly before this court. But as I said before, going through them they do not support the allegations in grounds 24 and 25. Annexure B complains of non compliance with section 210 (3) of the Criminal

Procedure Act. This was not made a ground of appeal. Some of the evidence was not read over to the witnesses, like PW1, PW4, PW7 and PW10. The other witnesses' evidence was read over to them, like PW16, PW17 and PW18. The evidence of the victims was not read over to them because of their age. I am not persuaded that this prejudiced the appellants. Annexure C, D, E and F are complaints of the way the proceedings were being conducted. They do not allege non writing of proceedings but what they term as unfair rulings. The trial magistrate delt with the incidence of counsel for the appellants writing administrative letters whenever a ruling was given against him and said inter alia:-

> *"He rushed to his office, and wrote a long letter to the administration. He reproduced what he thought was the correct version of the evidence (critic) by disclosing the gist of the case held in camera in an open letter..... ..... His furry had misled him to forget his noble duties as an officer of the court who owed a duty to his client the fourth accused person. I stand corrected that it is my considered opinion that the proper recourse to correct proceeding is not through the administration. Proper application should be made to the court for consideration so that both parties to the proceedings may have a fair hearing before a determination of the application....." (emphasis supplied)*

I think the trial magistrate approached the situation well. Court proceedings cannot be corrected administratively.

The allegations in grounds 24 and 25, although appear very serious are not supported by the record. I find no merit in the two grounds of appeal and dismiss them.

The concluding part of learned counsel for appellants address to this court was merely a wrap up of all the grounds together. As I said earlier, the issue of demeanor if best tested by the trial court. There is a host of authorities on this as refereed to when I was dealing with grounds ten and eleven. I will say no more on this. I covered the issue of refusal to summon the police detectives when I dell with grounds fifteen to twenty. I need not go into it again.

The general complaint that counsel for appellants were denied the calling of police witnesses who recorded statements of the victims has been delt with. Suffice it to say that I agree with Mr Mganga as to the duty of counsel in any trial. In the **Katindi** case (supra) the High Court, (the late Lugakingira, J, as he then was) said:

> *"It is the obligation of a defence counsel, both in duty to his client and as an officer of the court, to indicate in cross-examination the theme of his client's defence so as to give the prosecution an opportunity to deal with that theme. For to withhold the position of the defence and thereby take the prosecution and the court by surprise does, to my mind, portray a poor appreciation of the meaning and purpose of any trial."*

Had learned counsel for appellants conducted their defence well as stated above, the complaints would not have arisen.

Lastly I will say this. When dealing with ground nine I concluded that no proper *voire dire* examination was conducted but said the evidence of the victims could not be disregarded. It is to be treated as normal unsworn testimony. The trial magistrate believed the testimony of each of the 10 victims. She believed the corroborating evidence of all the witnesses including PW20. She was entitled to act on the evidence on record to ground a conviction of the appellants. That there were some contradictions in the evidence of the victims was delt by the trial magistrate when she cited the case of **Hamisi Abdallah v. Sakiru Seengi [1978] TLR NO.4** and said:

> *"In this instant case, the testified (sic) children were raped by the male accused persons in (sic) more than one occasion over a period of out six months. As said earlier, the key material witnesses are females (sic) of tender age. That being so, it would be less than just (sic) to expect them to remember all facts, dates and time of the occurrences of incidents of similar character over a period of such time."*

Normal differences in witnesses testimonies are a healthy attitude. Photocopy evidence should signify suspicion. I do not therefore think the contradictions pointed out by learned counsel for the appellants go to the root as to make this court interfere.

I will now comment on the way the appellants were convicted. In convicting the appellants the learned trial magistrate said:

> *"I find that the prosecution has established its case beyond all*

reasonable doubt. I accordingly find them all guilty as charged and convict them forthwith."

I think it was important for the trial magistrate to say clearly that she was finding them guilty of <u>each count as charged.</u> This would remove any ambiguity on the exercise of convicting.

The respondents also prayed for enhancement of sentence to include corporal punishment. The appellants were sentenced under section 131(1) (3) of the Penal Code as amended by SOSPA. I think the evidence as adduced fits the definition of gang rape contrary to Section 131A, under which the appellants were charged. I substitute the section under which the appellants should have been sentenced accordingly. On corporal punishment, I think the respondents are misinterpreting the law. Corporal punishment, in my opinion only comes is when a sentence of less than life imprisonment is imposed under section 131 (1) of the Penal Code as amended by SOSPA. Besides no cross appeal against sentence was filed to give the appellants room to reply. The sentence is therefore left undisturbed.

But for the few interferences as indicated, this appeal stands dismissed in its entirety.

T. B. Mihayo

JUDGE

12.01.05

27/01/05

Coram: T. B. Mihayo, J.

For Appellants: Matambo

For Respondent: Masara ass. by Mrs Mushi

Appellants: Present.

Judgment read in open Court this 27th day of January, 2005.

T. B. Mihayo

JUDGE

27/1/2005.

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

S. A. Lila

DISTRICT REGISTRAR

7/3/2005