IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

MUSOMA

CRIMINAL APPEAL 44 OF 2020

(Originating from Criminal Case No 55 of 2018 of the District Court of Musoma at Musoma)

CHRISTOPHER JUSTINE @ MNIKO.....APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

20th July & 2nd October, 2020

Kahyoza, J

The trial court convicted **Christopher Justine,** the appellant for sexually abusing a girl of four (4) years old. The Court sentenced the appellant to serve a life imprisonment and to pay a compensation of Tzs. 1,000,000/=.

Aggrieved by both conviction and sentence, the appellant appealed to this Court contending that there was no evidence to lead to his conviction as the prosecution's evidence was inconsistence and contradictory, victim's age was not proved, the charge was defective, the evidence of a tender age was not properly recorded and finally that the prosecution did not prove its case beyond all reasonable doubt.

The appellant's grounds of appeal raised the following issues-

1. Was the prosecution's evidence credible?

2. Was the victim's age proved?
3. Was the charge defective?
4. Was the evidence of the witness of tender age procured according to law?
5. Did the prosecution prove its case beyond all reasonable doubt?
6. Did the court fail to properly conduct a preliminary hearing? If, yes, did the failure cause any injustice to the appellant?

A brief background is that: The police arraigned **Christopher Justine @ Mniko,** the appellant, before the District Court of Musoma at Musoma with the offence of rape contrary to sections 130 (2) (e) and 131(1) and (3) of the Penal Code, [Cap 16 R.E. 2002] (the Penal Code). The prosecution alleged that the appellant, on 8th day of March, 2018 at Bweri centre within the District and Municipality of Musoma in Mara Region, had carnal knowledge of girl referred to as GG or the victim. The victim was four (4) years old.

The appellant pleaded not guilty to the charge. The prosecution lined up three witnesses namely Mogita Julius (**PW1),** Ally Maina **(Pw2)** and Dr. Regina Bernard Msonge (**PW3**). Mogita Julius (**PW1),** a bus conductor lived with his wife and their two children at Bweri. On 8.3.2018 the fateful date Mogita Julius (**PW1)** left the victim alone at home as his wife had gone to mourn the death of her relative. Later in the afternoon at 15.00hrs, Mogita Julius (**PW1)** bought food, (French

fries or chips). He requested his friend Ally Maina **(Pw2),** who was at the bus stand, to accompany him to deliver food to his daughter.

On arriving at his rented premises, Mogita Julius (**PW1)** opened his room and entered into his room. No sooner had he entered the room than he heard the victim's voice lamenting. She cried *"Kaka unaniumiza" meaning "brother, you are hurting me".* Mogita Julius (**PW1)** called his daughter's name. His daughter surfaced from the appellant's room. She emerged crying and her blouse stained with spermatozoa. Mogita Julius (**PW1)** entered into the appellant's room and asked what was he was doing with his daughter. The appellant replied that he was praying with the victim. Mogita Julius (**PW1)** called Ally Maina **(Pw2),** inside the appellant's rooms, took the appellant from the bedroom to the sitting room. They examined the victim's vagina and saw spermatozoa. Mogita Julius (**PW1)** went out, took a piece of wood in order to smash the appellant. Ally Maina **(Pw2),** impeded him.

Angry people came at the scene, some with intention to punish the appellant. Ally Maina **(Pw2),** saved the appellant and rushed him to Bweri police post. Ally Maina **(Pw2)** deposed that people still gather at Bweri police post with an intention to take the law into their hands by punishing the appellant, the act, which forced Ally Maina **(Pw2),** and police to rush the appellant to central police station.

Mogita Julius (**PW1)** took the victim to police and later to Musoma referral hospital. The victim was examined on that day, given medicine, and advised to go back to hospital on the following day. On the day following the fateful date, Dr. Regina Bernard Msonge (**PW3**)

examined the victim and prepared P.F. 3. She tendered the PF. 3 as exhibit P.1. Dr. Regina Bernard Msonge (**PW3**) read the contents of exhibit P.1 after the court passed it for admission. The doctor deposed that her examination revealed that the victim had no bruises on her external parts, but her vagina had expanded and the left part inside the vagina, the labia minora, had bruises. There were no sperms in the liquid taken from the victim's vagina. The doctor concluded that there was forced penetration to the victim's vagina.

The appellant gave his defence on oath denying to have committed the offence. He stated that Mogita Julius (**PW1),** the victim's father fabricated the case against him as there was bad blood between them. They were in love in one woman. The appellant did not mention the name of that woman.

After considering the evidence by both sides, the district court believed the prosecution's case, found the appellant guilty, convicted and sentenced him to life imprisonment for the offence of rape.

The appeal proceeded orally. Mr. Mahemba advocate, appeared for appellant and Mr. Temba, the State Attorney represented the respondent, the Republic. He opposed the appeal. I will refer to their submissions while considering the grounds of appeal. The appellant's advocate raised five grounds of appeal. He abandoned one ground of appeal and added two more grounds of appeal. I will commence with the issue raised by the last ground of appeal, whether the trial court did conduct the preliminary hearing properly.

Did the court fail to properly conduct a preliminary hearing? If, yes, did the failure cause any injustice to the appellant?

The appellant's advocate submitted the trial court conducted the preliminary hearing in violation of section 192(1) and (3) of the **Criminal Procedure Act**, [Cap. 20 R.E. 2019] (the **CPA**). He averred that the trial court did not prepare a memorandum of matters not in dispute and read the same to the accused person. That notwithstanding, the appellant signed a document which the court did not read to him. He stated that the appellant was prejudiced by the proceedings conducted during the preliminary hearing as the prosecution did not call witnesses to prove facts admitted at that stage.

The respondent's state attorney contended that the trial court complied with the procedure for preliminary hearing. It recorded the agreed facts although it omitted to put the titled. He added that that defect was curable under section 388 of the **CPA** as it did not occasion any injustice. He cited the case of **Flano Alphonce Masalu @ Singu and 4 Others v. Republic** Cr. Appeal No. 366/2018 (CAT unreported). He prayed the ground of appeal to be dismissed.

The record is clear. The trial court conducted the preliminary hearing and omitted to put a proper title before the facts admitted as required by law. I quote-

"ADMITTED FACTS
Facts no. 01, 02 are admitted.
Disputed Facts
Facts no 03, 04,05 and 06 are disputed.

ACCUSED SIGNED
PP. signed
Sdg: R.S. Mushi-RM"

The record shows that facts number 01 and 02 were as follows-

> *"01. That the accused person['s] address and particulars are as per the charge sheet.*
> *02. That lives with his mother at Bweri are in a rented house with other tenants such as Mogita Julius who lives with his daughter by name Noela Mogita."*

It is clear from the trial court's proceedings that the trial court did comply with section 192 (3), (4) and (6) of the **CPA** and Form No. 14 of the **Criminal Procedure (Approved Forms) Notice** G.N. No. 429/20017. One of the omissions was the trial court's failure to read the admitted facts to the accused person before it invited him to sign it. Thus, violating the approved format, which came into force on the 13th October, 2017. The appellant's advocate submitted that the violation was fatal while the respondent's state attorney contended that thedefect was curable under section 388 of the **CPA**.

It is settled as submitted by Mr. Temba state attorney, that in every procedural irregularity the crucial question is whether it has occasioned a miscarriage of justice. See the case of **Flano Alphonce Masalu @ Singu and 4 Others v. R** (supra). In that case the Court of Appeal stated that-

> *"However, in our earlier decision in **Jumanne Shaban Mrondo v. Republic**, Criminal Appeal No. 282 of 2010 (unreported), where we confronted an identical irregularity, we emphasized **that in every procedural irregularity the***

crucial question is whether it has occasioned a miscarriage of justice. *We, then, reasoned that:*

"In Richard Mebolokini v, R. [2000] TLR 90, Rutakangwa, J. (as he then was) was faced with a similar complaint. The learned judge observed that when the authenticity of the record is in issue, non-compliance with section 210 may prove fatal. We respectfully agree with that observation. But in the present case the authenticity of the record is not in issue, at least, the appellant has not so complained. In the circumstances of this case, we think that non-compliance with section 210 (3) of the CPA is curable under section 388 of the CPA"

In the instant case, I am of a view similar to the state attorney that the irregularity occasioned no miscarriage of justice, on the ground that the facts alleged admitted did not carry forward the prosecution's case. The prosecution was compelled to call all its witness to prove the elements of the offence. The admitted facts were basic ones. They were regarding to his name, address and residence. I see no miscarriage of justice as the prosecution at different stage proved the existence of those facts. It could have been different if the admitted facts constituted the elements of the offence the prosecution relied on to prove its case.

I am of the considered opinion that since the trial court did not properly conduct the preliminary hearing I expunge the preliminary proceedings from the record. Thus, there is no record that the court conducted the preliminary hearing. It is settled that an omission to conduct a preliminary hearing is not fatal. See **Pagi Msemakweli v Republic** [1997] TLR 24 where the trial court had omitted to conduct

the preliminary hearing. On appeal the appellant raised it as a ground of complaint, the High Court held that-

> *The question now is whether the omission was fatal to the proceeding.* ***I do not think so. The purpose of a preliminary hearing is to identify matters which are not in dispute so as to cut down on the number of witness and promote a fair and expeditions trial.*** *Unless, therefore, the omission to conduct a preliminary hearing has resulted in an unfair trial leading to a failure of justice, it cannot be held to be fatal to a proceeding. It was not suggested to me that the appellant had an unfair trial and my examination of the record does not suggest so either. (emphasis is added)*

I uphold the appellant's complaint that the preliminary hearing was not properly conducted and proceed to hold that the irregularity is not fatal, it did not occasion injustice. It is curable under section 388 the **CPA**.

Was the prosecution's evidence credible?

The appellant's advocate submitted regarding the credibility of the prosecution's evidence; **first**, that the prosecution's evidence was inconsistent and contradictory. He stated that, on one hand, Mogita Julius (**PW1)** told the court that the offence was committed on the 8th March,2020, and on the same day reported to police and the victim taken to hospital. On the other hand, the doctor deposed that she treated the victim on the 9th March, 2020.

The appellant's advocate pointed out other contradictions between the evidence Mogita Julius (**PW1)** and Ally Maina **(Pw2)**. He submitted that Mogita Julius (**PW1)** and Ally Maina **(Pw2)** deposed that they reached the crime scene at the same time but gave different account. He stated that Mogita Julius (**PW1)** deposed that on reaching the scene of the crime he heard the victim crying *"kaka, kaka"* and Ally Maina **(Pw2)** testified that he heard the victim crying *"kaka ananiumiza".*

The appellant's advocate pointed still another contradiction between the evidence of Mogita Julius (**PW1)** and Ally Maina **(Pw2)** regarding to what they saw. Mogita Julius (**PW1)** said he saw spermatozoa on the blouse of the victim and Ally Maina **(Pw2)** deposed that he saw them on dress (gauni).

There was yet another contradiction between the evidence of Mogita Julius (**PW1)** and Ally Maina **(Pw2)** on one side and the evidence of the doctor on the other side. Whereas Mogita Julius (**PW1)** and Ally Maina **(Pw2)** deposed that they saw spermatozoa on the victim's clothes, the doctor testified that she saw no spermatozoa.

He prayed that the contradictions and the inconsistencies in the prosecution's evidence to be resolved in favour of the appellant.

In reply to the appellant's advocates submission, the respondent's state attorney submitted there was no any contradictions or inconsistences in the prosecution's evidence. He stated that there was no contradictions between Mogita Julius (**PW1)** and the doctor. He submitted that they deposed that they went to the hospital on the date

when the offence was committed on the 8th March,2018 and went back on the 9th March, 2018. The doctor who gave evidence examined the victim on the 9th March,2018. Mogita Julius (**PW1)** took the victim twice to the hospital.

He refuted the contention that there were contradictions between the evidence of Mogita Julius (**PW1)** and Ally Maina **(Pw2).** He submitted that there would have been contradiction if one heard the victim crying "Kaka kaka" and another one heard her crying "dada dada". He added that there was no contradiction as to where Mogita Julius (**PW1)** and Ally Maina **(Pw2)** saw semen. Mogita Julius (**PW1)** deposed that he saw semen on the blouse and Ally Maina **(Pw2)** testified that he saw them on dress (guani). He concluded that semen could be found at any place. He cited the case of **Fundi Omary v. R**. (1972) to support his submission. He submitted that it was held in that case that "it is not necessary to prove emission of semen or rapture of hymen so as to prove penetration. What is required is to prove that the accused's genital being in contact with the genital of the victim." The fact that the Doctor did not see semen in the vagina of the victim is not a contradiction to the evidence of Mogita Julius (**PW1)** and Ally Maina **(Pw2).** The state attorney contended that there were no contradictions and should this Court find that there were such contradictions, he pleaded the Court to find out that the contradictions were minor did not go to the root of the case.

I will pinpoint out some basic principles which apply in assessing credibility of witnesses. **One**, it is trite law that in assessing a witness'

credibility, his or her evidence must be looked at in its entirety, to look for inconsistencies, contradictions and/or implausibility; or if it is entirely consistent with the rest of the evidence on record: See, for instance, **Shabani Daudi v. R.,** Criminal Appeal No. 28 of 2000 (CAT unreported).

Two, contradictions are inevitable in the evidence of two or more persons, the contradictions which go to the root of the matter are the ones which affect the credibility of the witness(es). See **Chrisant John v R** CAT Criminal Appeal No. 313 of 2015 (CAT unreported) where the Court of Appeal held that-

> *"**Contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case**. However, in considering the nature, number and impact of contradictions, **it must always be remembered that witnesses do not always make a blow by blow mental recording of an incidence.** As such contradictions should not be evaluated without placing them in their proper context in an endeavor to determine their gravity, meaning whether or not they go to the root of the matter or rather corrode the credibility of a party's case. (Emphasis added)*

The Court with a duty to determine the credibility has to consider the evidence as whole and it should not consider pieces of evidence in isolation. See **Elia Nshambwa Shapwata and another v R** Criminal Appeal No. 92 2007 (CAT unreported). It stated-

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."

Given the principles pointed out above, my task is to consider whether there are material contradictions and inconsistences, and whether they went to the root of the matter. The defence pointed out that there were contradictions on what Mogita Julius (**PW1)** and Ally Maina **(Pw2)** heard and saw. I see no material contradictions. Both, Mogita Julius (**PW1)** and Ally Maina **(Pw2)** deposed that they heard the victim was crying. Mogita Julius (**PW1)** said

*"Reaching at home I opned the door of my room and **heard a voice of my child calling "kaka,kaka"** soon after I saw Noela coming from the room of the accused person crying and her blouse was dirty with sperms (shahawa)."*

Ally Maina **(Pw2)** deposed that-

*"Reaching at his home we **heard a voice "kaka ananiumiza"** Pw1 called his daughter Noelaa.....And soon after Noela came from the room of the accused person while crying and she was saying "Baba baba Kaka ameniumiza" while pointing to her vaginal parts. From there Pw1 decided to enter inside the room where Noela came from and he met with the accused person. he called me while taking the accused from the room to the sitting room. At the sitting room I observed Noela at her vaginal parts and I saw semen at her vaginal parts (nilikuta shahawa nyingi katika uke wa mtoto na gauni lilikuwa limelowa shahawa."*

Considering the whole evidence and not just pieces of statements, I see no contradictions. It is clear from both accounts that the victim was lamenting that her brother inflicted injuries. There was no one who recorded the evidence.

Coming to what Mogita Julius (**PW1)** and Ally Maina **(Pw2)** saw after examining the victim. I find no material inconsistences or contradictions or discrepancies. They both saw semen. Mogita Julius (**PW1)** saw semen on the victim's blouse and Ally Maina **(Pw2)** saw semen on the dress (gauni). ***A blouse*** *is a woman's loose upper garment resembling a shirt, typically with a collar, buttons, and sleeves, whereas* ***dress (gauni)*** *is a one-piece garment for a woman or girl that covers the body and extends down over the legs. (According to Advanced Learners' Dictionary).* It is unlikely that the victim wore both the dress and blouse at the same time. I find it immaterial that the victim wore a dress or blouse, what is material is that both witnesses saw spermatozoa on the victim's cloth.

Lastly, the defence contended that there were contradictions between Mogita Julius (**PW1)** and Ally Maina **(Pw2)** on one side and the doctor, on the other. Mogita Julius (**PW1)** and Ally Maina **(Pw2)** testified that they saw semen and the doctor deposed that she did not see spermatozoa. I took passion to consider the whole the evidence and found that there were no contradictions, as the difference happened due to the fact that they examined the victim on different dates. Mogita Julius (**PW1)** and Ally Maina **(Pw2)** examined the victim on the **8th March, 2018** when the offence was committed while the

doctor examined the victim **on 9thday of March, 2018** a day after the commission of the offence.

Mogita Julius (**PW1)** took the victim to hospital on the 8th March, 2018 and for obscure reasons, a person who attended him requested him to take the victim back to the same hospital the following day. Mogita Julius (**PW1)** complied. The doctor who testified examined the victim on the 9thday of March, 2018, a day after the victim was raped. It was not astonishing for the doctor not see spermatozoa.

In the upshot, I find that the witnesses were consistent in material areas and there were no material contradictions between their evidence to vitiate their credibility. I dismiss the appellant's ground of appeal.

A **second** ground why the prosecution's evidence is not credible is that the prosecution relied on the evidence of Mogita Julius (**PW1)** and Ally Maina **(Pw2)** who were friends. He submitted that the law does not prohibit friends to give evidence but in the circumstances of this case there was a need to call an independent witness. He deposed that there was another tenant to whom the victim was left with. There was also the investigator who was not called to testify. He prayed the Court to draw an adverse inference for the prosecution's failure to call an independent witness and the investigator. He cited the case of **Aziz Abdallah v. R.** [1991] TLR 71, where the Court of Appeal stated that the general rule the prosecutor is under *prima facie* to call those witnesses who from their connection are able to testify on the material

facts. If such witnesses are within the reach and are not called without reason the court may draw adverse inference.

Replying to the above submission, Mr. Temba submitted that it was true that Mogita Julius (**PW1)** and Ally Maina **(Pw2)** were friends. However, their friendship did not affect their credibility. He submitted that the Court of Appeal considered the evidence of blood related witness and found it reliable in the case of **Godfrey Sabibunus and Others v. R.** Cr. Appeal No. 273/2017. It found their evidence credible despite the fact that the witnesses were related. He also referred the court to the case of **R. v. Lulakombe Mikwalo and Kibege** EACA [1936] 43 where the court held that "there is no rule of law or practice which permits the evidence of a near relative or friends to be discounted merely on their relationship".

It is trite law that the evidence of a relative of for that matter a close friend is credible and indeed there is no rule of practice or law which requires the evidence of relatives to be discredited, unless there is ground for doing so. See the case of **Mustafa Ramadhani Kihiyo v. R.** [2006] TLR. 323, the Court of Appeal emphasized that:

> *"The evidence of relatives is credible and there is no rule of practice or law which requires the evidence of relatives to be discredited. Unless there is ground for doing so.*
> "

In the present case, I am unable to discredit the evidence that Mogita Julius (**PW1**) and Ally Maina (**Pw2**) as there is no indication that they teamed up to promote untruthful story. Each one's evidence has to be considered and evaluated on the principles of evaluating the evidence. Ally Maina (**Pw2**) explained that he served the victim from

Mogita Julius (**PW1**)'s beating. It is on record that after Mogita Julius (**PW1**) discovered that the appellant raped his daughter he went outside and obtained a piece of wood for the purpose of beating the appellant. Ally Maina (**Pw2**) interfered and served the appellant. A mob of people assembled and wanted to bit the appellant. Ally Maina (**Pw2**) rescued the appellant by taking him to Bweri police post and later to central police station as people gathered again at that police post.

The appellant abstained from cross-examining Ally Maina (**Pw2**). It is settled that a party who fails to cross examine a witness on certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. See **Daniel Ruhere v. Republic** Criminal Appeal No. 501/2007, **Nyerere Nyauge v. R** Criminal Appeal No. 67/2010 and **George Maili Kemboge v. R** Criminal Appeal No. 327/2013, a few to mention. I see no reason to discredit Ally Maina (**Pw2**).

I also considered the evidence of Mogita Julius (**PW1**) the victim's father. I found the evidence of the doctor and the P.F. 3 (exhibit P.E. 1) corroborated Mogita Julius (**PW1**)'s evidence that his daughter was raped. The evidence of Ally Maina (**Pw2**) also corroborates the evidence of Mogita Julius (**PW1**). I have already found the evidence of Ally Maina (**Pw2**) credible.

Eventually, I find the evidence Mogita Julius (**PW1**) and Ally Maina (**Pw2**) credible despite their friendship. There was no need of evidence to corroborate the evidence of Mogita Julius (**PW1**) and Ally

Maina (**Pw2**) or of the independent witness. There is no need to draw adverse inference for the prosecution's failure to the call the investigator or the person to whom the victim was left with as submitted by the appellant's advocate. The trial court, therefore, rightly believed their evidence.

Was the victim's age proved?

The appellant's advocate submitted that the appellant was charged with statutory rape under section 130(2) (e) and 131(1) and (3) of the Penal Code. Pw1 did not tender evidence to prove that the victim's age was below 18 years or below ten years of age. He averred that Mogita Julius (**PW1**) did not tender a birth certificate, clinical card, or anything to prove that the victim was born in 2013. He concluded that the victim's age was not proved beyond all reasonable doubt.

The respondent's state attorney replied that the prosecution established the victim's age. He contended that the Mogita Julius (**PW1**) the victim's father was in the position to establish the victim's age. He cited the case of **Athanaz Ng v R** Criminal Appeal No 57/2018 where the Court of Appeal held that the age of the victim, can be proved by the victim, a relative, a parent, a medical practitioner and where available by production of a birth certificate.

It settled law that the evidence of a parent is better than that of a medical Doctor as regards the parent's evidence on the child's age. See the cases of **Edson Simon Mwombeki v. Republic**, Criminal Appeal No. 94 of 2016 (unreported) wherein the Court of Appeal cited the observation from our previous unreported decision in **Edward Joseph**

v. Republic, Criminal Appeal No. 19 of 2009 and **Mustapha Khamis V. R.** Cr. Appeal No. 70/2016. Mogita Julius (**PW1**), the victim's father deposed that-

> *"I live with wife and two children and other tenants. My children names are Noela Mugita(4) and Anstazua Mugita (2). Nolela was born in 2013 on 25 September...."*

Given Mogita Julius (**PW1**)'s evidence as to the victim's age, I find it proved that the victim's age was 4 years at the time the offence was committed.

I dismiss the complainant that the victim's age was not proved.

Was the charge defective?

The appellant's advocate raised the complaint that the appellant was charged with a defective charge. He did not provide meat to the skeleton complaint.

The respondent's state attorney contended the charge was not defective.

I examined the record and found that the appellant was charged under section 130 2(e) and 131(1) and (3) of the Penal Code [Cap. 16 R.E. 2002]. The charge did not mention section 130(1) of the Penal Code which creates the offence of rape. Section 130 (1) and (2)(e) stipulates that-

> *130.-**(1) It is an offence for a male person to rape a girl or a woman.***
> *(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
> *(a) .....; (b) .....; (c) .....; (d) .....;*

(e) ***with or without her consent when she is under eighteen years of age****, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.*

The victim is a girl below 18 years. The appellant was properly charged under section 130(2) (e) and section 131(1) and (3) of the Penal Code. As pointed out above the prosecution omitted to include **subsection (1) of section 130** of the Penal Code. It is my view that the error was curable under section 388 of the **CPA**, which provides that-

388.-(1) Subject to the provisions of section 387, ***no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint****, summons, warrant,* ***charge,*** *proclamation, order, judgment or in any inquiry or other proceedings under this Act;* ***save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice****, the court may order a retrial or make such other order as it may consider just and equitable.*

Given the contents of subsection (2) of section 130 of the Penal, I am of the firm view that the appellant knew the nature of the offence he was charged with in order to be able marshal his defence. The prosecution's failure to include subsection (1) of section 130 of the Penal Code did not prejudice him. I therefore, find that the omission did not **occasion a failure of justice**. I dismiss the complaint that the charge was defective.

Was the evidence of the witness of the tender age procured according to law?

Mr. Mahemba, the appellant's advocate complained that the trial court admitted the evidence of the victim's evidence in violation of section 127 of the **Evidence Act**, [Cap. 6 R.E. 2019]. He submitted that the law required the victim, who a witness of tender age, to promise to tell the truth before she gave evidence. The trial court violated it.

Mr. Temba, the state Attorney, submitted that the victim did not give evidence. He argued that she entered the court and pointed to the appellant and started crying. He contended that even if the victim's is regarded to have given evidence without promising to tell truth, failure to promise to tell truth was not fatal. He cited the case of **Seleman Moses Sotel@ White v R.** Criminal Appeal No. 385/2018

It is clear from the record that the victim did not testify. I quote record of the trial court to show what transpired when the victim entered appearance on the day she was to testify-

> ***"XD PW@ 4 YEARS***
>
> ***Court:*** *The victim is a child of 4 years, though there was a help of Afisa Ustawi wa Jamii but she has failed to give her evidence. She also managed to finger point the accused person and when asked to know the accused person she replied that he is "KAKA" and from there she started crying"*

It is clear from the above excerpt that the victim did not testify. Thus, the appellant's advocate's complaint is baseless. I dismiss it.

Did the prosecution prove its case beyond all reasonable doubt?

The appellant's advocate raised another complaint which was too general. This was more or less a fishing expedition. However, since this is the first appellate court I will briefly consider this last complaint although it too wide to include all the grounds of appeal already discussed. The Court of Appeal had the following to comment of the practice of filing specific grounds of appeal and coming up with the general ground of appeal. It stated in the case of **Rutoyo Richard V. R** Criminal Appeal No. 114/2017 thus-

> *"Although we find it not a good practice for an appellant who has come up with specific grounds of appeal to again include such a general ground, but where it was raised as was the case in the present case, it should be considered and taken to have embraced several other grounds of grievance."*

The appellant's advocate raised a number of complaints to support his general ground of appeal as follows; **First**, the appellant's advocate submitted that the appellant was convicted basing on the circumstantial evidence. Citing the case of **Hassan Fadhil v. R** [1994] TLR 89, he submitted that the Court of Appeal held that circumstantial evidence was not good evidence at all. The law on circumstantial evidence must prove irresistibly that it is the accused and not anybody else who committed the crime.

The respondent's state attorney replied that there was no dispute that the victim was raped as the doctor proved that there was

penetration. The doctor, Regina (**Pw3**) tendered also a P.F.3. He added that it was true that there was no eye-witness as the appellant was not caught *inflagrante delicto*. He averred the circumstantial evidence pointed to the appellant's guilt. The evidence shows that it was short of catching the appellant on the act.

I have no doubt in mind that the appellant was rightly convicted. Mogita Julius (**PW1**) and Ally Maina (**Pw2**) deposed that they heard the victim lamenting "Kaka, Kaka". Mogita Julius (**PW1**) saw her emerging from the appellant's room crying and complaining that the appellant had battered her pointing to her private parts. On examination, she was found with spermatozoa. What more direct evidence is needed than that which was given by Mogita Julius (**PW1**) and Ally Maina (**Pw2**). Ally Maina (**Pw2**) deposed how he served the appellant from Mogita Julius (**PW1**)'s and the mob justice's beating. I have no scintilla of doubt that there is ample and direct evidence pointing to the appellant irresistibly that he raped the victim.

Second, the appellant complained that the trial court did not give the appellant's defence the weight it deserved. He submitted that the trial court simply said "utetezi wake una mashaka" meaning the appellant's defence is doubtful or shaky. He submitted that for that reason his client was convicted on the weakness of his defence and not on the strength of the prosecution's case. He stated that it is settled that an accused person should not be convicted on the weakness of the defence but on the strength of the prosecution's case. He cited the case of **Christian & Another V. R** [1993] TLR 302.

The respondent's state attorney contended that the trial court did consider the appellant's defence and find it weak. He requested, this Court, should it find out that the trial court did not consider the defence, being the first appellate Court, to re-evaluate the evidence and consider the defence.

I am compelled to point out at the outset that to consider the accused's defence is different from upholding his defence. The court may consider the defence either find it implausible and give it no weight or find it probable and rely on it. In the instance case, the trial court considered the appellant's defence and found it implausible. The trial court stated-

> *"If the result from an expert is that the victim had been raped and the accused person is the one found with the victim inside the room, my conclusion is very straight, the accused person is the one who committed that offence. In my humble view he was duty bound to narrate to this Court what kind of "Mchezo' he was playing with the victim which resulted to undress his clothes plus that of the victim. Telling this Court that he had a quarrel with the victim's father is not a factor of playing such kind of game with the victim. And if at all he had a quarrel with the victim's father how about PW2? Admittedly this unhealthy state of evidence cannot raise even a single doubt in my mind. I am sure that the important ingredient of rape, that is penetration took place and the accused person is the one who committed that offence."*

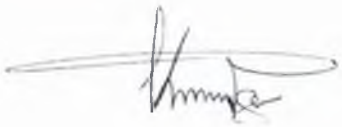
I find that the trial court did sufficiently consider the appellant's defence. Even if I was to reconsider the defence my conclusion would not be different. There was ample evidence to prove

that appellant committed the offence. The appellant's defence was that the victim's father fabricated the case against him due to their existing quarrels. The appellant did not cross-examine the victim's father to point out that evidence. It is settled that a party who fails to cross examine a witness on certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. See **Nyerere Nyauge v. R** (supra). The appellant's defence was an afterthought. Thus, the trial court rightly accorded it less weight.

I dismiss the complaint that the trial court did not consider the defence and that the it convicted the appellant on the weakness of his defence. Such complaints are meritless basing on the prosecution's evidence discussed above.

In the upshot, I find the prosecution proved the appellant's guilty beyond all reasonable doubt. Consequently, I dismiss the appeal in its entirety and uphold the conviction and sentence imposed by the trial court of life imprisonment under section 131(1) and (3) of the **Penal Code**, [Cap 16 R.E. 2002].

It is ordered accordingly.



J. R. Kahyoza
JUDGE
2/10/2020

Court: Judgment delivered in the presence of Mr.Temba, the State Attorney and in the absence of the appellants. B/C Catherine Tenga present.

J. R. Kahyoza,
JUDGE
2/10/2020