IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

MWANZA

CRIMINAL APPEAL 41 OF 2017

(Originating from Criminal Case No 207 of 2016 of the District Court of Geita at Geita)

LAZARO MPIGACHAI .....APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

1st & 23rdMay, 2022

Kahyoza, J.;

The Republic alleged that **Lazaro Mpigachai,** (the appellant) did unlawfully have sexual intercourse with **XX** (not real name) a girl of 11 years old. The offence was allegedly committed on the 2nd April, 2016 at 07:00 hrs. The appellant denied the charge. After full trial, the district court convicted the appellant and sentenced him to serve a custodial sentence of thirty years.

Aggrieved, the appellant petitioned to this Court with five grounds of appeal against both the conviction and sentence. The appellant's grounds of appeal raised the following issues-

1. Were the victim of rape (XX) and Sara Enosy (**PW6**) credible witnesses?
2. Was the evidence of the victim corroborated by hearsay evidence?
3. Did the trial magistrate fail to analyze the evidence?
4. Did the trial court err to rely on the PF.3?
5. Did the trial court err in assessing and probing the prosecution evidence?

A brief background is that; on 01/04/2016 Sara Enosy (**PW6**) saw a man (the appellant) walking behind a younger girl. Later, she decided to go to her paddy farm. On her way, she met the girl running to the opposite direction and the same man behind her. Sara Enosy (**PW6**) inquired from that man why was the girls running from him. The man rebuked the girl. She proceeded to her paddy farm. While coming from her paddy farm, Sara Enosy (**PW6**) met again the man. She asked him where was he staying as he was not a common resident of that village. The man replied that he was staying at Maria's house and that he was there to attend his brother. That person requested Sara Enosy (**PW6**) to buy his maize. Sara Enosy

(**PW6**) turned down the offer. The man beseeched earnestly Sara Enosy (**PW6**) to buy his maize as they wanted money to a sick relative. Sara Enosy (**PW6**) denied the offer telling the man that she cannot carry maize. The man promised to bring maize to her house and prayed to know the house. Sara Enosy (**PW6**) showed him the her house and the man promised to bring maize the following day. Suddenly, Sara Enosy (**PW6**) saw the man walking fast behind her. That man assaulted Sara Enosy (**PW6**), holding her neck tightly. That man told Sara Enosy (**PW6**) that was her last day.

Sara Enosy (**PW6**) shouted for help. Sara Enosy (**PW6**)'s children heard their mother's call for help. They responded. On seeing Sara Enosy (**PW6**)' children approaching the man escaped. She reported the incident to the ten-cell leader's secretary as she was not able to trace the tell-cell leader. The secretary summoned leaders. The leaders and Sara Enosy (**PW6**)'s husband commenced a search for that person as they knew him. They managed to arrest him on following day.

After, the man, (the appellant) was arrested, on 2. 4.2016 Sara Enosy (**PW6**) went to the village office and identified the person who

assaulted him. Whilst at the village office, Sara Enosy (**PW6**) deposed a girl complained that her assailant on 1.4.2016 raped that girl. They called the girl in the middle of the group of people and invited her to identify a person who raped her. She identified Sara Enosy (**PW6**)'s assailant.

After swearing, the victim deposed on 2.4.2016 went to did potatoes alone at around 07:00 am. The accused approached her, told that her mother wanted to meet her. The accused told the victim that her mother was at a mango tree. She told the accused that she was not able to locate the mango tree. The accused led her towards a mango tree. They passed through tall grasses. Shortly after discovering that victim discovered she had fallen the appellant's prey, the accused assaulted and undressed her. Her efforts to escape met the accused strong arm. The accused stripped off his clothes. The victim tried to escape an ordeal, the accused slapped her and threatened to hit her with a hoe. The accused ravished her. After he fished raping her, the accused ordered the victim to suck his penis. The victim obeyed.

She left the scene of crime, took potatoes and her hoe, went

home. She was too afraid to report the incident to her sister. The accused person threatened her not to report to anyone. The victim's sister sent her to the village center to buy salt. She bought salt. Later, her sister sent her to buy sugar. She went back to the centre. On arriving at the village centre, the victim found people surrounding the appellant. She identified him as the person who had raped her. She immediately notified Baba Daud [Mr. Emmanuel Kalwani (**PW2**)] that the accused raped her. Men appointed two women present to examine her. The women confirmed the victim's allegation, that she was raped.

Veneranda Zacharia (**PW5**) was one of the women who examined the victim. She deposed they saw white fluid dripping from the victim's vagina and dried blood. They reported back to the leaders, who summoned the police.

They took the victim and the accused person to police. Later, the victim was taken to hospital. Doctor Christopher Yohana Matola (**PW4**) examined her. He confirmed that the victim had a perforated hymen, a lacerated wound around the vagina, and vaginal orifice with fluid discharge. The fluid was examined and established that the fluid

were sperms. He tendered a PF.3 as exhibit P.1.

Mr. Emmanuel Kalwani (**PW2**) confirmed the victim's evidence that on 2.4.2016 while at the village centre where the accused was held for assaulting or trying to rape a woman, the victim attracted his attention by touching and calling him, Baba Daudi. The named the victim's name. The victim told him that the accused raped him. He immediately notified the ten-cell leader. The ten-cell leader requested two women to examine the victim. They did so an confirmed that the victim was raped.

Pares Aaron (**PW3**) the victim's father got information that her daughter was raped.

The appellant defended himself on oath. He had no witness to call. He denied to commit the offence and stated that he sold maize to Sara Enosy (**PW6**). Sara Enosy (**PW6**) paid Tzs 20,000/= out of Tzs. 80,000/=. The day after he sold maize to Sara Enosy (**PW6**), the appellant went to demand the balance. Sara Enosy (**PW6**) refused to pay the balance alleging that she paid the purchase price. He stated, sooner after Sara Enosy (**PW6**) denied to settle the debt, one woman appeared alleging that the appellant raped her daughter. He stated

the case was fabricate in order to deprive him money, the value of the maize he sold to Sara Enosy (**PW6**).

After considering the evidence of by both sides, the district court believed the prosecution's case, found the appellant guilty, convicted and sentenced him to thirty (30) year imprisonment for the offence of rape.

The appeal proceeded orally. The appellant fended for himself and Ms. Revina Tibilengwa, the Principal State Attorney represented the respondent, the Republic. She opposed the appeal. I will refer to their submissions while considering the grounds of appeal.

This is a first appellate Court which, apart from considering the grounds of appeal, has a duty to re-appraise the entire body of evidence on record including the defence, confirm or make its own findings. See the cases of **Alex Kapinga v. R.,** Criminal Appeal No. 252 of 2005 (CAT unreported) and **Josephat Joseph v. R.**, Criminal Appeal No. 558/2017, a few to mention.

Are the victim and Sara Enosy (PW6) credible witnesses?

I will, before considering the issue whether the victim and Sara

Enosy (**PW6**) were credible, determine whether the trial did admit the evidence of victim of rape properly. The victim of rape was 12 years at the time she testified. Section 127 (2) of the **Evidence Act,** [Cap. 6 R.E. 2019] requires the evidence of a child of tender age to recorded after that child has made a promise to tell the truth.

> *"127.-(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies".*

The victim, Pw1, a child of tender age did not promise to tell the truth but gave evidence oath. The victim testified on 19th July, 2016. The amendment of section 127(2) of TEA to introduce the requirement of a child of tender age to promise to tell truth, became operation from 7th July,2016 when the President assented. I entertained doubts if the trial court properly admitted victim's evidence, hence, I invited parties to address me on the issue. The appellant had nothing to substantive to tell the court. Ms. Revina, the Principal State Attorney, submitted

that trial court properly admitted the victim's evidence as the victim testified on oath. She argued that a child of tender age, who is required to promise to tell truth is the one who cannot testify on oath. To support her contention, she cited the case of **Suleiman Moses Soter @ White v. R,** Cr. Appeal No. 385/2018 where the Court of Appeal found that a child of 10 years old tendered evidence on oath instead promising to tell the truth. The Court of Appeal observed and held that-

> *"It is clear from the amendment to s. 127 of the Evidence Act that the purpose was to do away with the old procedure of conducting* ***voire dire*** *examination on the child witness. That procedure was intended to ascertain first, whether the child understands the nature of oath and whether or not he or she has sufficient intelligence to justify reception of the evidence of a child witnesses. In our considered view therefore,* ***in the present case, the trial magistrate acted properly in taking the evidence of PW3 on affirmation after the witness had been found to understand the nature of oath****. From the wording of s. 127 (2) of the Evidence Act, it cannot be said that her evidence was improperly taken. Obviously, the provision is silent on the procedure which a trial court*

should apply to decide whether a child witness should give evidence on oath or affirmation or upon a promise to tell the truth and on undertaking not to tell lies. Addressing that lacunae, the Court had this to say in the case of ***Godfrey Wilson*** *(supra).*

> *"The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions which may not be exhaustive depending on the circumstances of the case as follows:*
>
> *1. The age of the child.*
>
> *2. The religion which the child professes and whether she/he understands the nature of oath.*
>
> *3. Whether or not the child promises to tell the truth and not to tell lies. (**Emphasis is added**)*

Given the position of the law, I find that the trial court admitted the victim's evidence properly as she testified on oath instead of promising to tell the truth. It was satisfied that the victim knew the nature of telling oath. The trial court examined the victim and established that she was competent to testify on oath. She, therefore, gave her testimony in compliance with section 198 of the **Criminal**

Procedure Act, [Cap. 20 R.E. 2019] (the CPA).

That done, I now consider whether the victim and Pw6 were credible witnesses. The appellant complained that the trial court erred by its failure to discover the ill motive of the victim and Sara Enosy (**PW6**).

Ms. Revina, Principal State Attorney, replied that the victim and Sara Enosy (**PW6**) had no ill motive against the appellant. She submitted that there was no evidence any bad blood between the victim and the appellant or between Sara Enosy (**PW6**) and the appellant. She added that the victim testified on oath explaining how the appellant raped her. The appellant found the victim in the potatoes farm and lied to her that her mother was calling her. He told her that she was near the mongo tree. Innocently, she agreed to go where her mother. The appellant led her to tall grasses where he raped her. The victim explained how the appellant raped her for a long time. After he fished he order her to suck her penis.

Like, the principal state attorney, I am not convinced that the victim was coached. The victim testified that after the appellant raped her, she went home. She did not report to her sister afraid to be

punished and the appellant had threatened her. The appellant deposed that if the victim was raped she would not have been walked to the village centre to buy items. It is on record that after the victim was raped she went home and her sister sent her to the village centre to buy salt. Later, she sent her to buy sugar. She managed to identify the appellant at centre as he was arrested for assaulting Sara Enosy (**PW6**). There is no evidence that a girl cannot walk after she is raped. In this case, the victim narrated that the appellant raped her in the bush. She left the scene of the crime, went back to the potatoes farm, picked potatoes, and went home. She was able to walk. Thus, if she walked from the scene of the crime to their home place, she was capable of walking to the village centre for shopping. There is no evidence that the victim and Sara Enosy (**PW6**) had anything in common to benefit by seeing the appellant behind the bar.

Sara Enosy (**PW6**) narrated how the appellant assaulted her a day before he raped the victim. She deposed how she reported the indent to the secretary of the ten-cell leader and how a search commenced. The appellant was arrested for assaulting Sara Enosy (**PW6**). The victim found the appellant already arrested. She told Baba

Daud, Mr. Emmanuel Kalwani (**PW2**), how the appellant raped her. Veneranda Zacharia (**PW5**) and another woman examined her and confirmed that she was raped. Doctor, Christopher Yohana Matola (**PW4**) confirmed too, that the victim was a raped.

I have no reason to doubt the evidence of the victim. Like the trial court, I find her a credible witness. She had no reason to lie. It a settled principle of law that in sexual offences the best evidence comes from the victim. See the case of **Selemani Mkumba v. R.** [2006] T.L.R. 23 and **Daudi Shilla V. R**, Criminal Aappeal No. 117 of 2007 (unreported) the Court observed in that latter case that-

> *"The evidence of the complainant on what the appellant did to her is detailed and she missed no word. All the ingredients of the offence were given in her evidence. By then she was fourteen years. The Court in* ***Seleman Makumba Vs R*** *... said: -*
>
> *"The evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman, consent is irrelevant that there was penetration'...."*

The appellant did not cross-examine the victim or Sara Enosy (**PW6**) to unearth their ill motive. It is trite law that failure to cross

examine a witness on a very crucial matter entitles the court to draw an inference that the opposite party agrees to what is said by that witness in relation to the relevant fact in issue. In **Damian Ruhele v. Republic**, Criminal Appeal No.501 of 2009, the Court made reference to its earlier decision in **Cyprian Athanas Kibogo v. Republic**, Criminal Appeal No.88 of 1992 (both unreported), where it stated plainly that

> *"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence"*

The appellant contended in his defence that Sara Enosy (**PW6**) owed the appellant Tzs.60,000/= He sold maize on the 1/4/2016 worthy Tzs. 80,000/=. Sara Enosy (**PW6**) paid only Tzs. 20,000/=. On the following day, that is on the 2/4/2016 he went to Sara Enosy (**PW6**) to demand the balance. To avoid to pay the balance, Sara Enosy (**PW6**) fabricated a case of rape against the appellant. I was unable to find truth in the appellant's defence. The appellant did not cross-examine Sara Enosy (**PW6**) regarding the amount of money Sara Enosy (**PW6**) owed the appellant. The appellant's defence was an afterthought. There is ample evidence as to the way the victim

reported to be raped. She reported to Baba Daudi, Mr. Emmanuel Kalwani (**PW2**). Mr. Emmanuel Kalwani (**PW2**) confirmed that the victim told her after the appellant had been arrested that the appellant raped her.

There yet another piece of evidence that after the victim reported to Mr. Emmanuel Kalwani (**PW2**) that the appellant raped her, the leaders appointed Veneranda Zacharia (**PW5**) and another woman to examine the victim. They found white fluid dripping from the victim's vagina and dried blood. They reported back to the leaders, who summoned the police. The appellant did not contradict the evidence of Mr. Emmanuel Kalwani (**PW2**) and Veneranda Zacharia (**PW5**). 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.

As stated above the appellant's evidence was too weak to raise any reasonable doubt to the prosecution's evidence. The appellant's

evidence was an afterthought. The prosecution established beyond all reasonable doubt that the appellant raped the victim. I find first, second third and fifth grounds of appeal, which question the credibility of the prosecution's evidence baseless. I dismiss them.

The victim is alleged to be a girl below 18 years. In such cases, the offence of rape is established by proving penetration and the age of the victim. It is immaterial if the victim consented or not. 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 told the court that she was 12 years old. She

mentioned her age before she was sworn. The victim stated that she was a Std III pupil. I find that the victim's age was not proved. Despite the prosecution's failure to prove the victim's age, there is no doubt that the victim never consented to have sexual intercourses with the appellant. There is ample evidence that the appellant raped the victim. The offence was committed during the day and the victim identified the appellant and caused his arrest a few hours after he committed the offence.

The appellant complained that the victim's evidence was corroborated by hearsay evidence. Given the nature of the evidence, the victim's evidence did not require corroboration. It is not a legal requirement that the evidence of the victim must be corroborated. The court requires corroborating evidence where the evidence of the victim is not credible. See section 127(40) OF TEA. It states that-

> *"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 of as the case may be 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".

I hold that in the present case the evidence of the victim did not require corroboration. Like the trial court, I find that she was credible.

Did the trial court err to rely on the PF.3 ?

The appellant complained that the trial court erroneously relied on the PF.3, the medical examination report. The respondent's state attorney conceded that PF. 3 was not properly admitted and relied upon on the ground that the trial court omitted to read the exhibit to the appellant after it cleared it for admission. She submitted that the PF.3 exhibit P.1 must be expunged from the record. She cited the case of **Robinson Mwanjisi v. R.** [2003] TLR. 218. She quickly submitted that despite expunging exh.P.1, the court may still rely on the evidence of the doctor, Christopher Yohana Matola (**PW4**).

It is an established principal of law that failure to read the contents of the document after it is cleared for admission is a fatal irregularity. (See **Lack Kilingani Vs Republic,** Criminal Appeal No.405 of 2015). For that reason, I expunge the PF.3, Exh. P1 from the record

of this case. However, I believe the evidence of Christopher Yohana Matola (**PW4**) covered the contents of exhibit P.1, the P.F.3. Thus, Christopher Yohana Matola (**PW4**)'s evidence had corroborative value. It corroborated the evidence of the victim that she was raped.

Did the trial court consider the appellant's defence?

I examined the record to find out if the trial court considered the appellant's defence. A quick glance at trial court's judgment revealed that the magistrate did consider the defence evidence and found the evidence so weak to shake the prosecution case. He stated-

> *"There is nothing at all in the accused defence to raise doubt on the prosecution evidence. "*

I have no reason to differ with the trial court. I have said already that the defence evidence was an afterthought. As already demonstrated, the best evidence in cases of this nature comes from the victim. The victim, Veneranda Zacharia (**PW5**) and Christopher Yohana Matola (**PW4**), proved beyond all reasonable doubt that there was penetration. The victim established further that she did not consent. The evidence of Mr. Emmanuel Kalwani (**PW2**) corroborated the evidence of Veneranda Zacharia (**PW5**), the victim and Christopher

Yohana Matola (**PW4**),the doctor. Thus, the prosecution evidence was cogent enough to establish the offence of rape, without a PF.3.

I find that the appellant was convicted on the strength of the prosecution's evidence and a sentence imposed was in accordance with law.

In the upshot, I dismiss the appeal in its entirety and uphold the conviction and sentence imposed by the trial court of thirty (30) year custodial sentence.

It is ordered accordingly.

J. R. Kahyoza
JUDGE
25/5/2022

Court: Judgment delivered in the appellant and Ms. Revina Tibilengwa, Principal State Attorney. Right of appeal after lodging a notice within thirty days explained. B/C Jackline (RMA) present.

THE HIGH COURT OF TANZANIA
MWANZA

J. R. Kahyoza, J.
25/5/2022