

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT Jinja
CRIMINAL SESSION NO: 131 OF 2017**

**UGANDA:..... PROSECUTOR
VERUSUS
SSEGONGA MUSA:.....ACCUSED**

**HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI
RULING ON DECLARATION OF A HOSTILE WITNESS**

Brief Facts

Ssegonga Musa herein referred to as the accused was indicted with the offence of Rape contrary to Sections 213 and 124 of Penal Code act (PCA). It was alleged that the accused on the 22/01/2017 at Walukuba in Jinja District had unlawful carnal knowledge of Achom Alice without her consent.

Representation

The prosecution was represented by Pamela Orogot, a State Attorney in the Office of the Director of Public Prosecutions. The accused was represented by Counsel Daniel Mudhumbusi on State brief.

Submissions

In hearing of the prosecution's evidence, the prosecution summoned Mr. Mugambo Ibrahim (PW3) to give his testimony. PW3 gave evidence in examination in chief led by the State Attorney Pamela Orogot. When it appeared that PW3's evidence was different from the content in his police statement, Ms. Pamela Orogot asked the witness to confirm that he had recorded and signed a statement at Police which he indeed confirmed.

Given that PW3's testimony in Court differed from the contents of his police statement, the State prayed to Court to tender in PW3's statement and declare him a hostile witness. The State relied on the case of **Okwanga Anthony Vs Uganda SCCA No. 20 of 2000** to support this position.

The State applied to Court to tender in the witness statement of PW3 as an exhibit for its contents to be compared with the testimony he had given in Court and also prayed to Court to expunge the oral evidence of PW3 from record.



11.10.23

In reply the Defence Counsel argued that it was wrong for the State to make several prayers all at ago. That the State made a prayer to abandon the witness and also declare him a hostile witness. That the State had also prayed for the witness's testimony on oath to be expunged from the record and the 4th prayer was for Court to only adopt his police statement. Counsel for the accused argued that all these prayers by the State were untenable. He submitted that the State had the option to abandon this witness and withdraw him from the stand. The Defence further argued that since the State seeks to declare the witness hostile, then his statement on oath cannot be expunged from the record as prayed by the State since the State would have to compare the witnesses' testimony on oath to his police statement in order to demonstrate the hostility.

Defence Counsel argued that before the State is allowed to cross examine the witness in the case law as cited by the State, this Court is empowered to look at the police statement to find out which particular statements bring about the hostility. Bearing in mind that this is a statement that was recorded by a Police Officer and not by the witness. That as Court retires to make a decision, it should be observed that the State had failed to prove that the contents of the Police statement which was recorded by the police officer were read back and explained to the witness before he signed it. That this should have been done prior to the State's admission of the statement to Court which had not been done.

In rejoinder, the State submitted that procedurally, the Defence counsel had no right to reply and he was misguiding Court on procedures. That despite the wrong procedure, the State prayed to Court to declare the witness. That before a witness is declared hostile, the witness statement must first be observed by the Judge to ascertain whether the witness was resiling from the position that was taken during the investigation by the Investigating Officer.

Stated prayed this witness (PW3) be declared hostile and statement be admitted as an exhibit on court record.

Court analysis

In the case of **Okwonga Anthony v Uganda (Criminal Appeal No. 20 of 2000) [2002] UGSC 8 (9 January 2002)** as cited by the State supra, the Supreme Court in defining a hostile witness referred to **Sankar's Law of Evidence at p.1318** where the learned author writes:

"A hostile witness is one who from the manner in which he gives evidence (within which is included the fact that he is willing to go back upon previous statement made



by him) shows that he is not desirous of telling the truth [Penchanan vs R. 34 C. W.N. 526: A1930, C.276: 51 C.L.J. 203].

"The matter as to whether permission should or should not be given to cross examine one's witness however hostile he may appear to be, is eminently one in the discretion of the trial judge and his decision except in very exceptional circumstances is not open to appeal (emphasis is ours)."

In the case of **RAJESH YADAV & ANR. ETC. VERSUS STATE OF U.P. IN THE SUPREME COURT OF INDIA CRIMINAL APPEAL NOS. 339-340 OF 2014; February 04, 2022**, in which the Evidence Act of India is similar to that of Uganda, basing on the inheritance of the British system rules of procedure, the Supreme Court observed that: -

"The expression "hostile witness" does not find a place in the Indian Evidence Act. It is coined to mean testimony of a witness turning to depose in favour of the opposite party. We must bear it in mind that a witness may depose in favour of a party in whose favour it is meant to be giving through his chief examination, while later on change his view in favour of the opposite side. Similarly, there would be cases where a witness does not support the case of the party starting from chief examination itself. This classification has to be borne in mind by the Court. With respect to the first category, the Court is not denuded of its power to make an appropriate assessment of the evidence rendered by such a witness. Even a chief examination could be termed as evidence. Such evidence would become complete after the cross examination. Once evidence is completed, the said testimony as a whole is meant for the court to assess and appreciate qua a fact. Therefore, not only the specific part in which a witness has turned hostile but the circumstances under which it happened can also be considered, particularly in a situation where the chief examination was completed and there are circumstances indicating the reasons behind the subsequent statement, which could be deciphered by the court. It is well within the powers of the court to make an assessment, being a matter before it and come to the correct conclusion."

Sections 153 and 154 of the Evidence Act Cap 6 provides the circumstances in which a witness can be declared hostile and how to proceed after he is declared hostile: -

153. Question by party to his own witness

The court may, in its discretion, permit the person who calls a witness to put any question to him or her which might be put in cross-examination by the adverse party.

154. Impeaching credit of witness



The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the court, by the party who calls him or her—

(a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him or her to be unworthy of credit;

(b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his or her evidence;

(c) by proof of former statements inconsistent with any part of his or her evidence which is liable to be contradicted;

(d) when a man is prosecuted for rape or an attempt to ravish, by evidence that the prosecutrix was of generally immoral character.

In the instant case the State has prayed to this Court to declare PW3, Mugambo Ibrahim, as a hostile witness and on the ground that the oral testimony given by PW3 in Court was different from the statement that he made at police before the Investigating Officer.

Before a Court can declare a witness hostile, it is pertinent that a Judge looks at the statement made before the Investigating Officer to determine whether the witness was actually resiling from the position taken during investigations. **See Okwonga Anthony v Uganda (supra)**. With the guidance of the Supreme Court in the above cited case, I have had the liberty to analyze both the oral testimony that PW3 made on 21/09/2023 against the statement he made at Police before the Investigating Officer on 22/01/2017 as to ascertain if indeed PW3 resiled from his statement and I have highlighted some of these issues below: -

When asked to give a recount of what he saw the accused doing on 22/01/2017 in his response PW3 stated in his oral testimony that;

"I was going to the garden in the morning at about 10:00am. I found two men, one had removed the clothes of the lady and the other man was standing by."

In his recorded statement the witness stated that;

"Today, the 22/01/2017 when I was in my garden I saw two boys whom I know by face moving with a lady but they were in good terms."

Further in his oral testimony, PW3 stated that;

"The accused was standing by while the other man was lying on the lady. The lady was screaming. They were in a bush. When I heard the noise, I asked the men what they were doing. I feared to confront them. There was a building site nearby and I saw a man who was a builder on that site. The site was about 150m from the bush



where the lady was being raped. I was standing at about 30m from the scene of crime. When I saw them, I called the man at the building site. The man who was lying on top of the lady got up. I asked the two men why they were engaged in such activity. The accused was standing by with a knife in his hand. The accused was standing about 4m from the scene of crime. The bush was downhill and when I asked them what they were doing they climbed out of the bush and came on top of the hill. The man who was lying on top the girl told me that the girl was a friend of theirs. The girl looked at me and smiled pleasantly. That I had heard her screaming before and saw her smiling when she came uphill. I asked the girl what the men had done to her and she told me that the men were her friends. ”

However, in his recorded statement, PW3 stated that;

*“Because I heard the lady crying then my friend told me that those boys are wrong people. After we heard the lady crying that’s when we moved to see what was happening and only to get when they were raping her, the boy was already sleeping on her. When we reached the one who had a wooden pistol told us that the lady was so sweet. They wanted to give us money to leave them. We refused and one took off, then **we managed to get one Musa who slept on her.** And it’s not their first time to rape women, it’s their work to rape them. That is why I have made a statement true and correct. ”*

From the above oral testimony given by PW3, Mr. Mugambo Ibrahim, it is clearly evident that PW3 departed from his statement that was recorded at the Police before the Investigating Officer. This puts his credibility as a witness in balance. Although Court takes note that there has been a lapse of time since the offence was allegedly committed, its mind boggling why PW3 states totally new facts in his oral testimony different from his police statement which was recorded when the alleged offence had just occurred. Court observes that PW3 is 37 years old now and at the time the alleged offence had just occurred, he was 29 years old and was within the category of a youth. As such, issues of memory loss are minimal given that age of 29 years when he recorded the statement at Police. People generally tend to be forgetful as time passes and not the other way round.

On the issue raised by the Defence Counsel that the State had failed to prove that the contents of PW3’s statement which was recorded at Police had been read back and explained to him before he signed it, I totally disagree with the Defence Counsel’s submission. The accused himself acknowledged to this Court that he signed the statement and even went ahead to show Court where he had signed on it. The accused, therefore, owned his statement before this Court.

I therefore declare PW3 a hostile witness in this matter.



Before making the final conclusion, the State in her submission also prayed that the oral testimony of PW3 be expunged from record.

In the case of **RAJESH YADAV & ANR. ETC. VERSUS STATE OF U.P. (Supra)** the Supreme Court observed that: -

"On the law laid down in dealing with the testimony of a witness over an issue, we would like to place reliance on the decision of this Court in C. Muniappan v. State of T.N., (2010) 9 SCC 567: where court stated "It is a settled legal proposition that:

"6... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

Also in State of U.P. v. Ramesh Prasad Misra [(1996) 10 SCC 360: 1996 SCC (Cri) 1278] this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon.

The Supreme Court therefore observed in the above cited case that: - *"Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."* (emphasis mine)

Therefore, in conclusion, I declare PW3 Mr. Mugambo Ibrahim, a hostile witness for the prosecution and admit his recorded statement on the Court record as an exhibit and is accordingly marked as PEX3. The prosecution can proceed and cross-examine him. However, his oral testimony in Court will not be expunged off the Court record but will be admitted with serious scrutiny by this Court. Either party can rely on the parts of this evidence which are admissible in law. Therefore, this Court shall proceed to hear the Prosecution's cross examination of PW3 as a hostile witness.

I so order.



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HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI
JUDGE

Ruling delivered on 11th October, 2023.