

# Cross-examination as Part of Fair Trial in Tanzania: A Critical Analysis of the Case of Goodluck Kyando v Republic

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## Abstract

The concept of fair trial and the right to cross-examine by an accused person are fundamental in the broad spectrum of administration of justice in any jurisdiction. Both may well be said to form part of the concept of rule of law. The right to a fair trial is guaranteed in the Constitution of the United Republic of Tanzania of 1977 and in other laws just like the right to cross-examination of witnesses. The importance of affording parties a fair trial has been echoed by the international community in different international legal instruments. It is upon the courts, therefore to conduct trials fairly. One of the critical areas to ensuring fair trial is with respect to the manner the right of cross-examination is provided to the accused and exercised by the same. While admitting that the right to a fair trial takes on board the whole trial process from the beginning to the end, this article concentrates on the right to cross-examination. It is submitted here that the right to a fair trial is sometimes vitiated during the process of cross-examination when a party to a case (an accused or defendant as the case may be) exercises the right without being at least informed of the essence of doing the same. In such a situation it is as tantamount as the right has never been given to the accused. In short, as a matter of practice, the right to cross-examination is given haphazardly to, not only to children who are accused but also to unrepresented adult persons.

## A. Introduction

In the year 2006, I was a law student at Mzumbe University Mbeya Campus in Tanzania. It was at that time the sitting of the Court of Appeal was taking place in the High Court of Mbeya. As a young student in law and out of interest and curiosity, I always attended the court sessions to observe the Court of Appeal proceedings. One of the cases which I attended from the beginning to the judgment of the Court was the case of *Goodluck Kyando v Republic*. *Goodluck*,<sup>1</sup> a young boy, came to court from the prison where after being convicted by the High Court of Songea to 15 years term to prison. It was fortunate for him that he

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1 *Goodluck Kyando v. Republic*, Court of Appeal of Tanzania at Mbeya, Criminal Appeal No. 118, 2006 (Unreported).

came out of the courtroom as a free person and continued enjoying his rights and freedoms once again.

This article therefore is basically written as the title suggests but to wit what was observed by the author in the court of law and to examine how the justices of the Court of Appeal of Tanzania handled the rights to cross-examination as part of the right to fair trial.

In the exercise of their criminal jurisdictions courts are enjoined to observe the right to fair trial by properly providing the right to cross-examination which is intrinsic in the right to a fair trial.<sup>2</sup>

## B. The Concept of Fair Trial

The right to a fair trial is an ancient one and is synonymous with the trial process itself.<sup>3</sup> The right to a fair trial has been described as one of the ‘most cherished, celebrated and venerable human rights’ which illustrates humanity’s development regarding civil civilization.<sup>4</sup> The right to a fair trial is today a norm of international law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person.<sup>5</sup>

The roots of the basic principles of the right to a fair trial can be traced all the way back to the *Lex Duodecim Tabularum*—the Law of the Twelve Tables—which was the first written code of laws in the Roman Republic around 455 B.C. Contained within these laws was the right to have all parties present at a hearing, the principle of equality amongst citizens, and the prohibition against bribery for judicial officials.<sup>6</sup> Another important historical event in the development of the right to a fair trial is the *Magna Carta*. In forcing King John to sign the *Magna Carta Libertatum* in 1215, the English nobles ratified the principle that even a King’s will could be circumscribed by law. In doing so, the *Magna Carta* paved the way for later developments during the Age of Enlightenment that would seek to subject governments to the will of the people. The *Magna Carta* proclaimed that: ‘No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed – nor will we go upon or send upon him – save by the lawful judgment of his peers or by the law of the land’.<sup>7</sup>

The scope of the right to a fair trial was further developed and codified during the period of the Enlightenment of the 18<sup>th</sup> Century, when the political focus of government began

2 T. Riley, *The Little Red Book of Advocacy*, Darwin, 2<sup>nd</sup> edn. 2016, p. 36.

3 P. Robinson, *The Rights to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, in: Berkeley J.L. Int’l L. Publicist, vol. 3, 2009, p. 1.

4 E. R. Widder, *A Fair Trial at the International Criminal Court?*, Frankfurt/Main, 2016, p. 11.

5 Lawyers Committee for Human Rights, *What is a Fair Trial? A Basic Guide to Legal Standards and Practice*, 2000, p. 1, [https://tavaana.org/sites/default/files/fair\\_trial\\_0.pdf](https://tavaana.org/sites/default/files/fair_trial_0.pdf) (accessed on Feb. 22, 2017).

6 Robinson (fn. 3), pp. 1-2.

7 Robinson (fn. 3), p. 2.

to shift away from an all-powerful sovereign towards the will of the people, and the limits of governmental power began to be restructured accordingly. This restructuring often took the form of written laws, one of which embodied the right to a fair trial.<sup>8</sup>

As early as 1789, the French Declaration of the Rights of Man provided for the presumption of innocence and prohibited the arbitrary arrest and detention of citizens, unless as authorized by law. In 1791, the United States of America (U.S.), through the 6<sup>th</sup> amendment to the U.S. Constitution, provided that any person accused of any criminal conduct has a right to a speedy and public trial by an impartial jury, to be informed of the nature and cause of the charges against him/her, to confront witnesses against him and cross examine them, to have a compulsory process of obtaining one's own witnesses and a right to assistance of a defence counsel.<sup>9</sup>

The right to a fair trial is an aspect of the 'due process of law' principle, embodying the idea of fair play and substantial justice. Due process is essential to the maintenance of certain immutable principles of justice and constitutes certain standards that a society would expect from those entrusted with the exercise of sovereign prerogatives. As a legal concept, fair trial establishes rules and procedures applicable throughout a trial, intended to ensure equilibrium between the parties and to implement structures that are capable of safeguarding judicial independence and impartiality.<sup>10</sup>

As a basic component of the right to a fair trial, the presumption of innocence, *inter alia*, means that the burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit of doubt. This presumption is seen to flow from the Roman legal principle that *ei incumbit probatio qui dicit, non qui negat* that is the burden of proof rests on the person who asserts, not on him who denies. The presumption of innocence is in fact a legal instrument created by law to favour the accused based on the legal inference that most people are not criminals.<sup>11</sup>

### C. International and National Legal Standards on Fair Trial

The right to a fair trial is a norm of international human rights law and also adopted by many countries in their [national] procedural law. It is designed to protect individuals from

8 Robinson (fn. 3), p. 3.

9 S. Omondi, The Right to a Fair Trial and the Need to Protect Child Victims of Sexual Abuse: Challenges of Prosecuting Child Sexual Abuse under the Adversarial Legal System in Kenya, in: Journal of Research in Humanities and Social Science, vol. 2, no 3, 2014, p. 38, [www.questjournals.org](http://www.questjournals.org) (accessed on Feb. 22, 2017).

10 N. J. Udombana, The African Commission on Human and Peoples' Rights and the Development of Fair Trial Norms in Africa, African Human Rights Law Journal, 2006, p. 300. See also D. J. Bodenhamer, Fair Trial: The Rights of the Accused in American History, Oxford, 1992, p. 5, where he reiterates that 'in criminal law of a free society, a proper concern for due process is crucial'.

11 N. Tiwari, Fair trial vis-à-vis criminal justice administration: A critical study of Indian criminal justice system, in: Journal of Law and Conflict Resolution, vol. 2 (4), 2010, p. 66, <http://www.academicjournals.org/JLCR> (accessed on Feb. 22, 2017).

the unlawful and arbitrary curtailment or deprivation of their basic rights and freedoms, the most prominent of which are the rights to life and liberty of the person.<sup>12</sup>

The standards against which a trial is to be assessed in terms of fairness are numerous, complex and constantly evolving. They may constitute binding obligations that are included in human rights treaties to which the state is a party. But they may also be found in documents which, though not formal binding, can be taken to express the direction in which the law is evolving.<sup>13</sup>

The right to a fair trial is ‘aimed at the proper administration of justice’ and securing the rule of law. Human rights treaties’ provisions on fair trial establish a complex set of rules that cover two aspects of how the right is to be secured. First, there are rules which specify how court proceedings should be conducted. In general fair trial guarantees are not primarily concerned with the *outcome* of judicial proceedings, but rather with the *process* by which the outcome is achieved. Fairness of outcome is not guaranteed. Second, there are structural rules regarding organization of domestic court systems. Securing the right to a fair trial can require a high level of investment in the court system and many states fail to fulfil their obligations because of various structural problems.<sup>14</sup>

The first international instrument to recognize the right to a fair trial was the Universal Declaration of Human Rights (UDHR) of 1948. This document, though not binding, provides for the entitlement of everyone to full equality to a fair trial and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.<sup>15</sup> It includes as part of fair trial the right to be presumed innocent until proved guilty to everyone charged with a penal offence.<sup>16</sup> The right to a fair trial was next taken on board by the International Covenant on Civil and Political Rights (ICCPR) of 1966. This binding international treaty, which came into existence eighteen years after the UDHR, by and large borrowed the provisions from the UDHR. The ICCPR provides that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>17</sup> Equally important to the right to a fair trial the Covenant further provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.<sup>18</sup> Although the right to a fair trial is not listed as a non-derogable right under Article 4(2) of the ICCPR, the Human Rights Committee has treated the right to a fair trial as one which may not be subject to derogation where this would circumvent the protection of non-

12 *Tiwari* (fn. 11), p. 68.

13 Lawyers Committee for Human Rights (fn. 5), p. 2.

14 See generally *D. Moeckli, et al.* (eds.), *International Human Rights Law*, Oxford, 2<sup>nd</sup> edn. 2014.

15 Article 10 of the UDHR.

16 Article 11 of the UDHR.

17 Article 14 (1) of the ICCPR.

18 Article 14 (2) of the ICCPR.

derogable rights. Even in situations when derogation from Article 14 is permissible, the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected.<sup>19</sup>

As part of regional instruments the European Convention on Human Rights [ECHR] of 1950 under Article 6 guarantees the right to a fair trial and public hearing. It enshrines the principle of the rule of law, upon which a democratic society is built, and the paramount role of the judiciary in the administration of justice.<sup>20</sup> The Court and previously the Commission have interpreted this provision broadly, on the grounds that it is of fundamental importance to the operation of democracy. In the case of *Delcourt v. Belgium*,<sup>21</sup> the court stated that “in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of the Article 6(1) would not correspond to the aim and the purposes of that provision.”<sup>22</sup> Similarly, the American Convention on Human Rights [ACHR] of 1969 enumerates the right to a fair trial under the whole of Article 8.

The African Charter of Human and Peoples’ Rights of 1986 [ACHPR] provides that every individual shall have the right to have his cause heard and the right to be presumed innocent until proved guilty by a competent court or tribunal.<sup>23</sup> With respect to children the African Charter on the Rights and Welfare of the Child, [ACRWC] of 1990 requires that state parties to the present Charter shall in particular ensure that every child accused of infringing the penal law shall be presumed innocent until duly recognized guilty. The Charter has no specific provision expressly prescribing for the right to a fair trial. But once an accused person is presumed innocent, then the court has to afford him all the rights which will make a trial fair in the eyes of right minded thinking members of the community. People must be confident that the procedures as administered by the court will result into a decision which is just and fair.

The Constitution of the United Republic of Tanzania [CURT] of 1977, on the other hand, though it does not mention the phrase ‘fair trial’ has some provisions which are meant to ensure that citizens are afforded a fair trial by the courts and tribunals legally established. For example, the Constitution guarantees all persons equality before the law and therefore entitled protection by the law without any discrimination.<sup>24</sup> Again the same enti-

19 United Nations Human Rights, Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism, CTITF Publication Series, 2014, p. 7, [www.ohchr.org/EN/newyork/Documents/DetentionCounteringTerrorism.pdf](http://www.ohchr.org/EN/newyork/Documents/DetentionCounteringTerrorism.pdf) (accessed on Feb. 22, 2017).

20 *D. Vitkauskas, G. Dikov*, Protecting the Right to a Fair Trial under the European Convention on Human Rights, Council of Europe Human Rights Handbooks, Strasbourg, 2012, p. 7.

21 *Delcourt v. Belgium*, 17 January 1970, no. 2689/65, para. 25.

22 *N. Mole, C. Harby*, The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights, Human Rights Handbooks, No. 3, Strasbourg, 2006, p. 5.

23 Article 7 (1) & (b) of the ACHPR.

24 Article 13 (1) of the CURT.

ties persons whose matters have to be determined by the court or any agency a fair hearing.<sup>25</sup> If that is not enough the constitution provides for the presumption of innocence to a person charged with a criminal offence.<sup>26</sup> These rights, therefore, are meant to grant to accused persons a right to a fair trial. It follows, therefore, that the criminal procedural laws are crafted around that constitutional framework.

#### D. Cross-Examination of Witnesses

One of the key features of the adversarial criminal trial is the giving of oral evidence by witnesses and the testing of that evidence through cross-examination.<sup>27</sup> It is widely accepted that cross-examination is '[t]he primary evidentiary safeguard of the adversarial trial process' and that the defendant's inability to effectively test the prosecution's case will infringe the right to a fair trial principle.<sup>28</sup>

The roots of cross-examination are more easily traced to England and the development of its adversarial trial process. Recognition of the importance of cross-examination was developed in French criminal justice theory in the late sixteenth-century writings of *Pierre Ayrault*, who emphasized the desirability of cross-examination as a complement to the face-to-face rendering of an accuser's testimony.<sup>29</sup> Justices and judges of courts at all levels continue to find out cross-examination not only a necessary, but also a sufficient method of confronting a variety of trial evidence and burdens. As *Wigmore* once trumpeted, it remains in the eyes of the law, as in those of many practitioners and scholars, 'the greatest legal engine ever invented for the discovery of truth.'<sup>30</sup>

It has moreover been stated that cross-examination is one of the most powerful weapons in the hands of the cross-examining advocate for discovering truth and exposing falsehood or discrepancy. But the same is achieved if the cross examination is conducted with skills.<sup>31</sup> When a witness has been intentionally called by either party and sworn, the opposite party has a right, if the examination-in-chief is waived; or if the counsel changes his mind and asks no questions, or when the examination in chief is closed, to cross-examine him.<sup>32</sup> The right to cross-examination is fundamental, indispensable and forms the kernel of one of the principles of natural justice that is the right to be heard. It follows therefore that denial by the court to allow an accused to cross-examine would vitiate the pro-

25 Article 13 (6) (a) of the CURT.

26 Article 13 (6) (b) of the CURT.

27 *A. Cossins*, Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?, in: *Melbourne University Law Review*, vol. 33, 2009, pp. 68-69.

28 *Cossins* (fn. 27), p. 71.

29 *J. Epstein*, Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk", in: *Widener Law Review*, vol. 14, 2009, p. 431.

30 *Epstein* (fn. 29), p. 429.

31 *S. Sarkar et al.*, *Sarkar on Evidence*, Nagpur, 15<sup>th</sup> edn. 1999.

32 *M. N. Howard, et al.*, *Phipson on Evidence*, 14<sup>th</sup> edn., London, 1990, p. 241.

ceedings. But again if an accused person called to cross-examine the opponent without being informed of the essence of exercising the right that is tantamount to the right not being given.

In short, cross-examination is the examination of a witness by the adverse party.<sup>33</sup> The right to cross-examine has been articulated by a number of international treaties. The International Covenant on Civil and Political Rights provides that in the determination of any criminal charge against an accused person, everyone shall be entitled to the following minimum guarantees, in full equality, i.e. to examine or have examined the witnesses against him.<sup>34</sup> Likewise, the United Nations Convention on the Right of the Child (UNCRC) of 1989 provides that every child alleged as or accused of having infringed the penal law has a number of guarantees including to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her own behalf under conditions of equality.<sup>35</sup> These provisions have their reflection in Tanzania in the Criminal Procedure Act,<sup>36</sup> the Evidence Act<sup>37</sup> and the Law of the Child Act,<sup>38</sup> and other national laws in force containing numerous provisions which are necessarily designed to ensure that criminal trials are fairly conducted without prejudicing the rights of the parties to criminal trials.

The fundamental goal of cross-examination is to discredit both the evidence and the person providing it while eliciting information that is helpful to one's case. Because cross-examination by definition involves testing a witness's credibility and reliability some of the difficulties that one may experience may be inherent in the process itself. Indeed, cross-examination is not a pleasant process for any witness, including expert witnesses and police officers<sup>39</sup> or state attorneys and advocates. In a similar vein but in a more precise way *Keeton* outlines the importance of cross-examination, when he puts that 'it should be borne in mind that the objects of cross-examination are three, the first positive, and the other two negative. They are: to obtain evidence favourable to your client, to weaken evidence that has been given against your client, and finally, if nothing of value which is favourable can be obtained, to weaken or destroy the value of the evidence by attacking the credibility of the witness. Obviously different tactics must be adopted to achieve each of these objects'.<sup>40</sup>

The difficulty of cross-examination is spelled out by *MacCathy* saying that most trial lawyers and even a greater number of trial advocacy teachers, and even some casual trial

33 Section 146 (2) of the Evidence Act.

34 Article 14 (3) (e) of the ICCPR.

35 Article 40 (b) (iv) of the UNCRC.

36 The Criminal Procedure Act [CAP 29 R. E. 2002].

37 The Evidence Act [CAP 6 R. E. 2002].

38 The Law of the Child Act, 2009.

39 S. Zydervelt, *et al.*, Lawyers' Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s?, in: British Journal of Criminology, 2016, p. 3. See also section 155 of the Evidence Act.

40 G. W. Keeton, Harris' Hints on Advocacy: The Conduct of Cases Civil and Criminal, Gurgaon, 18<sup>th</sup> edn. 2013, 2013, p. 75.

observers, are in general agreement that cross-examination is the skill most lacking in trial lawyers.<sup>41</sup> It is the most dangerous branch, inasmuch as its errors are almost irremediable.<sup>42</sup> A mistake in cross-examination may be fatal to your case. A single question may make an opening for a flood of evidence that may overwhelm you.<sup>43</sup> Cross-examination may almost be regarded as a mental duel between advocate and witness.<sup>44</sup>

A good number of the High Court and Court of Appeal of Tanzania and from other jurisdictions have attempted to highlight the essence of conducting cross-examination. In *Meer Sujad Ali v. Kashee Nath*,<sup>45</sup> Norman, J, made the following remarks on the object and importance of cross examination: ‘The essence of cross-examination is, that it is the interrogation by the advocate of one party of a witness called by his adversary with the object either to obtain from such a witness admissions favourable to his cause or to discredit him. Cross examination is the most effective of all means for extracting truth and exposing falsehood’...”. The testimony of a witness is not legal evidence unless it is subject to cross examination, and where no opportunity has been given to the appellant’s counsel to test the veracity of the principal prosecution witness or where owing to the refractory attitude of the witness the court is constrained to terminate all of a sudden and prematurely the cross-examination of the witness, the evidence of such a witness is not legal testimony and cannot be the basis of a judicial pronouncement.<sup>46</sup>

The same was again emphasized in the case of *Kabulofwa Mwakalile & 11 Others v. Republic*,<sup>47</sup> where Samatta, J. (as he then was), reiterated what has been stated above when he says that ‘according to the law of this country the testimony of a witness cannot be taken as legal evidence unless it is subjected to cross examination and testimony affecting a party cannot be the basis of a judicial pronouncement unless the party has been afforded an opportunity of testing its truthfulness or accuracy by the way of cross examination’.

‘The exercise of this right is justly regarded as one of the most efficacious tests, which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his power of discernment, his memory and description are all fully investigated and ascertained and submitted to the consideration of the jury, who have an opportunity of observing his demeanour, and of determining the just value of his testimony. It is not easy for a witness, subjected to this test, to impose on a court or jury; for however artful the fabrication of

41 T. F. MacCarthy, MacCarthy on Cross-Examination, Chicago, 2007, p. 1.

42 Keeton (fn. 40), p. 75.

43 Keeton (fn. 40), p. 76.

44 Keeton (fn. 40), p. 79.

45 . *Meer Sujad Ali v. Kashee Nath*, 6 WR 181.

46 R. Ranchhoddas, D.K. Thakare, The Law of Evidence, Gurgaon, 23<sup>th</sup> edn. 2010, p. 746.

47 *Kabulofwa Mwakalile & 11 Others v. Republic*, [1980] TLR 144.

falsehood may be, it cannot embrace all the circumstances, to which a cross examination may be extended'.<sup>48</sup>

*Salhany* gives an account of some of the attributes that the cross-examiner must possess. A cursory look at these attributes signals that a lot is needed by the cross-examiner to be able to move the court where he wants to take it. It is hardly conceivable that such attributes as stated below can be met by an accused person who is unrepresented or by an accused child. These standards or rather attributes are too high to be met by the two categories of witnesses mentioned above. And these are attributes that have to linger in the minds of judges and magistrates during the process of examination of witnesses and it seems worth noting the comments of *Salhany* as he puts:

*'The successful cross-examiner must possess, in addition to a strong constitution, a multi-faceted personality. There will be times when he will have to have the skills of a doctor, accountant; engineer and lawyer all rolled into one. More importantly, he must understand the people. He should be able to sympathize with the truthful but mistaken witness, and still be able to score points for his side. The untruthful or biased witness must also be exposed and firmly, but fairly, dealt with. These are not skills which are learned at law school or after a few trials. It takes years of dull, drudging preparation, and the experience of trying many cases before counsel can hope to be competent'.*<sup>49</sup>

The observance of and compliance with the right to cross-examination has not only been considered as forming strong bones of criminal trials but also as part and parcel of the observance of the principles of natural justice which among other things advocates for affording parties fair hearing and for the judge to decline from being biased towards the parties to a trial. If the judge finds that owing to the circumstances of the case and the parties he is likely to be biased, the best option is to disqualify from hearing the case. Bias vitiates proceedings.

It has been said that the requirements of natural justice are often cited as a primary source of procedural due process standards. These requirements are predominantly procedural in nature and, although flexible, are generally satisfied by a 'fair hearing' and 'lack of bias'.<sup>50</sup> The nexus between cross-examination and observance of the principles of natural justice were clearly stated in the case of *Union of India v. Verma*.<sup>51</sup> On this regard *Aiyar, J.*, stated as follows:

*'Stating it broadly and without intending it to be exhaustive it may be observed that rules of natural justice require that a party should have the opportunity of adducing*

48 *Sarkar et al.*, (fn. 31), pp. 2162-2163.

49 *R. E. Salhany*, *Cross-Examination: The Art of the Advocate*, Toronto, 2<sup>nd</sup> edn. 1991, p. 8.

50 *W. Bateman*, *Procedural Due Process under the Australian Constitution*, *Sydney Law Review*, Vol. 31, 2009, p. 416.

51 *Union of India v. Verma*, AIR (1957) SC 882.

*all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence and that he should be given the opportunity of cross examining the witnesses examined by that party, that no material should be relied on against him without him being given an opportunity of replacing them’.*

In short, every party must be given a fair chance to cross examine the witness.<sup>52</sup> The trial court, in its discretion, may permit the cross examination of any witness to be deferred until any witness is examined or recalled for cross examination.<sup>53</sup>

### **E. Goodluck Kyando v. Republic**

This case is examined here to show the stance of the Tanzanian Court of Appeal on the need to observe the right to cross-examine a party to criminal proceedings. It is in this case also where the Justices of Appeal had opportunity to re-emphasize again the importance of cross-examination as it will be shortly stated. The case of *Goodluck Kyando v. Republic* was presided over by Justices *Mrosso*, *Msofe* and *Nsekela*. The appellant was unrepresented and therefore appeared in person and the prosecution side was represented by Senior State Attorney *Boniface Stanslaus*.

It appears proper at this juncture to briefly grasp the facts of the case leading to this appeal. The appellant, *Goodluck Kyando*, aged 16 years was charged before, and convicted by the District Court of Mbinga of attempted rape contrary to section 132(1) and (2) (a) of the Penal Code as amended by Sexual Offences Special Provisions Act, No. 4 of 1998 and was sentenced to 30 years imprisonment. The appellant was aggrieved and dissatisfied by the decision of the District Court and appealed against both the conviction and sentence to the High Court at Songea. On appeal to the High Court, *Manento*, J., (as he then was) disturbed the sentence meted to the accused by reducing it to 15 years. Once again, the appellant was aggrieved and dissatisfied with the sentence and decided to appeal to the highest court of the country, and hence the appeal to the Court of Appeal of Tanzania.

During the hearing of the appeal, the appellant i.e. the accused just adopted the grounds as they were stated in the memorandum of appeal. This was obvious because the accused apparently did not even know the gist of the memorandum of appeal let alone what was transpiring in the court of law between the Justices and the state attorney.

The State Attorney supported the appeal. He faulted first of all the decision by the High Court judge arguing that he had no such powers to reduce the sentence from 30 years to 15 years because the former was the minimum sentence provided by the law for a person who commits attempted rape. Moreover, the Senior State Attorney drew the attention of the court on the aspect of the sentence itself. The punishment for a similar offender who actually commits rape but is of the age below 18 and the first offender would be just corporal punishment but on the contrary the one who attempts to rape the punishment would be 30

<sup>52</sup> *Sarkar et al.* (fn. 31).

<sup>53</sup> *Ibid.*

years. The Senior State Attorney exposed this anomaly and suggested that it was not the intention of the legislature. He argued that the parliament did not intend to impose a (more) severe sentence for a person who is under 18 years of age, first offender and at the same time to impose a lesser sentence to the same person who actually commits rape.

I recall when the state attorney had completed addressing the justices in supporting the appeal by the accused person, the appellant was asked by the court if he had heard and understood the state attorney. To the surprise of most of the people who were full in court the accused person replied 'I have heard him but they are always oppressing me'. It was until the Justices explained to him that the State Attorney was assisting him when the 'poor' accused person said once again 'if he is helping me I thank him'. Thus, it can be said that the accused who was more than eighteen years old by the time the appeal came was actually not capable to appreciate the court proceedings. Court proceedings are special events so even lay adults sometimes fail to comprehend what is actually taking place in a court of law. In such situations, the administrators of justice are duty-bound to ensure that they try as much as possible to let the parties know the basic fundamentals at every stage of criminal trials. That might obviously be time consuming, but the goal of justice cannot be compromised because of time restraints. It is high time to recall the old adage that 'justice hurried is justice buried.'

In the course of hearing the appeal, it transpired in the minds of the justices of appeal that after the victim had given her evidence implicating the accused in the District Court, the accused instead of challenging the devastating piece of evidence against him, had opted not to cross-examine the victim. The court stated that 'without the benefit of cross-examination by the appellant, the testimony of the complainant... stood unchallenged'.

The justices of appeal with approval quoted *Murphy*, the learned editor of Blackstone's Criminal Practice (1992) who in his treatise at p. 1870 stated that the object of cross examination is: – (i) to elicit from the witness evidence supporting the cross examining party's version of the facts in issue; (ii) to weaken or cast doubt upon the accuracy of the evidence given by the witness in chief; and (iii) in appropriate circumstances, to impeach the credibility of the witness.

I concur with the Justices that failure to challenge the testimony of the victim or rather complainant makes his/her testimony remain intact. But with due respect to the justices, who had ample time to read the proceedings of the trial magistrate, they would have gone further to inquire whether the right to cross-examine was properly afforded to the accused in a manner that he could understand what he was supposed to do. We all accept that examination of witnesses and cross-examination in particular is a tricky exercise. It is not uncommon that sometimes accused persons who have a feeling that they did not commit the offence nevertheless decline to cross-examine complainants and sometimes they decline just because of being nervous having had attended no court proceedings before. This is because according to the understanding of some people, if a person has done nothing wrong why should he/she ask questions? They tend to think that by asking questions, the court can draw an adverse inference that he/she has probably committed the offence. This is an im-

passe that the court must strive to remove in the minds unrepresented accused persons and most in the case of accused children.

With respect to children, *Cossins* underscores that for them ‘cross-examination is that part of court proceedings where their ‘interests and rights...’ are more likely to be ignored and sacrificed’.<sup>54</sup> The Court of Appeal again after having discovered the problem on records (if it did find so) would have issued directives to all courts to ensure that the right is fairly given, explained in the simple language that the accused person understands and to record the same in the court proceedings. It was not proper to just take for granted that the accused person had declined to cross-examine. If cross-examination is a simple thing in trial no one would be afraid to exercise that right. It is worth at this juncture to celebrate the statements which underpin the bizarre of cross-examination by two eminent and experienced lawyers in this area. *Iannuzzi* holds that ‘cross-examination is the basic weapon in the armament of all trial lawyers. Strangely, despite the basic nature and the need of cross-examination to the trial attorney, it is a weapon rarely used effectively. One need only sit as a spectator at actual trials or hearings to know that most lawyers conduct abysmally ineffective cross-examination and, as a result lose many cases unnecessarily’.<sup>55</sup> Another statement equally important is that of *Wellman*. He says:

*‘...But as yet no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and reducing exaggerated statements to their true dimensions. Cross examination is generally considered to be the most difficult branch of multifarious duties of the advocate. Success in the court, as someone has said, comes more often to the happy possessor of a genius for it. Great lawyers have often failed lamentably in it, while marvellous success has crowned the efforts of those who might otherwise have been regarded as of a mediocre grade in the profession. Yet personal experience and the emulation of others, trained in the art, are the surest means of obtaining proficiency in this all important prerequisite of a competent trial lawyer. It requires the greatest ingenuity; a habit of logical thought; clearness of perception in general; infinite patience and self-control; power to read men’s minds intuitively, to judge their characters by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject matter itself; an extreme caution; and, above all, the instinct to discover the weak point in the witness under examination’.*<sup>56</sup>

From the above statement it can be confidently stated that taking for granted that a party to a case can fully exercise the right to cross-examine might to be simplistic and unconscious of the ramifications of improperly exercising such a right. The judges and magistrates

54 *Cossins* (fn. 27), p. 69.

55 *J. N. Iannuzzi*, *Handbook of Cross-Examination: The Mosaic Art*, New York, 3<sup>rd</sup> edn. 2011, p. 2.

56 *F. L. Wellman*, *The Art of Cross-Examination with the Cross-Examinations of Important Witnesses in Some Celebrated Cases*, New York, 4<sup>th</sup> edn. 1997, pp. 27-28.

should always refrain from affording the right to cross-examination haphazardly. This is because the right, once appropriately exercised with the proper guidance of the court, might ease the work of the court in determining the truth as to whether the evidence of the complainant leaves no doubt to hold the accused person criminally liable.

One would have expected when the Law of the Child Act of 2009 was enacted it would have provided categorically the manner how the right to cross-examination by accused children should be provided, but the Act falls short of that. The important thing with the Act is that the court may pose questions to witnesses as it appears to be necessary and desirable.<sup>57</sup> The law also permits guardians, parents, relatives or welfare officers to assist the accused child in examination and cross-examination upon the consent of the court.<sup>58</sup> These are remarkable improvements but the law did not impose the duty upon magistrate in the Juvenile Courts to explain this right to the accused child if he is not accompanied and to the categories of persons mentioned in the law.

It is important for the courts and framers of laws in each country to borrow the precedents developed by South African Courts when affording the unrepresented accused person or a child the right to cross-examine. In the case of *S v. Msimango & Another*,<sup>59</sup> it was stated that ‘the right to cross-examine is trite in our criminal justice system that curtailing it inappropriately or interfering with it, may render a trial unfair, vitiating the entire proceedings. There is also an obligation on judicial officer in criminal trials of unrepresented accused persons, not only to explain to such accused persons their procedural rights, but specifically, the right to cross-examination’.

Similarly, in the case of *S v. Mdali*<sup>60</sup> the court held that the failure on the part of the magistrate to adequately explain to unrepresented accused the right to cross-examination; how it should be conducted; the purpose and scope thereof; and the consequences of a failure to cross-examine, breaches the accused’s fundamental right to a fair trial. Indeed, the importance of the right to cross-examine in any disputed hearing, particularly in an adversarial trial system, can hardly be over-emphasized.

Apart from the child in juvenile courts, in other courts, it appears that most of the judges are still labouring the hangover of an adversarial system. It is a fundamental principle of adversarial systems that parties should prosecute their case and the court has to remain as an umpire. The court refrains or stands as an umpire to avoid inclinations or biases to either party which might be prejudicial. Despite that reality, the application of the principle should be exercised in a manner that will ensure prevalence of justice and suit the local circumstances. The distinction between adversarial and inquisitorial is well described by *Tiwari* that ‘in adversarial system responsibility for the production of evidence is placed on the opposing party that is prosecutions with the judge acting as a neutral referee between

57 Section 109 of the Child Act, 2009.

58 Section 108 (2) of the Child Act, 2009.

59 *S. v. Msimango & Another*, in the South Gauteng High Court, Case No. 187/2005.

60 *S v. Mdali* 2009, (1) SACR 259 (c).

the parties. By contrast, in inquisitorial trial system responsibility for the production of evidence at trial is the job of the trial judge and it is the trial judge who decides which witnesses will be called at trial and who does most of the questioning of witnesses'.<sup>61</sup>

It is high time that the courts should not be bound by these terms for the best interest of justice. In civilized world people resort to courts as temples of justice. It is upon the courts to administer trials in efficient manner while bearing in mind the broad right to a fair trial that parties to a criminal proceeding must enjoy. That underpins the observance of the rule of law in its broadest connotations

## F. Concluding Remarks

It must be gathered that examination of witnesses is an art which goes with different styles. To have mastery on the same, training coupled with experience becomes indispensable. While the exercise seems difficult even to trained lawyers, what would then be the situation to an accused laymen and accused children called to examine even to more complicated issues?

The author argues that the right is given haphazardly to the extent that the accused cannot properly exercise that right for one reason or the other owing probably to the fact that the right is improperly explained to the accused or the accused does not understand what to do or the accused finds himself innocent and therefore does not see any need to pose questions.

It is high time that in some instances the inquisitorial principles should be involved in adversarial systems to prevent likelihood of injustice particularly to an unrepresented layman or an accused child. The provision should be shaped in such a way that it makes mandatory for the court to explain the right to cross-examine to the accused in the language that he understands. Again the court should in certain cases unveil the umpire shield to pose questions which would ordinarily be asked by the accused if he only knew the essence of doing the same.

61 *Tiwari* (fn. 11), p. 67.