IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KOROSSO, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 224 OF 2019

DANIEL KIVATI MONYALU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)

(Mlyambina, J.)

dated the 13th day of June, 2019
in
Criminal Appeal No. 337 of 2018

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JUDGMENT OF THE COURT

29th June, & 7th September, 2021

KOROSSO, J.A.:

In the District Court of Kigamboni at Kigamboni, the appellant, Daniel Kivati Monyalu was arraigned on charges found in two counts of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, Cap 16 R.E 2002 (the Penal Code). It was alleged that the appellant on diverse dates between 2015 and August, 2016 at Vijibweni area within Kigamboni District, Dar es Salaam Region, on the first count, did have carnal knowledge against the order of nature, on a boy aged seven (7) years whose name we refrain to disclose and hereinafter to be referred to as PW5 or victim-2. In the second count, he did have carnal

knowledge against the order of nature on a boy aged 7 years old, whose name is henceforth withheld and to be referred to as PW4 or "victim- 1".

The case for the prosecution as narrated by Joseph Francis Kajala (PW1), PW4's father and Haliphar Rajab Chande (PW2), father to PW5, was that, both PW4 and PW5 were students at Vijibweni Primary School, Kigamboni and attended tuition classes at Viji academy, Soweto area of which the appellant was their tutor/teacher. According to PW1, on the 16/5/2016, after assisting PW4 in taking a shower, PW4's mother requested PW1 to find out whether PW4 had any problem in his anus. PW1 proceeded to query PW4 and his response was that: "*Mwalimu Danny anatubaka sisi tunaosoma tuition*". Unofficially translated is; "*teacher Danny rapes those of us undertaking tuition classes*". PW1 proceeded to undress PW4 and then conducted a physical inspection and noted that his anus was somewhat impaired. PW4 also informed PW1 that apart from himself there were other students who were also sodomised such as PW5 and another child. Subsequently, PW1 called PW2 (PW5's father) and informed him what he had learnt from PW4 and requested him to talk to PW5 to verify claims of being sexually abused by teacher Danny.

Sometime later, PW1 got a response from PW2 that PW5 had confirmed that he has also been sodomized by his tuition teacher. Thereafter, a search for the appellant ensued but it was in vain since he was nowhere to be found. PW1 then reported the incident to the police. On the 17/08/2016, at different intervals, PW4 and PW5, each accompanied by own parents carrying the PF3's handed to them by the police went to the hospital where each of them was examined and medically treated by John Hiza Lukindo (PW3). The appellant was arrested on 3/02/2018 and subsequently arraigned in the District Court of Kigamboni to face charges which are subject of the current appeal.

The appellant who was the lone witness for the defence disputed the charges. However, he conceded to be a tutor among many others conducting a tuition class at Viji Academy of which PW4 and PW5 were students. The appellant contended that the charges he faced were concocted and emanated from an altercation he had with the owner of the academy school where some of his tuition students studied and that he was also not in good terms with PW1.

After a full trial, being satisfied that the prosecution had proven their case beyond reasonable doubt, the appellant was convicted on both counts and sentenced to life imprisonment on each count, with an

order for the sentences imposed to run concurrently. His appeal to the High Court was dismissed in its entirety, hence the instant appeal.

The appellant fronted nine (9) grounds of appeal which having been compressed give rise to the following grievances; **One**, faults the first appellate court's rejection of his complaint that he was not provided with the complaint's statement despite his request. **Two**, challenges the credence and reliability of the evidence of PW3 and exhibit P1. **Three**, faults the first appellate court for not allowing his appeal taking into account the material contradictions in the evidence of PW4 and PW5. **Four**, contends that there was no proof of penetration in the prosecution evidence. **Five**, faults the first appellate court for absconding its duty by failing to re-evaluate the evidence on record. **Six**, faulted the first appellate court for not finding in his favour in view of the procedural errors done by the trial court; such as non-compliance with section 210(1)(a) and (3) of Criminal Procedure Act, Cap 20 R.E 2002 (the CPA) and failure to explain the substance of the charge to the appellant after a ruling of there being a *prima facie* case in line with section 231(1) of the CPA. **Seven** that the prosecution failed to prove the case against the appellant beyond reasonable doubt.

On the date the appeal was called for hearing, Daniel Kivati Monyalu, the appellant appeared in person and was unrepresented while on the side of the respondent Republic Ms. Brenda Mekyi, learned State Attorney entered appearance.

When accorded an opportunity to amplify his grounds of appeal, the appellant adopted his grounds found in the filed memorandum of appeal and his written submissions filed on 15/6/2021. He then sought leave to only amplify on the 1st and 3rd grounds of appeal and prayed for the appeal to be allowed. On the other side, the learned State Attorney who had initially informed the Court that the respondent Republic was supporting the appeal, in the midst of her submissions, she changed gears and decided to support the conviction and sentence meted by the trial court and prayed that the appeal be dismissed.

In determining this appeal, we kickstart by first addressing complaints concerning procedural errors and irregularities in the conduct of the trial and thereafter, proceed with the remaining grounds of appeal, sequentially. With regard to grievance number one, it was the appellant's contention that having requested for the complainant's statement during the trial, the court failed to provide it in terms of section 9(3) of the CPA. He argued that the first appellate court erred by

not considering the obvious contravention of the law that denied his rights to understand the substance of complaints against him, a fatal anomaly which should have consequently vitiated trial proceedings.

Ms. Mekyi's response was to concede to the trial court's contravention of section 9(3) of CPA. She however urged the Court to find the anomaly not prejudicial to the rights of the appellant since one, the complainant (PW1) testified in court and the appellant was present during the said testimony. Two, the appellant had an opportunity to cross-examine PW1 and was thus availed the substance of his evidence prior to presenting his defence. She implored the Court to find the anomaly curable under section 388 of the CPA.

Having heard both sides on this issue, we find it important to reproduce section 9(3) of the CPA which reads as follows: -

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

The provision clearly makes it a requirement for the accused person to be provided with the complainant's statement by the court where the complainant's name is listed as one of the witnesses. The first appellate court found this complaint unmerited finding it an afterthought by reason that the appellant should have raised this issue in the trial court and not await to raise it in the appeal.

We are of the view that the first appellate court's position was misconceived. Section 9(3) of the CPA is couched in mandatory terms. Provision of the complainant's statement to accused is at the initiative of the court where conditions therein are fulfilled. The record of appeal shows clearly that the trial court failed to provide the appellant with the said statement and as argued by both sides, undoubtedly, section 9(3) of the CPA was contravened. We are of the view that, had the High Court Judge carefully considered what transpired in the trial court, he would not have found that this complaint by the appellant was an afterthought. At this juncture, what remains thereof is to consider the fatality of the said anomaly and the consequences thereof.

Taking into account all the circumstances obtaining, we agree with the learned State Attorney that the appellant was not in any way prejudiced by the said anomaly for the following reasons: **First**, is

because the complainant (PW1) gave his evidence in the presence of the appellant and was thereafter duly cross examined by him. The substance of complainant's evidence was thus known to the appellant at the time he gave his defence. **Second**, the fact that the essence of the evidence of PW1 is mainly on what he heard and what he was told by PW4 and does not touch on the appellant directly; and **third**, essentially the substance of PW1's evidence was uncovered by the prosecution at the preliminary hearing stage when expounding the facts of the case and thus was not a surprise to the appellant during PW1's testimony. Consequently, we find that although the trial court failed to comply with section 9(3) of the CPA, the appellant was not prejudiced and the anomaly is curable under section 388 of the CPA. Thus, this grievance lacks merit.

With respect to grievance number two, the appellant implored the court to expunge exhibit P1 whose contents included the PF3's of PW4 and PW5 since the contents were not read aloud in court after being admitted. The learned State Attorney while conceding that the record of appeal did not show that the contents of exhibit P1 were read after being admitted, argued that when the said record is carefully

considered, it reveals that Exhibit P1 contents were shared in court upon being admitted.

Having revisited the record of appeal, it is apparent (at page 15) that after the two PF3's arising from the medical examinations of PW4 and PW5 admitted as exhibit P1 were not read over aloud in court. We are alive to the fact that there was some explanation on the findings in the two PF3's as testified as contended by the learned State Attorney, but we are of the view that this was not the reading out of admitted documents envisaged by various decisions of this Court including **Robinson Mwanjisi and Three Others vs Republic** [2003] TLR 218.

It is well settled that where admitted documents were not read out in court, the same should be expunged from the record or disregarded. (See, **Mbagga Julius vs Republic,** Criminal Appeal No. 131 of 2015 and **Rashid Kazimoto and Masudi Hamis vs Republic**, Criminal Appeal No. 458 of 2016 (both unreported). In consequence thereof, we expunge exhibit P1 from the record of appeal.

The appellant also queried the value to be accorded to the testimony of PW3, his argument being that he failed to prove his qualification as a medical doctor and that his credentials were questionable, considering there was material contradiction between

PW3's job title found in Exhibit P1 and his evidence on oath. In response, the learned State Attorney disputed the claims and argued that they were misconceived since PW3's credentials were as expounded in his testimony at the trial, that he was a medical doctor. She argued that concern on whether or not PW3 was a medical doctor or a clinical officer is inconsequential since it does not affect the competence and value of his evidence. She implored the Court to consider the fact that the appellant's concern was an afterthought since it was not raised when PW3 was cross-examined.

Having expunged exhibit P1, complaints related to the contents therein become superfluous, and what we shall address is whether PW3 was competent to examine medically PW4 and PW5. In his testimony, PW3 stated that he is a medical doctor while in exhibit P1 his title is stated as clinical officer. We agree with the learned State Attorney that the said discrepancy does not go to the root of the case because the underlying issue is whether PW4 and PW5 were medically examined by a competent medical person whose report should be accorded weight by this Court. This Court had an opportunity to discuss the term clinical officer in **Charles Bode vs Republic**, Criminal Appeal No. 46 of 2016

and **Makende Simon vs Republic**, Criminal Appeal No. 412 of 2017 (both unreported). In **Charles Bode vs Republic** (supra) it was held:

> *"Our understanding of the term "clinical officer" from the meaning which has been given above, has left us with no doubt that, PW6 was a qualified medical person, to perform post mortem examination to the body of the deceased as such his report was properly accepted by the trial court".*

The Court thereafter proceeded to accord weight to the report by the said witness, a stand we concur with and thus find the complaint to be misconceived and unmerited.

In grievance number two, there is also a complaint that exhibit P1 was tendered by the learned State Attorney. In view of the fact the said exhibit has been expunged, we find nothing useful will be achieved in further deliberating on this concern, such discussion being unnecessary.

Confronting the next complaint relating to non-compliance of sections 210(1) (a) and (3) of the CPA as found in grievance number six, the appellant prayed that the irregularity be found to be fatal and should vitiate the trial. The learned State Attorney conceded to the irregularity related to contravention of section 210 (3) of CPA but argued that since

no witness raised any concern during the trial it was thus a minor irregularity not going to the root of the case and curable.

Our perusal of the record of appeal reveals that after the testimony of each witness that is, after re-examination, the trial court recorded that section 210(3) of CPA complied with. In essence, the complaint is misconceived. Nevertheless, we wish to underscore that according to the said provision, it is the witness and not the accused person to whom the right to ask for the recorded evidence to be read over to him is afforded. With respect to his own testimony, the proper procedure would have been for the appellant to raise concern in the trial court immediately after his testimony and not in the instant appeal. (See, **Abuu Kahaya Richael v. Republic**, Criminal Appeal No. 557 of 2017; **Athuman Hassan v. Republic**, Criminal Appeal No.84 of 2013 (both unreported). Consequently, the complaint is unmerited.

The other grievance was on non-compliance of section 210(1)(a) of the CPA. Unfortunately, the appellant did not amplify on this anomaly and was unable to show how he was prejudiced by the same. Section 210 (1) of CPA regulates the mode of taking evidence in the subordinate courts. It essentially alludes that it is of utmost importance that the testimony of the witness should be recorded as accurately as possible

and in the exact words used by the witness and this should be clearly shown in the record of proceedings. It is also a well-established practice in criminal trials that after recording the evidence of every witness a trial magistrate or judge must append his/her signature at the end of each testimony.

In the present case, the record shows that the trial magistrate did not append his signature after recording the examination in chief and cross-examination of each witness but it was appended after re-examination of each witness and thus we are of the view that, in essence, it cannot be said that there was no signature of the trial magistrate appended after the testimonies of the witnesses. Under the circumstances, although this is not the known practice, we are of the view that since the signature of the trial magistrate was appended at the end of the overall testimony of a witness the authenticity of the respective testimonies cannot be doubted. Similarly, failure by the appellant to establish how he was prejudiced for such infractions renders the infraction curable under section 388(1) of the CPA as stated in the case of **Athuman Hassan v Republic,** Criminal Appeal No. 84 of 2013 CAT (unreported). Thus, the complaint lacks merit.

Concerning complaints regarding the trial court's non-compliance with section 231(1) of the CPA, our scrutiny of the record of appeal has failed to uncover such an omission. After the ruling of whether or not there was a case to answer, what transpired as recorded by the trial magistrate is as follows:

> *"Court" After a perusal on the evidence in record, this court finds a prima facie case has been established, the accused person has a case to answer, he is thus called upon the (sic) himself s. 231(1) of the CPA C/W.*
> *Court; Accused is informed his right to enter defence in oath or affirmation and if he has witnesses to call."*
>
> *Signed: S. B. Fimbo SRM*
> *31/5/2018*
>
> *Accused: I pray to defend on oath. I have no witness to call. I pray for DhW.*
> *S. 231(a) (b) C/W*
>
> *Signed: S. B. Fimbo SRM*
> *31/5/2018"*

Thereafter, on the 3/9/2018 when the hearing continued, the appellant (DW1) proceeded to give his testimony. From the record it is clear that the trial magistrate complied with all the requirements of section 231(1) of the CPA since it is recorded that section 231(1) of CPA

complied with. On the basis of the foregoing reasons, we find the complaints in grievance number six to lack merit.

Another irregularity which is drawn from the memorandum of appeal as expounded by the appellant in his oral submission derived from grievances number three and seven, is that section 127(2) of Tanzania Evidence Act, Cap 6 RE 2002 (TEA) was not complied with. The complaint stems from allegations that neither PW4 nor PW5 who were witnesses of tender age did promise to tell the truth as required by the law and that the irregularity went to the root of the case and vitiated their evidence. He argued further that this contravention meant that the prosecution failed to prove their case citing the case of **Hemedi Omary Ally @Dallah vs Republic**, Criminal Appeal No. 181 of 2018 (unreported) to cement his argument.

In her submissions in reply, the learned State Attorney argued that since the fact that PW4 and PW5 were aged nine (9) years and thus of tender age was not disputed, then the procedure by the trial court in taking their evidence was proper in line with section 127(6) of TEA. She pointed out that what was required was for the child witnesses to promise the court to tell the truth and not lies before giving testimonies and that this was complied with by the trial court with respect to PW4

and PW5 as found in the record of appeal. She thus prayed the complaint to be dismissed.

When determining whether the trial court complied with section 127(2) of TEA when recording the evidence of PW4 and PW5, the first appellate court found nothing to fault the procedure by the trial court. The High Court was guided by the principle laid down by this Court in **Godfrey Wilson vs Republic**, Criminal Appeal No. 168 of 2018 (unreported) which stated that the amendments of section 127(2) of TEA brought in by Act No. 4 of 2016 meant that a court when taking such evidence should be guided by; **one**, that a child of tender age should give evidence without oath or affirmation and **two**, before giving evidence, such a child is mandatorily required to promise to tell the truth to the court and not to lie. The High Court thus found that the trial court duly complied with the section 127(2) of TEA when taking the evidence of PW4 and PW5.

Upon perusal of the record of appeal, we concur with the restated finding of the High Court since before their evidence was taken, both PW4 and PW5 did promise to tell the truth and not to tell lies in compliance with section 127(2) of TEA. We have no qualm with what

transpired in court prior to recording PW4 and PW5 evidence and consequently find the complaint misconceived and unmerited.

Having dealt with the grievances related to procedural errors and found them wanting, we move to consider and determine grievances number three and four together. The appellant contended that the evidence of PW4 and PW5 was engrained in material contradictions which rendered the said evidence unreliable. He argued that simultaneously, the prosecution failed to prove penetration and to give evidence showing that the appellant was properly identified as the one who sodomized either of them and was one and the same as teacher Danny who tutored them at tuition session. The appellant argued that PW4 and PW5's evidence did not establish the venue where the alleged sodomy took place. The appellant argued further that while the evidence of PW5 narrated two separate places where he was sodomised, at the appellant's house near the tuition center at Vijibweni and in the class room it was contrary to his testimony that he had been sodomised only once. He argued that on the other hand PW4 stated that the crime scene was at the appellant's house in Soweto, a place far from the tuition class. The appellant thus sought the Court to find the inconsistencies and contradictions to be fatal and favour the appellants

contention since it meant that PW4 and PW5's evidence lacked credibility and was unreliable subject to be expunged or disregarded. He cited the case of **Lukas Kapinga and Two others vs Republic** (supra) to reinforce his arguments. He thus prayed the Court to find substance in the grievance and grant the prayer sought.

The learned State Attorney argued that although there were some immaterial inconsistencies in the prosecution evidence such as those highlighted by the appellant the evidence presented left no doubt that the appellant was "teacher Danny" who had sodomised PW4 and PW5. That this fact is amplified by the fact that the appellant did not dispute that he tutored both PW4 and PW5 at the tuition class. She argued that the Court should find any discrepancies or contradictions observed in the evidence of PW4 and PW5 to be minor and inconsequential and uphold the finding of the two lower courts that their evidence was credible and reliable. On the issue of whether or not penetration was proved, she argued that the evidence of PW4 and PW5 categorically stated that the appellant sodomized each of them and essentially, proved that penetration took place. She beseeched for us to find that PW4 and PW5's evidence was corroborated by the oral evidence of PW3 on this,

since he had testified to have found there was penetration in their anuses. She urged the Court to find the complaints to lack merit.

In deliberating on this complaint, the first appellate court re-assessed the relevant evidence especially regarding complaints on lack of clarity of the venue the alleged sodomy took place, having regard to evidence of PW4 stating it was at the appellant's home and PW5 stating two places, the appellant's home and in the classroom. The first appellate Judge found the alleged contradictions to be minor not going to the root of the case in view of the young age of the witnesses and also upon failing to find any evidence that PW4 and PW5 had any grudges against the appellant, their teacher.

We have gone through the record and found nothing to fault the finding of the first appellate court with respect to the evidence of PW4. PW4's evidence leaves no doubt that it is the appellant who sodomized him more than once. We reproduce some of his evidence stating:

> *"I used to go for Tuition at Vijibweni.* ***My teacher was called Danny.. ... Danny used to take us to his house in Soweto, which is far from where we were studying tuition, he used to take us, so that he could sodomise us, he used to lay us down take***

off our clothes then insert his penis inside our anus, he used to do that to me and Ibrahim. He did the act several times. *I did not tell anyone if the Act was done to me. Danny used to tell us not to tell anyone. He used to give us money, so that we could not state anything or else he would beat us."* [Emphasis Added]

When cross-examined by the appellant, PW4 stated that when teacher Danny was absent it was Bibi Rachel, the owner of the school who took over the class and none other. It is trite law that in cases involving charges of sexual offences, the position is that the best evidence is that of the victim. In **Selemani Makumba vs Republic** [2006] TLR 380 at page 384, it was held that: -

> *"True 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 where consent is irrelevant, that there was penetration."*

PW4's evidence was found to be credible by both the trial and the first appellate court. Similarly, it is important to note that any competent witness in terms of section 127 of the TEA is entitled to be believed, and invariably is a credible and reliable witness, unless there are reasons to challenge this as held in the case of **Goodluck Kyando vs Republic**

[2006] T.L.R. 363. In the current case we find none. Having gone through PW4's evidence, there is nothing to lead us to depart from the findings of the trial and first appellate court regarding reliability of his evidence. Assessing his testimony in chief and during cross examination, the witness was very adamant and consistent. From his evidence there is no question that the person who sodomised him was one Danny, his tuition teacher at Vijibweni. According to PW4, there were no other teachers apart from teacher Danny, Bibi Raphael and his aunt who had taught them for one day only. We are alive to the fact that the appellant conceded to the fact that PW4 was one of the students he tutored at the tuition centre. We find this further reinforces the fact that the appellant and PW4 knew each other and to a large extent removes the chance of mistaken identity on the part of PW4 on who was teacher Danny. We find the appellant's assertion that since there were more teachers at the centre, that there could be another teacher Danny there, a far-fetched claim having regard to the available evidence of only being two or three people who gave tuition lessons to PW4 and only one of them was Danny. Evidently, PW4's identification of the appellant's is not in doubt.

With regard to whether penetration on PW4 was established, we find this was proved to the standard required by PW4 (victim 1) stating

that Danny sodomised him in line with the principle emanating from **Selemani Makumba vs Republic** (supra). This evidence is corroborated by the evidence of PW3 who testified that in his examination of PW4, he observed that the anus was bruised and was not intact and that when the anus is not intact it means it was penetrated. With the above evidence, there is no doubt that penetration was proved. For the foregoing, we are satisfied that the prosecution proved beyond reasonable doubt that it was the appellant who sodomized PW4.

On the part of PW5, having gone through the evidence, we find that his evidence leaves some unanswered questions especially having regard to the several inconsistencies we discerned in his evidence. When testifying to prove that it was the appellant who sodomized him and the venue where the incident took place, he stated:

> *"On 16/8/2016 my father asked me what the tuition teacher has been doing to us. I told him, that the teacher used to sodomised us, at his house.... The teachers used to teach us near Vijibweni,* ***he used to sodomise us at his house, near the tuition center. I know teacher Danny".*** [Emphasis added]

When he was cross-examined by the appellant, he stated:

> *"You used to sodomise one after the other... I did not count the number of rooms in your house. There were no chairs, I went inside the house. I saw benches. I did not enter your house."*

During re-examination he had this to say:

> *"**Teacher Danny used to sodomise us at the classroom**. And not at his house. Nobody saw the Act. I was alone, when other children came he moved me to another class, he committed the Act to me only once..."* [Emphasis added]

A thorough perusal of PW5's evidence draws out pertinent contradictions and inconsistencies. While at the start of his testimony, he testifies that the sodomy took place at the appellant's house, he later changed tracks saying it was done in one of the classrooms. There was also his explanation on the classroom incident, stating that if people were heard coming during the act, the teacher would move him to another room. This in essence infers there could have been more than one incident and his testimony that he was sodomized only one time leave unanswered questions on the veracity of his testimony. Again, PW5 also testified on what was found in teacher Danny's house where he was sodomised although subsequently when his evidence was re-

examined, he stated that he had never been at the teacher's house. These contradictions in his evidence raise more questions. PW5 stated that he was only sodomized on one occasion which did not augur well with his testimony that expounded two venues where he was allegedly sodomised, and also two incidences of being sodomised when alone and another with other people.

We have taken into account all the contradictions and discrepancies in PW5's evidence especially as they relate to testimonies of other witnesses (see, **Shabani Daud vs Republic**, Criminal Appeal No. 28 of 2001 (unreported). We find the contradictions and inconsistencies in his testimony to be fatal as they go to the foundation of his credibility as a witness. We have considered the finding of the trial court and the first appellate judge that his evidence was credible and reliable. This being a second appeal, we are alive to the settled practice that the Court should only in exceptional circumstances depart from concurrent findings of fact by the trial and first appellate courts and that a competent witness is entitled to be believed. Interference in concurrent findings of subordinate courts is done only when warranted, such as where there was misapprehension of the evidence, miscarriage of justice or violation of some principles of law or procedure by the

courts below (see, **Joseph Safari Massay vs Republic,** Criminal Appeal No. 125 of 2012 and **Julius Josephat vs Republic**, Criminal Appeal No. 03 of 2007 (both unreported).

In the instant case, having considered all the guiding principles, we find the need to interfere in the concurrent findings of the trial and first appellate court regarding the credibility of PW5 for the following reasons; **one**, in view of the apparent contradictions in his evidence as shown hereinabove. **Two**, when the evidence of PW4 is compared to that of PW5 in terms of consistency, the dents in PW5's evidence are very clear and wanting. Therefore, with due respect, had the two lower courts properly evaluated PW5's evidence, they would not have arrived at the conclusion they did and relied upon his evidence. The doubts raised in his evidence should clearly benefit the appellant. We thus shall not rely in his evidence when determining the charges against the appellant.

The last grievance advanced by the appellant faults the first appellate court for abrogating its duty to re-evaluate the evidence on record and arrive at its own conclusion during the appeal and complaints that the case was not proved beyond reasonable doubt. The appellant contended that the first appellate court failed to step into the shoes of

the trial court and reevaluate evidence on record. He contended that the case was poorly investigated, as shown from the fact that some material witnesses were not called to testify, these included the investigator and people who were in the premises when he was arrested who would have been important to reveal the circumstances leading to his arrest. He contented that this prejudiced him because some of the witnesses might have bolstered his defence.

In response, the learned State Attorney urged the Court to find this complaint to lack merit. She argued that on the prosecution side they were satisfied that the witnesses they called managed to prove their case against the appellant beyond reasonable doubt and did not require other witnesses. The learned State Attorney rejected the argument that the first appellate court failed to re-evaluate the evidence and argued that such complaints were unmerited and unsubstantiated by the record of appeal. She urged the Court to find that the prosecution did prove the case to the standard required and dismiss the appeal.

The gist of the current complaint is failure of the prosecution to call important witnesses who would also have assisted the defence case. By virtue of section 143 of the TEA, there is no number of witnesses required to prove a fact (see, **Yohanis Msigwa vs Republic** [1990]

T.L.R. 148. Indisputably, the prosecution is to call witnesses who prove their case. We were informed by the learned State Attorney that they did call witnesses they found essential to prove their case and we find nothing to draw an adverse inference in terms of section 122 of TEA for failing to call the investigator or any other witness, since we are not convinced that they were material witnesses. The complaint is thus unmerited.

With respect to grievance number seven that the prosecution failed to prove the case, for the reason stated above we find there was strong evidence to sustain conviction in the second count and thus uphold the conviction and sentence in the second count.

With regard to the first count, having decided to disregard the evidence of PW5, we find that, the remaining evidence of PW2 and PW3 although proves there being penetration, in the absence of his own evidence, there was no evidence to prove who sodomised him. The evidence of PW2 is only to the extent of what he was told by PW5 and we find this not sufficient to prove that it was the appellant who sodomized him. PW4's evidence is also not enough to prove that PW5 was also sodomized by the appellant. Under the circumstances, doubts remain on who sodomized PW5, doubts which benefit the appellant. In

the premises, we hold that the prosecution failed to prove the charges in the first count beyond reasonable doubt. Therefore, the conviction is quashed and the sentence set aside with respect to the first count.

In the end, for avoidance of doubt, the appeal is partly allowed. In respect to the second account the appeal is dismissed in its entirety whereas, regarding the first account, the appeal is allowed, conviction quashed and sentence set aside.

DATED at **DAR ES SALAAM** this 6th day of September, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The judgment delivered this 7th day of September, 2021 in the presence of the appellant in person linked through video conference from Ukonga Prison and Ms. Kasana Maziku, learned Senior State Attorney for respondent Republic is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL