IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., KEREFU, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 532 OF 2019

SALEHE RAMADHANI OTHMAN @ SALEHE BEJJA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mgonya, J.)

dated the 11th day of November, 2019
in
DC Criminal Appeal No. 10 of 2019

JUDGMENT OF THE COURT

22nd September & 4th October, 2021

KEREFU, J.A.:

This is the second appeal by Salehe Ramadhani Othman @ Salehe Bejja, the appellant, who was before the District Court of Kinondoni at Kinondoni was charged 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, on diverse dates between June, 2017 to 24th day of August, 2017 at Magomeni Kagera within Kinondoni District in Dar es Salaam Region, the appellant had carnal knowledge of a boy child aged ten (10) years against the order of nature. The appellant was sentenced to thirty (30) years imprisonment term. For purposes of protecting the victim's

identity and privacy, we shall simply refer to him as the victim or simply 'PW1' as he so testified before the trial court.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. To establish its case, the prosecution marshalled a total of eight (8) witnesses. The appellant relied on his own evidence as he did not summon any witness.

The prosecution case as obtained from the record of appeal is that, PW1 was living at Sinza Lion with his mother one Sikujua Mbega Kassim (PW2) and he was studying at Magomeni Ndugumbi Primary School in Standard VI and he was also attending tuition and madrasa at the Masjid Ndugumbi. PW1 stated that he knows the appellant because he was his teacher of madrasa at the said Masjid and during prayers he used to supervise and arrange them on where to stand. PW1 stated further that, at the Masjid Ndugumbi and after swalat Ijumaa, he used to play with his friends known as Wakili, Abdul and Kareem.

PW1 recalled that one day, in 2017, the appellant asked him if he knows one student by the name of Wille. PW1 admitted to know the boy as they were in the same class. Then, the appellant gave PW1 his mobile

phone number and asked him to give it to Wille. PW1 said that he gave the said number to Wilie who admitted to know the appellant.

PW1 went on to state that, one day in 2017, after swallat Ijumaa, the appellant asked him if he had given the phone number to Wille which PW1 responded positively and the appellant requested that he should see him after class hours to receive his gift for a job well done. After class hours and completion of tuition studies, PW1 went to see the appellant and they together went to the Masjid Ndugumbi where the appellant told him to go upstairs (first floor) where PW1 found some people who had attended a madrasa class. PW1 testified further that, after the madrasa was completed, he remained with the appellant. While there, the appellant told him to undress his shorts but PW1 refused and told the appellant that Allah forbids that act. The appellant insisted while telling PW1 that '*mbona mwenzako anakubaligi*? Meaning that, '*your colleague is always accepting.*' Upon further refusing, the appellant slapped PW1 on his face and forcefully undressed his *pensi* and pants. He then unzipped his trouser, took out his penis and carnally known him against the order of nature. Thereafter, the appellant gave him TZS 2,000.00 and told him to go home and that he should come back every day after classes for the same ordeal.

PW1 testified further that, from that date it became a routine business that, every day after classes he used to go to Masjid Ndugumbi to meet the appellant, who would carnally know him against the order of nature and give him TZS 2,000.00 and sometimes TZS 5,000.00 or TZS 10,000.00. PW1 testified that at Masjid Ndugumbi they had sex for about twenty (20) times. Later on, after being suspected, the appellant told PW1 that they have to shift to another mosque known as Masjid Kichangani also situated at Magomeni. PW1 agreed, but before moving to the said Masjid, the appellant met PW1 at the school main gate and told him that he was travelling and he gave him TZS 50,000.00. PW1 stated that, after that date he did not see the appellant for a while until one day when he went to pray at Masjid Ndugumbi where he saw him and he told to meet him at the Masjid Kichangani, which he did and they continued with their business as usual. At Masjid Kichangani, they continued with the same game for about three days, on the fourth day, some children, who attended the madrasa came near them and the appellant pretended that he was teaching him Quran. Thereafter, the appellant told him that they have to shift to Masjid Bahati also located at Magomeni. PW1 agreed and on the next day, after school hours, he went to pray swallat alasir at Masjid Bahati where he met the appellant who told him to go to the toilet to meet him. On his way to

the said toilet, one man, Hassan Manzi Mbwana (PW3) became suspicious as he saw them talking. As such, PW3 asked PW1 if he knows the appellant and PW1 admitted to know him. Then, PW3 warned PW1 to immediately go home after the prayer. However, after the prayer, PW1 went to the toilet to meet the appellant. PW1 testified further that the door of the said toilet had defects and did not close properly. That, when he started to undress, PW3 opened the toilet's door and found them there while the appellant was yet to undress. PW3 called people who were around that place to come and see them. PW1 stated further that, people came and assisted PW3 to apprehend the appellant. A moment later, the police came and arrested the appellant and PW1 was taken to the hospital for medical examination.

In their testimonies, PW2 and PW3 supported the narration by PW1. PW3 added that he knew the appellant for a long time as they used to attend one gym for two years, and that the appellant had been also a barber, carpenter and a cook in different ceremonies at several occasions. PW3 also added that at the Masjid Ndugumbi where the appellant was a madrasa teacher, he (PW3) was '*Muadhini Mkuu.' i.e* an officer of the Mosque who call people for prayers. PW3 testified further that on the fateful date he also went to pray at Masjid Bahati. Upon completion of

prayers and while coming out of the Masjid he found the appellant with PW1 outside the Masjid's corridor where the appellant greeted him. Thereafter, the appellant went inside the Masjid while PW1 was still outside removing his shoes. PW3 said that, he greeted PW1 and asked for his name, where he was schooling and if he knows the appellant. PW1 introduced himself and told him that he does not know the appellant. PW3 warned PW1 to go home immediately after the prayer. PW1 agreed.

PW3 testified further that, as he was walking away, he was suspicious and had a feeling that something bad is going to happen, because he knows that the appellant had many scandals of similar nature. As such, PW3 decided to go back and upon entering the corridor of the Masjid, he found PW1's shoes together with his bag but PW1 was not there. He entered inside the Masjid and found the appellant's bag on the carpet but the appellant was also not there. PW3 searched for them inside and outside the mosque at all places used for prayers but he never found them. He then decided to go to the toilet where there were seven toilet rooms. He stated that, all doors of the toilet rooms were open except the sixth toilet which was closed, though not completely, as its door has some defects and it is not full covered as its half downside and upside which makes it possible for people outside to see the feet of the person inside the

toilet. PW3 testified that he saw four feet inside the toilet and when he came closer and looked inside the toilet through the upside space, he saw the appellant standing while his trouser has been undressed to the knees, his penis erected while PW1 was bending down and his hands touching on the toilet walls. PW3 stated further that he pushed the door and entered into the toilet and found them there. He apprehended the appellant by the neck and asked him why he is destroying others children. PW3 testified that the appellant apologized while beseeching him not to report the matter to anyone. PW3 said that some people who came lately for prayer together with some leaders of the Mosque heard their arguments and came to the scene and assisted him to take the appellant inside the mosque. He said that the local government leaders, namely Shomari Haji Suleiman (PW4) and Jafari Jongo (PW5), respectively came to the scene of crime and they called the police, who came and arrested the appellant.

At the hospital, PW1 was examined by Dr. Verian Msuya (PW8) who confirmed that PW1's anus was pulsating and had inflammation an indication that it had been penetrated. PW8 filled the PF3 to that effect and the same was tendered in evidence as exhibit P1. Upon being interrogated by E.2630 D/CPL Joston (PW7), the appellant, in his cautioned statement (exhibit P2), confessed to have committed the offence to PW1 at several

times and in different locations. However, his statement was expunged by the first appellate court on account of some procedural infractions which impacted on its validity.

In his defense, the appellant (DW1), though admitted that he was a madrasa teacher at Masjid Ndugumbi since 2012 and that he was supervising madrasa pupils during prayers, he denied to have committed the offence. He contended that, on that fateful date, he went to pray at Masijid Bahati and when he entered the mosque, he found the *jamaa* prayer had ended, so, he went to take *udhu*. A moment later, he saw PW1 accompanied by PW3 and he asked PW3 what he was doing with the boy. DW1 said that he was astonished to see PW1 crying and upon asking, PW1 said that he was beaten and carnally known by PW3. Then, PW3 shouted that the appellant had carnally known PW1 and people gathered assaulted him and he was later arrested by the police. Thus, the appellant tried to insinuate bad blood between him and PW3, allegedly arising from their working relationship at Ndugumbi Masjid where PW3 wanted to take his position of calling people for prayers.

In sentencing the appellant, the trial court relied on the testimony of PW1 whose evidence was corroborated by PW3, PW4, PW5, PW6, PW7 and PW8. It found that the charge against the appellant was proved to the hilt.

Hence, the appellant was found guilty and sentenced to thirty (30) years imprisonment.

The appellant's appeal before the High Court hit a snag, as the court dismissed the appeal but enhanced the sentence from thirty years to life imprisonment as dictated by section 154 (1) (b) and (2) of the Penal Code. Undaunted, the appellant has preferred the instant appeal predicated on fourteen (14) grounds in the original memorandum of appeal and six (6) additional ground in a supplementary memorandum of appeal. All the twenty (20) grounds raise the following main complaints, **firstly,** that the evidence of PW1 was taken contrary to the provisions of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2002 (the Evidence Act); **secondly,** that both lower courts failed to determine the material contradictions in the evidence of prosecution witnesses; **thirdly,** the first appellate court failed to resolve irregularities committed by the trial court which rendered the entire proceedings and its judgment a nullity; and **finally,** that the prosecution case was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person without legal representation whereas the respondent Republic was represented by Mses. Haika Temu and Imelda Mushi, both learned State Attorneys.

When given an opportunity to amplify on his grounds of appeal, the appellant adopted the grounds of appeal together with his written submissions except grounds nine and twelve of the original memorandum of appeal which he prayed to abandon and he then argued the appeal based on the above indicated issues.

Elaborating on the first issue, the appellant contended that the *voire dire* test was conducted contrary to the requirement of section 127 (2) of the Evidence Act as PW1, a child of tender age did not promise to tell the truth and was never asked as whether or not he knew the meaning and nature of an affirmation. Due to those omission, the appellant urged us to discount the evidence of PW1 from the record. To buttress his position, he cited the cases of **Fredwin Martine Minja v. Republic,** Criminal Appeal No. 237 of 2008, **Joseph Damian @ Savel v. Republic,** Criminal Appeal No. 294 of 2018 and **Masoud Mgosi v. Republic,** Criminal Appeal No. 195 of 2018 (all unreported). He then argued that, after discounting the evidence of PW1, the remaining evidence on record is doubtful, contradictory and not water tight to ground a conviction.

On the second issue, the appellant argued that the case against him was not proved to the required standard because the evidence of the prosecution witnesses contains material contradictions hence lack

credibility and consistency to warrant any conviction. He clarified that, PW1 and PW3 were not credible witnesses as at page 14 of the record of appeal PW1 testified that he told PW3 that he knows the appellant, while PW3 at page 20 of the same record stated that when he asked PW1 if he knows the appellant, he responded that he does not know him. It was his further submission that at page 14 of the same record, PW1 testified that when PW3 found them in the toilet, he (PW1) had already undressed but the appellant was yet to do so. PW3 at page 21 of the same record said that, when he entered into the toilet, he found the appellant's trouser had been undressed to his knees and his penis erected. It was the argument of the appellant that, since what was testified by these witnesses had raised serious doubts on the authenticity of the prosecution case, the same should be resolved in his favour. To bolster his position, he cited **Hassan Fadhili v. Republic** [1994] TLR 89 and **Lukas Kapinga and 2 Others v. Republic** [1995] TLR 3.

As regards the third issue on procedural irregularities, the appellant argued that the witnesses' testimonies were recorded contrary to the provisions of section 210 (3) of the Criminal Procedure Act, [Cap. 20 R.E. 2019] (the CPA) as their evidence, after being recorded was not read over to them. It was his argument that since the said evidence was not properly

recorded, it should be disregarded. It was the appellant's further complaint that the trial court did not enter conviction after finding him guilty and before sentencing him contrary to the provisions of section 235 (1) of the CPA. He argued that the failure by the trial court to enter conviction had rendered its' judgment invalid as it was prepared contrary to the provisions of section 312 (2) of the CPA. To bolster his position, he cited the case of **Amani Fungabikasi v. Republic,** Criminal Appeal No. 270 of 2008 (unreported). He then invited us to nullify the trial court's proceedings and the two decisions of the lower courts. Based on his submission, the appellant argued that the case against him was not proved to the required standard and he thus urged us to allow the appeal and set him free.

In response, Ms. Temu from the outset, declared her stance of opposing the appeal. She however, started with the third issue on the non-compliance with the provision of section 210 (3) of the CPA, where she readily conceded that the trial court proceedings is silent on how it complied with the requirement of that section, but she was quick to state that the same can be glossed over as the appellant did not state on how the said omission prejudiced him. She added that the said omission is curable under section 388 of the CPA. To support her position, she cited **Yuda John v. Republic,** Criminal Appeal No. 238 of 2017 (unreported).

As regards the failure by the trial court to enter conviction before sentencing the appellant, Ms. Temu cited the case of **Butongwa John v. Republic,** Criminal Appeal No. 450 of 2017 (unreported) and invited us to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] (the AJA) to rectify the error.

On the first issue, Ms. Temu challenged the submission by the appellant for not being supported by the record. To clarify on that point, she referred us to page 10 of the record of appeal where PW1 clearly promised to speak the truth before giving his testimonial account. It was her argument that PW1's evidence was properly recorded as the trial court had complied with the provisions of section 127 (2) of the Evidence Act. She added that, since PW1 promised to tell the truth and testified under oath, his evidence is valid and cannot be discounted from the record.

As regards the second issue on the alleged contradictions between the evidence of PW1 and PW3, Ms. Temu, though conceded that the pointed-out contradictions do exists, but she argued that the same are minor defects which do not go to the root of the matter, because they do not dispute the fact that PW1 was carnally known by the appellant previously on different dates and at several locations. She elaborated that, in terms of the charge, the offence the appellant was charged with was not

committed on the date when PW3 found him in the toilet with PW1, but on previous dates and at different places. On the contradictions that PW1 told PW3 that he does not know the appellant, Ms. Temu referred us to the testimony of PW1 found at pages 11 to 14 of the record and argued that in his evidence, PW1 clearly stated on how he knew the appellant for quite sometimes as his madrasa teacher at the Masjid Ndugumbi. She thus urged us to disregard the pointed-out contradictions, which she insisted that they are only minor defects which do not go to the root of the matter. She finally concluded that the case against the appellant was proved to the required standard.

At the conclusion of her address to us, we asked her to comment on the propriety or otherwise of the charge laid before the trial court against the appellant. Ms. Temu responded that the issue of defective charge was adequately handled and determined by the first appellate court. She thus rested her case by urging us to find the appellant's appeal unmerited and dismiss it in its entirety.

In rejoinder submission, the appellant did not have much to say other than reiterating what he submitted earlier and insisted that the appeal be allowed and he be set free.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and examined the record before us, we find it appropriate to start by stating that, this being the second appeal, we are guided by a salutary principle of law which was restated in **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149 and **Mussa Mwaikunda v. The Republic**, [2006] TLR 387 that, in a second appeal the Court is only entitled to interfere with the concurrent findings of facts made by the courts below if there is a misdirection or non-direction made. The rationale behind that, is because the trial court having seen the witnesses is better placed to assess their demeanour and credibility, whereas the second appellate court assess the same from the record. We shall be guided by the above principle in disposing this appeal.

We have noted that, in their submissions, the parties, among others, submitted on matters of law including the defectiveness of the charge laid against the appellant, failure by the trial court to enter conviction against the appellant and non-compliance with the provisions of section 210 (3) of the CPA. These being points of law, we shall start with them.

Starting with the issue of the defectiveness of the charge on account of wrong citation of the provision which creates the punishment of the alleged offence, we wish to state that we are in agreement with Ms. Temu

that the said defects were properly addressed by the first appellate court and there is nothing to fault its findings on that aspect. It is also on record that even the appellant himself did not submit on this matter.

On the failure by the trial court to enter conviction, we wish to refer to page 81 of the record of appeal where, after she had analyzed the evidence adduced before her, the learned trial Magistrate concluded that: -

> *"...the court has established that the prosecution has proved its case beyond reasonable doubt.* ***The appellant is hereby found guilty of committing unnatural offence*** *contrary to section 154 (1) and (2) of the Penal Code." [Emphasis added].*

As argued by the parties, it is clear from the above extracted paragraph that after having found the appellant guilty, the trial court did not enter conviction before sentencing him. We are mindful of the fact that, in her submission on this aspect, Ms. Temu invited us to invoke the provisions of section 4 (2) of the AJA and rectify the omission done by the trial court. With profound respect, we decline the invitation as we are aware that, in a number of occasions, we held that failure to convict is a fatal omission, thus remitting such matters to the trial court to enter conviction. See for instance the cases of **Marwa Mwita v. Republic**,

Criminal Appeal No. 317 of 2014 and **Malima Mazigo v. Republic**, Criminal Appeal No. 315 of 2015 (both unreported). Yet, in some other cases, such as **Musa Mohamed v. Republic,** Criminal Appeal No. 216 of 2005 and **Omary Hussein Kipara v. Republic**, Criminal Appeal No. 80 of 2012 (both unreported), we have taken a different route. Specifically, in **Musa Mohamed** (supra) we observed that: -

> *"This Court being the final court of justice of the land, apart from rendering justice according to law also administer justice according to equity. We are of the considered opinion that we have to resort to equity to render justice, but at the same time making sure that the Court records are in order."*

The Court went on to state that: -

> *"One of the Maxims of Equity is that, 'Equity treats as done that which ought to have been done'. Here as already said, the learned Resident Magistrate for all intents and purposes convicted the appellant and that is why he sentenced him. So, this Court should treat as done that which ought to have been done. That is, we take it that the Resident Magistrate convicted the appellant."*

Similarly, in the case at hand, looking at the extracted paragraph above, and specifically the bolded expressions, it is clear that the learned

trial Magistrate having found the appellant guilty, she proceeded to record mitigation and sentenced him. As such, and being guided by the above authority, we take it that she convicted the appellant. In the event, we find the complaint of the appellant on this aspect to have no merit.

As regards the irregularity on the failure by the learned trial Magistrate to comply with the provisions of section 210 (3) of the CPA, it is indeed clear that the record does not show on how the trial Magistrate complied with that provision which require him to read over the evidence to the witnesses after having recorded it. For the sake of clarity section 210(3) of the CPA provides that: -

> *"The Magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the Magistrate shall record any comments which the witness may make concerning his evidence."*

We have considered the appellant complaint in respect of the said omission and we agree with Ms. Temu that it was not proper for the appellant to generalize his complaint on that aspect. In **Jumanne Shaban Mrondo v. Republic,** Criminal Appeal No. 282 of 2010 (unreported), when faced with a similar omission, the Court stressed that in every

procedural irregularity the crucial question is whether the same has occasioned a miscarriage of justice. The Court stated that: -

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

Therefore, in the instant case, since the appellant made a blanket claim without indicating on how he was affected by such omission and taking into account that there was no such complaint from other witnesses and the authenticity of the record is not complained of, we are settled that the omission did not cause miscarriage of justice. We thus find the appellant's complaint on this aspect to have no merit.

As regards the first issue on the complaint that the evidence of PW1 was improperly received, it is undisputable fact that at the time of giving

evidence, PW1 was a child of tender age. Section 127 (4) of the Evidence Act defines who is a child of tender age. It states as follows: -

> *"For the purpose of sub-section (2) and (3), the expression 'child of tender age' means a child whose apparent age is not more than fourteen years."*

Furthermore, the procedure of taking the evidence of a child of a tender age is stipulated under section 127 (2) of the same Act, thus: -

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies."*

In the case of **Geoffrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported) we lucidly expressed the import of the above section thus: -

> *"To our understanding, the ...provision as amended provides for two conditions.* ***One,*** *it allows the child of tender age to give evidence without oath or affirmation.* ***Two,*** *before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies."*

From the plain meaning of the provisions of sub-section (2) of section 127 of the Evidence Act reproduced above, a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. In a situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies.

In the case at hand, as correctly argued by Ms. Temu, PW1 promised to tell the truth but also testified under oath. To paint the picture, we wish to reproduce what transpired on 17th January, 2018 when PW1 was fielded to testify. At pages 10 and 11 of the record of appeal the trial court recorded that: -

> *"...Magistrate: What your teacher at madrasa teaches you on a person who is lying?*
> *PW1: The person who is lying will be taken to jehanam.*
> *Magistrate: Do you want to go to jehanam?*
> *PW1: Nooo.*
> *Magistrate:* ***What do you promise to this court? Are you going to tell lie or the truth?***
> *PW1:* ***I promise to tell the truth.*** *" [Emphasis added].*

In terms of the wording of the above extract, and taking into account that PW1 testified after the amendment of section 127 (2) of the Evidence Act by the Written Laws (Miscellaneous Amendments) (No 2) Act No. 4 of 2016, we agree with Ms. Temu that the appellant's complaint on this aspect is unfounded and not supported by the record. We have however noted that in addition to his promise of telling the truth and not lies, PW1 gave his evidence on affirmation, although the record does not reflect that he understood the nature of oath. We wish to emphasize that the amendment to section 127 (2) of the Evidence Act did not dispense with or do away with the duty of the trial court, before receiving the evidence of a child of a tender age, to ascertain whether the said child possess sufficient intelligence and understand the duty to speak the truth. See the provisions of sub-section (1) to section 127 of the Evidence Act. However, since in this case, we are satisfied that the learned trial Magistrate complied with the requirement of section 127 (2) of the Evidence Act and PW1 promised to tell the truth and not lies, his evidence has evidential value and cannot be discounted from the record as submitted by the appellant. We are settled in our mind that the evidence of PW1 could stand alone and capable of mounting a conviction on the appellant. We thus find the cases

cited by the appellant on this aspect to be distinguishable from the circumstances of this case. We equally find the first issue to have no merit.

On the second issue, the appellant's complaint is to the effect that the prosecution witnesses PW1 and PW3 are not credible witnesses as their evidence is tainted with contradictions and inconsistences. Having revisited the testimonies of these witnesses and considered the contradictions and discrepancies complained of, we are in agreement with Ms. Temu that the pointed-out contradictions are minor defects which do not go to the root of the matter. It is on record and in terms of the charge found at page 1 of the record, the offence the appellant was charged with was not committed on the date of arrest where the said contradictions are hinged, but on previous dates and at several locations where PW1 testified to have been carnally known by the appellant for more than twenty (20) times.

The testimony of PW1, the best evidence in this case, that he was carnally known by the appellant against the order of nature, clearly narrated on how he knew the appellant as his madrasa teacher at Masjid Ndugumbi and how he was carnally known by him on different dates and at several locations. The evidence of PW1 was corroborated by the testimony of PW8 who medically examined PW1's private parts and found that his anus was pulsating and had inflammation an indication that it had

been penetrated. Therefore, since in this case we have already observed and labelled the pointed discrepancies to be trifling and minor, the same cannot corrode the evidence adduced and shake the version of the prosecution case.

In the circumstances, we wish to restate the well-established principle by this Court that the best evidence in sexual offences, like the one at hand, comes from the victim as is the one to express the sufferings during the incident. See for instance the cases of **Selemani Makumba v. Republic** [2006] T.L.R. 379, **Hamis Mkumbo v Republic,** Criminal Appeal No. 124 of 2007 and **Rashidi Abdallah Mtungwa v. Republic,** Criminal Appeal No. 91 of 2011 (both unreported), among others.

It is also on record that the trial court and even the first appellate court sustained the appellant's conviction after being satisfied that the offence the appellant was charged with was proved by the evidence of PW1 himself which was corroborated by the evidence of PW3, PW4, PW5, PW6, PW7 and PW8. All these witnesses, in our considered view, proved the prosecution case to the required standard. We thus find the second and the fourth issues to be devoid of merit.

In totality, we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair and impartial

decisions which we do not find any cogent reasons to disturb, as we are satisfied that the evidence taken as a whole establishes that the prosecution's case against the appellant was proved beyond reasonable doubt.

In the event, we find the appeal devoid of merit and it is hereby dismissed in its entirety.

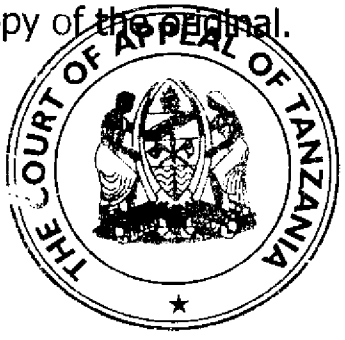
DATED at **DAR ES SALAAM** this 1st day of October, 2021.

S. A. LILA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 04th day of October, 2021 in the presence of appellant in person linked via video conference at Ukonga Prison and Ms. Dhamiri Masinde linked via video conference at DPP's office Dar es Salaam for the Respondent/Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL