IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., GALEBA, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 606 OF 2021

SHOMARI MOHAMED MKWAMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(De Mello J.)

dated the 7th day of December, 2020

in

Criminal Appeal No. 312 of 2019

.....

JUDGMENT OF THE COURT

23rd September & 21st October 2022

GALEBA, J.A.:

In this appeal, Shomari Mohamed Mkwama, the appellant, was charged before the District Court of Mkuranga in Criminal Case No. 119 of 2018 on two counts of rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code) and unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code. The victim of the offences, to whom we will refer to as "PW1" or "the victim", in order to conceal her identity and protect her dignity, was a female infant of 4 years when the offence was committed on 13th July 2017. At that time, the victim was a nursery

school pupil living with her grandmother, PW2, one Ashura Mohamed Mkumbato at Kisiju Village in Mkuranga District within Coast Region.

According to the prosecution, at around 1730 hours on 13th July 2017, the appellant found the victim at the playground playing with her friend Nasri and told her to have a walk with him. As she obliged, the appellant led her to his house, took off her skirt and under pants such that the poor girl remained naked and unprotected. The appellant then committed unnatural offence and raped the girl. After the painful experience, the appellant dressed her up and took the victim back to the playground. The victim went straight home crying in pains and reported to PW2, as to what had happened to her. The said PW2 decided to take the child to the Police Station and later to Hospital. As PW2 was taking the victim to Nyota ya Bahari Dispensary, on the way she saw the appellant. However, when she called him in order to inquire from him as to what he had done to the victim, he took to his heels, henceforth disappeared from the village until about a year later in June 2018 when he resurfaced and immediately apprehended and charged as indicated above.

The appellant denied the charge, whereupon a total of four prosecution witnesses, being PW1, the victim, PW2, her grandmother,

PW3 a medical doctor and PW4, a police officer who investigated the case, were called to substantiate the charge. Although the appellant denied any involvement in any of the two immoral and criminal acts, still the District Court found him guilty on both counts, convicted him and sentenced him to life imprisonment. His appeal to the High Court, before De Mello J, (as she then was), was dismissed on 7th December 2020. In the same breath, the appellant's conviction and the sentence were both upheld and confirmed. This appeal is seeking to challenge the above decision of the High Court. In that respect the appellant preferred a total of 7 grounds of appeal, as follows:

> *"1. That the first appellate court grossly erred in law by upholding the appellant's conviction relying on the evidence of PW1 which was received in contravention of section 127 (2) of the Evidence Act as amended by Act No. 4 of 2016 as there is no record to show whether PW1 promised "not to tell lies" in court.*
>
> *2. That the first appellate court erred in law and fact by upholding on the evidence of PW3 and a PF3 (Exh. P.1) without observing that such evidence was illegal, contradictory, unreliable and incredible by not filing a PF3 in the Government Hospital as the PF3 chit direct for itself contrary to the procedure of law.*

3. *That the lower courts grossly erred in law and fact in holding on the testimonies of PW2, PW3 and PW4 which were unreliable, incredible and with material inconsistencies whose stories failed to corroborate PW1's story against the appellant.*
4. *That the lower courts grossly erred in law and fact by convicting the appellant for the offence of rape and unnatural counts whereas there was no relevant evidence to establish the commission of any of those offences.*
5. *That the lower courts grossly erred in law and fact by failure to resolve the variance between the names of PW1 stated in the particulars of the offences, that appeared in the voire dire test and that stated by herself when she testified in chief.*
6. *That the learned first appellate Judge grossly erred in law and fact by upholding the appellant's conviction and sentence obtained on the evidence not borne out of the trial court record as seen in the trial court's judgment at page 46, 48 and 49 which is incurable hence rendering the lower courts' judgments to be null and void.*
7. *That the lower courts grossly erred by failure to observe that the case for the prosecution wasn't proved beyond reasonable doubt."*

At the hearing of this appeal, the appellant appeared in person without legal representation, whereas the respondent Republic had the

services of Ms. Gladness Mchami and Ms. Sofa Bimbiga, both learned State Attorneys.

As the appellant had lodged his written submissions in support of his appeal, he implored us to adopt them and together with his grounds, consider his appeal and allow it. Ms. Bimbiga was counsel for the respondent Republic, who argued in resisting the appeal.

The complaint in the first ground of appeal is that before the trial court was to record the evidence of a child of tender age of 6 years in this case, it ought to have ascertained whether the witness knew the meaning and nature of oath so that it could make a decision to require the witness to promise to tell the truth and not lies under the provisions of section 127 (2) of the Evidence Act [Cap 6 R.E. 2002, now R.E. 2022] (the Evidence Act). He submitted further that the victim's promise offended the above provision of the Evidence Act, because the child did not promise not to tell lies although she promised to tell the truth. Relying on this Court's decision in **Hassan Yusuph Ally v. R,** Criminal Appeal No. 462 of 2019 (unreported), the appellant beseeched us to disregard the evidence of the victim for the above reason.

On her part, Ms. Bimbiga was of the contrary view. She submitted that as the witness promised to tell the truth at page 22 of the record of

appeal, the requirements imposed by the provisions of section 127 (2) of the Evidence Act, were met and satisfied. To bolster her proposition, she referred us to our discussion in **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018 and **Wambura Kiginga v. R,** Criminal Appeal No. 301 of 2018 (both unreported).

To resolve this ground, we will start with section 127 (2) of the Evidence Act which provides that:

> *"(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

A child of tender age under section 127 (4) of the Evidence Act, means a child whose apparent age is not more than fourteen years since birth. If such a child is to give evidence in court, the above quoted section of the law, must be complied with. The issue for resolution in this ground is therefore whether, in taking the evidence of PW1 section 127 (2) of the Evidence Act was not complied with.

According to the record, nine questions were put to the child. The following details were inquired from her and she responded to them as appropriate; her name, her age, the person with whom she lived, whether she was schooling or not, her religion, whether she knew the

difference between truth and falsehood and the consequences of each, and finally she was asked:

"Question: Do you promise to tell the truth?

Answer: I promise nothing but to tell the truth."

The complaint of the appellant is that the appellant was not asked whether she knew the meaning and nature of oath before she could give the promise above.

In the case of **Hassan Yusuph Ally** (supra), sought to be relied upon by the appellant, a child of 14 years was sworn and started to testify without the trial court first ascertaining how it came to a conclusion that she could give evidence on oath. It was therefore a valid point in that case, because before a child can testify there must be some questions to be put to him or her before he or she can testify, see **Godfrey Wilson** (supra). Since in this case, the child gave evidence not on oath or affirmation the case of **Hassan Yusuph Ally** (supra), is distinguishable and it cannot assist us. If, it is a matter of asking general questions to a child witness before she can promise to tell the truth, the court satisfactorily performed that function as indicated above.

The case of **John Mkorongo James v. R,** Criminal Appeal No. 498 of 2020 (unreported), that the appellant referred us to, is also distinguishable because in that case, the trial Judge suddenly jumped to

a conclusion that the child of 10 years understood the duty to tell the truth while the court had not put any questions to her contrary to what we held in **Godfrey Wilson** (supra).

As observed above in this case, PW1 was asked about nine questions before she could promise to tell the truth, unlike the position in **Hassan Yusuph Ally** (supra) and **John Mkorongo James** (supra), where no questions were asked.

The other point was that the promise of PW1 was incomplete because there was no promise not to tell lies. However, according to the above quoted text, the witness promised to tell nothing else except the truth. That, to us means, she promised to tell the truth only to the exclusion of any lies. Thus, section 127 (2) of the Evidence Act was not offended in any way. In the circumstances, the first ground of appeal has no merit and we dismiss it.

The complaint of the appellant in the second ground of appeal is that the trial court and the first appellate court erred in law when it attached evidential value to exhibit P1 (the PF3), whereas the document was not filled in at a Government Hospital or a public institution.

In reply to that complaint, Ms. Bimbiga submitted that, the PF3 was valid as long as the victim was examined by a medical professional

recognised and registered under the Medical, Dental and Allied Health Professionals Act, No. 11 of 2017 (the Medical Professionals Act).

In this case, the victim was taken to Nyota ya Bahari, a health centre managed by the Catholic Church located at Kisiju in Mkuranga. The victim, at the centre, was attended to by PW3, Wellu Mpinga Gundula, a Medical Officer with registration No. 2696. After he examined the victim, he filled in the disputed PF3, which was tendered in court as exhibit P1. The issue in this ground of appeal is whether the said PF3 is illegal because it was filled in at a centre which is not a government owned facility.

We will start with the law on medical practitioners. A registered medical practitioner is defined under section 3 of the Medical Professionals Act as:

> *"a person holding a degree, advanced diploma, diploma or certificate in medicine or dentistry from an institution recognized by the Council, with his level of competency and registered, enrolled or enlisted to practice as such under this Act."*

In this case, according to the record of appeal, PW3 testified that he was a registered medical doctor with competence to attend to

patients in an endeavour to save their lives. He also testified that he had been transferred to Nyota ya Bahari health facility by the Government. We are satisfied, in the circumstances, that PW3 was, at the time of examining the victim, a medical practitioner within the meaning of section 3 of the Medical Professionals Act. Thus, we do not agree with the appellant that for the PF3 to have evidential value and credibility, it must have been filled in or completed by a medical practitioner stationed at a government-owned hospital or health centre.

In our view, what matters is the medical or clinical competence of a given medical practitioner who examines a victim and fills in the medical report irrespective of the location at which the report is filled in. Besides, in this case, PW3 was a government employee who had been transferred to Nyota ya Bahari Health Center, a designated heath centre recognized by the Ministry responsible for health. In the circumstances, and for that reason, the second ground of appeal fails.

The next ground of appeal was ground three. The complaint in this ground is that the evidence of PW2, PW3 and PW4 was unreliable such that it could not have been used to corroborate the evidence of the victim. The rationale for the complaint in terms of the written submissions of the appellant, was that the substance of the evidence as

tendered by the said witnesses, before the predecessor Magistrate honourable Kinyage RM, is materially different from their evidence adduced before a successor Magistrate, honourable Makabwa SRM.

In reply to that ground of appeal, Ms. Bimbiga submitted how credible was the evidence of PW2, PW3 and PW4 and how their evidence corroborated that of PW1. Nonetheless, that was not the point made by the appellant, the appellant's argument was that those witnesses' account before the predecessor magistrate materially contradicted their evidence tendered before the successor magistrate. In other words, the appellant's complaint in that ground of appeal was not appropriately rebutted by the learned State Attorney.

That notwithstanding, we will tackle the ground of appeal whose resolution, we think, presupposed a complete mastery and comprehension of the record of the proceedings in the trial court. In the context of the third ground of appeal, the proceedings were in two phases. The initial phase started on 1st October 2010 to 13th March 2019. The judicial officer who presided over the proceedings in this phase was honourable Kinyage RM. The magistrate recorded the evidence of the victim's grandmother, Ashura Mohamed, the victim and WP 8053 Neema. However, after recording the evidence of these in the

initial phase and adjourning the hearing to 27th February 2019, the honourable magistrate, made the following observation and order:

> *"Upon receipt of a complaint letter from the accused, directed to DRM i/c asking for change of a trial magistrate for reasons contained therein; thought I consider them to lack any merit, for the interest of justice to be seen to be done; I choose to disqualify myself from the conduct of this case.*
>
> *J. B. KINYAGE*
> *RM*
> *26/02/2019.*
>
> *R/A Let the case be placed before the DRM i/c for reassignment.*
>
> *J. B. KINYAGE*
> *RM*
> *26/02/2019.*

Consequently, on 13th March 2019, the case file was reassigned and when the matter was called on for continuation of hearing on 13th March 2019, before honourable Makabwa SRM, (the successor Magistrate), the following transpired:

> "***PP:*** *For hearing; I have a witness and ready.*
>
> ***Court:*** *This is a reassignment. The trial Magistrate disqualified herself The accused*

addressed as per section 214 of the CPA [R.E. 2002].

Accused: *I prayed for her disqualification as I had no trust in her.* ***I pray all witnesses to be recalled for the sake of justice****. For that I pray for an adjournment.*

Court: *For the sake of justice* ***witnesses be recalled****.*

E.R. MAKABWA
SRM
13/3/2019.

Order: *Hearing on 19/3/2019*

W/S warned.

AFRIC.

E.R. MAKABWA
SRM
13/3/2019."

[Emphasis added]

According to the record of appeal, that point marked the end of phase one of the proceedings. On 15th April 2019, the second phase of the trial started and it lasted to 17th June 2019 during which the prosecution recalled the three witnesses who had testified before the predecessor magistrate and added the fourth such that all the

prosecution witnesses were four in total. The appellant also appeared on his own to defend himself.

On this point we will have to consider the consequences of the trial court resummoning witnesses under section 214 (1) of the Criminal Procedure Act, [Cap 20 R.E. 2022]. That section provides as follows:

> *"(1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings* ***is for any reason unable to complete the trial*** *or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary,* ***resummon the witnesses and recommence the trial*** *or the committal proceedings."*

In the context of this provision, where for any reason any magistrate cannot conduct a trial to its finality, if it becomes necessary

the magistrate taking over the proceedings, may recall the witnesses who had already testified. In this case the appellant prayed that witnesses be recalled, which act made it necessary for the court to grant the prayer.

The issue to resolve in this ground is whether, the appellant in the circumstances can be allowed to rely on the first phase evidence to contradict the prosecution evidence in the second phase. The appellant made his position clear, why he moved the predecessor magistrate to recuse himself from the proceedings. He stated that he had lost trust in him. The appellant did not end there, he also moved the successor magistrate to recall witnesses who had testified before the previous magistrate. In our view, the fact that the appellant prayed that witnesses, be resummoned, he had also lost trust in the record that was taken by the predecessor magistrate, particularly the evidence. We have no doubt in our mind that that is the reason why the appellant specifically made a prayer that witnesses be recalled.

In this appeal, the appellant is challenging the trial court and the High Court for having failed to compare the evidence in the two phases and hold that the two sets were inconsistent with one another. In our judgment, that complaint which is the heart of the third ground of

appeal, has no substance, for it is an afterthought which cannot be taken seriously. That is so because where a party moves for resummoning of a witness or witnesses who have already testified, he cannot seek to rely, on the previously recorded evidence of the witness he prayed to be recalled. In effect, the initial evidence which was taken before the appellant prayed for resummoning of the witnesses cannot be used to contradict any evidence taken subsequently. The evidence previously recorded, does not have any evidential weight or value to be considered or relied upon for any lawful purpose including to contradict evidence recorded subsequently. For that matter, the third ground of appeal has no merit and we dismiss it.

At the moment we will skip ground four because it will be considered and determined along with the sixth ground of appeal. So, we will leap and proceed with ground five.

The complaint in the fifth ground of appeal is that the victim's name is not consistent throughout the record of the trial court. We must state at this stage that the nature of this ground will necessitate partial disclosure of the surname of the victim which we promised to fully conceal. In the charge sheet, the victim's surname is referred to as Jumanne @ Omary whereas in her evidence, she was referred to as

Jumanne Paga and also as Mohamed. The appellant's complaint, at the hearing was that he does not know in respect which victim he was sentenced to life imprisonment for committing unnatural offence and rape. In reply, Ms. Bimbiga submitted that, although the names are mistakenly written with different surnames, the victim was one person who was PW1. She submitted that the appellant, the victim and the latter's grandmother knew each other well, and the complaint that the appellant does not know his victim has no basis.

Admittedly, there were indeed, the inconsistencies complained of in the victim's surname, but the victim herself appeared in person in court and testified fully implicating the appellant. It would be different if the victim did not appear in court to testify in the presence of the appellant. As to whether the appellant knew the victim or not, the fact is clear on record. According to the record of appeal, during cross examination the appellant confirmed the following:

> *"I know the child and the child knows me. She has been seeing me in the café."*

The café is the business which was being run by the victim's grandmother, PW2. In this case, the inconsistences in the name of the victim would have been material and deemed to have led to a failure of justice or an unfair trial, if there was opacity or vagueness in the victim's

identity, in which case the appellant would not have been able to know the actual victim in the charge.

In our view, had the victim's actual identity been at issue in this case, the appellant could have sought clarification during cross examination of the victim, but that was not done. At the trial the appellant did not cross examine the victim as to her real name or express any doubts as to her identity. It is now a settled position of the law that failure to cross examine the adverse party's witness on a particular aspect, the party who ought to cross examine the witness, is deemed to have taken as true, the substance of the evidence that was not cross examined; See **Issa Hassan Uki v. R,** Criminal Appeal No. 129 of 2017 and **Martin Misara v. R,** Criminal Appeal No. 428 of 2016 (both unreported).

We are therefore, satisfied in this case that the appellant was certain of the victim's identity throughout his trial. In the circumstances, we find no substance in the appellant's complaint in the fifth ground of appeal.

Next in line for our consideration are the fourth and the sixth grounds of appeal. The complaint in the fourth ground of appeal is that the appellant's conviction was based on the evidence that was not

tendered before the trial court at his trial. In his written submissions, the appellant argued that his conviction was erroneously based on the evidence contained at page 46 lines 11 to 32 in the record of appeal, which he argued did not relate to his case.

The appellant's grievance in the sixth ground of appeal, is more or less like that in the fourth. In that ground, the appellant complains that the trial court included extraneous matters in its judgment at pages 46, 48 and 49 of the record of appeal. In reply to that ground, Ms. Bimbiga submitted that although the trial court included extraneous matters in the judgment, the matters were not relied upon in finding the appellant guilty and convicting him. She thus moved the Court to hold that the alleged extraneous matters, were of no bearing or any consequence to the appellant's conviction.

In respect of the fourth and sixth grounds of appeal, we agree with both parties that there are, indeed extraneous matters, in the judgment of the trial court. The whole of page 46 and about half of page 47 contain the substance of the evidence concerning a motorcycle rider who committed unnatural offence against a male victim. Surely, in all fairness that part of the judgment was irrelevant to the charge that was levelled against the appellant. But that is not all, the question is

this; was the appellant convicted in this case, because of the substance of the evidence recorded at page 46 and part of page 47 of the record of appeal?

In the trial court's judgment, it is clear that although the court included the foreign material quite unconnected to the case at hand, nonetheless, the evidence which was taken into serious consideration before the appellant was convicted is that of PW1.

At page 48 of the record of appeal the trial judge observed:

> *"The only evidence implicating the accused was that of the young victim and the evidence of the victim PW1 was clear and satisfactory in all material respects."*

We should add too, that the evidence of the victim was corroborated by that of PW2 and PW3, the victim's grand mother and the medical doctor who examined the girl. We must however hasten to put a clear caveat here that, our decision in this case does not in any way suggest that importing extraneous matters in court proceedings, is a lawful thing to do. It is illegal as held already in **Shija Sosoma v. D.P.P,** Criminal Appeal No. 327 of 2017 and **Monde Chibunde @ Ndishi v. R**, Criminal Appeal No. 328 of 2017 (both unreported). However, the question in this case is whether it is the inclusion of extraneous matters

which culminated into a conviction of the appellant in this case. In our view, the extraneous matters concerning a male victim by a motorbike rider, as observed above, the unnatural offence of the male victim, had nothing to do with the conviction of the appellant. Thus, we find the complaint of the appellant in the fourth and the sixth grounds of appeal lacking in merit.

We finally proceed to ground seven. The appellant's complaint in that ground of appeal is that he was convicted for having committed unnatural offence and rape without proof of the case beyond reasonable doubt. In the appellant's written submissions, there does not feature any argument to support the ground. In reply however, Ms. Bimbiga submitted that the case was proved to the hilt. She submitted that the victim testified in detail on how the appellant committed the unnatural offence and raped her. She argued that immediately thereafter the victim reported the matter to PW2 who took her to Nyota ya Bahari Health Centre where PW3 confirmed that the victim had been sexually abused in line with the charge and the evidence of the victim. According to the learned State Attorney, the appellant was convicted based on the credible evidence of the prosecution witnesses.

The issue for our determination in the seventh ground of appeal is whether the case was proved beyond reasonable doubt as required by section 3 (2) (a) of the Evidence Act. To resolve this issue, we will briefly navigate the evidence tendered at the trial by the prosecution. According to the evidence on record, the victim stated as follows at page 22 of the record of appeal:

> *"One day while in Kisiju I was playing with Nasri, Shomari came and told me that we may go for a walk. He took me to his home. He then put his 'mdudu' here and here.*
>
> ***Court:*** *Witness touching her vagina and anus.*
>
> *...before putting his 'mdudu' inside me he undressed my skirt and pant. I felt severe pain when he was inside me. I told him nothing. I went to my grandmother and I wanted to go to the toilet. I was crying as I was in a lot of pain. My grandmother gave me 100/= to keep silent and tell her why I was crying.*
>
> ***Court Observation:*** *The witness is crying while testifying.*
>
> ***PW1 Continues:*** *I managed to tell my grandmother what had taken place. I told her, Shomari took me to his home and put 'mdudu'. He did it in front and behind (pointing at her vagina and anus). My grandmother called Shomari's mother and others. I*

gave my story...I was taken to the Roman Hospital and was given medication."

At this point we wish to observe, albeit in passing that, in sexual offences the best evidence is that of the victim, as per this Court's decision in **Selemani Makumba v. R** [2006] T.L.R. 379. In this case, PW1, being the victim, her evidence was indeed the best and did not need corroboration in order for it to form a credible basis of conviction as the trial court was satisfied that the victim told nothing but the truth. That is, as per section 127 (6) of the Evidence Act which provides that:

> *"(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits,* ***notwithstanding that such evidence is not corroborated,*** *proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."*

[Emphasis added]

Although no corroboration was legally necessary, but for the sake of completeness, there was the evidence of PW2, who was staying with her. Her material evidence supported that of the victim. She told the court that on the same day that the victim was abused, the child came home crying and she gave her TZS. 100/= to calm her into silence so that she could tell her what had befallen her. She told her, of her ordeal as above, and upon inspecting the victim, PW2 noted that the child's clothes had blood and faeces. She called the appellant's mother who pleaded with her that the matter be sorted out at family level. They then took PW1 to the Police Station where they were given PF3 which was filled in by PW3 and tendered in court.

At this juncture we must pause for a moment and make one remark. It is now established in our jurisdiction that the ability of a victim of any crime to name a suspect at the earliest possible opportunity after the incidence, attests to the credibility and reliability of that witness and his or her evidence. Among many decisions of this Court on that point include **Bakari Abdallah Masudi v. R,** Criminal Appeal No. 126 of 2017 (unreported) and **Jaribu Abdallah v. R** [2003] T.L.R. 271. In this case, it will be recalled that the appellant was named

by PW1 to PW2 on the same day of the incidence as soon she stopped crying.

At the health centre PW3, on the same day, that is 13th May 2017, received PW1 who was in the company of PW2, her grandmother. This is what the medical officer stated before the trial court:

> *"The child was not able to sit properly. She told me mdudu was manhood. After that I took responsibility to examine the child. I realized that the child had fresh scratches in the vagina and anus. The scratches were bleeding. She had been washed but still the scratches were fresh. The vagina was open. She had no hymen. It was open there was penetration, I saw no sperms."*

This said evidence corroborated the evidence of PW1 who stated that she was raped by the appellant who also committed unnatural offence to her. With the above evidence, like the trial and the first appellate courts, we are, satisfied that the prosecution proved the case against the appellant to the hilt. In the circumstance, the seventh ground of appeal is hereby dismissed for want of merit.

As we are about to wind up this judgment, there is one miscellaneous matter in respect of which we wish to express our view, although it was not made a subject of complaint by the appellant. After

hearing parties on all their arguments, we inquired from them whether the trial court was right by sentencing the appellant with a life imprisonment in respect of each of the two counts without specifying that the two terms in prison would run concurrently. The appellant being a layman, had no useful input, however Ms. Mkonongo submitted that as the offences were committed in the course of the same transaction, the sentencing court ought to have specified that the sentences should run concurrently.

In this case, the appellant was convicted of committing both unnatural offence and rape and a sentence of life imprisonment was imposed in respect of each of the two counts. However, the trial court did not make an order on how the sentences would be served. In such a case, that is, where it is not specified that two or more sentences will run concurrently, the presumption is that the sentences imposed should be served consecutively. This is the moral behind the enactment of section 168 (2) of the CPA which provides that:

> *"Where a person is convicted at one trial of two or more offences by a subordinate court the court may, subject to the provisions of subsection (3), sentence him for those offences to the several punishments prescribed for them and which the court is competent to impose; and*

those punishments when consisting of imprisonment, shall commence one after the expiration of the other in such order as the court may direct, unless the court directs that the punishments shall run concurrently."

[Emphasis added]

The position of the law obtaining in this jurisdiction is that, unless there are exceptional circumstances, trial courts must order imprisonment sentences to run concurrently in case a suspect is convicted of two or more offences committed in a course of one transaction. On that point, in **Ramadhani Hamisi @ Joti v. R,** Criminal Appeal No. 513 of 2016 (unreported), this Court observed that:

"The law is settled that the practice of the courts in this jurisdiction is that, where a person commits more than one offence at the same time and in the same series of transaction, save in very exceptional circumstances, it is proper to impose concurrent sentences."

[See also **Festo Domician v. R,** Criminal Appeal No. 447 of 2016 (unreported) on the same point.]

In this case however, being a human being like any other, the appellant necessarily has only one life time to enjoy on Planet earth. He

can only live once. So, sentencing him to serve two consecutive sentences of life in prison is unrealistic. In the circumstances, we invoke this Court's revisional powers under section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] and order that the sentence of life imprisonment imposed on the appellant in respect of each of the two offences shall run concurrently.

Finally, except for the order made in respect of the manner that sentences imposed shall be served, this appeal has no merit. It is accordingly, dismissed in its entirety.

DATED at **DAR ES SALAAM** this 20th day of October, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 21st day of October, 2022 in the presence of appellant connected via video facility from Ukonga Prison and Mr. Faraji Nguka, learned State Attorney for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL