IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 183 OF 2019

(Appeal from the Judgment of the Resident Magistrates' Court of Mwanza at Mwanza (Ruboroga, SRM) Dated 20th of August, 2019 in Criminal Case No. 358 of 2018)

MARWA KIHONGO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT OF THE COURT

11th May, & 4th June, 2020

ISMAIL, J.

This appeal arises from the decision of the Resident Magistrates' Court of Mwanza at Mwanza, in respect of Criminal Case No. 358 of 2018, in which the appellant was convicted of unnatural offence against a boy aged 13 years of age, contrary to sections 154 (1) of the Penal Code, Cap. 16 R.E. 2002. Having been found guilty and convicted, the appellant was sentenced to imprisonment for thirty (30) years. This decision did not sit well with the appellant. He has, as a result, taken a ladder up and knocked

the door of this Court through a Petition of Appeal which has four grounds, paraphrased as follows: ***One***, that his conviction was wrong as it based on Exhibit P1 which did not have any evidential value to prove penetration and its tendering was not followed by elaboration of its contents by the maker; ***two***, that admission of Exhibit P2, was done without affording the appellant an opportunity to opine on its contents and without conducting a min-trial test to test its admissibility; ***three***, the trial court erred when it held that the prosecution's witnesses were credible while none of them stated if he was arrested before or after 22:00 hours; and ***lastly***, that the trial court did not consider the appellant's defence and that the prosecution's case relied on circumstantial evidence.

Before I delve into the substance of the contention by the rival parties in this appeal, I find it pertinent that a brief factual background of what precipitated this appeal be stated, and it is as follows. The victim, who I shall refer as ABC, to withhold his identity (or PW1), was a grade five pupil at Nyanza Primary School within Mwanza City. He was aged 13 years then. On 15th July, 2018, at around 19.00 hours, ABC was at a male salon for a haircut and he was in the company of a three-year nephew. In the salon, they found the appellant who was watching a TV. After they had

been served the victim and his nephew stepped out. The appellant offered to escort them because it was dark and insecure. Along the way, the appellant accused ABC of destroying his flowers. ABC, PW1, demanded that he be shown flowers which were allegedly destroyed but the appellant stuck to his guns. PW1 took the child home, leaving the appellant at the neighbour's residence. He went back to where the appellant was and the latter led him to school premises, where the appellant served as a security guard. He then covered PW1's mouth and dragged him to a laboratory room when he was ordered to undress after which the appellant inserted his penis into the PW1's anus. A phone call interrupted as the appellant was forced to cut short his indulgence. He took the victim back home. Along the way they met PW3 who enquired about where the appellant had taken the victim and his response was that he was teaching him. It is at this point in time that the victim disclosed what had befallen him. A rowdy mob that had gathered administered a beating that saw him lose his consciousness. The victim was then taken to the police station where a PF3 (Exhibit P1) was issued for medical examination. The examination revealed evidence of anorectal sex against the victim. The appellant was then arraigned in court where he was tried, convicted and sentenced.

The appellant refuted the accusation, contending that this was pure fabrication, choreographed by PW1's mother, PW2, to settle scores arising out of the past ill-blood between them. This version did not do enough to convince the trial court and let him off the hook. The court was satisfied that the prosecution had proved its case to the hilt. It convicted him and handed down a thirty-year prison term.

When the matter came up for hearing before me, the appellant fended for himself, unrepresented, as the respondent enlisted the services of Ms. Gisela Alex, learned State Attorney. In his brief address, the appellant submitted that the Court should base its decision on the grounds of appeal submitted by him and prayed that he be acquitted and set free. He maintained that he was innocent.

The learned attorney began her address by supporting the conviction and sentence imposed against the appellant. In respect of the grounds of appeal, Ms. Alex chose to address the Court in respect of ground four of the appeal. Conceding that the trial magistrate profoundly erred by not considering the appellant's defence testimony, the learned counsel held the view that this irregularity was fundamental and had the effect of vitiating the judgment which was based on the prosecution's evidence alone. It

rendered the judgment a nullity, she contended, and that such anomaly could only be cured through remitting the matter to the trial court for composition of a new judgment. To aid her cause, she cited the decision in ***Jonas Bulai v. Republic***, CAT-Criminal Appeal No. 49 of 2006 (unreported).

The appellant did not have a meaningful rejoinder, other than noting that the matter has taken a year to dispose of. He urged the Court to expedite its disposal and rid him of the suffering he is exposed to. He prayed that he be set free.

Let me embark on a disposal journey by first dealing with ground four of the appeal, which decries the trial court's failure to factor the appellant's defence when it composed and pronounced a judgment that finally convicted him. This fact has been emphatically conceded by Ms. Alex who was generous enough to cite the ***Jonas Bulai*** (supra) as the basis for her concession and prayer for consignment of the matter back to the trial court. Review of the impugned judgment reveals that, while defence testimony was fleetingly given a mention, the same was not considered when the trial magistrate arrived at a conclusion that guilt of the appellant had been established. The trial court drew this conclusion using one set of

the testimony *i.e.* prosecution's evidence. This was an exclusionist indulgence which is an affront to justice, and this Court and the Court of Appeal have pronounced themselves in that respect, through a multitude of decisions. In all of those decisions, the consistent message is that trial courts are under a strict duty of ensuring that determination of cases that are before them takes into consideration the totality of evidence tendered before them. Piecemeal evaluation of evidence or in isolation of one set of testimony is a flagrant error which has dire consequences. It goes to the root of the legitimacy of the decision bred by this flawed process. (See ***Deus Yusuph & Another v. Republic***, HC-Criminal Appeal No. 94 of 2019 (MZA-unreported)). Quoting with approval the decision of the defunct Court of Appeal for Eastern Africa in ***Ndege Marangwe v. R*** 1964 EACA 156, the Court held in ***Henry Mpangwe and 2 others v. R*** (1974) LRT 50, as follows:

> *"It is the duty of the trial judge when he gives judgment to look at the evidence as a whole ... It is fundamentally wrong to evaluate the case of the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it".*

A similar warning was sounded in ***Elias Stephen v. R*** (1982) TLR 313 (HC), when the trial court's imbalance came to the fore. The Court held thus:

> *"it is clear from the judgment that the trial magistrate did not seriously consider the appellant's defence. Indeed, he did not even consider the other defence witnesses who testified to it. He merely stated 'defence of accused has not in any way shaken the evidence'".*

So critical, is the requirement of considering the defence testimony in composing a judgment that the Court of Appeal had to weigh in and disapprove decisions which defy this established norm. In ***Michael Joseph v. Republic***, CAT-Criminal Appeal No. 506 of 2016 (Tabora) (unreported), the superior Bench threw its weight behind this Court's decisions in the cited cases. It observed:

> *"In the appeal before us, it is evident from the excerpt of the trial court judgment ... that .... it ignored the material portion of the evidence laid before it by the accused person, now the appellant herein. The trial magistrate totally ignored the evidence of the appellant and worst still he did not even consider that defence in his analysis."*

Notably, the decision in ***Michael Joseph*** (supra) took inspiration from its own reasoning held in ***Malando Bad' and 3 others v. Republic,*** CAT-Criminal App. No. 64 of 93 (Mwanza) (unreported). In this case the appellant's quest for reversal of the decision of the trial court was granted. The superior Court held in the process as follows:

> *"As was held by the Court of Appeal in Okoth Okale v. Uganda (1965) EA 555 it is an essentially wrong approach provisionally to accept the prosecution case and then to cast on the defence the onus of rebutting or casting doubt on that case. It is an error separately to look at the case for the defence but evidence should be looked at as a whole. We believe that had the trial magistrate not fallen into this error, his decision on the case would probably have been different."*

Having concluded that the trial court indulged in an irregularity, the question that follows relates to the fate of the conviction that emanated from the flawed process. It is trite law that failure to consider the defence of the accused person is fatal and vitiates a conviction (See: ***Halid Hussein Lwambano v. Republic***, CAT-Criminal Appeal No. 473 of 2016; and ***Sadick Kitime v. Republic***, CAT-Criminal Appeal No. 483 of 2016 (both at Iringa-unreported). Both of these decisions were inspired by the

decision of this Court (Weston, J.) in ***WJ Lockhart-Smith v. The United Republic*** [1965] EA 211 in which it was held:

> *"The trial magistrate did not, as he should have done, take into consideration the evidence in defence, his reasoning underlying the rejection of the appellants statement was incurably wrong and no conviction based on it could be sustained."*

The wisdom in ***Lockhart-Smith*** (supra) was echoed in ***Godfrey Richard v. Republic***, CAT-Criminal No. 365 of 2008 (unreported). It was held:

> *"... we are satisfied that the failure to consider the defence case is as good as not hearing the accused and is fatal."*

See also: ***Hussein Iddi & Another v. Republic*** [1986] TLR 166; ***Michael Alais v. Republic***, CAT-Criminal Appeal No. 243 of 2007; and ***Jeremiah John & 4 Others v. Republic***, CAT-Criminal Appeal No. 416 of 2013 (both unreported)

In consequence of all this, what then is this Court required of? While Ms. Alex is rooting for a re-trial, the appellant's preferred route is an acquittal and setting him free. I take neither of the proposed routes, and

my decision is predicated on the guidance given by the Court of Appeal in several of its decisions. The trite position is that this anomalous conduct can be cured by having this Court step in and evaluate the evidence and have a conclusion on whether the defence testimony raised any doubts which would result in a finding of not guilty against the appellant. This position was accentuated in ***Director of Public Prosecutions v. Jaffari Mfaume Kawawa*** [1981] TLR 149. At p. 153, it was stated:

> *"The next important point for consideration and decision in this case is whether it is proper for this court to evaluate the evidence afresh and come to its own conclusions on matters of facts. This is a second appeal brought under the provisions of S.5 (7) of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this court only on a point or points of law. Obviously this position applies only where there are no misdirections or non-directions on the evidence by the first appellate court. In cases where there are misdirections or non-directions on the evidence a court is entitled to look at the relevant evidence and make its own findings of fact."*

The crucial question, at this point, is whether there was any misdirection or non-direction by the trial court. Ms. Alex has submitted that the defence testimony was not considered by the trial court and that the

decision of the trial court was a one sided affair. I agree with the learned attorney, and my conviction is that this failure constituted a non-direction which justifies intervention with a view to looking at the relevant evidence and make a finding thereon.

In this case, the defence testimony, which was elbowed from the decision of the trial court, was to the effect that the appellant did not commit the offence he was charged with. He attributed his tribulations to the victim's mother, PW2, with whom he had an axe to grind, following what the appellant alleged that he subjected her to the payment of fines for her indulgence in the sale of illicit liquor and absence of a toilet facility at her residence. The appellant contended that PW2 vowed to fix him. Recalling the events of the fateful day, the appellant was on his way to Sandestus Masele when he met a mob of people that invaded and beat him up senselessly. He said that he gained his consciousness when he was in hospital, and it is then that he learnt that he was being held because he had had carnal knowledge of PW1. On cross examination, the appellant conceded that he did not have any grudges with PW3 the Street Chairman but he felt that he had been set to fabricate lies against him.

Having extracted the defence testimony, the next step involves testing the effect of the defence testimony and whether it casts any doubt on the prosecution case. The prosecution's case heavily relies on the testimony of the victim himself, PW1, in which narrated how he met the appellant at the hair salon and offered to escort him and his young brother home. Along the way the appellant is alleged to have changed course and started to accuse PW1 of destroying floors. He ostensibly took him to school where it was alleged that flowers had been destroyed. He then covered PW1's mouth and dragged him to a laboratory when he ordered him to undress and had his male organ enter into PW1's anus after which he took him back to his residence. He reported the matter to his mother and neighbor and was taken to hospital for examination that culminated in the issuance of Exhibit P1, a PF3.

Before I consider the probative value of the testimony of PW1, I wish to remark on what I found in the course of reviewing the trial court's proceedings. This relates to page 9 of the typed proceedings in which the Court recorded and made an assessment of PW1's ability and promise to tell the truth and no lies. The trial magistrate recorded as follows:

"I have examined the witness and satisfied myself that he us possessed with enough intellect and knows the duty to tell the truth and premises (sic) to tell nothing but the truth."

In recording the assessment, the trial magistrate was ostensibly complying with the requirements of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2002, as amended by section 26 of the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016. This amendment dispensed with the requirement of *voire dire,* as hitherto enshrined under ***section 127 (2) and (3)*** of the Evidence Act (supra). The new dispensation provides as follows:

"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 tell lies."***

With this amendment, the role of a witness of tender age is, hence forth, only limited to giving a promise of telling the truth and no lies. This position has been underscored by the Court of Appeal in several of its decisions, including the ***Selemani Moses Sotel @ White*** CAT-Criminal Appeal No. 385 of 2018 (unreported). In ***Msiba Leonard Mchere***

Kumwaga v. Republic, CAT-Criminal Appeal No. 550 of 2015 (unreported). It was held:

> *"... Before dealing with the matters before us, we have deemed it crucial to point out that in 2016 section 127 (2) was amended vide Written Laws Miscellaneous Amendment Act No. 4 of 2016 (Amendment Act).* ***Currently, a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies.*** *"*

Having examined the rationale for the trial court's recording, a nagging question emerges on whether such statement by the trial court reflected what the law requires. As held in the foregoing decision, the law requires the child of the tender age should promise, meaning that he/she should be recorded saying as such. It should not come from the judicial officer. In this case, the trial magistrate made the assessment and made the statement himself. In my view, the trial magistrate deviated from the 'norm'. I would, however, hold the view that the deviation is not of any fatal effect, especially where the law isn't explicit on the procedure that should be adopted in arriving at the conclusion as to whether a promise has been made by the would be witness. It is why the Court of Appeal

came up with possible questions which would help in establishing if the witness has made the (see: ***Godfrey Wilson v. Republic***, Criminal Appeal No. 168 of 2018 (unreported)). This view is fortified by the decision of this Court in ***Cosmas Herman v. Republic***, HC-Criminal Appeal No. 72 of 2019 (Mwanza-unreported) in which it was held that in the absence of a provision which would provide the ***"how"***, then it matters less if the objective for which the new position was promulgated has been achieved. This holding is in consonance with the superior Court's decision in **Bashiru Salum Sudi v. Republic**, CAT-Criminal Appeal No. 379 of 2018 (Mtwara-unreported) in which it was held:

> *"However, we are settled in our mind that the fact that the trial court determined PW1's ability to give evidence on oath or affirmation on the basis of the practice obtaining under the repealed law, did not invalidate that evidence. This is because, as observed in* ***Godfrey Wilson v. R*** *(supra) and later* ***Issa Salum Nambaluka v. R*** *(supra), the law is silent on the method of determining whether such child may be required to give evidence on oath or not. In the absence of such method, we do not think the method adopted by the trial court for the purposes of ascertaining PW1's ability to give evidence on oath or affirmation was fatal to her evidence and thus prejudicial to the appellant."*

I take a similar path and hold that irrespective of the trial magistrate's deviation from the known method, the testimony adduced by PW1 has suffered no adverse effect.

Review of the testimony has revealed yet another concerning shortfall. This relates to admissibility of Exhibit P1 which corroborated the testimony of PW1. From the record, this testimony was admitted without any objection when PW1 was led to tender it. After it had been admitted in evidence, the trial magistrate did not inform the appellant of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection. This is an imperative requirement enshrined in Section 240 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (CPA) which provides as follows:

> *"When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."*

Glancing through the proceedings, it is discerned that the appellant did not cross-examine PW1 when Exhibit P1 was tendered and admitted in court. In my considered view, the appellant's 'acquiescence' was informed by the fact that PW1, who tendered the said exhibit was not the maker or the medical expert who would be examined on the contents of the report. A different picture would probably be painted had the trial court fulfilled the compelling need of explaining the right that the appellant had to cross examine the maker, and undertaking to ensure that such maker would be made available if he felt that such need arose. This did not happen and, as a result, the testimony sailed unscathed. Failure by the trial magistrate constituted an irregularity of no trifling magnitude. It was of a mammoth effect and it occasioned an injustice to the appellant. The trite position is that such flaws have a bearing on the standing of the exhibit irregularly admitted. In ***Sprian Justine Tarimo v Republic***, CAT-Criminal Appeal No. 226 of 2007 (unreported), it was held:

> *"We accept the conceded complaint that the mandatory provisions of section 240 (3) of the Act were not complied with by the trial court after exhibit P1 had been admitted in evidence. This Court has held on numerous occasions that once the medical report as a PF3 has been received in*

evidence under section 240 (1) of the Act it becomes imperative on the trial court to inform the accused of his right of cross-examining the medical witness who prepared it: See ***Kashan Buyoka v R,*** *Criminal Appeal No. 176 of 2004 (unreported) and* ***Sultan s/o Mohamed v R,*** *Criminal Appeal No. 176 of 2003 (unreported). The Court has, as a result, held that if such a report is received in evidence without complying with the provisions of section 240 (3) of the Act, it should not be acted upon. The Court, in* ***Sultan Mohamed's case*** *went further and found the omission to have flawed the trial and ordered a retrial."*

Connected to this flaw, was the trial court's yet another horrendous omission. It did not allow reading of exhibit P1 when it was admitted in court. The consequence of this is equally colossal. In ***Sprian Tarimo's case*** (supra), the Court of Appeal stressed the importance of conforming to this requirement by stating the consequence of ignoring this requirement. It observed thus:

"Another fatal flaw is that the contents of Exhibit P1 were not even read out to the appellant. So the appellant was convicted on the basis of evidence he was not made aware of although he was always in court throughout his trial. In our settled view, these two serious omissions which, unfortunately, escaped the attention of the learned first

appellate judge, ***wholly vitlated the evidential value of the PF 3. We shall accordingly discount it in our judgment."***

This stance was emphasized in the subsequent decision in ***Hamisi Saidi Butwe v. Republic***, CAT-Criminal Appeal No. 489 of 2007 (Mtwara-unreported), wherein the following reasoning was postulated:

"Secondly, whether or not an accused objects to the production of PF3, Section 240 (3) still imposes a duty on the trial court to advise an accused person of his right to call the doctor; and his answer must be recorded. This was not done here. This means, that the PF3 (Exh. P1) was irregularly received into evidence. And as rightly submitted by Mr. Manjoti, the PF3 must and is hereby expunged from the record. (See ***Prosper Mnjoera Kisa v. R****, Criminal Appeal No. 73 of 2003 (CAT),* ***Messon Mtulinga v. R****, Criminal Appeal No. 426 of 2006;* ***Shabani Ally v. R****, Criminal Appeal No. 50 of 2001;* ***Alfeo Valentino v. R****, Criminal Appeal No. 92 of 2006;* ***Issa Hayis Likalamiko v. R****, Criminal Appeal No. 125 of 2005 (all unreported)."*

In the end, in both cases, the Court of Appeal expunged the testimony. Inspired by this reasoning, I allow ground 1 of the appeal and expunge Exhibit P1 from the prosecution's testimony.

Before I revert to the substance of the submissions by the parties which are in relation to ground four of the appeal, let me pronounce myself with respect to grounds 2 and 3 of the appeal. With respect to ground two, the appellant's contention is that exhibit P2 (a confessional statement) was admitted in court without a mini-trial test. The proceedings reveal at page 21 that Exhibit P2 was admitted in evidence without any objection from the appellant. PW 5 who tendered it in court was cross-examined as to why the statement was recorded outside the four-hour period set out by the law. His response thereto was that the appellant was admitted to hospital prior thereto. This means compliance with the four-hour requirement was practically impossible. Though the appellant was not clear on what a ***"mini-trial test"*** implies, my understanding is that he meant to refer to an inquiry or a trial within a trial which would determine admissibility of the confessional statement. If my guess is right, then my hastened view is that circumstances of this case did not require taking that route. This is in view of the fact that a trial within a trial or a mini trial test, as the appellant chose to call it, is only conducted where involuntariness in the recording of the statement is imputed. This is in terms of section 27 of the Evidence Act and the

provisions of the CPA, and the legal position, as it currently obtains, is that failure to hold a trial within a trial makes the confessional statement inadmissible (See: ***Sabas Bazil Maramndu @ Myahudi & Another v. Republic***, CAT-Criminal Appeal 299 of 2013 (Arusha); ***Amiri Ramadhani v. Republic***, CAT-Criminal Appeal No. 228 of 2005 (Arusha); and ***Frank Michael @ Msangi v. Republic***, CAT-Criminal Appeal No. 323 of 2013 (Mwanza) (all unreported)). In the absence of any retraction on the ground of involuntariness by the appellant, the trial court was not under obligation to indulge in a rigorous process of having to test admissibility of a document whose tendering has not been contested. In the upshot, I find this ground hollow and untenable. I dismiss it.

The appellant's complaint in ground three is not comprehensible. While it appears to suggest that something was wrong with the time at which and the manner in which the appellant was arrested, he appears to cast aspersion on the credibility of the prosecution witnesses. No details were given on either of the two. Either way, I find nothing warranting any serious attention to these allegations. Issues relating to arrest and the manner in which it was effected is not in the remit of the trial court. A trial court's only legitimate pre-occupation would relate to what happens

subsequent to an accused's arraignment in court. In this case, there was nothing untoward about the credibility of the witnesses and the appellant has not told the Court who, between the five prosecution witnesses, had any credibility crisis which would be the basis for the trial court's decision to disentitle their credence. In the absence of any material on which to base the appellant's complaint, this ground of appeal lacks any appeal in my eyes. I choose not to subscribe to it. I dismiss it.

Turning back to ground four of appeal and, looking back and revisiting the residual testimony, after chalking off the PF3 on account of the stated irregularities, the question that follows is whether the same has what it takes to discharge the burden of proof. This is in view of the defence testimony in which the appellant imputed PW2's personal vendetta as the basis for initiating charges which are purely trumped up. The appellant's defence testimony portrayed PW2 as a person whose account of facts should be taken with a serious pinch of salt, in view of what is thought to be a bad blood between them. This statement has not been substantiated by any other piece of testimony. But even assuming that the same held some elements of truth, it would only discredit the testimony of PW2 which has very little significance in the proof of the charges against

the appellant. This is in cognizance of the fact that in offences of this nature, evidence of the victim is crucial, of a decisive effect and sufficient to base a conviction on, without any need for corroboration. This is consistent with a plethora of decisions of this Court and the Court of Appeal of Tanzania. In ***Bakari Hamisi v. Republic***, CAT-Criminal Appeal No. 172 of 2005 (unreported) the Court of Appeal of Tanzania held:

> *"... Conviction may be founded on the evidence of the victim of rape if the Court believes for the reasons to be recorded that the victim witness is telling nothing but the truth."*

This position was underscored in ***Godi Kasenegala v. Republic***, CAT-Criminal Appeal No. 10 of 2008 (unreported) in which it was stated:

> *"It is now settled law that the proof of rape comes from prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence."*

See also: ***Kalebi Elisamehet v. The D.P.P.,*** CAT-Criminal Appeal No. 315 of 2009(unreported); ***Selemani Makunge v Republic,*** CAT-Criminal Appeal No. 94 of 1999 (unreported); *and* ***Ramadhani Samo v Republic,*** CAT-Criminal Appeal No. 17 of 2008 (unreported).

Casting a critical eye at the defence testimony, yet again, I get the firm impression that the same has not raised any reasonable doubts which would create a dent on the testimony of PW1, on which the prosecution's case hinges, or the testimony of PW3 which went unchallenged. The latter's testimony was to the effect that he was the last person who saw the appellant leaving with the victim, PW1, and were headed to the direction of the school where PW1 said was the scene of the crime. Though the testimony did not go to the extent of proving that the appellant was seen molesting the victim, it had the effect of corroborating what PW1 stated with respect to his being taken to school by the appellant for what turned out to be a heinous act that the appellant was charged with. The appellant has stated in his testimony that he has no bone to pick with the PW3 or any other prosecution witnesses, including PW1, the victim himself. This means that their testimony could not be influenced by PW2 with whom the appellant allegedly had an axe to grind. From the foregoing, it is fair to conclude that the testimony of the appellant, which skipped to address the crucial testimony of PW1 and PW3, lacked the potency or cutting edge that would be required to perforate or dislodge the prosecution's case, and blur what appears to me as an impeccable account

of how the appellant was involved in the commission of the offence with which he was charged and convicted of. I hold the view that charges against the appellant were proved beyond reasonable doubt to sustain the conviction, save for the trial court's anomalous treatment of the defence testimony, which anomaly has been addressed by this Court. Consequently, this ground of appeal partly succeeds but unable to affect the conviction passed by the trial court.

In sum, I dismiss the appeal, uphold the conviction and sentence imposed on the appellant.

It is so ordered.

DATED at **MWANZA** this 4th day of June, 2020.

M.K. ISMAIL

JUDGE

Date: 04/06/2020

Coram: Hon. J. M. Karayemaha, DR

Appellant: Present

Respondent: Absent

B/C: B. France

Appellant:

I am ready for the judgment.

Court:

1. Judgment has been delivered on line in the presence of the appellant and absence of the respondent on 04th June, 2020.
2. Right of Appeal fully explained.

THE HIGH COURT OF TANZANIA
MWANZA
At Mwanza
04th June, 2020

J. M. Karayemaha
DEPUTY REGISTRAR