IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINALAPPEAL NO. 97 OF 2022

(Originating from Criminal Case No. 54 of 2022, Resident Magistrates'

Court of Musoma at Musoma)

IDRISA ATHUMAN @ NALEJA

VERSUS

THE REPUPLIC

JUDGMENT

28th February & 28th March 2023

F. H. Mahimbali, J:.

In this current appeal, the appellant who was a school teacher at Kyawazaru Primary School which is within Butiama District in Mara Region, was charged, convicted and sentenced to life sentence imprisonment upon being convicted of the offence of unnatural offence contrary to section 154 (1) of the Penal Code, Cap 16 R.E 2019. It was alleged by the prosecution that on unknown dates of April 2022 at Kyawazaru Primary School within Butiama District in Mara Region, had carnal knowledge of one boy aged 13

years against the order of his nature. The appellant pleaded not guilty to the charge.

In efforts of establishing the charge against the appellant, the prosecution at the trial court summoned a total of six witnesses and tendered two exhibits exhibit (PF3 of the victim boy and an introduction letter). In summary, the prosecution's case goes this way.

The victim boy (name withheld), who is of tender age, upon compliance to section 127(2) of the Tanzania Evidence Act, (Cap 6 R.E 2019) testified as PW1 in the case. His testimony is to the effect that he was born in 2008. That he is the first born to his family and a standard six pupil at Kyawazaru Primary School in Butiama. He recalled that he has been sodomised twice by his Kiswahili school teacher. That the first time to be sodomised by his teacher was in April 2020 he was called by the said teacher into bush around 11.00hrs at school environment. He did so by forcing him to undress his short dress, made him bent, ornamented his penis by saliva and some ornamented it into his anus, then the teacher started inserting his penis into his anus. He felt much pain as he was never subjected to such a thing. After the teacher had finished, he warned him

not to tell anyone and that he promised to buy him shoes. As the Swahili saying goes, honey is not tasted once (Mramba asali harambi mara moja), he was on the second time (date) he was called by the said teacher at his office at 15.00hrs it was time for going home. The said teacher showed him playing pornographic videos where then he demanded doing the same thing he did the other time. The boy refused, but this time was again forced, laid on table undressed him and again the teacher inserted his penis into his anus vowing that he would marry him had he been a girl. He could not tell his parents yet as it was a scaring thing. That in June, 2022, he together with other 21 pupils were called by their head teacher and inquired about the issue of being sodomised by teacher Idrissa Athuman Naleja. Each one then narrated his story. He recalled those interrogated included Japhet, Thomas amongst the 21. Amongst the 21, each one told his story. There were those who also admitted being sodomised by him but others were not yet but also in process. So his testimony is to the effect that he was sodomised twice (in April 2020 around 11.00hrs at bush and June 2022 at his office but around 15.00hrs).

The father of the victim boy (PW1) Mr. Wangi Machera, testified as PW2 that the victim boy is his son – first born. He testified to the effect that the said boy is born on 12th October 2008 and is studying at Kyawazaru in standard six. On 30th June 2022, he received a call from the head teacher of Kyawazaru School that he should go to school. When he reached there, he met other parents who were then told that their children were amongst the victims of sodomy by one teacher. The news did upset him much as it was something bad to hear about his beloved son.

The said boy was sent to medical examination where PW3 – Doctor Sunday Malulu (Medical Doctor) of Butiama District Hospital confirmed the act saying that the victim's anus was traumatized. The said PW3 testified that he was employed in 2020 after completion of his studies – degree in medicine from St. Francis University – Ifakara with registration number MCT 4518. He testified how on 30th June 2022 he had examined amongst others the victim boy of this case (name withheld) to establish whether his anus was known carnally. He did so by conducting physical and digital examination. In his findings, he established that the both anal sphincters (internal and external) were relaxed suggesting that the victim's boy anal

system was traumatized. He further subjected the boy for HIV tests where he was found to be negative. The said medical examination report was admitted as exhibit PE1 of the case.

PW4 is another victim boy (name withheld). His testimony is to the effect that he is also studying at Kyawazaru secondary school in standard six. He was born in 2010 and was 12 years old. He further testified that teacher Idrissa Athuman is one amongst the staffs at Kyawazaru Primary School. Other teachers in the school were: Rajabu Mchilowa – Mathematics teacher, Hassan Abdalah – Social studies teacher, Marwa Thomas – Civic and Moral studies teacher, Idissa Athuma – Kiswahili teacher. He also testified how he was also sodomised once by the said Idrisa Athuman, Kiswahili teacher by being inserted with the teacher's penis into his anus in which caused much pain to him. As thanks giving, he was given 2000/=. That on 30th June 2022, while at school, their head teacher called them (identified victim boys). They were about 21 of them. They were interrogated whether they were known carnally by teacher Idrissa. He was one amongst the persons who replied in affirmative following being

carnally known by his Kiswahili teacher against the order of his nature and was subjected to medical examination.

That Mr. Hassan Abdallah who is the head teacher of the said school (Kyawazaru Primary School) in which the appellant was teaching and the victim boy schooling, testifying as PW5 told the trial court that he got the teaching course at St. Marry's Teachers College in 2008 where he was awarded a certificate of teachers grade IIIA. He was first posted at Madaraka Primary School from 2008 to 2018, then Butiama Primary School before he was transferred to Kyawazaru Primary School in 2021 as head teacher. That amongst his duties as Head teacher are supervision of education, school properties, discipline of his fellow staff teachers and pupils at large and also take care of the school environment. He recalled that on 28th June 2022 around evening time, he had received a call from one parent complaining that his son was being solicited by the appellant of being known carnally against the order of his nature. And that in the said solicitation, the said boy named other pupils they had already been known carnally against the order of their nature. As head teacher, he had to work on that information where he first met with the said whistle blower pupil

(the subject of solicitation) and established truth to some boys who admitted confidentially that they were known so, and amongst them was the victim in this case. He talked to teacher Idrissa first, where he refused but later admitted doing the said sodomy but only to three of them and it was in 2021. He then convened the staff meeting on the best way forward. The appellant seems to have admitted so before the school management and vowed them to do anything they wanted. The matter was then reported to the ward, district and regional educational level administration where eventually these charges were preferred against the appellant. He identified the said teacher – Idrissa Athuman in the dock.

G.7535 D/CPL Richard of police Butiama, testified as PW6 in this case. He testified how he was assigned the case file by his OC-CID and in the course of his investigation, amongst other things, interrogated the appellant who admitted knowing the victim boy carnally against the order of his nature. He was further ordered by his OC-CID to send the said appellant to the District Commissioner's Office where he saw the DC, DED and DEO who also wanted to know the said appellant and his accusations. The appellant according to PW6 also orally admitted knowing the said

victim boys carnally against the order of their nature including the victim boy in this case (name withheld) and asked for forgiveness. That in the course of his further investigation regarding this matter, he had managed to know other ten suspects (victims) where eight of them established being known so by the appellant, two of them were not yet known as solicitation was on process. It is from these findings, this charge was one amongst the preferred by the prosecution against the appellant.

In his defense testimony, the appellant disputed having known carnally the said eight pupils against the order of their nature (the victim of this case inclusive) as alleged. He considered the case as a fabricated one by the prosecution side against him. As to why it was a fabricated case against him, the appellant narrated a good tongue taste story. That at one time in March 2022, there came one parent who had two daughters at the school but with bad record of attendance. The said parent by name of Joseph Marwa Nyamasisiri had brought one sheep and cash money 500,000/= to the head teacher that he got an excuse of his daughter Consolata to abscond school for marriage. The token brought was for the school teacher to forbear. As was against that deal and vowed to echo it to

the superiors the head teacher also vowed to make him surrender. So, all the story of this case is a fabricated one as per his head teacher's vengeance against him.

Upon digest (of the case's testimony in record), the trial court convicted the appellant and sentenced him to a life imprisonment. Undaunted, the appellant has preferred this appeal armed with a total of eight grounds of appeal, namely:

1. *That the conviction based on PW1's testimony was bad because he did not pass out as credible.*
2. *That the medical officer's finding in PF3 had no scientific justification so they were unreliable.*
3. *That the proof of penetration as required by section 130 (4) of the Penal Code was not established by PW1, PW3 or PF3, there was no proof of sodomizing.*
4. *That the trial court did not consider the appellant's defense.*
5. *That the unsworn testimony of PW1 was wrongly relied upon as it was not corroborated hence unreliable of sustaining the appellant's conviction.*
6. *That, the testimony of PW2, PW3, PW4. PW5 and PW6 were wrongly relied upon as were hearsay thus can not corroborate the testimony of PW1.*

7. *That the exhibit P1 (PF3) and the testimony of PW3 were contradictory, hence unreliable.*

8. *That the trial court erred in law and fact to convict and sentence the appellant by relying the testimony of PW1 which was not properly constituted because a social welfare was not in the coram.*

During the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent -Republic was represented by Ms Beatrice Mgumba, learned state attorney who strongly resisted the appeal.

In arguing his appeal, the appellant- Mr. Idrisa Athuman @ Naleja, submitted that his grounds of appeal be adopted to form part of his submission. He then invited the Republic – Respondent to respond to them first, and if there will be anything to clarify will submit so in his rejoinder submission.

On her part, Ms. Beatrice Mgumba learned state attorney argued that in her digest to the grounds of appeal, she opposes it as it is baseless.

With the first, third and fifth grounds of appeal, she jointly argued them together. That as per pages 6-8 of the typed proceedings of the trial court, it is clear that when PW1 was interrogated by trial court who ultimately promised to tell truth in lieu of oath. He being a child of tender

age, it was sufficient as per law that he promised to tell truth and not lies. Therefore, it was not necessary in the promise of truth to give his evidence on oath.

As regards to the fact of penetration, the best evidence comes from the victim himself it being a sexual offence. It is not expected that another person can testify better on the fact of penetration than the victim himself (see the case of **Selemani Makumba vs Republic** (2006) TLR 376 makes a clear stand on that. Making reference to page 8 of the typed proceedings she submitted that, PW1 testified well that he was told to bend, then the appellant ornamented his penis by saliva and then deeply inserted it against the victim's anus. Therefore, the fact of penetration is well explained and the appellant's grievance on that is unmaintained. Reliance is also made in the case of **Selemani Makumba** on the best evidence in sexual offences comes from the victim himself.

With the 2nd and 7th grounds of appeal, concern the testimony of PW3 and PE1 exhibit (PE3). In her legal assessment, PW3 testified how he got his medical profession from the various courses he attended. He also testified how then in his medical duties, met the victim (PW1) and did his

medical examination. The doctor's evidence was not to establish whether the appellant sodomised the victim, rather, whether the victim's anus was traumatized the fact he established it positively. At page 12 of the typed proceedings, PW3 testified well that the inner sphincters of the victim's anus were not intact which suggested being penetrated. Therefore, what PW3 testified, is scientifically established. In the case of **Said Mwamwindi vs Republic** (1972) HCD 212 held that exparte evidence though not binding DESERVES RESPECT. Any departure from it must be accompanied by relevant explanations/reasons for not agreeing with it.

That notwithstanding, even the trial court didn't pay much attention to the testimony of PW3 and his exhibit PE1 in reaching her verdict but mainly, the evidence of PW1- The victim. On allegation that the evidence of PW3 and his exhibit PE1 is not corroborated, it is seriously countered. In the case of **Dickson Elia Nsamba Shapatwa and another vs Republic**, Criminal Appeal No 92 of 2007 (unreported) stipulates that there are facts which need corroboration in their proof and others not. As he was reliable and credible witness, she prayed that this court to respect his expertism on the said fact and dismiss the appellant's argument.

On the fourth ground of appeal, that the appellant's defense testimony was not considered is equally vehemently contested. At page 14-15 of the trial court's judgment is clear on how the trial Magistrate reproduced his defense testimony that he was implicated by false evidence that he was in bad blood with some teachers and parents of the victim. The appellant during the hearing of the case didn't raise any such question of being in bad blood between the said head teacher and some parents of the victims' children and teachers. As the appellant was in a better position of asking questions to the prosecution witnesses, his failure of not doing so, suggests that what he is arguing now is a mere after thought, thus of no legal value. In the case of **Joseph Kulwa Samwel vs Republic**, Criminal Appeal No 79 of 2020, High Court – Musoma at page 12: " Failure to cross examine a witness on certain crucial matters, lost the rights to contest it now".

With the sixth around of appeal, the appellant alleges that the testimony of PW2-PW6, is hearsay. However, as per sexual offences, the evidence of the victim, is of paramount important in establishing the said charge which fact has been well established. (See the case of **Seleman**

Makumba-supra). PW2 is a parent of the victim (PW1) who testified how he reacted upon receiving/knowing the said fact. PW3 is a medical doctor (Medical doctor) who testified how he examined the victim boy medically. PW4 is a fellow student of the victim but also victim in another case. His evidence corroborated the testimony of PW1 that the appellant used to be sodomising them. PW5 is the head teacher of the victim's school and also the accused person's boss (Head teacher) and he testified the steps he took as head teacher of the said school in respect of the said incidence.

PW6 is an investigator of the case, who testified how he received the case file, did investigation but does not tell things out of his control/knowledge. Therefore, all these who testified just corroborated what the PW1 had testified. Therefore, there is no hearsay as alleged.

On the last ground of appeal, the appellant claims the issue of absence of social welfare officer that in the said proceedings was improper as per law. She submitted that it is not the legal requirement, that upon the child of tender age giving testing, there must social welfare officer. At part IX of the law of Act child met just stipulates when a child is in conflict of the law, is dealt with section 99 (1) b of the law of Child Act is clear that

whenever a criminal case against a child is in progress, the said proceedings must be done in camera and in the presence of social welfare officer.

With all these, all grounds of appeal are devoid of merits Appeal be dismissed for being frivolous and vexatious.

In his rejoinder submission, the appellant (Mr. Idrisa Athuman Naleja), reiterated his previous submission on the grounds of appeal and insisted that the evidence of a child (PW1) was not properly done. With the testimony of PW3, by using a finger inserting into one's anus, cannot be scientific evidence to establish sexual penetration. Further, PW3's evidence is contradictory to the testimony of PW5 on the number of victims sent to Hospital for examination. The evidence of PW1 is not trustable as he doesn't even know when he was vindicated.

With these issues of clarifications, he prayed that his grounds of appeal be accorded weight and that upon thorough consideration, he be acquitted.

I have thoroughly scanned the available prosecution's evidence and that of defense, I have equally digested the appellant's grounds of appeal,

his submission in support thereof and the response of the prosecution/republic on the said argued grounds of appeal, the important question to ask is one whether the appeal is merited. To arrive at that conclusion, the important issue to consider is whether the prosecution's evidence established the offence charged.

Admittedly, I find this appeal bankrupt of any merit. There are a lot of case material connecting the appellant and the charges. This being a sexual offence, as well argued by the prosecution, the best evidence comes from the victim himself (see the case of **Selemani Makumba - supra, Jaspini s/o Daniel @ Sikazwe**, Criminal Appeal no. 519 OF 2019, CAT at Mbeya). Considering the manner the said victim boy testified (PW1), he established both he was known carnally against his order of his nature and that there was penetration and that he was forced so. The unnatural offence, it is an offence by itself provided there is a penetration by a male organ against one's order of nature (anus). The issue of consent is not a requirement. Section 154(1) of the Penal Code, is coached into the following wording:

154.-(1) Any person who-

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

(2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment.

So, whether, it is consented or not, once one's male organ is inserted into someone's anus, the unnatural offence is conclusively committed. In this case, the testimony of PW1, has said all how the appellant induced him and then started knowing him carnally against the order of his nature.

With ground no.1 of the petition of appeal that PW1 is not credible witness because did not pass out the test of credibility, I find no merit in it. He being a minor of 13 years, the Evidence Act (Cap 6) recognizes him as a child of tender age in giving his testimony unlike adult persons as he is below 14 years old. Whereas adult persons are required to give evidence on oath/affirmation a child of tender age needs not necessarily give his

evidence on oath (See section 127(2) of the Evidence Act). In law, it is only sufficient if he promises to tell truth and not to tell lies. For clarity of what I have stated above, section 127(2)(3)(4)(6) and (7) of the Evidence Act, says all and I hereby reproduce it for sake of underscoring what I am going to discuss.

> *2) A child of tender age may give evidence without 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.*
>
> *(3) Notwithstanding any rule of law or practice to the contrary, but subject to the provisions of subsection (6), the evidence of a child of tender age received under subsection (2) may be acted upon by the court as material evidence corroborating the evidence of another child of tender age previously given or the evidence given by an adult which is required by law or practice to be corroborated.*
>
> *(4) For the purposes of subsections (2) and (3), the expression "child of tender age" means a child whose apparent age is not more than fourteen years.*
>
> *(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.

(7) For the purposes of this section the term "sexual offence" means any of the offences created in Chapter XV of the Penal Code.

How was PW1 incredible, I have not gathered any sufficient material in record or from the appellant's submission in discrediting his testimony. As he is of tender age (below 14 years), according to section 127 (2) of the Evidence Act, what he was required to do before giving his testimony was either to give his testimony under oath or on promise of telling the truth. He could give under oath had he known the nature of oath. As he is recorded not to know the nature of oath, he promised to tell truth in his testimony. He being a child of tender age then dully complied with the law. Perhaps the appellant's argument would have been valid under section 198 of the Criminal Procedure Act, Cap 20 R.E 2019 that every witness before a

criminal court has to take oath before he or she gives his testimony as per law. The said section says:

> *198.-(1) Every witness in a criminal cause or matter*
>
> *Shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act.*
>
> *(2) Where an accused person, upon being examined,*
>
> *elects to keep silent the court shall have the right to draw an adverse inference against him and the court and the prosecution may comment on the failure by the accuse to give evidence.*

That said, the PW1 and PW4 being minors dully gave their evidence as per law and the trial court record tells all that before that step was taken. The trial magistrate dully interrogated them and she was satisfied that they knew what they were going to tell the court was nothing but truthful and not lies, each promised so. Had they not promised to tell truth to the trial court before reception of their evidence, and that they had not taken oath, their evidence would have been improperly before the court and liable for expunge.

In line with ground 5 of the petition of appeal, I think it is a misconception by the appellant. The law is clear that in criminal proceedings involving sexual offence where 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 (See **section 127(6)** of the Evidence Act and the case of **Seleman Makumba**-supra). Thus, so long as the trial court is satisfied with the evidence of the victim of sexual offence that it is nothing but truthful, that evidence is sufficient by itself to incriminate the accused person. In the current case, the testimony of PW1 (victim boy) has sufficiently established that the appellant carnally knew the victim boy against the order of his nature. PW3 the examining doctor corroborated that evidence by establishing that the victim's boy anus has been traumatized. Considering further the testimony of PW4 who is also victim boy by the same appellant but by another case

who established that the appellant is their Kiswahili teacher at their school – Kyawazaru Primary School and that he also knew him carnally against the order of his nature about twice times, the trial magistrate was fully satisfied that the said PW1 was dully known carnally against the order of his nature and that it was the appellant who did so as per available evidence in record. This is what she said, I quote at page 13-14 of the impugned judgment:

> *"Therefore, the act of penetration was proved by PW1 and PW3. And the PW1 who is very credible witness pointed the accused person as the one who did the act to him, and PW1 knows the accused person as his Kiswahili teacher..... And the evidence of PW4, PW5 and PW6 corroborated the evidence of PW1, PW2 and PW3 to prove against the accused person."*

Since the victim boy testified as PW1, all those other material witnesses (PW2, PW3, PW, PW5 and PW6), corroborated the evidence of PW1. I say so because the fact in issue for consideration is whether the victim boy (PW1) was carnally known by the appellant. PW1 himself sufficiently established so, and the trial magistrate being in the position of observing the demeanor of the testifying witnesses before her, was sufficiently satisfied that the victim boy spoke nothing but the truth. In

essence, PW2 being the parent of the victim boy, his evidence mainly established the age of the victim and that he studies at that school and lastly that he accompanied him to the hospital where he was dully examined by PW3 and told that his son was proved carnally known. PW3 the examining doctor, testified how in his findings, he established that the both anal sphincters (internal and external) were relaxed suggesting that the victim's boy anal system was traumatized. PW4 is just a fellow pupil to PW1 at Kyawazaru Primary School, classmate. He thus knows the appellant as their Kiswahili teacher at their school and thus forms one of the staffs at the school. However, he testified how he also is the victim of the said teacher in another case as he was also known carnally by him about two times. The testimony of PW5 in essence, being the head teacher, he was the first person to receive complaints from one of the parents that his son was forced to be known carnally by the appellant. He was shocked. As head teacher he had to make his findings by working on the said information. He got the list of all those boys who were allegedly known carnally by the said appellant and others who were being seduced to be known. He then had a dialogue with the said doer (the appellant) on the issue where eventually he admitted and prayed for pardon. He informed

fellow teachers and later reported the incident to the ward and district education authorities. PW6 is a police officer at Butiama Police Station and investigator who testified amongst other things, that on 30th June, 2022 he was ordered to send the said appellant at the DC's office where he saw DC, DED, DEO and other district officials. The said appellant was then being asked as to what had transpired against the said school boys (victims). PW6 says he heard the appellant admitting before those officials led by the DC that it is true that he did the said acts but it was just a satan and then asked for their forgiveness. He also testified how he took part in interrogating ten school boys (the victim inclusive) where they stated how their teacher seduced them to be known carnally and how he knew some of them, the victim of this case (PW1) being one. The total number of the school boys established to be known carnally were eight out of ten interrogated.

With this testimony of PW2-PW6, I wonder then which one is directly hearsay. Mainly, the testimonies of PW2 to PW6 corroborate what PW1 (the victim boy) complained about being known carnally by the said appellant. By saying so, ground no. 6 of the petition of appeal is answered

in negative. Perhaps the appellant does not know what is the meaning of hearsay evidence, which simply means the second-hand information not directly from the person in possession of the said fact/knowledge.

That the findings in the PF3 had no scientific justification, therefore unreliable, I had expected much clarification from the appellant as what is unjustified in the said findings for this court not to justify its authenticity. According to PF3 (exhibit PE1), the PW3 (examining doctor) on the physical state of and injuries to the anus and if suggests any penetration in case of anal intercourse, he remarked in his findings: *External and internal sphincters with positive reflex and anal dilation.* He concluded by saying that *the anal examination suggests to be penetrated by anal intercourse due to loss of external and internal sphincters with positive reflex anal dilation test.* When this PW3 was being examined by the appellant, here is what transpired, I quote:

> *"I don't know on the side of law, but on the side of medicine, a doctor has no limitation. One doctor can examine many people. The victim said the incident happened in May, it was about one month passed. It was in the end of April to May. Examination can be*

conducted at any time, if the incident was within 24 hours, I could have seen even sperms, bruises."

I have not seen any serious cross examination to question the doctoral scientific evidence as testified and documented in exhibit PE1. I therefore agree with Ms Beatrice Mgumba, leraned state attorney that what PW3 testified is scientifically established. In the case of **Said Mwamwindi vs Republic** (1972) HCD 212 held that exparte evidence though not binding DESERVES RESPECT. Any departure from it must be accompanied by relevant explanations/reasons for not agreeing with it. I have no any such reason, so to speak. Thus ground three, equally has no any relevancy in the context of this appeal.

The argument that the trial magistrate didn't consider the defense testimony is a laughable argument in the context of this appeal. I say so, because, at page 14-15 of the trial court's judgment is clear on how the trial Magistrate reproduced his defense testimony that he was implicated by false evidence as he was in bad blood with some teachers and parents of the victim. The appellant during the hearing of the case didn't raise any such question of being in bad blood between the said head teacher and some parents of the victims' children and teachers. As the

appellant was in a better position of asking questions to the prosecution witnesses, his failure of not doing so, suggests that what he is arguing now is a mere after thought, thus of no legal value as he barred by doctrine of estoppel (see the case of **Nyerere Nyague vs Republic**, Criminal Appeal No 07 of 2010). As the accused person's latter story appears to be an afterthought from the former, this court can hardly rely on this second thought. It is merely a lie which in law, corroborates prosecution case (See **Nkanga Daudi Nkanga V Republic**, Criminal Appeal No.316 of 2013).

I am also alive that credibility of a witness can be determined by the court in other ways as the Court pronounced itself in the case of ***Yasin Ramadhani Chang'a vs Republic*** [1999] T.L.R. 489 and ***Shabani Daud vs Republic***, Criminal Appeal No. 28 of 2001 (unreported) both quoted in *Nyakuboga Boniface vs Republic, Criminal Appeal No. 434 of 2017 (unreported).* that:-

> *"Apart from demeanour.... The credibility of a witness can also be determined in other two ways that is,* ***one by assessing*** *the coherence of the testimony of the witness, and* ***two,*** *when the testimony of the witness is considered in relation to the evidence of other witnesses."*

Like the trial court, I have examined the prosecution evidence on record as summarized above and found the same is consistent and coherent. I have no reason to doubt the credibility of PW1 and PW3.

On the issue of requirement of social welfare officer to enter appearance at the trial juvenile court, the Law of the Child Act, provides in the following manner:

> ***98.-(1) A Juvenile Court shall have power to hear and determine-***
>
> ***(a) criminal charges against a child; and***
>
> ***(b) applications relating to a child care, maintenance and protection.***
>
> ***(2) The Juvenile Court shall also have jurisdiction and exercise powers conferred upon it by any other written law.***
>
> ***(3) The Juvenile Court shall, wherever possible, sit in a different building from the building ordinarily used for hearing cases by or against adults.***
>
> *100A.-(1) The Juvenile Court may, during the proceedings, where it considers necessary, seek the opinion and recommendation of social welfare officer.*

(2) Where the court considers necessary to have the

opinion or recommendation of a social welfare officer, the court shall consider such opinion or recommendation before passing the sentence.

As the proceedings which led to this appeal did not originate from Juvenile Court, the attendance of a social welfare officer was not necessary as argued by the appellant. As this was case in which a child was the victim of sexual offence, it was not necessarily a juvenile case. That said, this ground of appeal is misconceived.

Since the legal stand has always been one that in establishing the guilt of the accused person it, is the Republic's first duty. The burden has never shifted to an accused person. Therefore, the accused person's story (defense testimony) need not be true, but only suffices if it reasonably raises legal doubt. This is the essence of **section 3(2)a, and section 110 of the Tanzania Evidence Act**, Cap 6 R.E 2022 (See also the case **Magendo Paul and Another Vs The Republic** [1993] T.L.R 219 (CAT), it was held inter alia that;

"..for a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave only a

remote possibility in his favour which can easily be dismissed"

In totality of the whole appeal, I find this appeal case in its wholesome devoid of any merit. The same is hereby dismissed in its entirety as the prosecution's case was proved beyond reasonable doubt. Both, conviction and sentence are confirmed and upheld.

DATED at MUSOMA this 28th day of March, 2023.

F. H. Mahimbali

JUDGE

Court: Judgment delivered this 28th day of March, 2023 in the presence of the appellant, linked from Musoma prison, Mr. Felix Mshana, state attorney for the respondent and Mr. D. C. Makunja, RMA.

F. H. Mahimbali

JUDGE