IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

DC. CRIMINAL APPEAL NO. 76 OF 2022

(Originating from Criminal Case No. 10 of 202I in the District Court of Iringa at Iringa)

AYUBU KIYANZA---------- APPELLANT

VERSUS

REPUBLIC---------- RESPONDENT

JUDGEMENT

Date of Last Order: 08/05/2023

Date of Judgment: 19/05/2023

A. E. Mwipopo, J.

This appeal originates from the Iringa District Court, where Ayubu Kiyanza, the appellant herein, was charged and convicted for an unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E. 2019. The particulars of the offence in the charge sheet reveal that on 11th January, 2019, in Ipogolo area, within the District and Region of Iringa, the appellant unlawfully had carnal knowledge of I.M. (the name of the

victim is concealed), a boy of six years, against the order of nature. The trial court sentenced the appellant to serve life imprisonment.

The appellant was aggrieved by the decision of the District Court and filed the present appeal. In his petition of appeal, the appellant has raised three grounds of appeal as provided hereunder:-

1. *That, the learned Resident Magistrate erred in law and facts by not complying with the mandatory provision of section 127(2) of the Evidence Act, Cap. 6 R.E. 2022.*
2. *That, the learned trial Magistrate erred in law and facts for failure to conduct an inquiry in respect of the cautioned statement before admitting it as Exhibit PE1.*
3. *That, the learned trial Magistrate erred in law and facts for failure to analyse properly the testimony of X.Y.*

On 29th March, 2023, the appellant filed an amended petition of appeal containing seven grounds of appeal as follows hereunder:-

1. *That, the learned Resident Magistrate erred in law and facts by not complying with the mandatory provision of section 127(2) of the Evidence Act, Cap. 6 R.E. 2022.*
2. *That, the learned trial Magistrate erred in law and facts for failure to analyse properly the testimony of X.Y.*
3. *That, the appellant's cautioned statement was recorded out of time prescribed by the law.*

4. *That, the trial Magistrate erred in law and facts to convict and sentence the appellant based on the fatally defective charge.*
5. *That, the learned trial Magistrate erred in law and facts to convict and sentence the appellant without proper identification.*
6. *That, the learned trial Magistrate erred in law and facts to convict the appellant based on the evidence which did not tally with the offence charged.*
7. *That, the prosecution did not prove its case beyond a reasonable doubt.*

On the hearing date, the appellant was present, and Ms. Theresia Charles and Mr. Cosmas Masimo, advocates, represented him, whereas Ms. Hope Masamvu, State Attorney, represented the respondent. The Court invited both parties to make their submissions.

The appellant abandoned grounds of appeal no. 4 and 6 in the amended petition of appeal and submitted on the remaining five grounds of appeal. She submitted jointly on the grounds of appeal no. 1 and 2 in the amended petition of appeal on the recording evidence of the victim of the crime, a child of tender age. The trial court's typed proceedings show on page 10 that the Court recorded that PW2 was not sworn but promised to tell the truth and lies. According to S. 127(2) of the Evidence Act, a child of tender age may give evidence without being sworn after promising to tell

the truth and not to tell lies. The recording of the trial Magistrate is not in line with the provision of the law for the reasons that the child of tender age is required to be recorded in her own words and not in reported speech as shown in the record. In the case of **Maulid Kachumba vs. Republic**, Criminal Appeal No. 30 of 2020, High Court Kigoma District Registry at Kigoma, (unreported), this Court page at 4 expunged the evidence of victim child of tender age, which was recorded in reported speech.

Further, Section 127(2) of the Evidence Act requires a child of tender age to promise to tell the truth and not lies. In this case, PW2, the child of tender age, promised to tell the truth and lies in the subheading when PW2's testimony was recorded. For that reason, it is not known what is the truth and not the truth in PW2's evidence.

It was the appellant's submission on the 3rd ground of appeal that the appellant's cautioned statement was recorded outside of the prescribed time. Section 50(1) of the Criminal Procedure Act (C.P.A.) requires the suspect's statement under restraint to be recorded within 4 hours unless the time is extended in terms of s. 51(2) of the C.P.A. In this case, the appellant was arrested on 11th April, 2021 according to the facts stated by the prosecution in Preliminary Hearing. But, PW4 testified that he recorded the appellant's

statement on 13th January, 2021. The appellant's statement was obviously recorded out of 4 hours provided by the law. PW4, in cross-examination, said that the appellant's statement was recorded on 13th January, 2021 as the appellant was admitted to hospital after he sustained injuries when civilians attacked him during his arrest. However, according to the law, the appellant's cautioned statement does not show the reasons for the delay in recording the statement within four hours from the time appellant was arrested. In the case of **Hawadi Msilwa vs. Republic**, Criminal Appeal No. 271 of 2020, Court of Appeal of Tanzania at Iringa, (unreported), on page 10, the Court expunged cautioned statement of the accused person, which was recorded out of time.

In the 5th ground of appeal, the appellant's counsel submitted that the appellant was convicted without proper identification. There is no evidence in the record which proves as to how the appellant was identified. PW1 and PW2 did not provide the physical appearance of the appellant, as it was the first time to see him. It was expected for these witnesses to describe the physical appearance of the appellant. The appellant was identified in the dock, and dock identification to the accused person not previously known to the witnesses has no value. The appellant was identified because of mud

found on his knee and hands, similar to those found in the victim's clothes. According to the record, the incident was during the rainy season, and it was easy for anyone to be covered with mud.

In the case of **Joseph Chally Rashidi vs. Republic**, Criminal Appeal No. 231 of 2018, High Court D.S.M. Registry at D.S.M., (unreported), it was held on page 7 that as witnesses met the appellant for the 1st time on the date of the incident, there was need of conducting on identification parade to corroborate their evidence. The police were supposed to conduct an identification parade to corroborate the identification evidence. Also, in the case of **Waziri Amani vs. Republic [1880] TLR 250,** it was held that evidence of visual identification is of the weakest kind and most unreliable. The Court should only act on evidence of visual identification if all possibilities of mistaken identity were eliminated, and the Court is delighted that the evidence before it is absolutely watertight.

On the last ground of appeal, it was the appellant's submission that there are contradictions in prosecution evidence which raises doubt about the prosecution case. There is a contradiction in the date as to when the incident occurred. The facts read over during the Preliminary Hearing show that the incident occurred on 11th April, 2021 around 13:00 hours. PW1, PW2

and PW3 testified that the incident occurred on 11th January, 2021. PW1 testified that the victim arrived home around 13:00 hours. The contradiction regarding when the incident occurred raises doubt about the prosecution's case.

Facts and charge sheet show that the incident occurred at 13:00 hours. This means the time of 13:00 hours remained static from the time the victim was coming from school, the incident occurred and the time the victim arrived home. On the other hand, PW2 testified that he left the school at 13:00 hours.

Another contradiction is on the date the appellant was arrested. PW1 testified that appellant was arrested on 11th January, 2021 after the incident. PW4 testified that the accused was arrested on 13th January, 2021 around 13:00 hours. Further, there is a contradiction in the date the cautioned statement was recorded. PW4 testified that the statement was recorded on 13th January, 2021, but facts admitted during the Preliminary Hearing show that the appellant cautioned statement was recorded at the police station. The contradictions pointed out are fatal as they go to the gist of the case. The contradictions raise doubt in the prosecution's case. The said contradictions were supplied to be ruled in favour of the appellant as it was

held in the case of **Alloyce Mgovano vs Republic**, Criminal Appeal No. 182 of 2011, Court of Appeal of Tanzania at Iringa, (unreported), at page 10, that the evidence of the prosecution is full of contradictions and lacked coherence. Such evidence creates doubts as to whether the appellant was the one who committed the offence. The doubt should be resolved in the favour of the appellant.

It was further submitted that there were contradictions in the testimony of PW1, PW5, and the content of the PF3 (Exhibit PE1). PW5 testified that after examining the victim, he found there were red blood cells which indicated there were some bruises or bleeding in the anus. Following those findings, one may think there was forceful penetration. But Exhibit PE1 (PF3) shows on page 2 that the victim had tenderness on the D.R.E. (rectal), had no laceration and no bleeding. What is recorded in PF3 is contrary to what PW5 testified. Tenderness means there was a pain when touched. Medical Report (PF3) shows no laceration or blood, but PW5 testified that there were blood cells and bruises. PW5's testimony is false as his testimony differs from the content of the report he prepared. The testimony of PW5 and content of Exhibit PE1 be expunged.

Further, PW1 testified that when he examined the victim's anus, he saw semen and faeces. But PW5 said nothing about this. If the semen were found in the victim's anus, then the said semen was supposed to be taken for further examination to see if it belonged to the appellant. In **Mapambano Michael @ Mayanga vs. Republic**, Criminal Appeal No. 268 of 2015, Court of Appeal of Tanzania at Dodoma, (unreported), on page 16 it was held that the material contradictions in the identification evidence of the two main prosecution witnesses cast doubt in the case of the prosecution. After taking evidence away from contradicting evidence of PW1 and PW2, and in the absence of any other evidence placing the appellant at the crime scene, the appellant's conviction can no longer be regarded as safe. The same was done by the Court of Appeal in **Munziru Amri Mujibu and Another vs Republic**, Criminal Appeal No. 151 of 2012, Court of Appeal of Tanzania at Bukoba, (unreported), on pages 13 and 14.

The Exhibit PE1 had some apparent defects which affected its authenticity. It has no police case Number and no signature or stamp of requesting officer. The said PF3 is required to have a name, case number and seal. There was no name, signature or seal to prove that the said PF3 came from the police station and not from anywhere else. The medical officer

who examined the victim used the form to report his examination, and the Court relied on the PF3 to convict the appellant. In the case of **Chacha Ng'era vs. Republic**, Criminal Appeal No. 87 of 2010 Court of Appeal of Tanzania at Mwanza, (unreported), on page 8, it was held that the contradiction raises doubt about the prosecution's case and the appellant has to benefit for the doubt, and he was acquitted.

In reply, the counsel for the respondent opposed the appeal. The respondent submitted that the 1st and 2nd grounds of appeal have no merits. The evidence of a child of tender age was correctly recorded. This is seen on page 10 of the typed proceedings. The trial court recorded the words of PW2, who stated that he like the truth and always speaks the truth. PW2 said he would speak the truth and promised to speak the truth and not lie. The Court recorded that S. 127 (2) of the Evidence Act was complied with. The counsel for the appellant relied on the area in the proceedings where the trial court was recording particulars of PW2. In this area, the trial court recorded that PW2 was not sworn but promised to speak the truth and lies. But this was just an error on the part of the trial court. It is a slip of the pen as the child's own words were recorded. If the trial court believed that the

child promised to tell the truth and lies, it could not record the witness's statement and relied on it in its judgment.

The respondent submitted on the 3rd ground of appeal that the appellant's cautioned statement was recorded out of 4 hours from the time he was arrested, as the appellant stated. The reasons for recording the statement out of time are that he was attacked and injured by civilians when he was arrested and taken to hospital for treatment. Section 50(2)(a) of the Criminal Procedure Act provides that the time a police officer may record the accused statement is excluded when the accused is taken to other places for investigation. PW3 testified that after they reached the police station, PW2 and the appellant were given PF3 and were taken to the hospital, where PW2 and the appellant were admitted. PW4 answer during cross-examination on page 40 of the typed proceedings shows that the appellant was injured by civilians and was admitted to a hospital for treatment. The appellant could not give a statement within 4 hours as he was admitted to hospital. The appellant's cautioned statement was recorded out of time, but the reason is that appellant was taken to the hospital for treatment, where he was admitted. Thus, the cautioned statement was recorded according to the law.

The respondent said on the fifth ground of appeal that the identification of the appellant was proper as he was arrested at the scene of the crime during the daytime. He was detained immediately after the incident. Soon after the incident, the victim informed PW1 (his father) about the incident, and PW1 returned to the scene with the victim. The victim did show PW1 that the appellant was the person who penetrated him in his anus. PW1 arrested the appellant. Street leaders and police arrived at the scene later on. The appellant was arrested at the scene of the crime. In such a situation, there is no need to conduct an identification parade, as the appellant was arrested at the crime scene. PW3, the cell leader of Tagamenda Street, said the appellant admitted before him that he sodomised the victim after the arrest. The appellant also admitted in a cautioned statement to sodomise the victim. In such circumstances, there was no need for an identification parade.

It was submitted by the respondent on the last ground of appeal that there was no contradiction whatsoever in the prosecution's evidence. The counsel for the appellant said facts of the prosecution at the trial court during the preliminary hearing show that the incident occurred on 11th April, 2021, but the testimony of witnesses shows that incident occurred on 11th January,

2021. The facts stating that the incident occurred on 11th April, 2021 was typing error, as the same facts show the appellant was brought to Court for the offence on 15th February, 2021. Also, the charge sheet shows that the incident occurred on 11th January, 2021. PW1, PW2, PW3 and PW5 testified that the incident occurred on 11th January, 2021. The said ground has no merits.

On the contradiction of the time of the incident, the respondent said that the witness stated it was about 13:00 hours when the incident occurred. It was not precisely at 13:00 hours when the incident occurred. The word used is about 13:00 hours. The incident occurred around 13:00 hours, not precisely at 13:00 hours. Thus, there is no contradiction in the incident's time.

Regarding the allegation that PW5's testimony contradicts that of his report in the PF3, the respondent said that PW5 testified on the outer appearance of the victim that his anus was swollen. He felt pain when inserting his finger into his anus. The internal examination was conducted by inserting a rectal swab which showed the presence of red blood cells, indicating bruises or bleeding in the victim's anus. The presence of bruises or bleeding was by rectal swab examination. By normal eyes, there were no

bruises or bleeding in the victim's anus. Thus, there is no contradiction between the PW5 testimony and PF3.

The respondent said on the issue of the authenticity of PF3 that PF3 had no signature and stamp of the police who issued it. But, the evidence available is sufficient to prove that the police issued it. PW1 testified that they went to the Iringa police station, where PF3 was issued, and they went to Iringa Region Referral Hospital for treatment and examination. PW3 testimony also shows that they went to the police station, and PF3 was issued. Even if the said PF3 is expunged, still there is evidence of PW5 who examined the victim. PW5 testimony proves that the victim was penetrated in his anus by a blunt object after he had examined him. The prosecution's case was proved without any doubt.

In rejoinder, the appellant retaliated submission in chief and emphasised that section 51 of the Criminal Procedure Act provides several conditions for the validity of cautioned statements recorded after the expiry of 4 hours when the accused was arrested. The said condition is for a statement to be recorded not more than 8 hours after 4 hours has expired or if the permission of the Court was granted. As the appellant was arrested on 11th January, 2021 and his cautioned statement was recorded on 13th

January, 2021, which is almost two days, the statement was supposed to be recorded after the Court granted permission. The appellant testified that he admitted to committing the offence because he was beaten. PW3 also testified that the appellant was beaten during his arrest, they took him to the hospital for treatment, and he was admitted. The appellant objected to tendering of the cautioned statement on the ground that he was tortured before recording it. This proves that the cautioned statement was not voluntarily given.

Regarding the identification of the appellant, it was the appellant's submission that the record does not show the appellant being arrested at the crime scene or committing the crime. PW1 testified on page 8 that the victim showed him the appellant while going to the crime scene. In such circumstances, it could not be said appellant was arrested at the scene of a crime or committing the crime. Thus, there was a need to conduct an identification parade.

Having heard submissions from both sides and the evidence in the record, the issue for determination is whether this appeal has merits.

The appellant's submission was based on the grounds of appeal found in the petition and the amended petition of appeal. Grounds no. 1, 2, and 3 in the first filed petition of appeal are similar in context to grounds no. 1, 2, and 3 in the amended petition of appeal. The appellant abandoned grounds of appeal no. 4 and 6 on the defectiveness of the charge and submitted on the remaining grounds. All grounds of appeal are based on the claims that the prosecution failed to prove the case against the appellant beyond a reasonable doubt.

Starting with the 1st and 2nd grounds of appeal, the appellant alleges that the trial Court erred to convict him based on the testimony of PW2, the victim of the crime, which was not recorded according to the law. The Court recorded that PW2 was not sworn but promised to tell the truth and lies in the proceedings of the trial Court. This is contrary to section 127(2) of the Evidence Act. The child of tender age must be recorded in her own words and not in reported speech when promising to tell the truth and not lies before recording their evidence. In this case, the promise of PW2 was recorded in the reported speech. Besides, the record shows that PW2 promised to tell the truth and lies. For that reason, it is not known what is the truth and not the truth in PW2's evidence. In contention, the respondent

said the evidence PW2 was correctly recorded according to the law. The trial court recorded the words of PW2, who promised to speak the truth and not lies. This proves that section 127 (2) of the Evidence Act was complied. The appellant relied on the area of the proceedings where the trial court recorded that PW2 was not sworn but promised to speak the truth and lies. This was just a slip of the pen as the child's own words were recorded.

As it was submitted by learned counsels from both sides, a child of tender age may testify without oath if they promise to tell the truth and not lies. This is provided by section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019. The said section reads as follows:-

> *"127 (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."*

From the above-cited section, a child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the Court and not to tell lies. The Court of Appeal was of the same position in the case of **Msiba Leonard Mchere Kumwaga vs. Republic**, Criminal Appeal No. 550 of 2015, (unreported).

In the present case, PW2 (the victim) was the child of 6 years. The Court can record his evidence without taking the oath if he promises to tell the truth and not lie. The record shows evidence of PW2 from the last paragraph of page 9 to 2nd paragraph of page 12 of the typed proceedings. The trial Court before recording PW2's evidence, made inquiries if he knew the nature of the oath. The Court recorded PW2's answers in his own words in the investigation. In the inquiry, PW2 promised to tell the truth and not lies. The Court recorded that PW2 does not know the nature of the oath, but he promised to speak the truth and not lies. This proves that PW2 promised in his own words to tell the truth and not lies.

When the trial Court was recording particulars of PW2, it recorded that PW2 is six years old, not sworn but promised to speak the truth and lies. It is without a doubt that this was a slip of a pen on the part of the trial Court. The trial Court recorded this statement, which the witness (PW2) did not state in his own words. The trial Court recorded a preliminary statement before commencing to record witness evidence. It is an introductory statement providing particulars of the witness and if the witness has taken an oath. It is not the evidence or words of the witness. PW2, in his own words, promised to tell the truth and not to tell lies. Thus, section 127 (2) of the Evidence Act was complied. Appellant's grounds of appeal No. 1 and 2 are found to be meritless.

In the 3rd ground of appeal, the appellant averred that the trial Court erred in convicting the appellant, relying on the cautioned statement which was recorded out of time prescribed by the law and was not given voluntarily. The respondent on her side said that the reason for recording cautioned statement on 13th January, 2021, which was out of time provided by the law, is that the appellant was admitted to hospital for treatment after his arrest on 11th January, 2021. He was discharged from the hospital on 13th January, 2021, and his cautioned statement was recorded after he reached the police station.

The Criminal Procedure Act provides in section 50 (1) that the period available for interviewing a person who is in restraint in respect of an offence is four hours commencing when he was taken under restraint in respect of the offence. In the record, the appellant was apprehended by PW1 for the offence on 11th January, 2021, around the afternoon and was taken to the street office. Police were informed, and they came to the street office. The appellant was taken to the Police Station before he was taken to the hospital for treatment as he sustained some injuries during the arrest. The cautioned statement of the appellant was recorded on 13th January, 2021. The said

cautioned statement was recorded out of 4 hours after the appellant was arrested.

The Criminal Procedure Act provides in section 50 (2) how to calculate the period available for interviewing a person under restraint regarding an offence. Section 50 (2) (a) of the Act provides for the time which shall not be reckoned in calculating a period available for interviewing a person who is under restraint regarding an offence. The law states that the time when the police officer investigating the offences refrains from interviewing a person or causing the person to do any act connected with the investigation of the offence while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation shall not be calculated. The section reads as follows hereunder:-

> *"50 (2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence-*

(a) *while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation.* "

The counsel for the appellant said that the extension of the time of recording the accused statement is done under section 51 (1) (a) and (b) of the Criminal Procedure Act by either extending the interview for a period not exceeding eight hours and inform the person concerned accordingly or either before the expiration of the original period or that of the extended period, make application to a magistrate for a further extension of that period.

Sections 50 (2) (a), (b), (c) (d) and 51 (1) of the Criminal Procedure Act provide for two different situations of interviewing a person who is under restraint in respect of an offence. The situation provided under section 50 (2) of the Criminal Procedure Act is for the time excluded from calculating a period available for interviewing a person under restraint regarding an offence. The law says that the time when the police officer investigating the offences refrains from interviewing a person or causing the person to do any act connected with the investigation of the offence while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation shall not be calculated.

Section 51 (1) of the Criminal Procedure Act provides the procedures and grounds for the extension of the interview period.

The evidence in the record proves that the appellant was injured during his arrest and sustained severe injuries. After the police arrested and took the appellant to the police station, PF3 was issued by the police, and the appellant was taken to hospital for treatment. This is found in the testimony of PW1 and PW3. PW3 testified that the appellant was admitted to the hospital. PW4 said during cross-examination that civilians beat the appellant at the time of arrest, and he was admitted to the hospital. As a result, the appellant's cautioned statement was recorded on 13th January, 2021. PW4 said the appellant was unconscious and could not give his statement at the hospital. The appellant also said in his testimony that he lost consciousness after PW1 beat him, and when he gained consciousness, he was in the hospital.

From the evidence available, there is no dispute that the appellant was beaten during his arrest on 11th January, 2021. As the appellant was injured and in bad condition, he was taken to the hospital for treatment, where he was admitted. The evidence is silent regarding when the appellant was discharged after treatment. PW4 testified that he recorded the appellant's

cautioned statement on 13th January, 2021, and the appellant was in custody. The appellant testified that he was discharged from the hospital on the same date, and his cautioned statement was recorded at the hospital. In the absence of evidence as to when the appellant was discharged from the hospital, it is not prudent to exclude the time the investigator refrained from interviewing the appellant on the reason that the appellant was admitted to the hospital as it was suggested by the State Attorney. There is the possibility that the appellant was discharged on the same date he was admitted (11.01.2021), as he said in his evidence. There is no evidence in the record that the appellant was discharged from the hospital on 13.01.2021, the date the cautioned statement was recorded. Thus, I find that the appellant's cautioned statement was recorded out of 4 hours provided by the law. Therefore, the said cautioned statement, which was tendered and admitted as Exhibit PE1, is expunged from the record for being recorded out of prescribed time without sufficient reason.

On the issue of identification of the appellant, the counsel for the appellant said that the appellant needed to be correctly identified as the person who committed the offence. PW1 and PW2 did not provide the physical appearance of the appellant, as it was the first time to see him. In

such circumstances identification parade was inevitable, but the same was not conducted. In contention, the respondent said that the identification of the appellant was proper as he was arrested at the scene of the crime during the daytime. The victim show PW1 that the appellant was the person who committed the offence, and PW1 arrested the appellant. The appellant was arrested at the scene of the crime. In such a situation, there is no need to conduct an identification parade, as the appellant was arrested at the crime scene.

The law is settled that an accused person's conviction could be founded on identification evidence where the evidence is watertight. The Court should only act upon the evidence where all the possibilities of mistaken identity have been eliminated. In **Luziro Sichone and Another vs. Republic**, Criminal Appeal No. 131 of 2010, Court of Appeal of Tanzania, (unreported), on page 8, it was held that:

> *"The law is equally well settled on the value of visual identification evidence. First, this type of evidence is the weakest and most unreliable. It should be acted upon cautiously when the Court is satisfied that it is watertight and that all possibilities of mistaken identity are eliminated, even if it is evidence of recognition; as was the case here. See; for instance, WAZIRI AMANI v. Republic, [1980] T.L.R.*

250 and MENGI PAULO SAMWELI LUHANGA & ANOTHER v. Republic, Criminal Appeal No. 222 of 2006 (unreported). "

The police usually conduct identification parades during investigations to identify the accused or suspect with the offence for which they are charged or suspected. The purpose of the parade is to find out from the witness who claims to have seen the accused or suspect at the scene of the crime committing the crime whether he can identify the accused or suspect. The purpose of the identification parade is provided under section 60 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2019. The wording of section 60 (1) of the Criminal Procedure Act is similar in context to the section of the Police Force and Auxiliary Services Act, Chapter 322, Revised Edition, 2019. Section 60 (1) of the Criminal Procedure Act reads as follows:-

"60.-(1) Any police officer in charge of a police station or any police officer investigating an offence may hold an identification parade for the purpose of ascertaining whether a witness can identify a person suspected of the commission of an offence."

It is vital to conduct a parade of identification where a witness allegedly identified the suspect and identifying person did not know the suspect before the incident. In the case of **Hamisi Ally and three others vs. Republic**, Criminal Appeal No. 596 2015, Court of Appeal of Tanzania at Dodoma,

(unreported), it was held that the test of conducting an identification parade is to enable a witness to identify a person or persons whom they had not known or seen before the incident. The said evidence corroborates the identification of the accused at the dock in terms of section 166 of the Evidence Act as stated in the cases of **Moses Charles Deo vs. Republic [1987] TLR 134** and **Benson Kibaso Nyankonda @ Olembe Patroba Apio vs. Republic [1998] T.L.R. 40**.

However, when the accused person is arrested at the crime scene, there is no need to conduct an identification parade. In the case of **Patrick Lazaro and Another vs. Republic,** Criminal Appeal No. 229 of 2014, Court of Appeal of Tanzania at Bukoba (Unreported), it was held that:-

> *"When an accused is arrested at the scene of crime, the question whether he was identified or not does not arise."*

The evidence in the record shows that after the offence was committed, PW2 informed PW1. PW1 testified that PW2 told him that he could identify the person who sodomised him if he could see. While on the way to the crime scene, PW2 saw the appellant and told PW1 that he was the person who committed the offence. This evidence proves that the

appellant was arrested close to the crime scene, and the victim identified and pointed to the appellant as the person who committed the crime. The incident occurred during the daytime. Although PW2 did not describe the appellant or say in his evidence if he knew the appellant prior to the incident, the circumstances do not require an identification parade to be conducted. During the incident, the victim saw the appellant and informed PW1 that he would identify the person who sodomised him. The evidence shows that it was PW2 who identified the appellant as the person who sodomised him when he saw him while on the way to the crime scene. The appellant was arrested close to the scene of the crime.

I'm aware of the position stated in the cited case of **Waziri Amani vs. Republic, (supra),** that the evidence of visual identification is weakest and unreliable, that no court should act on evidence of visual identification unless all possibilities of mistaken identity were eliminated and the Court is fully satisfied that the evidence before it is absolutely watertight. However, the circumstances of this case show that the victim identified the appellant as the person who committed the offence immediately after the incident. It shows that it took a short time after the commission of the offence to the act of PW1 going to the crime scene accompanied by PW2, where they saw

the appellant close to the crime scene and PW2 identified the appellant as the perpetrator. The incident occurred during the daytime, and it was immediately after the incident. PW2 appear to be credible and the witness of the truth. The evidence on identification available eliminates all possibilities of mistaken identity. Thus, I'm of the same position as the trial Court that the appellant was identified correctly by the PW2.

On the last ground of appeal, the appellant submitted that the prosecution failed to prove the offence without doubt as its evidence is full of contradictions. It was submitted that there are contradictions on the date of the arrest of the appellant and time of the incident. Contradictions on the testimony of PW1, PW5 and content of PF3, and the authenticity of PF3 is in doubt. In contention, the respondent said there is no contradiction in the prosecution's evidence.

The charge sheet reveals in the particular offence that the appellant on 11th January, 2021 at Ipogolo area had carnal knowledge of PW2, a boy of 6 years, against the order of nature. The evidence PW1 and PW2 shows that the incident occurred on 11th January, 2021 around 13:00 hours. The appellant testified that it was about 13:00 hours on 11th January, 2021 when he was arrested for the offence. As stated by the counsel for the respondent,

when the word about or around is used to refer to the specific time, it does not mean the exact time. It means near the mentioned time. Usually, when the incident occurs, witnesses do not look at the watches or phones to record the exact time the incident occurred. They approximate the time from the last time they looked at the time. Even the appellant admitted he was arrested at about the same time. Thus, I found no contradiction in the time and date of the incident and when the appellant was arrested.

Regarding the contradictions in the testimony of PW1, PW5, and the content of the PF3 – Exhibit PE1, the record shows that PW1 examined PW2 in his anus after PW2 informed him that he was sodomised. PW1 found semen and faeces coming from PW2's anus. PW5 testimony shows that he was a doctor who examined PW2 on 11th January, 2021. PW5 said he saw PW2's anus was swollen, and PW2 was feeling sharp pain when he inserted his fingers. After he conducted a rectal swab, he found red blood cells in the swab, indicating bruises or bleeding in PW2's anus. There is an inconsistency in PW1 and PW5 evidence as each examined the victim in different time. PW1 inspected PW2 immediately after the incident and PW5 later on. PW5 is a medical expert, and his examination is expert evidence, while that of PW1 is examination and opinion of normal person. Under such

circumstances, the difference in opinion and observation are inevitable. But the same is not contradiction.

In the PF3 (Exhibit PE2), PW5 recorded the victim's tenderness in the rectal/ anus. In the summary of Exhibit PE2, it was described that the physical state of the injury of the anus was that the victim had no lacerations or bruises. It is clear that there is no contradiction in the testimony of PW5 and the content of Exhibit PE2. Exhibit PE2 requires the physical description of the genital injured to be provided and not the results of the further examination. The indication of the presence of bruises or bleeding was the result of conducting a rectal swab. Physically, no bruises or bleeding was observed from the PW2 anus.

The appellant's counsel said that Exhibit PE2 had some apparent defects which affected its authenticity as it did not contain the police case number, signature or stamp/seal of requesting officer. However, looking at Exhibit PE2, it says something else. I observed that Exhibit PE2 have the seal of the police station and the name of requesting officer. The police officer who issued the PF3 is No. F. 3928 D/Cpl Edmund. What is missing is the case file number. However, the evidence from PW1 and PW3 shows that after arresting the appellant, they went to the police station where PF3 was

issued, and the appellant and victim were taken to the hospital for treatment. PW1 and PW3 testimony proves that the police issued PF3. Their evidence also confirms that the investigation case was not opened when the PF3 was given. This provides the answer as to why PF3 does not contain case file number. I find that the omission does not affect the value of the PF3.

In general, the evidence adduced by the prosecution shows that PW2, the child of 6 years, was penetrated by the appellant against the order of nature. The age of PW2 (victim) is proved by the testimony of PW1, PW2, PW5 and Exhibit PE1 (PF3). PW2 testified that appellant took him downhill when he was coming from school, took off his shorts and pants, lay him down, took his penis and inserted his penis into his anus. After the incident, the appellant told PW2 to go home. PW2 informed PW1 about the incident, and PW1 examined him. He found faeces and semen coming from PW2's anus. PW2 informed PW1 that he would identify the culprit who committed the offence. While on the way to the crime scene, PW2 saw the appellant and told PW1 that it was the appellant who sodomised him. PW1 arrested the appellant. Testimonies of PW3 and PW5 support the testimony of PW2. PW3 testified that after he arrived at the area, he saw PW1 fighting with the appellant. He asked PW1 what happened, and PW1 answered that the

appellant had sodomised his son (PW2). PW3 asked the appellant if that allegation was true, and the appellant admitted that he sodomised PW2. This evidence is oral confession. The appellant did not cross-examine PW5 on this evidence during testimony. It means the appellant accepted testimony of PW3 on this point, which is vital point. PW5 on his side was of the opinion that PW2's anus was penetrated. This prosecution evidence proved without a doubt that PW2 was penetrated against the order of nature, and it was the appellant who penetrated PW2 against the order of nature and it is nobody else.

Therefore, all grounds of appeal are without merits. I proceed to dismiss the appeal in its entirety. It is so ordered accordingly. Right of appeal explained.

A.E. MWIPOPO

JUDGE

19/05/2023