IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 14 OF 2023

(Arising from Criminal Case No. 01 of 2020 in the District Court of Iringa at Iringa)

ARNOLD EXAUD MLAY.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 29.05.2023

Date of Judgment: 09.06.2023

A.E. Mwipopo, J.

Arnold Exaud Mlay, the appellant herein, was charged and convicted by the Iringa District Court for an unnatural offence contrary to section 154(1)(a) of the Penal Code, Cap 16 R.E. 2002. The particulars of the offence in the charge sheet revealed that from May 2016 to February 2019 at Semtema "A" area within the District and Region of Iringa, the appellant had a carnal Knowledge of one E.N. (the name of the victim is concealed for his protection), a boy of 15 years old, against the order of nature. When the

charge was read over to the accused, he pleaded not guilty, and the prosecution called four witnesses to prove their case.

The evidence adduced by the prosecution's witnesses reveals that on 16.12.2019, PW2, the victim's mother, got information that the appellant was arrested for having sexual intercourse against the order of nature with male children residing around Sentema area in Iringa Municipality. As PW2's three male children were close to the appellant, and he is their neighbour, she decided to ask them if the appellant sexually abused them. On 18.12.2019, PW2 interviewed her children, including PW1, a boy aged 16 years old, about his relationship with the appellant, and PW1 admitted that he was carnally known against the order of nature since 2016 by the appellant. PW2 reported to the police, and her statement and that of the victim were recorded. On 19.12.2019, police issued PF3 and PW1 were examined by the Frelimo Hospital Doctor. In cross-examination, PW2 said that on 18.12.2019, he went to the police to inquire about the appellant's cases, and when he returned to his house, he asked his three children if the appellant sodomised them.

PW1 (victim) testified that he had known the appellant since May, 2016, as he used to go to the room of a computer games business owned by the appellant to play games. The second time he went to the room, the appellant took him to his room and touched the victim's buttocks. The next day, the victim went to play games in the appellant's room, and the appellant undressed the victim, undressed himself, took his penis and penetrated the victim's anus. After the incident, the appellant threatened the victim not to tell anybody because he would kill the victim. The appellant used to have carnal knowledge of the victim several times until he was arrested in 2019. The victim said that after his mother interviewed him, he admitted that the appellant was sodomising him. In cross-examination, PW1 stated that the doctor examined him and is currently attending counselling at Ngome Clinic. He has the appellant's computer.

PW3 is a clinical officer who examined PW1. He testified that on 19.12.2019, he examined the victim, who came to the hospital complaining of being sodomised. PW3 examined PW1's anus and found old bruises caused by something hard. He examined PW1's blood, and the result showed that he has no H.I.V. or Sexual Transmitted Infections. He filed his report of the examination on the PF3 (exhibit P1). Exhibit P1 shows that the victim

had minor bruises on the anus and no discharge. Also, there is evidence of anal penetration. In cross-examination, PW3 said that he did not check penetration. The victim's anus was abnormal as it had bruises outside of the anus. The victim told him that he was sodomised two months before he was examined. Anus could be loose if he were recently abused. When questioned by the Court, PW3 said that he wrote minor bruises in exhibit P1 but intended to write that there is no evidence of anal penetration.

The last prosecution witness is the investigator of the case (PW4). PW4 testified about another child and not the victim. Thus, PW4 evidence is not relevant to this case. The prosecution closed its case, and the Court did find the appellant with a case to answer. The appellant informed the trial Court that he would testify under oath without calling any witnesses.

In his defense, the appellant denied committing the offence. He said that he was arrested on 15.12.2019 by the police for one offence of unnatural offence. On 18.12.2019, he called PW2, his girlfriend, to bail him out. PW2 visited him at the police station on 18.12.2019 and 19.12.2019 and told him she was still fighting for bail. This was the last date PW2 saw him. On 27.12.2019 appellant got information that PW2 had complained to the District Commissioner and police that he had committed the offence against

her children. He said that the victim did not mention the date and time of the incident. PW2 fabricated the case after her husband persuaded her. There is a contradiction in PF3 and PW3 evidence, PW4 evidence is void, and PW2 testimony is hearsay. The appellant closed his case.

After hearing the evidence from both sides, the trial Court found the prosecution's case was proved without doubt and convicted the appellant for the offence charged. The Court sentenced the appellant to serve 30 years imprisonment.

The appellant was aggrieved with the decision of the trial District Court, and he has preferred this appeal. The appellant has a total of eleven grounds of appeal as follows:-

1. *That, the trial Magistrate erred in law by failing to address the appellant properly according to section 214 of the Criminal Procedure Act, Cap. 20 R.E. 2019, now R.E. 2022.*
2. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant relying on a defective charge sheet which differed from the evidence contrary to sections 132 and 135 of the Criminal Procedure Act, Cap. 20 R.E. 2019, now R.E. 2022.*
3. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant without taking into account that the evidence of PW4 was about another person and also his interview/interrogation*

through caution statement mode was contrary to section 50 and 53 Criminal Procedure Act, Cap. 20 R.E. 2019, now R.E. 2022.

4. *That, the learned trial Magistrate erred in law for failure to explain again the substance of the charge to the appellant contrary to section 231(1) of Criminal Procedure Act, Cap. 20 R.E. 2019.*
5. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant without considering that the PW1 denied being sodomised by the appellant at the earliest opportunity.*
6. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant relying on weak evidence adduced by PW1 when he failed to mention precisely the date and month of the occurrence of the said offence therein.*
7. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant based on contradictory and uncorroborated evidence adduced by prosecution witnesses.*
8. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant without considering that the ingredients of unnatural offence were not proved in the anus of PW1 due to the fact that PF3 did not test/ check (examine) penetration in the victim's anus.*
9. *That, the learned trial Magistrate erred in law for admitting the exhibit P1 (PF3) without considering that the same was mistaken/ wrongly filed by PW3, hence it was devoid of merits.*
10. *That, the learned trial Magistrate erred in law for failing to consider that the prosecution side failed to summons material witnesses to testify.*

11. *That, the prosecution failed to prove this case against the appellant beyond reasonable doubt.*

On the hearing date, the appellant appeared in person, whereas Mr. Sauli Makoli, state attorney, appeared for the respondent. The Court invited both parties to make their submissions.

On the 1st ground of appeal, the appellant submitted that the trial Magistrate did not address him adequately after the case was transferred from Hon. Kasele to Hon. Mwankejela. The successor Magistrate did not address the appellant's right to recall witnesses who testified. This is seen on page 30 of the typed proceedings and it is contrary to section 214 of the Criminal Procedure Act. The omission is fatal and has prejudiced his rights.

As to the second ground of appeal, the appellant submitted that the trial court convicted him based on a defective charge. The charge and the evidence adduced differ. The information shows that the incident occurred from May, 2016 to February, 2019, but prosecution witnesses indicate that the incident occurred between May, 2019 and December, 2019. Also, he said that the ingredients of the offence were not revealed in the particulars of the offence in the charge sheet.

On the 3rd ground of appeal, it was the appellant's submission that PW4, who recorded his cautioned statement, testified about the incident that

occurred to another person. PW4 testified that the offence was committed to his young brother (the other boy). But in this case, the victim is not the other boy. That other boy and the victim are two different persons. PW4 recorded the cautioned statement out of time provided by the law. He said he was arrested on 15.12.2019, and his statement was recorded on 19.12.2019. In his testimony, PW4 did not state if he gave him his right to call for the presence of relatives, friends or his advocate. He prayed for the Court to expunge the cautioned statement and disregard all of PW4's testimony.

The appellant submitted on the 4th grounds of appeal that the trial magistrate failed to explain the substance of the charge to him after the ruling of a case to answer contrary to section 231 (1) of the Criminal Procedure Act.

Concerning the 5th ground of appeal, it was the appellant's submission that the trial court did not consider the victim's testimony. The victim denied in his testimony being penetrated by him. The victim said he agreed he was having sexual intercourse with the appellant against the order of nature after his young brother mentioned him. The trial Court was supposed to consider that the victim was forced to testify and mentioned him after his young

brother mentioned him. The victim's testimony was not supposed to be believed.

The appellant's submission regarding the 6th ground of appeal is that the trial court convicted him relying on the weak evidence of PW1. PW1 failed to say the date of the incident and how many times he was penetrated against the order of nature. He prayed for the Court to re-evaluate the evidence of PW1.

In the 7th ground of appeal, the appellant submitted that the trial court convicted him relying on the contradictory evidence of the prosecution side. There was a contradiction in the age of the victim. PW1 testified that in 2020 he was aged 15 years. PW2 testified that the victim is 16 years old. He said there were doubts about the age of the victim. He added that another contradiction in the testimony of PW4 shows that the victim knew him as his teacher. PW1 denied that appellant was not their tuition teacher. PW1 testimony shows that the appellant was having sexual intercourse with him against the order of nature, and sometimes he abused him sexually. PW2 evidence was contradicting. She testified that on 16.12.2019, she was going to town with her husband when she got information about the victim being sodomised by the appellant. They asked the victim about the information,

and the victim admitted it. She delayed reporting the incident as her husband was not at home. After her husband returned, they reported the incident to the police on Wednesday, 18.12.2019. PW2 also said that on 18.12.2019, she went to the police to see the appellant and was informed that her child was named among the people he sodomised. She went home to ask the victim, the victim admitted, and she went back police to open the case. The appellant believed that as this contradiction goes to the root of the case, the Court has to give him the benefit of the doubt.

Regarding the 8th ground of appeal, the appellant said that the ingredients of the offence of unnatural offence were not proved. PW3, a clinical officer, testified that he did not examine the victim to see if he was penetrated in the anus. PW3 testified that he found healed bruises outside of the anus. He said there was no discharge in the victim's anus to prove that he was penetrated in the anus frequently. This supports PW2's testimony that she saw no behaviour change in the victim. There is no proof of penetration.

The appellant turned to the 9th ground of appeal and submitted that the trial Court wrongly admitted the PF3. PW3 testimony shows that he made a mistake in filing PF3 as he was supposed to record in the PF3 that there

was no proof of penetration. As the maker has said the document was wrongly filled, the said document has to be expunged.

Regarding the 10th ground of appeal, the appellant said that the prosecution failed to bring material witnesses to testify. The father of the victim was not called to testify. The evidence in the record shows that he was the one who took the victim to the doctor to be examined. Another material witness who did not testify is the boy who mentioned the victim. He said that the said the other boy was the one who mentioned the victim as the person whom the appellant was sodomising. Failure to bring material witnesses, the Court must make adverse inferences to the prosecution's case.

In the last ground of the appeal, the appellant said that the prosecution side failed to prove the case without doubts, as he had shown in the previous grounds.

In his reply, the counsel for the respondent opposed the appeal. It was his submission on the first ground of appeal that the successor magistrate did not inform the appellant of his right to recall witnesses who had already testified after the change of Magistrate. The law gives discretion to the

successor magistrate if they find it necessary to recall any witnesses who have already testified. Even the appellant did not request the successor magistrate to recall for cross-examination witnesses who have already testified. The successor magistrate provided the reason for the change of Magistrate that the predecessor magistrate had been transferred. The appellant said that he was ready to proceed with the case after the change of the trial Magistrate. This ground of appeal has no merits.

Regarding the second ground of appeal, the respondent's counsel contended that the charge had no defects as it complied with sections 132 and 135 of the Criminal Procedure Act. The date of the incident is found in the charge sheet that the incident occurred between May 2016 and February 2019. This ground had no merits.

In reply to the appellant's submission of the third ground, the respondent said that PW4 named another person while he was giving information about what PW4 did in this case. The appellant had several cases of the offence of unnatural offence. PW4, as the investigator of the case, conducted his investigation concerning all those cases against the appellant. For this reason, PW4 mentioned another victim in the buildup of his evidence on this case. Even if there is any contradiction in PW4's evidence, the

evidence of the victim of the offence is still present, which is the best evidence. The Court of Appeal stated this in the case of **Seleman Makumba vs. Republic,** Criminal Appeal No. 94 of 1999, Court of Appeal of Tanzania at Mbeya, (unreported).

He said that the ingredient for the unnatural offence was stated in the case of **Francis Eliud @ Manyamwezi vs. Republic,** Criminal Appeal No. 82 of 2021, High Court, Dar Es Salaam Registry at Dar Es Salaam, (unreported), that it must be proved that the victim was carnally known against the order of nature and the accused is the person who committed the offence. PW1 testified that he was carnally known against the order of nature by the appellant. This proves without doubt that the appellant is the one who committed the offence. The counsel said that the answer to this ground no. 4 of the appeal also covers and answers the appellant's ground of appeal No. 5, 6, 7, 8 and 9. The counsel prayed for the Court to dismiss those grounds for want of merits.

On the fourth ground of appeal, the counsel submitted that the typed proceedings show on page 36 the trial Court informing the appellant of his right to defend himself for the offence charged after he was found with a case to answer. The appellant replied that he would defend himself on oath

without calling any other witness. There is nowhere where the appellant informed the Court that he had forgotten what he was charged with. The appellant proceeded to defend himself for the offence he was charged with.

Regarding the 10th ground of the appeal, the counsel for the respondent submitted that all witnesses the appellant said were material witnesses have hearsay evidence. The key witness, in this case, is the victim. Other witnesses' evidence is mostly hearsay. Thus, there was no need to call them. Usually, sexual offences are not committed in the presence of people. The offences are executed in secrecy. For that reason, the victim's evidence is the best. The appellant had an opportunity to call those witnesses as his witnesses, but he did not do so.

The respondent said in response to the last ground of appeal that the evidence in the record shows how the victim was carnally known by the appellant. The victim's evidence is supported by the doctors who examined the victim and said that the victim had healed bruises in the anus. There is no evidence in the record to show that there was reason to fabricate this case against the appellant.

In his short rejoinder, the appellant reiterated his submission in chief and added that the victim's evidence is not corroborated with medical

evidence. Thus, this witness is not credible. The victim mentioned that the appellant was sodomising another boy. That other boy was the one who mentioned the victim, but the victim denied at first being sodomised by the appellant. Thus, bringing that other boy to testify and say his reason for mentioning the victim was essential.

Having heard the submissions from both sides, the main issue for determination is whether this appeal has merit.

In determining this appeal, I find it relevant to categorise the appellant's 11 grounds of appeal into three minor issues. The first one is the defectiveness of the charge, the second one is the presence of procedural irregularities in the trial, and the last one is the substance of prosecution evidence is full of doubt and insufficient to prove the offence.

On the issue of defectiveness of the charge, the same is found in 1st and 2nd grounds of the appeal. The appellant submitted that the charge and the evidence adduced differ. The charge sheet shows that the incident occurred from May, 2016 to February, 2019, but prosecution witnesses indicate that the incident occurred between May, 2019 and December, 2019. Also, he said that the ingredients of the offence were not revealed in the

particulars of the offence in the charge sheet. The counsel for the respondent said in reply that there is no variance in the charge.

I have read the charge sheet and evidence on record. The particulars of the offence show that the offence was committed by the appellant to the victim on various dates from May, 2016 to February, 2019. The particulars of the offence in the charge sheet reads as follows, I quote:-

PARTICULARS OF OFFENCE

Arnold S/O Exaud Malay @ Big, from May, 2016 to February, 2019, at Semtema "A" area within the District and Region of Iringa, had carnal knowledge of one E.M., a boy of fifteen years old against the order of nature."

All ingredients of the unnatural offence were stated from the above-quoted particulars of the offence. The appellant had carnal knowledge of the victim against the order of nature, and the victim was a fifteen-year-old boy. Thus, the particulars of the offence in the charge sheet revealed all ingredients of the offence.

On the variance of the date of the incident, the charge sheet shows that the offence was committed on various dates from May, 2016 to February, 2019. The testimony of PW1 and PW2 shows that the appellant knew PW1 carnally from May, 2016 until when he was arrested. PW3 said that PW1 told him during the medical examination that the last time PW1

was sodomised was two months before 19.12.2019, which was the examination date. This evidence shows variance on the date of the incident in the particulars of the offence and the testimony of witnesses. However, the said variance of the charge with the evidence is minor and did not prejudice the appellant. Witnesses testified on the date of the incident, and the appellant had a chance to defend himself on the respective testimony. Under normal circumstances, where the crime was committed several times for a long time, the victim is not expected to record each date the crime was committed. I do not expect the witness (victim) to be specific about each date the appellant sodomised him. The said variance, though present, is curable under section 234 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2019. The section provides that: -

> *"(3) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material, and the charge need not be amended for such variance if it is proved that the proceedings were instituted within the time, if any, limited by law for the institution thereof."*

The Court of Appeal was of the same position when it encountered a similar issue in the case of **Nkanga Daudi Nkanga vs. Republic**, Criminal

Appeal No. 316 of 2013, Court of Appeal of Tanzania at Mwanza, (unreported) at page 11, and in the case of **Said Majaliwa vs. Republic**, Criminal Appeal No 2 of 2020, Court of Appeal of Tanzania at Kigoma, (unreported). In **Damian Ruhele vs. Republic,** Criminal Appeal No. 501 of 2007, Court of Appeal of Tanzania at Mwanza, (unreported), on page 6, the Court held that:-

> *"The complaint in the second ground has merit in the sense that it is true that the charge sheet reflected that the date of the incident was 23/4/2002, whereas, in the evidence of PW1, it was stated that the incident took place on 23/3/2002. However, as correctly submitted by Mr. Hilla, this was probably a slip of the pen. At any rate, the variance in dates was curable under Section 234 (3) of the Act....."*

Thus, this issue has no merits.

On the issue of procedural irregularities, the appellant complained that the trial successor Magistrate did not address him adequately after the case was transferred from Hon. Kasele to Hon. Mwankejela. The successor Magistrate did not address the appellant's right to recall witnesses who testified contrary to section 214 of the Criminal Procedure Act. Another procedural irregularity is that the trial Magistrate failed to explain the

substance of the charge to him after the ruling of a case to answer contrary to section 231 (1) of the Criminal Procedure Act. In response, the counsel for the respondent said that the successor Magistrate provided the reason for the change of Magistrate that the predecessor Magistrate had been transferred. The law gives discretion to the successor Magistrate if they find it necessary to recall any witnesses who have already testified. On the issue that the appellant was not informed of his right to defend himself after he was found with the case to answer, the respondent said that the trial Court informed the appellant of his right to defend himself for the offence charged after he was found with a case to answer. The appellant replied that he would defend himself on oath without calling any other witness. There is nowhere where the appellant informed the Court that he had forgotten what he was charged with.

There are circumstances where a case changes hands from one Magistrate to another for various reasons. In criminal cases, the situation is covered by Section 214 (1) of the Criminal Procedure Act, Cap. 20. The section reads as follows:-

> *"214 (1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any*

committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, re-summon the witnesses and recommence the trial or the committal proceedings."

The above cited provision requires the reason for the failure of the predecessor Magistrate to complete the matter must be recorded. The successor Magistrate after providing the basis for taking over the case, may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, re-summon the witnesses and recommence the trial or the committal proceedings. It is the discretion of the successor Magistrate to act on evidence or proceedings recorded by the predecessor Magistrate, to recall witnesses who have already testified, or to recommence the trial. The aim is to stop chaos in the administration of justice. This was stated in the case of **Priscus Kimario vs. Republic**,

Criminal Appeal No 301 of 2013, Court of Appeal of Tanzania at Arusha, (unreported), where on page 9, the Court of Appeal held that:-

> *"We are of the settled mind that where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first Magistrate to complete the matter must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons, could just pick up any file and deal with it to the detriment of justice."*

The law does not say that the accused person must be given the right by the successor Magistrate to recall a witness or start a case afresh, as the appellant claimed. It is discretion of the successor Magistrate after giving the reason for taking over the case from predecessor Magistrate to recall a witness who have already testify or to start a case afresh.

Regarding the claim that the appellant was not informed of his right to defend himself after he was found with the case to answer, the record show the appellant was informed of his right to defend himself after he was found with the case to answer. Section 231 (1), (2) and (3) of the Criminal Procedure Act, Cap. 20 R.E. 2019, provides as follows:-

> *"231 (1) At the close of the evidence in support of the charge, if it appears to the Court that a case is*

made against the accused person sufficiently to require him to make a defense either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted, the Court shall again explain the substance of the charge to the accused person and inform him of his right-

(a) to give evidence, whether or not on oath or affirmation, on his own behalf; and

(b) to call a witness in his defense, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the Court shall then call on the accused person to enter on his defense save where the accused person does not wish to exercise any of those rights.

(2) Notwithstanding that an accused person elects to give evidence not on oath or affirmation, he shall be subject to cross-examination by the prosecution.

(3) Where the accused person, after he has been informed in terms of subsection (1), elects to remain silent, the Court shall be entitled to draw an adverse inference against him, and the Court, as well as the

prosecution, shall be permitted to comment on the failure by the accused person to give evidence."

The above cited section requires the trial Court to inform the accused person of his right to defend himself by testifying on oath or without oath and to call witnesses in his defense after finding that the prosecution case has been made to require the accused person to make a defense for the offence charged.

The typed proceedings show on page 36 that the trial Magistrate after finding that the prima facie case has been established, recorded that the accused person is addressed in respect of section 231 of the C.P.A. Cap. 20 R.E. 2019. What was addressed to the appellant in terms of section 231 of the C.P.A. was not recorded in the proceedings. This is an omission on the part of the trial Magistrate. However, the omission did not prejudice the appellant. The record reads that the appellant was addressed in terms of section 231 of the C.P.A. by the trial Court, and the appellant answered that he would testify on oath without calling a witness. This answer proves that the appellant was informed that he has the right to defend himself and call witnesses. The appellant testified on oath and in his evidence he denied to commit the offence he was charged with. The appellant's evidence proves he understood what was addressed to him in terms of section 231 of the

C.P.A. This ground also has no merits. Thus, there are no procedural irregularities in the proceedings of the trial Court as it was complained by the appellant.

Turning to the issue of the prosecution case being full of doubt and not sufficient to prove the offence, the appellant said that PW4 testimony was to be disregarded as he testified about the incident that occurred to another person. He said the victim (PW1) is not a credible witness as at first when PW2 asked him the victim denied at first to be sodomised by the appellant. He did not mention the date of incidates and how many times he was penetrated. The appellant added that prosecution evidence is contradictory on the victim's age. PW4 said PW2 knew him as the victim's teacher, but the victim denied the appellant being his teacher. PW1 said the appellant was sodomising him, and sometimes he was abusing him. Further, PW2's evidence contradicts the reason for reporting the incident to the police on 18.11.2019.

In reply to the issue, the respondent said that PW4 was investigating several cases of unnatural offence against the appellant. As a result, PW4 mentioned another victim in the buildup of his evidence on this case. Even if there is any contradiction in PW4's evidence, the evidence of the victim of

the offence is still present, which is the best evidence. PW1 testified that he was carnally known against the order of nature by the appellant, and this proves without doubt that the appellant is the one who committed the offence.

I agree with the appellant that the testimony of PW4 was in respect of another boy who was carnally known by the appellant and not the victim of this case. It is not true that PW4 mentioned the other boy in building up his evidence in this case as it was averred by the counsel for the respondent. Thus, PW4's evidence is irrelevant to this case, and this Court disregard it.

Regarding the credibility of PW1 and PW2, where there are inconsistencies in the witness testimony, the trial Court is supposed to determine if the inconsistencies are minor or go to the root of the case. In the case of **Mohamed Said Matula vs. Republic [1995] T**.L.R. on page 3, the Court of Appeal held that:

> *"where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."*

In the case of **Said Ally Ismail vs. Republic**, Criminal Appeal No. 249 of 2008 (unreported), the Court of Appeal held that:-

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

From the above cited cases, the Court must consider where there are inconsistencies and determine whether they are minor, not affecting the prosecution case, or goes to the root of the matter. In **Mapambano Michael @ Mayanga vs. Republic, Criminal Appeal No. 268 Of 2015,** Court of Appeal of Tanzania at Dodoma, (Unreported), the Court cited with approval its holding in **Munziru Amri Mujibu and Dionizi Rwehabura Kyakaylo vs. Republic**, Criminal Appeal No. 151 of 2012, (unreported), wherein the Court of Appeal regarded contradictions in evidence so material to the integrity of the conviction of the appellant that it did not wish to engage other grounds of appeal.

In the case at hand, the appellant claimed that PW1 was not a credible witness as, at first, when PW2 interviewed him, he denied being carnally known against the order of nature by the appellant, but he admitted later.

The appellant added that PW1 did not mention the date of each incident and how many times he was carnally known against the order of nature, and PW1 sometimes said that he was abused. Concerning PW2 testimony that PW1 at first denied committing the offence, but upon further interview, he admitted. Usually, the child may not tell the truth to the person when asked about the wrong committed. PW1, in his testimony, said that the appellant threatened him not to say about the incident to anybody otherwise, he would kill him, or those people would kill him. This is sufficient reason for the victim not to reveal what was done to him by the appellant. The evidence shows that the appellant started to have carnal knowledge against the order of nature of PW1 in 2016 when he was only 12 years. PW1 was still young and could not reveal what was done to him by the appellant for three years. It was after the appellant was arrested for the allegation of sodomising another child when the suspicion arouse. The appellant was very close to the victim, this raised suspicion that probably appellant was doing the same thing to the victim. It is the suspicion which made PW2 interview the victim if the appellant was doing the same thing to him.

The appellant submitted that the victim is not credible for not mentioning the dates and how many times the incident was committed in

his testimony. This point has no basis because the appellant has been carnally knowing the victim severely for over three years. Under normal circumstances, the victim could not record how many times and on each date he was sodomised. Further, regarding the victim's testimony is contradictory that the appellant was abusing him and having carnal knowledge of his against the order of nature, it is not expected in the African traditions and customs for a victim who is a child to say direct that the appellant penetrated his penis into his anus. The trial Court did understand what PW1 was saying, and it recorded that PW1 stated that the appellant inserted his penis into his anus.

In the case **of Joseph Leko vs. Republic,** Criminal Appeal No. 124 of 2013, Court of Appeal at Arusha, (unreported), the Court of Appeal mentioned several instances of making the victim fail to call direct the penis by its name and use other words. It held on page 14 of the judgment that, I quote:-

> *"Recent decisions of the Court show that what the Court has to look at is the circumstances of each case, including cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence. The reason is*

obvious. There are instances, and they are not few, where a witness and even the Court would avoid using direct words about the penis penetrating the vagina. This is because of cultural restrictions mentioned and other related matters."

The Court of Appeal expounded the inference of sexual words used in sexual cases in **Hassan Bakari @ Mamajicho vs. Republic**, Criminal Appeal No. 103 of 2012 (unreported), in which it stated that:-

"... it is common knowledge that when people speak of sexual intercourse, they mean the penetration of the penis of a male into the vagina of a female. It is now and then read in court records that trial courts just reference such words as sexual intercourse or male/female organs or simply to have sex, and the like. Whenever such words are used, or a witness in open Court simply refers to such words, in our considered view, they are or should be taken to mean the penis penetrating the vagina ..."

From the above-cited cases, there are instances where a witness and even the Court would avoid using direct words showing the penis penetrating the vagina or anus. In our culture and upbringing, using a mild or indirect word as a substitute for a word considered too harsh when referring to

something unpleasant or embarrassing is normal. This is what we call a euphemism (tafsida). In this case, even the Clinical Officer who examined the victim was sometimes recorded by the trial Court saying that the victim was sexually abused and sometimes sodomised. Likewise, the trial Court was using the words interchangeably. Under the circumstances of this case, PW1 was telling the trial court that the appellant inserted his penis in his anus. The victim's evidence was sufficient to prove that appellant penetrated the victim's anus.

On the credibility of PW2's testimony, the record shows that PW2 testified that on 16.12.2019, while going to town with her husband, she was informed by Mama Tina that the appellant was arrested for sodomising a boy. As PW1 was close to the appellant, it is better to ask him if the appellant did not carnally know him. On 18.12.2019, PW2 interviewed the victim, who admitted that the appellant had been sodomising him since 2016. PW2 went to report to the police on the same date, and her statement and that of PW1 was recorded. On 19.12.2019, police issued PF3 and the victim was taken to the hospital for examination. There is no contradiction, as it was alleged by the appellant in the testimony of PW2.

Regarding the testimony of PW3, PW3 testified that he examined the victim on 19.12.2019 and observed that he had old bruises on the anus. PW3 was of the opinion that the victim was penetrated, and the same is reflected in the PF3. However, when the Court asked a question to PW3, he answered that the victim was not penetrated and that he was supposed to write in the PF3 that the victim was not penetrated. The reason for the answer is that he found minor bruises on the victim's anus. This reason does not change what was observed by the PW3 in the victim's anus during the examination. The contradiction is minor and does not go to the root of the case as to whether the victim was penetrated or not. The law is clear in rape offence that penetration however slight is sufficient to prove penetration. The same is applicable to the unnatural offence since the offence includes the act of male person penis penetrating another person against the order of nature. Thus, this complaint has no merits.

The appellant claimed that there was a contradiction in PW4's evidence. I have already decided earlier herein to disregard the evidence of PW4 for the reason that his evidence was in respect of another person and not the victim in this case. Thus, there is no need to determine this point.

Regarding the victim's age contradiction, the appellant said that PW1 said his age is 15 years, and PW2 said the victim's (PW1) age is 16 years. However, the evidence in the record shows that it is only PW2 who testified on the age of the victim. She said that PW1 was aged 16 years at the time PW2 was testifying (04.06.2020). PW1 said nothing about his age. It is settled principle that the proof of the victim's age is done by the testimony of the victim, the testimony of the victim's parents, relatives, medical practitioner or documentary evidence. This principle was stated by the Court of Appeal in the case of **Issaya Renatus vs. Republic**, Criminal Appeal No. 542 of 2015, Court of Appeal of Tanzania at Tabora, (Unreported), on pages 8 and 9 of the judgment. Thus, the testimony of PW2 proves the victim's age without a doubt.

Therefore, as a general principle, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness. This position was stated by the Court of Appeal in **Goodluck Kyando vs. Republic, [2006] T.L.R., 363**. There is nothing to show that PW1, PW2 and PW3 are not credible witnesses, so I find the appellant's claims devoid of merits.

As to the issue that the prosecution failed to summon material witnesses who are the father of the victim and another boy who mentioned the victim as the person whom the appellant was sodomising, the appellant said that the Court has to take adverse inference on the omission. The law is a settled law that no specific number of witnesses is required to prove any case. This is in accordance with section 143 of the Evidence Act, Cap. 6 R.E. 2019. The position was stated by the Court of Appeal in **Samson Matinga vs. Republic**, Criminal Appeal No. 205 of 2007, (unreported), it was held that:-

> *"A prosecution case, as the law provides, must be proved beyond a reasonable doubt. What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence. (See also Yusuf Abdallah Ally Vs. Republic, Criminal Appeal No. 300 of 2009 (unreported). The said proof does not depend on the number of witnesses but rather, to their credibility (see section 143 of the Tanzania Evidence Act, Cap. 6 R.E. 2002 and the case of Goodluck Kyando Vs. Republic, Criminal Appeal No. 118 of 2003, and*

Majaliwa Guze Vs. Republic, Criminal Appeal No. 2013 of 2004 (both unreported)."

In **John Nziku vs. Republic**, Criminal Appeal No.181 of 2011, Court of Appeal of Tanzania at Iringa, (unreported), on page 9 of the judgment, the Court observed that:-

" No particular number of witnesses is required for proof of any fact it is dependent on the credibility and reliability of their evidence. The number of witnesses the prosecution summons is exclusively their choice."

From the above cited cases, there is no limited number of witnesses required by the prosecution to prove their case against the accused person. The Court considers the credibility and reliability of the evidence of the witness brought. The victim's father and another boy who mentioned PW1 were not crucial witnesses in this case as their evidence is on what they heard from the victim. The victim testified and his evidence proved the offence. Hence, this issue has no merits, and the same must fail.

In conclusion, the prosecution evidence from PW1, PW2 and PW3 proved that PW1 was carnally known against the order of nature by the appellant from May, 2016 to December, 2019. PW1 informed PW2 during the interview after PW2 learned that the appellant was sodomising other children living around Semtema "A" area. As the appellant was their

neighbour and was close to PW2's children, including the victim, PW2 decided to interview them. PW1 testified that the appellant had carnal knowledge of him several times from May, 2016 to December, 2019. The evidence of PW1 is supported by PF3 and testimony of PW3 which shows that during the examination of PW1's anus, some old minor bruises were found. The appellant was well known to the victim and PW2. The defense evidence that PW2 fabricated the case after her husband persuaded her has not raised any doubt to the prosecution's case.

Therefore, I find the appeal has no merits, and I hereby dismiss it. The conviction and the sentence of the trial Court are upheld. It is so ordered accordingly.

A.E. MWIPOPO

JUDGE

09.06.2023