IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 15 OF 2023

(Originating from Criminal Case No. 284 of 2021 of Moshi District Court)

PETER CALIST SACHORE.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

24/07/2023 & 18/08/2023

SIMFUKWE, J.

This is an appeal by Peter Calist Sachore (the appellant) against the decision of the District Court of Moshi in Criminal Case No. 284 of 2021 in which he was charged and convicted of unnatural offence contrary to **section 154 (1) (a) and (2) of the Penal Code [Cap 16 R.E. 2019].** He was sentenced to thirty (30) years imprisonment. The offence was said to have been committed by the appellant on 28th June, 2021 at Uru Shinga within Moshi Rural District in Kilimanjaro Region.

It was the prosecution's case before the trial court that on the fateful date in the morning PW1 (the victim) was sent to the shop by PW3 (his mother) to buy milk. PW1 alleged that while on his away to the shop, he met the

appellant who told him to go to his home place to collect his father's battery. When they arrived at the appellant's home, the appellant asked the victim to undress his clothes so that he could spread medicine to his anus to enable him to pass his examinations at school. After undressing himself, the appellant sodomised the victim. After he had finished, the appellant told the victim not to tell anyone and gave him Tzs 5000/=. Moreover, he ordered the victim to call the child of his aunt so that he could spread the medicine to him too. When he called the said child, he was stopped by his mother.

When the victim returned home, his mother (PW3) noticed that the victim went to the toilet often and he was farting frequently. When asked, the victim narrated the tragedy to his mother. The matter was reported to the local government leaders and later on to the police station and the victim was taken to hospital. At the hospital, the victim was examined by the Doctor (PW2) who, according to his testimony the victim's anus sphincter muscles were loose which suggested that the victim was penetrated with a blunt object.

In his defence, the appellant denied to have committed the offence in question. He alleged that the case was fabricated against him because of the grudges he had with his relatives concerning the farms.

The trial court found the prosecution case credible. It convicted and sentenced the appellant to serve 30 years in prison. The appellant was aggrieved and filed this appeal relying on thirteen (13) grounds of appeal as follows:

1. *That the trial magistrate grossly erred in law and in fact for failing to append her signature immediately after the witness had taken oaths as required by the law.*
2. *That, the honourable magistrate erred both in law and in fact for acting on the evidence of a child of tender (sic) without such minor to promises (sic) not to tell lies in his testimony.*
3. *That, the honourable magistrate erred both in law and in fact for failing to make assessment of credibility of the child of tender age before relying on his testimony in convicting the appellant.*
4. *That, the honourable magistrate erred both ·in law and in fact by convicting the appellant without giving him the right to cross examine some of prosecution witnesses which led to unfair trial and great miscarriage of justice.*
5. *That, the honourable magistrate erred both in law and in fact by convicting the appellant by considering the evidence of the witnesses for prosecution which was fraught with discrepancies.*
6. *That the honourable magistrate grossly erred in fact and in law by convicting the appellant basing on the evidence presented by the respondent (then prosecution) which was surrounded with contradictions, inconsistencies and unreliable.*
7. *That the court grossly erred in fact and in law by convicting the appellant despite of contradictions on the evidence presented by the prosecution side (respondent)*

8. *That, the honourable magistrate erred both in law and in fact by convicting the appellant while he was not identified by PW1 (victim) who at the dock during hearing. (sic)*
9. *That the honourable magistrate grossly erred in fact and in law by convicting the appellant on the criminal case which was never investigated by the police.*
10. *That the trial court erred in fact and in law by convicting the appellant without proof of DNA taking into account the appellant purported to have been arrested on the date of the incidence.*
11. *That the trial magistrate erred in law for failing to compose judgment in accordance with the law.*
12. *That the trial court grossly erred in fact and in law for failure to analyze the evidence presented before it.*
13. *That, the honourable magistrate erred both in law and in fact by convicting the appellant without considering that the prosecution did not prove its case beyond reasonable doughty. (sic)*

At the hearing of the appeal which was conducted through written submissions, the appellant was represented by advocate Wilhad A. Kitaly and the respondent was represented by Mr. John Mgave, the learned State Attorney.

In his submission, Mr. Kitaly dropped the 9th ground of appeal and argued the 5th, 6th,7th and 12th grounds of appeal collectively while the rest of the grounds were argued separately.

Supporting the first ground of appeal, Mr. Kitaly faulted the trial magistrate for failure to append her signature immediately after the

witness had taken oath as required by the law. Elaborating this point, the learned advocate argued that it is a matter of practice for a presiding officer to append the signature after the oath or affirmation is taken by a witness before testifying. He argued that in the case of **Geoffrey Raymond Kasambula vs Total Tanzania Limited, Civil Appeal No. 320 of 2019** (unreported) it was held that failure to append the signature vitiates the authenticity of the evidence taken and is fatal to the proceedings.

Mr. Kitaly averred that omission to append signature after the evidence of the witness jeopardised the authenticity of such evidence and made the proceedings fatal. He prayed this court to nullify the proceedings and quash the decision of the trial court.

On the second ground of appeal, the trial magistrate was faulted for failure to observe **section 127(2) of the Evidence Act, [Cap 6, R.E 2019]** which is couched in mandatory terms for a child of tender age before giving evidence to promise to tell the truth to the court and not to tell lies. The learned counsel referred to page 7 and 8 of the trial court proceedings where the victim who was of tender age did not promise not to tell lies contrary to the said law.

Mr. Kitaly submitted further that PW1 was not asked pertinent questions to test whether he understood the nature of oath. Mr. Kitaly suggested that the trial magistrate was required to ask few questions to determine whether or not the child witness understood the nature of oath. He supported his argument with the case of **Issa Salum Nambaluka vs Republic, Criminal Appeal No. 272 of 2018** (unreported) and the

case of **Godfrey Wilson vs Republic, Criminal Appeal No. 168 of 2018 (unreported)** which held that:

> *"We think the trial magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case, as follows;*
>
> 1. *Age of the child*
> 2. *The religion which the child professes and whether he/she understands the nature of oath.*
> 3. *Whether or not the child promises to tell the truth and not to tell lies."*

Mr. Kitaly continued to state that upon making the promise, such promise must be recorded before the evidence is taken, which was not done in the trial court proceedings. Basing on the alleged omission, the learned advocate prayed the court to expunge from the trial court records the evidence of PW1 (a child of tender age).

On the third ground of appeal, it was the appellant's lamentation that the trial magistrate did not properly scrutinize the evidence of the victim particularly his credibility before convicting the appellant. It was explained that **section 127(6) of the Evidence Act** (supra) allows the court to convict the accused with only the evidence of the child of tender age without corroboration if such court satisfied itself that the victim who is a child of tender age promises to tell the truth to the court and not to tell lies.

In the present case, Mr. Kitaly submitted that nowhere the trial court recorded that the court satisfied itself that the victim was telling the truth

to the court and not telling lies as required by the law. In that premises, the learned advocate prayed the court to expunge the evidence of PW1 as it was wrongly admitted contrary to **section 127 (6) of the Evidence Act** (supra).

On the fourth ground of appeal, Mr. Kitaly stated that the appellant was not accorded right to cross examine some of prosecution witnesses which curtailed the appellant fair trial and caused miscarriage of justice as guaranteed in the Constitution of the United Republic of Tanzania, 1977. It was alleged that the appellant was not accorded right to cross examine PW1 Boniface Masao. It was insisted that denial to cross examine is a serious non direction which entails that the appellant was not accorded fair trial. He referred to the case of **Hussein Idd and Shaban Hassan vs The Director of Public Prosecutions, Criminal Appeal No. 16 of 2020** (unreported) to support his argument.

Supporting the 5th, 6th, 7th and 12th grounds of appeal which concerns evaluation of evidence, it was submitted that the trial magistrate only analysed the evidence of the prosecution and ignored the defence evidence which prejudiced the appellant. That, the defence evidence that the appellant had grudges over the farm was not considered. Mr. Kitaly contended that such omission to consider the defence evidence curtailed the appellant fair hearing. Reference was made to the case of **Hussein Idd and Another vs Republic [1986] TLR 166** and the case of **Tanzania Breweries Ltd vs Antony Nyingi**, TLS Law Report 2016 at page 99-100. The learned counsel emphasized that the entire judgment does not indicate whether such evidence was admitted or rejected and even if it was rejected no reason was given for such rejection.

On the eighth ground of appeal, Mr. Kitaly faulted the trial magistrate for convicting the appellant while he was not identified by the victim at the dock during the hearing, considering the fact that the appellant was not arrested at the crime scene. He added that, the victim said that he was sodomised by one Peter Calist but nowhere the victim identified that Peter Calist in court (dock identification) as reflected at page 8 of the typed proceedings. That, the victim who is a child of tender age was supposed to identify the accused person in the dock for the court to satisfy itself that the accused person was properly identified.

On the tenth ground of appeal, the learned advocate faulted the trial court for convicting the appellant without proof of DNA given the fact that it was alleged that the appellant was arrested on the date of incidence immediately after the purported incidence. Reference was made to the case of **Christopher Kandidius @ Albino vs Republic, TLS report 2017** at page 371 which held that:

> *"In rape cases where the prosecution should have filled the evidential gap by resorting to DNA evidence forensically to link the rape of the complainant to link the appellants as provided by section 36 of SOSPA and human DNA Regulation Act, 2009."*

Supporting the eleventh ground of appeal, the learned advocate challenged the trial court's judgment for contravening **section 312 of the Criminal Procedure Act, Cap 20 R.E 2019** on allegation that no reason for the decision was adduced in the entire judgment.

In his conclusion, the appellant's advocate was of the view that if the evidence was properly analysed it would result to one conclusion that the

prosecution failed to prove their case on the standard required. That, the prosecution evidence left the court with a lot of doubts which could be resolved in favour of the accused person as it was held in the case of **Fadhili Makanga vs Republic, Criminal Appeal No. 458 of 2017** (CAT).

The learned counsel prayed the court to allow this appeal, the judgment and conviction by the trial court be quashed and the appellant be acquitted and set free.

On his part, Mr. Mgave the learned State Attorney, did not support the appeal. On the first ground on failure to append the signature; the learned State Attorney admitted that **section 210(1)(a) of the Criminal Procedure Act** (supra) requires the trial magistrate to sign after finishing recording the evidence of a witness. However, he condemned the appellant for failure to state which page of the trial court proceedings was not signed after the witness had finished testifying. He explained that when PW1 finished testifying at page 9 the magistrate signed; whereas PW2 finished at page 12, PW3 finished at page 14, PW4 finished at page 16, PW5 at page 17 and PW6 at page 18 of the trial court's proceedings. Also, when DW1 finished testifying at page 23 the magistrate signed and at page 25 when DW2 finished his testimony, it was signed.

Responding to the second ground of appeal, it was asserted that at page 7 of the typed proceedings the victim promised to tell the truth. It was the opinion of Mr. Mgave that promise to tell the truth implies that the child promised not to tell lies as stated in the case of **Mathayo Laurence William Mollel vs Republic, Criminal Appeal No. 53 of 2020** [2023].

It was submitted further that the trial court was right to receive the evidence after clear assessment of the child which in itself was complete. Also, Mr. Mgave stated that the court has not been provided with hard and fast rules on how to question but just that the questions should be simple to help understand the ability of the child to testify.

Replying the third ground of appeal on failure to make assessment of the credibility of the child of tender age, it was stated that the magistrate complied with **section 127(2) of the Evidence Act**(supra) and believed the evidence of PW1 after careful scrutiny and assured itself that it was the appellant who sodomized the victim. That, the position of the law is clear that the best evidence in sexual offences comes from the victim. The learned State Attorney cemented his argument with the case of **Marcelino Koivogui vs Republic, Criminal Appeal No. 469 of 2017** [2020] TZCA 252 which held that:

> *"In that regard every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

It was explained further that the victim told the trial court that it is the appellant who sodomised him and his evidence was corroborated by the evidence of PW3, PW4 and PW5. That, nowhere the court stated in its judgment that it relied only on the evidence of PW1.

Responding to the 4th ground of appeal on curtailment of right to cross examine, it was submitted by Mr. Mgave that page 13 of the proceedings shows that after PW2 finished testifying, he was cross examined but there is a typing error as the trial magistrate wrote cross examination by State Attorney instead of accused. That typing error cannot be used by the

appellant to deny the fact that he cross examined the prosecution witnesses.

The learned State Attorney called upon the court to expunge the evidence of PW2 in case it finds that there was no typing error. He argued that even if the said evidence is expunged still there is enough evidence to convict the appellant since the best evidence in sexual offence comes from the victim as stated in the case of **Seleman Makumba vs Republic [2006] TLR 339.** He insisted that, typing errors may occur since even in this case, the appellant referred PW1 to be doctor Boniface Masao while PW1 is the victim, Joshua Amedeus.

Responding to the 5th, 6th, 7th and 12th grounds of appeal in respect of evaluation of evidence, Mr. Mgave submitted that the trial Magistrate evaluated the evidence of both the prosecution and the defence properly and believed that the prosecution case was proved at the required standard. That, the court raised issues as to whether the offence was really committed by the appellant as seen at page 4 to 5 of the proceedings, evaluated the evidence and found out that evidence adduced by the prosecution witnesses proved that the appellant was the one who committed the offence and proceeded to convict him.

On the contention that the court did not consider the evidence that the appellant had grudges with the victim's father due to the farm which he possesses, Mr. Mgave stated that the court stated that the appellant was required to produce evidence to that effect so that his evidence could be believed. However, the record of the trial court does not show if DW2's evidence was considered as the record is silent. He argued that it is a requirement of the law that in reaching conclusion while composing

judgment, evidence from both sides must be scrutinized failure of which led to miscarriage of justice. Mr. Mgave partly agreed that evidence of the defence side was not considered particularly evidence of DW2. Under such circumstances of failure by the trial court to consider DW2's evidence, Mr. Mgave implored this court to step into the shoes of the trial court to consider the defence evidence and come up with conclusion on whether it raised doubt to the prosecution case.

Countering the 8th ground of appeal that the victim did not identify the accused at the dock, the learned State Attorney submitted that as per the testimony of PW1 at page 8 of the judgment, the victim knew the appellant by name and as their neighbour the fact which was never objected. Also, during cross examination the victim told the court that the appellant lives with his wife the fact which the appellant didn't object. He was of the view that raising such fact at this stage is an afterthought.

On the 10th ground of appeal which concerns convicting the appellant without proof of DNA, the learned State Attorney averred that DNA is not mandatory requirement in proving the offence of rape. That, such practice is not common in our jurisdiction as stated in the case of **MUSSA SEBASTIAN V REPUBLIC (CRIMINAL APPEAL NO. 406 OF 2018) [2021]** TZCA 119. It was argued further that in the instant matter the accused was convicted with an offence of Unnatural offence of which the position of the respondent will be the same that in proving sexual offences, DNA test is not mandatory and not the best practice. He was of the opinion that the court was right to consider the best evidence from the victim which was corroborated by the doctor and other witnesses and sufficed to convict the appellant.

Mr. Mgave also disputed the 11th ground of appeal by arguing that the trial Magistrate composed the judgment in accordance with the provision of **section 312 of the Criminal Procedure Act** (supra) since the reasons for the decision were given. That, at page 5 of the judgment the trial Magistrate stated that from PW1's narration there is no reason not to believe what he told the court. He referred to the case of **RAJABU DIBAGULA VS REPUBLIC [2004) TLR 196** in which the Court of Appeal clearly explained the way a judgment should look like and stated that:

> *"Good judgment must be clear, systematic and strategic. Every judgment must state facts of the case by reference to particular evidence adduced during the trial and give sufficiently and plainly the reasons which justify the finding of the court."*

On the 13th ground of appeal, Mr. Mgave believed that the prosecution case was proved beyond reasonable doubt that led to the conviction of the appellant. That, the trial magistrate received evidence of PW1 the victim who testified that he was sodomized by the appellant as per page 8 of the proceedings. Evidence of PW2 a doctor corroborated the evidence of PW1 by tendering PF3 that proved that the anus of the victim was widened which suggested that a blunt object had penetrated the victim and therefore one element of penetration was proved.

Also, the trial court in answering the second element as to who did the act to the victim, it found the appellant to be the one who did the act whereby evidence of PW1 (the best evidence) linked the appellant with the offence. The victim identified the appellant by name and as a

neighbour which suggests that the appellant was not knew to the victim and the offence was committed during the day time, so there was no mistaken identification.

In his conclusion, Mr. Mgave prayed the court to dismiss this appeal and allow it to the extent of those grounds collectively argued herein in respect of consideration of defence evidence.

Having keenly gone through the grounds of appeal, submissions by the parties, and the trial court's record, I now resort to answering the grounds of appeal seriatim having in mind that this being the first appellate court, where necessary, the court will re-evaluate and analyze the evidence on record and come up with its own findings. Also, I will be guided by the cardinal principle of law that in criminal cases, the prosecution is enjoined to prove the offence charged beyond reasonable doubts while the appellant has a duty to raise reasonable doubts and not to prove his innocence.

On the first ground of appeal, the learned advocate condemned the trial magistrate for failure to append her signature immediately after the witness had taken oaths as required by the law. This argument was disputed by Mr. Mgave, the learned State Attorney who argued that the signature was appended by making reference to the typed proceedings.

As rightly submitted by Mr. Kitaly, it is a legal requirement for the trial magistrate to append his/her signature after receiving the evidence of a witness. This requirement is provided for under **section 210(1)(a) of the Criminal Procedure Act** (supra) which provides:

"210. -(1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner-

(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record;"

Looking at the hand written impugned proceedings, the contention that the trial magistrate did not append her signature after receiving the evidence of the witnesses is unfounded since the trial magistrate appended her signature as seen at page 10, 13, 14, 16, 17 and 18 of the typed proceedings when PW1, PW2, PW3, PW4, PW5 and PW6 finished to give their evidence. Also, when DW1 and DW2 finished testifying, the trial magistrate appended her signature as seen at page 23 and 25 of the proceedings respectively. Therefore, the contention that the trial magistrate did not append her signature is unfounded.

On the 2nd ground of appeal, the learned advocate for the appellant noted that, PW1 the victim who was of tender age did not promise not to tell lies contrary to the law. Also, it was argued that PW1 was not asked pertinent questions to test whether he understood the nature of oath before giving his promise.

The learned State Attorney did not agree with this contention. He argued that promise to tell the truth implies that the child promised not to tell lies. Concerning the issue of asking pertinent questions, the learned State

Attorney submitted that there are no hard and fact rules on how to question a child of tender age but just that the questions should be simple to help to understand the intelligence of a child.

According to the trial court's proceedings, PW1 who was a child of tender age, before giving evidence promised to tell the truth. However, the words **'not to tell lies'** were not recorded. As rightly submitted by the learned State Attorney, promise to tell the truth implies the promise not to tell lies. This has been stated in a number of cases including the case of **Mathayo Laurance William Mollel** (supra), at page 12 where the Court of Appeal held that:

> *"We understand the legislature used the words "promise to tell the truth to the court and not to tell lies." We think the tautology is evident in the phrase, for, in our view,* ***'to tell the truth" simply means "not to tell lies".*** *So a person who promises to tell the truth is in effect promising not to tell lies. The tautology in the subsection is, in our opinion, a drafting inadvertency."* [Emphasis added]

On the strenght of the above authority, this court is satisfied that the ommission to state whether the child will not tell lies is not fatal.

Regarding the allegation that the trial magistrate did not ask pertinent questions to the child witness, looking at page 7 of the typed proceedings the records show that the victim stated the following:

> *"PW1, Joshua Amedeus, 8 years, Standard 4 at Chomo at Ushira, I am Christian I used to go to church. I promise to speak truth.*

Court: *The child possed enough intelligent and he promised to speak truth."*

From the above quoted sentences, I am of considered opinion that the above words show that the trial magistrate posed some questions to the victim whose reply is as quoted above and at the end she was satisfied on the promise to tell the truth which was given by PW1, a child of tender age. Besides that, in her judgment, the trial magsitrate stated that the child spoke nothing but the truth. In the case of **Wambura Kiginga vs. Republic, Criminal Appeal No. 301 of 2018 (CAT)** (unreported) at page 15 it was held that:

*"We must confess at the outset that we construed the opening phrase "**Notwithstanding the preceding provisions of this section"** to mean that, a conviction can be based on only subsection (6) of section 127 without complying with any other sub section of 127 including sub section (2).*

*Based on that understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127(2) of the Evidence Act is not complied with, provided that some conditions must be observed to the latter. **The conditions are; first, that there must be clear assessment of the victim's credibility on record and; second, the court must record reasons that notwithstanding noncompliance with section 127(2), a person of tender age still told the truth.** "*
[Emphasis added]

Having said that and done, I find the second ground of appeal have no merit.

Turning to the 3rd ground of appeal, it was Mr. Kitaly's argument that the trial magistrate did not properly scrutinize evidence of the victim particularly his credibility, to satisfy herself that the victim was telling the truth to the court and not lies as required by the law. It was argued to the contrary by Mr. Mgave that the evidence was properly scrutinized.

I have revisited the impugned judgment of the trial court, at page 4 and 5 of the typed judgment. I am of the opinion that the trial magistrate properly scrutinized evidence of the victim. At page 5 she stated that:

> *"As to this case in my hand I found that the prosecution evidence proved the charge of unnatural offence. This finding was based also on the victim testimony and supported by the PF3 that the victim was sodomised. Also, the victim promised to tell truth. The victim knew accused before."*

Guided with the above case law and together with the findings at page 4 of the trial court judgment that the victim's evidence was corroborated by other evidence, it goes without saying that the trial court properly analysed the victim's evidence and satisfied itself that the offence was proved beyond reasonable doubt.

On the 4th ground of appeal, the appellant lamented that he was curtailed right to cross examine PW2 the doctor. The learned State Attorney submitted to the contrary that such right was availed to the accused though there is a typing error where it was written cross examination by State Attorney instead of cross examination by the accused.

I am alive that right to cross examine is a constitutional right. In the case of **Abanus Aloyce and Ibrahimu vs Republic, Criminal Appeal No. 283 of 2015** the Court of Appeal emphasized that denial of the right to cross examine result to miscarriage of justice.

Much as I am aware with the above principle, in the instant matter, without further ado, I hold that the appellant was not curtailed right to cross examine PW2 the doctor. At page 13 of the typed proceedings, the records speak loudly that the appellant was availed such right. However, there is a slip of a pen as rightly submitted by Mr. Mgave that instead of writing cross examination by Accused, the trial magistrate wrote cross examination by State Attorney. I am of the opinion that such error cannot take away the fact that the accused was availed right to cross examine.

The next issue for consideration is whether the trial magistrate properly evaluated the evidence as lamented on the 5th, 6th, 7th and 12th grounds of appeal. The central grievance in these grounds were that the trial magistrate did not consider the defence evidence. The learned State Attorney partly agreed that evidence of DW2 was not considered but evidence of DW1 was considered. He implored the court to step into the shoes of the trial court and see whether the said evidence raises doubt.

In the impugned judgment of the trial court, at page 5 the defence evidence was dully considered where it was stated that:

> *"On the other hand, accused told the court he has grudges with the victim father as he claim (sic) money from him. Also, he had grudges with PW1 father due to farm which he is in possession. But accused has no evidence to prove his allegations."*

The above quoted words reflect evidence of DW1. Therefore, the contention that the defence evidence was not considered in unfounded. At page 24 of the typed proceedings of the trial court, DW2 the wife of the appellant testified to the effect that she left from home at 12:00hrs and came back at 18:00hrs and heard people saying that his husband had sodomized one boy. When she asked her husband, he replied that he had left at 10:00hrs and went to his uncle at another part of Uru. It may be noted that if the appellant left from home at 10:00hrs that meant DW2 was left at home. However, what can be depicted from DW2's testimony is that when she left home the appellant remained at home. Thus, evidence of DW2 contradicts that of DW1 the appellant. Moreover, the victim testified that he met the appellant at 07:00hrs in the morning, meaning that if the appellant went to his uncle at 10:00hrs, he had already committed the offence when he left.

On the 8th ground of appeal, the appellant complained that the trial magistrate erred in convicting him while he was not identified by PW1 (the victim) at the dock during the hearing. The State Attorney was of the view that the appellant was identified by the victim since the victim testified that the accused was his neighbour.

This issue will not detain me since at page 8 of the proceedings, it is clear that the victim identified the accused as his neighbour. Besides that, during cross examination at page 9 the victim while answering the questions posed to him by the appellant stated that:

"Your(sic) my neighbour…You are living with your wife."

Thus, that the appellant was properly identified.

On the tenth ground of appeal, Mr. Kitaly contended that the appellant was convicted without proof of DNA. He cited the case of **Christopher Kandidius @ Albino** (supra) to support his argument. On his side, the learned State Attorney was of the view that DNA is not a legal requirement to prove the offence of rape.

With due respect to Mr. Kitaly, the cited case of **Christopher Kandidius @Albino** (supra) is distinguishable to the case at hand since in that case, the accused was convicted with an offence of rape while in this case, the accused was convicted with the offence of unnatural offence. Nevertheless, in the cited case, the Court was of the view that DNA test is not popular means in our jurisdiction to prove rape. I am also of considered opinion that there is no legal requirement of conducting DNA test in proving the offence of unnatural offence as rightly submitted by Mr. Mgave.

The next and last ground for consideration is the contention that the judgment of the trial court contravened **section 312 of the Criminal Procedure Act** (supra) for not containing reasons for the decision. Mr. Mgave did not agree with this contention. He submitted that the trial magistrate composed her judgment in compliance with the law.

The content of a judgment is well explained under **section 312(1) of the Criminal Procedure Act** (supra) which is to the effect that:

> *"312. -(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain*

the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."

The above provision has been interpreted by courts in various decisions. In the case of **George Mingwe V.R [1989] TLR 10 (HC)** it was held that:

"A judgment which does not conform with the provisions of s.312 (1) of CPA is not a judgment in law and will certainly run the risk of being quashed, it has been said now and again that a judgment to be a judgment "must contain the point or points for determination, the decision thereon and the reasons for the decision".

Looking at the trial court's judgment, it reveals that the same contains all elements as envisaged under the above provision. The reasons for the decision are found in each of the raised issue from page 4 to 5 of the judgment. The trial court found that evidence of the victim who promised to tell the truth was sufficient to convict the appellant. Also, the trial court found that evidence of the victim was corroborated by other witnesses' evidence including the doctor.

Having discussed all the grounds of appeal raised by the appellant, as a first appellant court, I find no cogent reason to fault the decision of the trial court. I also find that the prosecution managed to prove the case against the appellant beyond reasonable doubts. Consequently, I dismiss this appeal in its entirety.

However, it came to my attention that when the incident occurred the victim was a child of 8 years which under **section 154 (2) of Penal Code,** the proper statutory sentence should have been life imprisonment and not 30 years as imposed by the trial magistrate.

In the premises, I invoke my revisionary powers under **section 373 (1) (a) of the Criminal Procedure Act** (supra), nullify the trial court's sentence of thirty (30) years and enhance it to life imprisonment.

It is so ordered.

Dated and delivered at Moshi this 18th day of August 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

18/08/2023