**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM SUB-REGISTRY**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 98 OF 2023**

***(Appeal from the decision of the District Court of Ilala at Kinyerezi in Criminal Case No.68 of 2022 dated 13/03/2023 as per Hon.R.Z.LYANA, SRM)***

**EDWARD JOHN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

***Date of last Order: 30/10/2023***

***Date of Judgment: 22/11/ 2023***

**GONZI, J.;**

In the District Court of Ilala, the Appellant was charged with one count of rape and one count of unnatural offence. In the first count the accused person was charged with the offence of rape contrary to sections 130(1),(2),(e) and 131(1) of the Penal Code, Cap 16 of the Laws of Tanzania. In the second count he was charged with the offence of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, Cap 16 of the Laws of Tanzania. In respect of the first count, it was alleged that the accused person on diverse dates between 2021 and January 2022, at Nzasa area within Ilala District in Dar es Salaam Region, did have carnal

knowledge of one "QZ" a girl aged 7 years old. In respect of the second count, it was alleged that the accused person on diverse dates between 2021 and January 2022, at Nzasa area within Ilala District in Dar es Salaam Region, did have carnal knowledge of one "QZ" a girl aged 7 years old, against the order of nature.

It was testified for prosecution that the appellant was a Motorcycle rider popularly known as a Boda Boda rider who used to park his motorcycle at Nzasa Shuleni near the school where the victim was studying and was in standard 2. It was testified that the Appellant used to take the victim girl child (PW1) to the nearby bushes and rape her as well as sodomize her on diverse dates in 2021 up to January 2022. It was testified by the Prosecution that on the fateful day of 20th January 2022, the victim child while at school, was observed by her grandmother and guardian (PW 2), who was also a teacher at the same school, not walking properly as she was walking with her legs widened. PW 2 instructed her daughter called Theresia also known as Edith to examine the victim in her vagina and anus and Theresia found that Pw1 had faeces mixed with slippery fluids in her vagina and that she had faeces in the anus beneath her underpants. PW 2 also personally inspected PW 1 in her vagina in the evening upon returning

from work and found her labia swollen and that PW2's vaginal opening was too large for a girl of her age. It was testified that only after PW2 punished her that PW1 mentioned the Appellant Edward John to Theresia or Edith (an Aunty of the victim) as the culprit. The matter was reported to Police station the next day where PF 3 (Exhibit P1) was provided and the victim was taken to Chanika Health Center where PW4 (Best Rajabu Chambuso) attended her and filled the PF 3. Diagnosis conducted by Pw4 showed that the victim had bruises in her vagina and had no hymen hence PW4 opined that it was a suspected case of rape or penetration by blunt object. PW4 also stated that he had examined the anus of the victim and found bruises. No sperms were seen in either part. The Appellant was arrested on 23/01/2022 at his parking station near the school. He was arrested by PW 3 (Baraka Kanji) a member of the peoples' militia who was lead to the appellant by the victim accompanied her aunty Theresia in a car. PW 5 (No.G 2498 D/Cpl Mahamoud) investigated the case where he interrogated the other prosecution witnesses and the Appellant upon being brought to Police Station. PW 5 described the crime scene as a place with low bushes bordering Kazimzumbwi forest.

The appellant denied the charges and testified that one day on 23rd January 2023 he was arrested at Nzasa Shuleni after being pointed at by PW1 and that he was taken to Police station where he was informed of the rape allegations. He testified that he was arrested while he had parked his motorcycle at their Motorcycle parking station (Kijiwe) called Nzasa Shuleni, near the school. He testified that it was a case of mistaken identity as he does not know the victim girl nor did the victim girl know the appellant before.

After full trial, the learned trial Senior Resident Magistrate acquitted the accused of the second count of unnatural offence as the victim in her testimony stated that she had never ibeen nspected by the doctor in the anus but only in the vagina. The trial court however convicted the appellant of the 1st count of rape and sentenced him to 30 years imprisonment. The appellant is aggrieved with both conviction and sentence hence the present appeal.

The petition of appeal contained five grounds of appeal that:

1. That the trial court erred both in law and fact for failure to properly evaluate, analyze and consider the evidence on records of witnesses,

a failure which lead the trial court to arrive into improper and erroneous decision.

2. That the trial court erred in law to convict and sentence the appellant based on the evidence of PW1, which the prosecution failed to prove the case beyond reasonable doubt, a standard of proof which is required in criminal cases.
3. That the trial court erred in law to convict and sentence the appellant basing on the evidence of PW1, which is self contradictory, improbable and implausible, not credible and inconsistent with human nature.
4. That the appellant was incorrectly convicted basing on visual identification evidence of a child of tender age whose evidence did not pass the test of truthfulness as required by the law.
5. That the appellant was illegally convicted basing on invalid identification which was made against the Appellant by PW1 in violation of the law.

At the hearing of the appeal, the Appellant had the services of Mr.Japhet Mmuru, learned Advocate. The Respondent had the services of Ms Rozi Makupa, learned Sate Attorney.

Mr. Mmuru opted to submit in respect of all the 5 grounds of appeal together. He made the following arguments. That section 127(6) and 127(7) of the Evidence Act were not complied with. He argued that where conviction is based solely on the evidence of a single witness who is the victim, the court must firstly satisfy itself that the victim is a credible witness. That the word of the victim should not be taken as the gospel truth but should pass the test of truthfulness. He relied on the case of **Mohamed Said versus Republic** (2017) decided by the Court of Appeal of Tanzania to buttress his point. He argued that in the present case, PW1's identification of the Appellant is contradictory. It was submitted that there are places in the course of proceedings where she identified the appellant by name and mentioned him to her auntie called Edith and to Police station. But the same PW1 also told the trial court that she doesn't know the appellant as per page 54 of the proceedings when she was being cross examined. It was submitted that this is a material contradiction that ought to have been resolved in favour of the accused person.

Mr. Mmuru submitted further that in the case of **R versus Mohamed Bin Alui** (1942)9 EACA, at page 72 the Court of Appeal for Eastern

Africa held that when identity of the culprit or accused is at issue, the victim ought to have given, or is required to give, the description and terms of such description of the accused person to the responsible authority or immediate person. Such description should be given first before the accused is arrested or before evidence is given in court. He argued that in the case at hand, PW1 did not give any graphic description of the appellant to anyone including her grandmother and the Police investigator, in terms of facial, morphological appearance, colour, physique as well as garments. He argued that PW1 mentioned the name of the Appellant firstly to her Aunty called Edith but the said Edith was never called as a witness. The Appellant's counsel called upon the court to draw an adverse inference against the Prosecution for failure to call a material witness. He relied on the case of **Boniface Kundakira Tarimo versus R** (2008) to stress the need of calling a material witness.

Mr. Mmuru submitted further that PW1 is not a reliable witness because at first when asked by her grandmother why she was not walking properly, she had lied to her saying that "vipele vimenitoka" (that she had rashes in her private parts). But later upon being screened by the

grandmother she told her that she had been raped by the appellant. He submitted that when a witness tells lies in a material point, that witness should not be believed in other testimonies she makes. For this the learned counsel relied on the case of **Mathias Timoth versus R** (1984) TLR 84.

The learned Advocate submitted that PW1 told the trial court that her grandmother had beaten her excessively by cane in order to force her to tell the truth. It was argued PW 1 therefore was mentioning the appellant under threat of pain.

The appellant's counsel also submitted that the Prosecution witnesses contradicted each other in their testimonies. He submitted that PW1's evidence contracted that of PW2. Examples of contradictions are that PW1 at one place said that she had told her grandmother PW2 that there is a man who used to take her to the bushes and rape and sodomize her while the same PW1 is shown to have told the Investigator PW5 that the appellant used to be waiting for her in the bushes to rape and sodomize her. Also that the said Pw1 the name of the Appellant to her Aunty Edith while she told the court that she does

not know the name of the appellant but only used to see him at the school area.

The appellant's counsel argued that the generic name "boda boda" (motorcycle rider) used by PW1 to identify the Appellant was vague. It refers to many persons and can not conclusively point to the particular person like the appellant. He argued that the Prosecution ought to have mounted an identification parade. He relied on the case of **Jumapili Misiete versus R** (2014) by the Court of Appeal of Tanzania on this point. That is where the victim does not know the name of the accused, or suspect then the procedure is to conduct identification parade. Failure to conduct identification parade violated section 60(1) CPA and PGO 232.

The learned counsel for appellant argued that in sexual offences the evidence of the victim can be enough to ground a conviction, but that evidence should stand on its own without depending on other evidence. Hence credibility of the witness is essential. That the evidence of PW1 does not pass the test under section 127(6) and (7) of the Evidence Act and hence the prosecution has failed to prove its case beyond reasonable doubt.

Ms. Rose Makupa learned State Attorney submitted that there is no dispute in the case at hand that PW1 was raped. Evidence of PW1 was corroborated with Exhibit P1 (the PF3) and PW4 the medical officer. She argued that the only issue is whether or not the appellant is the culprit She submitted that the trial court considered the evidence of the prosecution side and held that the same did not shake the prosecution case. This can be seen at page 7 of the judgment. Hence, she argued that ground 1 of the appeal is devoid of merits.

The learned State Attorney submitted further that the prosecution proved their case beyond any reasonable doubt in terms of section 3(3) of the Evidence Act. She submitted that in order to prove the offence of stator rape as charged, the prosecution was required to establish penetration of male sexual organ into female's sexual organ. The second ingredient was age of the victim to be below 18years. She relied on the case of **Charles Kayoka versus R,** (2007) decided by the Court of Appeal of Tanzania at Tabora where the court underscored that the crucial evidence from the victim is to prove that there was penetration of male organ into her sexual organ. Penetration, however slight is enough to establish rape. She argued that in the present case, the

victim testified that: "aliiningiza kidude chake kwenye sehemu yangu ya mbele ya kukojolea" (he inserted his sexual organ into my vagina). It was submitted that this proves that the appellant indeed had carnal knowledge of the victim. She argued further that the Medical Officer also supported penetration in his findings as per Exhibit P1. On the age requirement, Ms Rose argued that at page 22 of the proceedings, the victim testified that her age was 7 years. The learned State Attorney relied on the cases of **Alex Ndendia versus R (2017) and George Claud Kasanda versus R (2017)** which emphasized on the need for proof of age in statutory rape cases. She submitted that the second ground of appeal holds no water.

In respect of the third ground of appeal, the learned state attorney submitted that the evidence of PW 1 was not self-contradictory or inconsistent. She submitted that in sexual offences the evidence of the victim is taken to be the best evidence. She referred the court to the case of **Selemani Makumba versus R** (2006) TLR 379. She argued that the evidence of PW1 established both elements of the offence of statutory rape, in that PW1 was able to identify the offender. The learned State Attorney argued that the minor contradictions are

tolerable as the witness is a child of 7 years. She relied on the case of **Said Ally versus R** (2008) where the Court of Appeal held that minor contradictions which do not go to the root of the case cannot make prosecution case to flop. The counsel argued that the Appellant did not dispute the testimony that the appellant had a Motorcylce station "Kijiwe" near the victim's school. This fact was not cross examined upon and hence by virtue of the case of **Nyerere Nyambue versus R,** that failure to cross examine on it amounted to admission of the fact.

On improper identification, she submitted that in the testimony of PW3, he stated that when they went to arrest the appellant, the girl (PW1) pointed to the Appellant many times before PW 3 (the peoples militia) arrested him. Therefore, the appellant was identified before arrest.

On ground 4 namely visual identification by a child, and ground 5 that the appellant was illegally convicted basing on invalid identification which was made against the Appellant by PW1 in violation of the law, the respondent replied to them together. The Respondent's Counsel submitted that in **Waziri Amani versus R** (1980) TLR 250 the tests of identification were mentioned to include time under which the victim put accused under observation, the distance between them, source of light

and , past knowledge of the accused. She submitted that all the conditions were in the case at hand met because the offence took place during day time, and during sexual intercourse the appellant and the victim were inevitably close together. Mentioning the appellant and "kijiwe chake" (his parking station) implies that PW1 had enoughpast knowledge of the accused.

On PW1 mentioning the appellant under threat of punishment, the learned state attorney submitted that the proceedings show that PW1 had been threatened by the Appellant that if she reported the matter to any one the appellant would kill PW1 and her entire family. So PW1's guardians had to use threat to elicit information from her.

On credibility of PW1, Ms Rose Makupa argued that the principle is that every witness is entitled to credence and must be believed unless there are good reasons not to believe a witness. She supplied the case of **Goodluck Kyando versus R** (2006) TLR 363. She argued that PW1 was entitled to credence as her testimony does not contain material contradictions. She invited the court as the first appellate court to analyse the evidence and see if there is coherence in it.

In brief rejoinder, Mr. Mmuru for the Appellant, argued that in the case at hand there is no analysis of evidence but the trial court only summarized the evidence. That the trial court took PW1's evidence as the gospel truth despite so many contradictions in it as shown in his submissions in chief.

The learned advocate submitted that as the Appellant's name was not known to the victim, identification parade was necessary. Also being a child of tender age is not an excuse for a witness to vary her evidence under section 127(7) of the Evidence Act. He argued that credibility of a witness is of the utmost importance and the law must be strictly complied with.

On failure to cross examine PW1 on being familiar with the appellant, the learned counsel submitted that page 25 of the proceedings shows that PW1 was cross examined on her allegation of being familiar to the appellant.

On identification of the Appellant during arrest, the learned advocate argued that PW1 was not a free agent when she pointed to the appellant while she was inside the car.

On the threat to kill PW1 so as to silence her from telling anyone, the learned counsel submitted that the allegation of a threat was made by PW2 and not PW1 herself. Hence it is a hearsay evidence and not to be relied upon.

After hearing the submissions by the parties and revisiting the authorities relied upon as well as looking at the records of the lower court, I am now in a position to determine the present appeal. In determining the appeal I will consider the first ground of appeal separately and then I will consider the remaining related grounds of appeal together.

On the first ground of appeal, the Appellant complained that the trial court erred both in law and fact for failure to properly evaluate, analyze and consider the evidence of witnesses on record, a failure which lead the trial court to arrive into improper and erroneous decision.

The major complaint by the Appellant's counsel on this ground is that the trial court did not analyse the evidence on record. In particular there were many contradictions by prosecution witnesses and hence the trial court should have seen reasonable doubts therein. I will consider what constitutes analysis of evidence and proceed to see whether or not the

evidence on record was analysed or just summarized as argued by the appellant's counsel. In case there was no analysis, I will go on to assess the consequences of failure to analyse evidence and do what should have been done.

In the case of **John Francis Versus The Republic**, Criminal Appeal No. 178 of 2023, High Court at Dar Es Salaam, I attempted to explain what analysis of evidence entails. I clarified in extenso that:

> ***"Evidence does not speak for itself. The decision maker is supposed to evaluate the evidence in line with the applicable law and make the necessary inferences, deductions, observations and conclusions derived from the several pieces of evidence before him. That analysis being an objective exercise, should be shown in the judgment. It should not be a subjective analysis taking place in the mind of the decision maker and who then pastes the conclusion in the judgment without showing how logically he reasoned through towards that conclusion. It is the logical analysis that justifies the decision arrived at. I would like to subscribe to the words attributed to the famous American Jurist Oliver Wendell Holmes who once stated:***
>
> ***"The training of lawyers is training in logic.....the language of judicial decision is mainly the language of***

*logic. And the logical method and form flatter that longing for certainty and repose which is in every human mind."*

*I cannot stress more the fact that it is through logical analysis of the case that the parties' mind can be flattered hence bring certainty and repose. A person is entitled to know why his evidence or argument was or was not accepted by the decision maker. This can be done only where the presiding judicial officer makes an evaluation or analysis of evidence for both sides before reaching conclusion. And what does analysis essentially entail? It is all about deduction and induction. In the book "Analysis of Evidence" by Terrence Anderson and others, published in 2005 by Cambridge University Press, the learned authors have explained simply that the process of analyzing evidence is the process of drawing an inference and they put it at page 80 that:*

*"Everyone draws inferences from evidence. The dog barks, you infer that someone is approaching the house; a loud horn sounds behind me, I infer that the driver behind me is impatient or angry; there are dark clouds over head, foot prints in the sand, lipstick on the shirt, fingerprints on the steering wheels of a stolen car. All tell tales. Inferential reasoning is a basic human skill."*

In that case, I held that the trial court had not made analysis of the evidence before the court. In the present case too, I still harbour the same view that the trial court mainly summarized the evidence and stated in general phrases that the court had taken into account considered the evidence of defence and that the same was a general denial. That was not an analysis of evidence. Analysis of evidence entails inferrences being drawn from the pieces and bits of the evidence on record.

Where the trial court does not make proper analysis of evidence, the position of the law is clear that the first appellate court should step into its shoes and do the analysis. In ***Masanja Maliasanga Masunga and 2 others Versus The Republic***, Crim. Appeal No.328 of 2021 decided by the Court of Appeal at Dodoma, the Court of Appeal of Tanzania pointed out that where the trial court fails to analyse evidence, it is not a fatal irregularity. Instead, the appellate court can step in the shoes of the Trial court and analyse the evidence and come to its own conclusions.

In my analysis I have considered the arguments by the Appellant that he was identified by the generic name of Boda boda and that PW1 was not a free agent at the time when she was pointing the Appellant to PW3. Also that the crime scene was an open space hence not possible to commit the

offence. I have also considered the allegations of failure to conduct identification parade. I have carefully considered the argument of PW1 being not a free agent and identifying the Appellant while under control of her aunty and PW3 and inside the car. I am of the view that despite this factor, the said PW1 was making a correct identification. It is on record that upon arrival at the motorcycles parking station at Nzasa Shuleni, PW1, her aunty Edith/ Theresia and PW3 the peoples militia member, they found other Motorbike riders who had already parked there before the appellant. But PW 1 did not just single out any motorcycle rider, they waited until the Appellant came and parked. It is when PW1 pointed at him. In my view, if PW1 was under pressure or threat of punishment from her aunty or PW 3, reasonably she would have wished to get over it as soon as possible by haphazardly naming and pointing at anyone of the other motorcycle riders present at the station. Why would PW1, wait supposedly in agony and tension without knowing after how long would the appellant show up, and if he would show up at all. By waiting patiently until the appellant arrived at Kijiwe cha Bodaboda at the school, I find that the victim child was not under pressure or fear of punishment by her aunty or PW3. She was a free agent. The appellant has not alleged any hostility with the guardians of

PW1 or PW1 herself so as to suggest the possibility of a bad motive on their part to set up PW1 against the Appellant by coaching or pressurizing PW1 to name the appellant. In fact it has been testified that the Appellant and the family of PW1 did not know each other. If PW1 had just randomly pointed at any of the other riders, PW3 and PW1's aunty could not verify the truth or otherwise because they did not know the true culprit themselves. Why did PW1 have to wait until the Appellant arrived? And it should be noted that the Appellant did not deny to be a motor cycle rider having his passengers waiting area at Nzasa Shuleni that is within the compounds of the school where PW1 attended. The appellant was arrested in that area too. This fact increases the likelihood of interactions between the appellant and PW1 hence providing opportunity for appellant to get used to the PW1 and rape her. I therefore rule out the possibilities of PW1 acting under threat or fear of pain. The fact that PW1 pointed out the appellant and picked him out of several other motorcycle rides in plain daylight removes the need for identification parade. Also he was not identified generally as bodaboda. He was picked out specifically.

The Appellant argued that the school compound is an open space hence it was not possible to rape the victim there. But to this evidence there is a contradictory evidence from the prosecution namely the Police Investigator Pw 5 who visited the crime scene and is on record describing the area as one with bushes and borders a forest known as Kazimzumbwi forest. The appellant has argued that PW1 contradicted herself when she said that the appellant took her to the bushes for the rape incident while in another place she testified that the Appellant used to be waiting for her in the bushes where she would go and be raped. I don't find any contradiction in those statements. It must be borne in mind that the prosecution case is not referring to a single incident of rape. It refers to a series of repeated pattern of rape incidents happening on diverse dates from 2021 up to January 2022. It is not necessary that all the repeated rape incidents be identical. The child witness was describing different rape incidents happening at different times but at the same place involving the same culprit and same victim. The variations in her testimonies reflect the variations in modus operandi used by the appellant in different occasions, in my view. I am also of the view that the variations are not material because they do not negate the rape incidents. They all point towards one

common end result. That is the appellant finally raped the PW1 in the bushes near the school compounds. How the appellant had access to, and privacy with, PW1 is immaterial. I hold that even after making an analysis of the defence evidence, the ultimate conclusion is the same like the one reached by the trial court, that the defence evidence was not enough to shake the strong prosecution evidence and hence the prosecution evidence proved the case beyond any reasonable doubt. There was also the argument that adverse inference be drawn against the Prosecution for not calling the aunty of PW 1 named Edith or Theresia to who the name of the appellant was named for the first time. I do not accept this argument. Whatever the said Edith could have testified was testified by PW1, PW2 and PW 3. Edith is shown to have inspected PW1's private parts and so did PW2 and the Doctor PW 4. Edith is mentioned to have questioned PW1 and so did PW2 the grandmother and PW PW5 the Police Investigator. Edith was said to have taken part in the arrest of the appellant at Nzasa School, and so did PW 3, the member of peoples militia. The issue of identification of the appellant was taken care of by the PW1 herself. She mentioned the Appellant to Edith, she pointed out the Appellant to Edith and PW3 during

arrest, she identified him in court. PW1 is credible and her evidence is coherent.

In the second ground of appeal, the appellant is complaining that the trial court erred in law to convict and sentence the appellant based on the evidence of PW1, which the prosecution failed to prove the case beyond reasonable doubt, a standard of proof which is required in criminal cases. I would like to combine this with the third, fourth and fifth grounds of appeal. The third ground of appeal was that the trial court erred in law to convict and sentence the appellant basing on the evidence of PW1, which is self contradictory, improbable and implausible, not credible and inconsistent with human nature. The fourth ground of appeal was that the appellant was incorrectly convicted basing on visual identification evidence of a child of tender age whose evidence did not pass the test of truthfulness as required by the law. The fifth ground of appeal was that the appellant was illegally convicted basing on invalid identification which was made against the Appellant by PW1 in violation of the law. All these grounds have a common theme of failure by the prosecution side to prove the case beyond reasonable doubts. Different reasons are given under different grounds of appeal by the Appellant for that alleged failure to

prove the case beyond reasonable doubt such as that of weakness of visual identification, identifying the appellant under threat of punishment from her guardians, PW1 the key witness making contradictory testimonies as well as contradicting other witnesses. Also there is an argument that as a child, her evidence was illegally received.

I have considered these grounds and the arguments made by both sides to the appeal passionately. It is trite that the charge facing the appellant in the trial court was one of statutory rape. In the cases of ***Kayoka Charles versus R,*** (2007) by the Court of Appeal as well as the case of ***Isaya Renatus versus R,*** Crim. Appeal No. 542/2015, the elements of statutory rape namely penile penetration of the victim's vagina by the penis of the accused and the victim being under 18 years old were stipulated. In the case at hand, there was no dispute that PW1 was a 7 years old pupil at Nzasa Primary School. Evidence coming from PW1 herself, PW 2, that is her grandmother and Guardian and PW 4 that is the medical practitioner, all pointed to the victim being 7 years old girl child. Penetration was proved by PW2 who inspected the private parts of PW1 and found bruises, swollen labia majora and minora and enlarged vaginal opening incompatible with the age of PW1. Exhibit P1 that is the PF 3 filled by the Doctor (PW 4) also

proved penetration of PW1's vagina by a blunt object like a penis. Pw 1 also testified on how the appellant used to penetrate her. The only issue was whether it was the Appellant who had the carnal knowledge of the victim? That evidence was supplied by PW1 herself. The best evidence in sexual offences comes from the victim. There are minor discrepancies in her testimony but I find that they do not go to the root of the case. Being a 7 years old child testifying in court, such discrepancies are expected. As she was the victim of the offence, the possibility wavering slightly while giving testimony is to be expected. But taken together, the evidence of PW1 shows coherence and consistency in linking the appellant as the culprit. It is on record that PW1 and the Appellant had opportunity to interact daily at school where the appellant used to park his motorcycle waiting for customers. Evidence shows that immediately upon being questioned, PW1 mentioned the Appellant to her Aunty Theresia or Edith. During the arrest of the Appellant, it is shown that while PW1 was in the car with PW3 and her aunty Edith, they reached the motorcycles waiting kijiweni area at PW1's school and found other motorcycle riders there but not the appellant. PW1 did not point towards any other person among the other riders present but waited until when the appellant arrived and that is

when she pointed towards him "many times" according to PW3. PW3's evidence at page 31 of the proceedings describes the way the appellant was arrested in the following words:

> ***" We arrived at Nzasa Primary school and parked the car. We saw many motorcyclists there, I asked the girl about the alleged suspect, the girl told me on that time the suspect was not there, but thereafter one motorcyclist arrived and parked his motorcycle, the girl pointed to the said motorcyclist.".***

In my view, there was no improper identification. PW1 was able to single out and pinpoint the appellant as her sexual assailant in a group of many assorted motorcyclists. In my the way the identification happened was akin to an identification parade.

At page 23 of the proceedings, PW1 had this to say about how the appellant was arrested:

> ***"I named the accused person to auntie Edith. Accused was arrested by auntie Edith and "Afande". I pointed accused person to them while I was at my school. I saw accused person behind one class. I told auntie Edith and Afande 'yule pale kaka aliyenibaka" auntie Edith went near accused person she talked with him, then Afande***

***arrested accused person. I was inside the car when I pointed accused person to auntie Edith".***

There is coherence in the evidence of the prosecution between PW1 and PW3 on how the appellant was identified.

On whether it was the appellant who had raped the PW1, again there is unwavering testimony by PW1 herself who stated that:

***"I study at Nzasa Primary School in standard two. I used to see the accused person kule Nzasa kwenye kijiwe kwake karibu na shuleni kwetu. I remember accused person raped me. I remember the first day I was at school outside the class playing, the accused called me but I told him "sitaki". I was playing as I said. He took me to the bush. he undressed my clothes. He also undressed his clothes. He took out kidudu chake. He inserted kidudu chake kwenye sehemu yangu ya mbele ya kukojolea. He then inserted kwa nyuma kwenye sehemu yangu ya kunyea. When he finished I left that place and I go back to my class. Nilikuwa nikitembea upande upande".***

The above narration undoubtedly disclosed the element of penile penetration of the vagina and anus of the victim child. And the victim child named no other person but the Appellant as the responsible person. I have considered the argument by the Appellant's counsel that PW1 initiallly lied to her grandmother (PW2) when she was probed as to why she was not

walking wide-legged saying that she had rashes in her private parts. It was after she was caned by PW2 that she eventually spilled the truth to auntie Edith.

At page 23 of the proceedings PW1 narrated that:

***"my grandmother phoned auntie Teddy I went back home. auntie Tedy was the first person to inspect me mbeleni kwangu sehemu ya kukojolea. Auntie Tedy told my grandmother huyu mbnona ana kinyesi. Auntie Tedy phoned my grandmother. Auntie Tedy inspected me at home. My grandmother was at work. She later came back home. My grandmother told me to take a bath. My grandmother inspected me mbele sehemu yangu ya kukojoleana akaona kitobo. My grandmother told me niseme ukweli. My grandmother took a stick akanichapa sana fimbo. I did not tell my grandmother the truth, but later I told my auntie Edith the truth. Auntie Edith mkali sana. I told Auntie Edith accused person raped me. "***

The appellant's counsel has argued that the said victim child named the appellant due to the fear of punishment. That she was coerced and was acting under fear of the punishment. I have deeply thought of this argument but it has not convinced me. There are several reasons. Firstly, it

is clear from the testimony of PW 1 above that despite being punished she did not tell anything to her grandmother who is the only person that caned her. She subsequently told her auntie Edith the truth by mentioning the appellant's name to auntie Edith. There is no evidence on record that Auntie Edith had also caned or any hour punished PW1. Therefore, when PW1 was before her auntie, there was no caning as she was telling the truth. Secondly, the caning of PW1 by her grandmother and who is her guardian is a normal parental chastisement over an indecent child in a typical African society settings. Sexual intercourse by a child is one of grave moral misconducts which to most African parents and guardians attracts caning as adomestic punishment. And the reason behind the caning was shown that it was intended to elicit the truth. "***My grandmother told me niseme ukweli. My grandmother took a stick akanichapa sana fimbo.***" The beating was therefore not done for the purpose of coercing PW1 to mention the Appellant as the culprit because by that time PW2 and auntie Edith did not even know yet who the culprit was. The appellant and PW1's family did not even know each other and had no grudges towards the appellant as to have any ill motive towards him. Therefore, I am of the view that the Prosecution had proved its case beyond any reasonable

doubt in terms of section 3(2)(a) and section 110(1)(2) of the Evidence Act. Thirdly, when the victim child identified and pointed the appellant to PW3 the peoples militia at school, there is no evidence that she was being threatened. Actually the grandmother (PW2 ) who had earlier on used the stick at home, was not in the car at school when the Appellant was being arrested. In my view, even the conditions stated in **the case of Waziri Amani** were not applicable in the case at hand. The case is about visual identification in unfavourable conditions. In the case at hand the identification complained of by the Appellant is that of the day of arrest of the Appellant. The identification was done in broad day light when the arrest was done at the Appellant's parking station at Nzasa Shuleni.

At this juncture I need to state once again that indeed there are minor variations in the testimony of PW1. Pw1 in cross examination said that she doesn't know the name of the accused. But in my view that didn't mean that she didn't know who raped her. One can be raped by a person whose name she doesn't know. Pw1 knew the culprit otherwise than by name. I am of the view that the discrepancy did not cause prosecution case to flop. It is said that children are not miniature adults. Their physical, mental and psychological abilities are still developing. PW1 was

not only a minor of 7years old, but also the victim herself. In **the Handboook on Justice for victims**, published by the UN Office for Drugs Control and Crime Prevention (UNODCCP) in New York, 1999 at page 6 it is stated that psychological studies on how victims react to crimes perpetrated against them reveal that a victim passes through 4 phases. I quote:

> ***"Crime is usually experienced as more serious than an accident or similar misfortune. It is difficult to come to terms with the fact that loss and injury have been caused by the deliberate act of another human being. At the same time, it is evident from research and experience that it is impossible to predict how an individual will respond to a particular crime. The initial reaction may include shock, fear, anger, helplessness, disbelief and guilt. Secondly is a period of disorganization, which may manifest itself in psychological effects such as distressing thoughts about the event, nightmares, depression, guilt, fear and a loss of confidence and esteem. Life can seem to slow down and lose its meaning. Previously held beliefs and faiths may no longer provide comfort. Thirdly is a period of reconstruction and acceptance, which leads to normalization or adjustment. The early stages of coming to terms with crime are often characterized by***

***retrospective thinking, where victims long for everything to be as it was before and to turn the clock back. Fourthly Post-traumatic stress disorder. For individuals with PTSD, the traumatic event remains, sometimes for decades or a lifetime, a dominating psychological experience that retains its power to provoke panic, terror, dread, grief or despair, as manifested in daytime fantasies, traumatic nightmares or psychotic re-enactments known as PTSD flashbacks."***

Therefore, it is my settled view that it is not uncommon for a child witness and who is also the victim of the crime to sway here and there in the course of giving evidence especially during her cross examination. Throughout her testimony, PW1 never named or referred to any other person as the culprit apart from the Appellant. She identified the appellant in the presence of other riders. She identified the Appellant in court during the trial. PW1, was a victim and a child of tender age of 7 years who was testifying in court about traumatic experiences that she endured in that childhood. I find her evidence coherent and consistent.

At any rate, the legal requirement is that the evidence should generally be coherent. It was held in the cases of ***Vuyo Jack versus DPP*** Criminal Appeal No.334/2016 and ***Marando Slaa Hofu and 3 others versus R***, Criminal Appeal No.246/2011 that contradictions between or among witnesses are not always fatal to the prosecution's case. Also, in the cases of ***Dickson Elia Nsamba versus R***, Crim Appeal No. 92/2007 and ***Goodluck Kyando versus R*** (2006) TLR 363the principle is that every

witness is entitled to credence unless there are good reasons for not believing the witness and that minor contradictions among witnesses are immaterial.

In the fourth ground of appeal, the appellant argued that the appellant was incorrectly convicted basing on visual identification evidence of a child of tender age whose evidence did not pass the test of truthfulness as required by the law.

I have decided to reproduce the said section 127(6) of the Evidence Act, Cap 6 of the laws of Tanzania (R.E 2019) which provides as follows:

> ***(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.***

It is clear that the above provision has relaxed the rules of procedure on admissibility and weight of the evidence of victims of sexual offences. Recognizing the peculiar situation as regards child witnesses, the Law of

Evidence Act is a bit flexible for children witnesses under section 127(2). A child witness may or may not give evidence under an oath or affirmation. Also, the provision does not any longer require the child witness to be examined by the court as to whether or not she understands the nature of an oath or the duty of telling the truth. Where a child witness testifies without an oath or affirmation, the only requirement is for his/her to firstly promise to tell the court the truth and not to tell any lies. Further section 126 does not require corroboration of the evidence of the victim of a sexual offence including child witness. The requirement on competency and admissibility of the evidence of a child of tender age, which is being received without an oath or affirmation, is for the child witness to promise two things to the court. The first is to promise that she will tell the court the truth. The second promise is that she shall not tell the court any lies. That is all that is required under the law.

The pertinent question is whether or not the legal requirement for receiving evidence of a child of tender age was complied with before PW 1 testified in the trial court? Looking at the proceedings of the trial Court, to be precise at pages 22 thereof, it is on record that before the child witness-PW 1 testified in the trial court, she promised: **"I promise to tell the**

**truth to the court and not to tell any lies".** From there she started to testify. In my view the legal requirements for receiving her evidence had been complied with. Prior to making that promise, the trial court asked her some questions to test her understanding. For the reasons I have given while answering ground 2 and 3 above, I find the evidence of PW1 reliable and on its own merits capable of establishing the case against the appellant. Although in law that evidence could have been enough, it gets more support from corroboration by evidence PW2, PW3, PW4, PW5 and the exhibit P1. The corroboration, although not a legal requirement anymore, helped to add credibility to the evidence of PW1. The trial court was justified to believe PW1. If the offence was committed in the secrecy of the bushes, who else might witness it better than PW1 herself?

In final analysis, the appeal fails and is hereby dismissed. I sustain the conviction of the District Court but not the sentence. Sentence is a matter of law. The trial Court had the following to say about sentence:

> ***"I have considered accused's mitigation factors that he is a first offender and a family man, but taking note of moral deterioration in our society, to deter others, I hereby sentence the accused person to 30 years imprisonment. It is so ordered."***

In my view, there appears to be an anomaly in the sentence imposed by the trial court. The Penal Code provides that:

> ***"131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.***
>
> ***(2) Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall- (a) if a first offender, be sentenced to corporal punishment only; (b) if a second time offender, be sentence to imprisonment for a term of twelve months with corporal punishment;***
>
> ***(c) if a third time and recidivist offender, he shall be sentenced to five years with corporal punishment.***
>
> ***(3) Subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment."***

In the case at hand, the offence fell falls under section 131(3) of the Penal Code, Cap 16 of the Laws of Tanzania. The victim girl was aged 7 years old and hence under the age of 10 years. The mandatory sentence was imprisonment for life, not the 30 years imprisonment imposed.

Further, the sentence imposed by the trial Court also offended section 348A of the Criminal Procedure Act, Cap 20 of the Laws of Tanzania which provides:

> ***"348A.-(1) Notwithstanding the provisions of section 348 of this Act, when a court convicts, an accused person of a sexual offence, it shall in addition to any penalty which it imposes make an order requiring the convict to pay such effective compensation as the court may determine to be commensurate to possible damages obtainable by a civil suit by the victim of the sexual offence for injuries sustained by the victim in the course of the offence being perpetrated against him or her."***

The trial Court did not impose a compensation order in favour of the victim of the sexual offence while the law expressly requires that compensation be paid. Whether the convict will be able to pay the compensation or not, is another issue but the punishment should have been imposed imperatively. Thinking of ability to pay the compensation

ordered would make no better argument than thinking of ability to serve a 30 years or life imprisonment. The victim deserved her right being declared by the court. It brings sense of satisfaction upon the victim seeing that justice has been meted out in accordance with the law against the culprit. In the case at hand, the appeal was against both conviction and sentence. The issue of sentence is also on my table therefore.

The objective of an ideal criminal justice system is to address **all aspects** of the impacts of the crime to the victim namely social, economic, financial and psychological. The Victim is interested with both **the process** and **the end result** of the justice system. The criminal justice system affords victims of crimes procedural rights and service rights. Procedural rights involve affording victims specific rights that could enable victims to effectively participate in and contribute to the conduct of their cases like investigation, prosecution, sentencing and the determination of quantum of compensation. When PW1 testified in the trial court with respect to the present case as it can be seen at page 20 of the proceedings, she testified in camera pursuant to Section 186 of the Criminal Procedure Act. By being called as a witness, she was given her procedural right to take part in the criminal justice process. By testifying in camera she was also being

afforded her procedural right as a child witness. By her name being concealed in the charge and judgment she was being afforded her procedural right to protect her dignity in the course of the proceedings.

Like the law has provided victims with procedural rights, the law also provides the victims with service rights. The service rights are aimed at ameliorating the impact of the criminal the process on the victim by addressing the victims' needs for physical and psychological support and post-trauma assistance. Service rights include the restorative remedies like restitution, compensation and Assistance. Section 348 A of the Criminal Procedure Act, Cap 20 of the Laws of Tanzania is one such attempt by laws which deliberately introduced the compulsory compensation right to victims of sexual crimes.

In the case at hand, the trial Court during sentencing phase did not comply with the mandatory legal requirements. As the appellate court where the anomaly in respect of sentencing has become apparent, I am mandated to enter into the shoes of the trial Court and rectify the anomaly by varying the sentence accordingly It must be noted that the life term imprisonment is the mandatory sentence in sexual offences where the victim is under 10 years old. Also, the compensation order is a mandatory punishment for

sexual offences. It is not something over which a court has discretion whether to impose or not. The sentence in this case was plainly illegal. I cannot allow an illegality which has come to the attention of the court persist.

Where a sentence imposed by the trial court is plainly illegal, what should the appellate court do? In **Fortunatus Frugence vs R,** Criminal Appeal No. 120/2007 it was held that:

> ***"An appellate Court should not alter a sentence imposed by a trial Court on the mere ground that if it were sitting as a trial Court it would have imposed a different sentence. This position emanates from the well-settled principle of law that sentencing is a function best left in the discretion of the trial Court."***

On the other hand I am guided by the rule which was stated by the Court of Appeal in **Katinda Simbila @ Ng'waninana Vs R,** Criminal Appeal No. 15 of 2008, that: **"A Court of Appeal will not ordinarily interfere with the discretion exercised by a trial judge in a matter of sentence unless it is evident that he has acted upon some wrong principle or overlooked some material factor".**

I find that the trial Magistrate overlooked some material factor namely that the law has imposed mandatory sentences of life term and compensation in respect of sexual offences whose victims are children under 10 years, and that is what the facts in the trial court glaringly called for. I have to interfere with the sentence imposed by the trial court.

I do hereby set aside the sentence imposed by the trial Court. Stepping in the shoes of the trial Court, I do hereby impose upon the appellant the mandatory sentence of life imprisonment under section 131(3) of the Penal Code, Cap 16 of the Laws of Tanzania. Also, I order the Appellant to pay PW1 (the victim) Tshs.20,000,000/= (Twenty million shillings only) as compensation, which amount is payable immediately from the date of delivery of this Judgment. Save for the variation in sentence, the appeal is dismissed in its entirety. Right of appeal explained.

It is so ordered.


**A.H.Gonzi**
**JUDGE**
**22/11/2023**

Judgment is delivered in court today the 22nd day of November 2023 in the presence of the appellant in person and Ms. Rose Makupa learned State Attorney for the Respondent.


**A. H. Gonzi**

**JUDGE**

**22/11/2023**