IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 411 OF 2024
(Arising from the Judgement of the District Court of Mkuranga at Mkuranga in Criminal Case No. 308 of 2023 (Hon. H.I Mwailolo, SRM)

LIVINGSTONE MWESIGWA KYARWENDA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last order: 17th May 2024
Date of Judgement: 29th May 2024

MTEMBWA, J.:

This Appeal stems from the decision of the District Court of Mkuranga in Criminal Case No. 308 of 2023 where the Respondent was arraigned for unnatural offence contrary to ***section 154 (1) (a) and (2) of the Penal Code, Cap 16, R.E 2022.*** It was alleged that, on 10th and 11th July 2023 at St. Mathew's Pre & Primary School at Mwandege area within Mkuranga District in Coast Region, the Respondent did have carnal knowledge of a boy aged nine (9) years (name withheld) against the order of nature. For purposes of this Appeal, I shall refer the victimized boy as "PW1" and or where necessary "the Victim".

The Respondent pleaded not guilty to the charge. Consequently, prosecution fronted five (5) witnesses and tendered two (2) exhibits. The Respondent defended himself and brought three (3) other witnesses. In order to prove his innocence, the Respondent tendered in addition, three (3) exhibits. Having evaluated the evidence adduced during hearing, the learned trial Magistrate was satisfied that, the offence to which the Respondent was charged with was proved beyond reasonable doubts. As such, she proceeded to convict and sentence the Respondent to life imprisonment. Dissatisfied, the Respondent has laid before this Court the following grounds of appeal and I quote in verbatim;

1. *That the Trial Magistrate erred in law and fact by holding that the prosecution side proved their case beyond reasonable doubt.*
2. *That the Trial Magistrate has failed to properly evaluate the evidence presented before the trial court.*
3. *That the Trial Magistrate erred in law and fact in holding Appellant's conviction based on doubtful evidence of PW-1 which was not corroborated by the teachers purported to have given him permission to go for a short call.*
4. *That the Trial Magistrate erred in law and fact by ignoring the fact that the Appellant was never present at school during the time of commission of purported offence.*
5. *That the learned trial Magistrate grossly erred in law in holding the Appellant's conviction relying on the evidence of PW-1 which was wrongly moved under Section 127(2) of the Evidence Act, Cap 6 as amended by Act No. 4 of 2016.*

When the matter was placed before me for orders on **9th April 2024**, the Appellant was represented by **Mr. Sosten Mbedule** assisted by **Mr. Helmes Mutatina** both learned counsels while the Republic was represented by **Ms. Gladness Mchami**, the learned state attorney. By consent parties agreed to argue this Appeal by way of written submissions. Having gone through the records, I am satisfied that parties adhered to the agreed schedule of which I personally recommend.

Launching up the missiles, Mr. Mbedule opted to start by arguing on the fifth ground of appeal. On this, he complained that, the learned trial Magistrate grossly erred in law by convicting the Appellant basing on the testimonies of PW1 which was wrongly moved under ***Section 127(2) of the Evidence Act, Cap 6 R.E 2019*** as amended by ***Act No. 4 of 2016***. He added further that, the law requires the child to promise to tell the truth to the Court and not to tell lies before he or she is allowed to testify. He contended that, according to the records, *voire dire test* was conducted but very unfortunate PW1 only promised to tell the truth and never promised not to tell lie. Basing of the foregoing, Mr. Mbedule resolved that PW1's promise did not meet the required standards under the cited law.

To fortify, Mr. Mbedule cited the case of ***Mohamed Ramadhan @ Kolahili Vs. Republic, Criminal Appeal No. 396 of 2021*** where the

Court quoted the case of ***Yusuph Molo Vs. Republic, Criminal Appeal No. 343 of 2017*** where it was observed that, a promise to tell the truth and not lies should be reflected from the records. Stretching further, the learned counsel observed that, the evidence of PW5 and Exhibit P2 (PF3) cannot help the day and in the same stance, the evidence of PW2, PW3 and PW4 is incapable of incriminating the Appellant of the offence charged.

Mr. Mbedule also compressed the first, second and third grounds of appeal and argued them altogether. Giving to them the thoughtful attention, the learned counsel submitted that, ***sections 3 (2) (a), 110 (1) and (2) of the Evidence Act (supra)*** require that, a criminal case be proved beyond reasonable doubt and that the burden of prove is always on prosecution. In his evaluation, prosecution failed to discharge such duty. He questioned how could PW1 walks properly (not limping) after a fully grown man penetrated his anus. Similarly, the learned counsel doubted the accuracy of the information on the commission the offence revealed to PW3 by PW1. He contended that, PW1 was beaten by his mother (PW3) and in such circumstances, he could name any one in his mind.

Mr. Mbedule also added that, the learned trial Magistrate in her Judgement never considered the credibility of PW1 and truthfulness of his

testimony. He submitted in addition that, failure to assess the credibility of PW1 and making a finding on it, was a serious omission on the part of the trial Court. He cited the case of ***Method Leodiga Komba @Todi & Another Vs. Republic, Criminal Appeal No. 150 of 2021, (unreported)*** where the Court observed, and I quote;

> *In the instant appeal, the trial court did not, in its judgment, expressly state that it was in any way moved or believed PW1 as a witness of truth or credible. As would be discerned from the above quoted part of the judgment, it simply examined her evidence and held that it was corroborated by the testimonies of PW2 and PW6. As a trial court, trite legal proposition is that determination of credibility by demeanour is within its exclusive domain (See Yasin Ramadhani Chang'a vs. Republic [1999] T.L.R. 489). The issue of her credibility first featured in the High Court judgment. It is common knowledge that, even an appellate court may assess a witness's credibility by looking at the evidence on record. In Shabani Daud vs. Republic, Criminal Appeal No. 28 of 2000 (unreported)."*

The learned counsel further submitted that, according to PW1, he was sodomized on the 10th and 11th July 2023 by the Appellant until when he ejaculated into the anus. However, that, prosecution never laid proof of male semen found in the victim's anus given that he was medically examined on 12th July 2023, two days after the alleged incident. In addition, the learned counsel faulted the trial Magistrate for not considering the fact that at 06:00 am when the incident is said to have

been occurred the appellant had not come to school on both days. He pointed out that, in view of Exhibit D1, the Appellant had reached to school at 07:24 am on 10th July 2023 and on 11th July 2023 has an emergency and thus arrived at 10:00 am in terms of Exhibit D3.

The learned counsel continued to question the credibility of PW1 that, according to DW2, she had no subjects on 10th July 2023 at around 06:00 am to 07:00 am and thus she could not have permitted PW1 to attend a call of nature. Similarly, that, DW2 could not have permitted the victim as she had no subjects to teach on 11th July 2023 around 06:00 am to 07:00 am. He referred this Court to pages 29 and 30 of the typed script of the proceedings. Repeatedly, the learned counsel insisted to this Court to revisit the case of ***Method Leodiga Komba @Todi & Another Vs. Republic (supra)***.

On the other hands, Mr. Mbedule noted that, the arrest of two offenders, that is, the Appellant and teacher Machali raised a doubt. That, there is no plausible reasons advanced as to why prosecution proceeded against the Appellant only. That, it was not easily established why PW1 named two offenders. Vigorously, the learned counsel questioned the whereabout of teacher Machali who seemed to have jumped the police bail and disappeared to unknown. In his recollection, the matter was framed against the Appellant due to the fact that the actual offender was

not traceable.

Mr. Mbedule further pointed out the contradictions as to the date of arrest between PW1, PW2 and PW3. On that he observed that, according to PW2, he was called by police on 10th July 2023 to escort a woman to St. Mathew's Pre & Primary School to arrest suspects. That upon arrival and having been assisted by the head master to call the offenders, he arrested both of them. But then, according to PW1 and PW2, the arrest was done on 13th July 2023. According to Mr. Mbedule, the Appellant could not have been committed the offence on 11th July 2023 if at all was arrested on 10th July 2023 and if it was a mistake, then prosecution was under duty to clear it up. He observed that the contradictions should be resolved in favour of the Appellant.

Mr. Mbedule further faulted the learned trial Magistrate's act of expunging Exhibit D3 as tendered by DW4 and that the act resulted into miscarriage of justice. He added further that, before tendering of Exhibit D3, an affidavit of authenticity was filed in Court and served to prosecution. He referred this Court to page 45 of the typed proceedings where the said Affidavit was admitted without objection. On the foregoing, Mr. Mbedule noted that, the act of expunging the said exhibit at the time of writing the Judgement was not proper as parties were not afforded an opportunity to be heard.

Mr. Mbedule also faulted the police's failure to interrogate teachers responsible for morning subjects on 10th and 11th July 2023. Similarly, he faulted prosecution evidence for failure to call them as witnesses during hearing to support the assertion that they had permitted the victim to attend a call of nature and how he was walking thereafter. These submissions were preferred in view of the facts that, the Appellant had canal knowledge of the victim against the order of nature until when he ejaculated. He referred this Court to pages 16 to 17 of the typed proceedings. He cited the case *of* ***Azizi Abdallah Vs. Republic (1991) TLR 71***.

Mr. Mbedule insisted that, Madam Regina and Madam Leah (teachers) were necessary witnesses because they are the ones who said to have permitted the victim to attend the call of nature on both days. That, failure to call them was a serious misdirection on the part of prosecution. He lastly implored this Court to allow the first, second and third grounds of appeal.

On the fourth ground of appeal Mr. Mbedule submitted that, the trial Magistrate erred in law and fact by ignoring the fact that the Appellant was not present at school during the time of commission of purported offence. He added further that, according to PW4, the offence was committed in the morning hours at 06:00 am for both days. However, the

Appellant presented evidence that in both days, he was not near the area of scene at that material time. The learned counsel relied on Exhibits D1 and D3 and the testimony of DW4. Stretching further, Mr. Mbedule submitted that, the Appellant's defense of alibi was not considered by the trial Court.

The learned counsel insisted that, having admitted the electronic evidence (Exhibit D3), the trial Court was bound to assign the weight it deserved. He added that, once the Court admits the document without objection from prosecution, such evidence would in no way be expunged. He reiterated that, expunging such evidence during the composition of the Judgment without affording to the parties a right to be heard amounted to an abused of Court process and a gloss miscarriage of justice. Basing on the foregoing, the learned counsel beseeched this Court to step into the shoes of the trial Court and re-evaluate the Appellant's defense. He cited the case of ***Felix Kichele and Another Vs. Republic, Criminal Appeal No.159 of 2005 (unreported)*** quoted with approval in the case of ***Nurdin Iddi Ndemule Vs. Republic, Criminal Appeal No. 410 of 2018***.

The learned counsel conceded to the requirement of the law that the defense of alibi must be preceded by a notice in view of ***section 194 (1) and (5) of the Criminal Procedure Act (supra)***. That, it was

impossible to adhere to the requirement owing to the fact that the charge did not indicate the exact time when the offense was committed. He added further that, the Appellant came to know through the testimony of PW4. He concluded that, the trial Magistrate was fatally wrong not to consider the Appellant's defense. He cited the case of ***Charles Samson Vs. Republic (1990) TLR 39***.

Finally, he implored this Court to allow the appeal, quash the conviction and set aside the sentence meted therefrom.

In rebuttal, Ms. Mchami was on duty. She supported the conviction and the sentence meted against the Appellant. As to the style of opposing the appeal, the learned state attorney opted to start with the third, fourth and fifth grounds of appeal before reverting to the second and first grounds of appeal.

In response to the third ground of appeal, the learned state attorney submitted that, in view of ***section 127 (6) of the Evidence Act (supra)*** as amended, the Court may convict on sexual offences basing on the evidence of the victim without corroboration provided that it is satisfied that the victim is telling nothing but the truth. The learned state attorney noted further that, PW1 managed to testify as to how he was penetrated by the Appellant against the order of nature on 10th and 11th July 2023 at St Mathew's Pre & Primary School but he did not exactly

mention the time. Equipped with ***section 143 of the Evidence Act (supra),*** Ms. Mchami contended that, the allegations on the failure to call Madam Leah and Madam are unfounded.

The learned state attorney noted in addition that, PW1 was credible, reliable and trustful warranting the trial Court to believe his story. That, he was consistent and coherent on how the appellant had carnal knowledge of him against the order of nature. She implored this Court to dismiss the ground of appeal.

Replying to the fourth ground of appeal, the learned state attorney submitted that, the Appellant did not issue a notice in compliance with ***section 194 (1) and (5) of the Criminal Procedure Act (supra)*** and thus it was proper for the trial Court to accord no weight to the defense of alibi. She resisted the argument that the charge had not indicated the time to which the offense was committed because it has never been a requirement under the law. She beseeched this Court find this ground of appeal worthless.

In reply to the fifth ground of appeal Ms. Mchami observed that, PW1 promised to tell the truth as required by the law. She cited the case of ***Shomari Mohamed Mkwama Vs. Republic, Criminal Appeal 606 of 2021*** where the Court observed that;

According to the above quoted text, the witness promised to tell

nothing else except the truth. That, to us means, she promised to tell the truth only to the exclusion of any lies. Thus, section 127 (2) of the Evidence Act was not offended in any way. In the circumstances, the first ground of appeal has no merit and we dismiss.

The learned state attorney further referred this Court to page 5 of the typed proceedings where PW1 promised to tell the truth in view of the holding in the case of ***Godfrey Wilson Vs Republic, Criminal Appeal No. 168 of 2018.*** Ms. Mchami reminded this Court of ***section 127(7) of the Evidence Act (supra)*** as amended by ***the Legal Sector Laws (Miscellaneous Amendments) Act, 2023*** which provides that, failure by a child of tender age to meet the provisions of subsection (2) shall not render the evidence of such child inadmissible. In view of the foregoing, she implored this Court to find the ground of appeal wanting of merit and proceed to dismiss it.

In response to the second ground of appeal, the learned state attorney referred this Court to pages 2 to 12 of the Jugdement where the trial Magistrate evaluated prosecution and defense evidence and thereafter proceeded to frame issues before arriving at the conclusion. That, even if that was not done, this Court has mandate to step into the shoes and reevaluate the evidence adduced during hearing.

In reply to the first ground of appeal, Ms. Mchami argued that the

prosecution managed to prove the charge beyond reasonable doubts. She contended further that, the evidence adduced by PW1 proved the assertion that the Appellant penetrated him against the order of nature. That, such testimony was corroborated by the testimony of PW5 who examined him and revealed that there was penetration of a blunt object and bruises in PW1's anus. She cited the case of ***Selemani Makumba vs. Republic, Criminal Appeal 94 of 1999, [2006] TZCA 96 (21 August 2006)*** where it was observed that, in sexual offences, true evidence comes from the victim.

In conclusion, the learned state attorney beseeched this Court to dismiss the grounds of appeal because prosecution managed to prove the offence against the Appellant in view of ***section 3 (2) (a) of the Evidence Act (Supra).***

In rejoinder, Mr. Mbedule submitted that, the Respondent never commented anything in respect to the position of the law stated in the case of ***Method Leodiga Komba @Todi & Another Vs. Republic (supra*)**. Basing on that, the learned counsel noted that such silence is an admission that the trial Magistrate never stated anywhere that he believed on PW1's testimonies. To add, the learned counsel observed that PW1 was not credible and or reliable as he lied during hearing that he was permitted by Madam Leah and Madam Regina while the truth was the

contrary. He cited the case of ***Jadili Muhumbi Vs. Republic, Criminal Appeal No. 229 of 2021, Court of Appeal at Tanzania*** where the Court observed that;

> *While we agree with the learned judge that PW1 and PW2 lied in stating that PW3 was there with them at the time of effecting the arrest of the culprits, we find it hard to go along with him that the accounts of these same witnesses would be acted upon in making a finding that the said culprits were found in possession of elephant tusks. We do not think that the principle in* ***Goodluck Kyando v. Republic (supra)*** *that every witness is entitled to credence, as argued by Mr. Magige, holds good even when such a witness is caught on a lie at some point, as in this case. In the present case we would reiterate the principle that a witness who tells a lie on a material point should hardly be believed on other points.*

Basing on the foregoing, Mr. Mbedule implored this Court not to believe and trust on the PW1's testimonies.

As regard to the cited case of ***Shomari Mohamed Mkwama Vs. Republic (supra)***, Mr. Mbedule beseeched this Court to disregard it and follow the recent one of ***Mohamed Ramadhani @ Kolahili Vs. Republic (supra)***. To fortify, he cited case ***of Arcopar (O.M) SA Vs. Harbert Marwa Family Investment Co. Limited & 3 others (2015) TLR 76*** where it was observed that, where there are conflict decisions of the same Court on a fundamental principle of law, the Court should follow the latter until the full bench is convened to resolve such conflict. Lastly, he besought this Court to allow the appeal.

Having considered the rival arguments by both parties, the question would be whether unnatural offence contrary to ***section 154 (1) (a) and (2) of the Penal Code (supra)*** was proved to the required standards of the law, that is, beyond reasonable doubts. In ***Ahmad Omari Vs. Republic, Criminal Appeal No. 154 of 2005, Court of Appeal of Tanzania at Mtwara (unreported),*** the Court observed that, in a criminal case, the burden of proof is on the prosecution and the standard of proof is beyond reasonable doubt. This is in consonant with ***Section 3(2) (a) of the Evidence Act (supra).***

In the case of ***John Makolobela Kulwa Makolobela & Another*** *alias* ***Tanganyika Versus Republic (2002) TLR 296****,* the court noted;

> *A person is not guilty of a criminal offence simply because his defence in not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which established his guilty beyond reasonable doubts.*

Being the first appellate Court, it has a duty to re-evaluate the evidence on records and put it under critical scrutiny and come out with its own conclusion. In the case of ***Mapambano Michael @ Mayanga Vs. Republic, Criminal Appeal no. 258 of 2015***, the Court placed the special duty on the first appellate court as follows;

> *The duty of the first appellate court is to subject the entire evidence on record to a fresh re-evaluation in order to arrive at*

decision which may coincide with the trial court decision or maybe different altogether.

In this case, PW1 (the victim) testified that, on **10th July 2023**, while at St. Methew's Pre and Primary School in the morning, while in class, he was permitted by Madam Regina to attend a call of nature. That on his way to toilet, the Appellant while carrying a stick, followed him up to the toilet room. While there, the Appellant entered the toilet and asked PW1 to undress (to remove his short and boxer) then bend on the wall. Thereafter the Appellant inserted his penis into PW1's anus. Having done that, the Appellant required PW1 to dress up properly and go back to class. Before that, According to PW1, he was afraid of being beaten by the Appellant.

PW1 continued to testify that, on **11th July 2023**, he appeared as usual at school and Madam Leah was on duty teaching. While in class, he felt like attending a call of nature. He then asked for permission and he was so allowed. While in his way to the toilet, he saw the Appellant at V J class and greeted him. The Appellant then followed him (PW1) to the toilet room. That, while there, the Appellant asked PW1 to undress (remove his short and boxer) and bend on the wall. He threatened him that if he would not heed to his demands, then he will beat him. Having complied, the Appellant then inserted his "Mdudu" into his anus.

According to PW1, he cried as he felt pains. The Appellant then threaten to beat PW1 if he would not stop crying. He (PW1) heeded to the Appellant's instructions. Thereafter PW1 was asked to dress up properly and go back to class.

After class hours, PW1 went back home and attended madrasa trainings at 17:00 hours and returned home. He was discovered limping by his mother (PW3) later on that day. When asked as to the reason why he was walking improperly, PW1 started to cry. He revealed to his mother that if he discloses the reason he will be beaten by the Appellant. Having promised that the Appellant will be asked not to beat him by PW3, PW1 divulged the secret. He informed his mother on what happened on 10th and 11th July 2023 at school. Having so reported, on 12th July 2023, PW1 together with his mother (PW3) reported the incident at Maturubai Police Station.

Having reported the incident to the Police Station, he was taken to Zakiem Hospital at Mbagala however nothing was done. They had to return there on 12th July 2023 where PW5 examined PW1. Thereafter, the Police officers arrested the Appellant together with teacher Machali. At police station, PW1 was asked to identify the offender between the two. He identified the Appellant as the one who penetrated him against the order of nature. PW1 pointed out that, the Appellant is his teacher and he

had no misunderstandings with him.

The PW1's testimony was corroborated by the evidence of PW3 (his mother) who narrated that PW1 is a minor aged nine (9) years old born on 19th November 2013. She was the first to discover the improper walking of PW1 (kutanua Miguu) and when asked, he replied nothing like "hakuna kitu mama". PW1 then started to cry insisting that the Appellant warned him not to tell anyone (Nikisema nitapigwa). When pleased, he told her that the Appellant inserted his "Mdudu" into his anus and that he was in a serious pain. Having consulted PW1's father, she reported the incident to Matulubai Police Station. Early in the morning on 12th July 2023, PW3 had to talk to PW1 who repeated the same story.

PW3 continued to testify that, the Appellant was arrested by Militiamen. When brought to the police Station, PW1 identified the Appellant as his teacher and associated him with the incident. Earlier, PW2 testified as to how he participated in the arrest of the Appellant. PW4 was an investigator. He narrated almost the same story as to PW1.

PW5 was a medical doctor stationed at Mbagala rangitatu, Temeke which is the Government Hospital. He recalled that, on 12th July 2023 while on duty, he attended PW1 who was accompanied by his mother (PW3). That, the patient came with PF3 (Exhibit P2) which required him to conduct an examination. He conducted a general examination from

head to toes. He then examined the PW1's anus and discovered that there were bruises and a sign of penetration by a blunt object. Luckly, PW1 was not contaminated by veneral diseases. He tendered PF3 and was admitted as **Exhibit P2**.

On his part, the Appellant denied to have been present at the area of the scene. He testified that, the offense is said to have been committed on 10th and 11th July 2023 at 06:00 hours at St Methew's Pre and Primary school's toilets. He testified further that, at that material time (that is 06:00 hours) he was yet to arrive at school. That, on 10th July 2023, he arrived at school at 07:24 hours signed through signing machine. On 11th July 2023, that he arrived at school at 11:09 hours and he tendered the text message he sent to the head master and was admitted as **Exhibit D1**. His evidence was supported by the testimonies of DW2 who tendered the school's time table (**Exhibit D)** and DW3, the deputy head teacher. DW4, the information technology officer tendered Exhibit D3 (a flash disk) evidencing the movement of PW1 and the Appellant for both two days.

I have dispassionately examined the evidence adduced during hearing and I am satisfied that PW1 was telling nothing but the truth. His evidence was direct and consistent on what happened on 10th and 11th July 2023. For reasons to be advanced hereinafter, the defense evidence did not cast any doubt towards prosecution evidence. I examined closely

the evidence of PW1 and noted that, he was direct, credible and consistent on what happened on both days. The evidences of PW3, PW5 and exhibit P2 corroborated closely the evidence of PW1. The collective prosecution evidence adduced during hearing directly points fingers to the Appellant to be the one who committed the offence contrary to ***section 154 (1) and (2) of the Penal Code (supra).***

In ***Onesmo Laurent @ Salikoki Vs. Republic, Criminal Appeal No. 458 of 2018, Court of Appeal at Moshi***, the Court observed at page 12, this;

> *….. we are cognizant that in view of the inherent nature of the offence of rape or any other sexual offence where only two persons are usually involved when it is committed, the testimony of the complainant is very crucial and must be examined and judged cautiously. Indeed, in this context, we held, for instance, in* ***Selemani Makumba (supra),*** *that the best proof of rape (or any other sexual offence) must come from the complainant. Consequently, the complainant's credibility becomes the most important matter for consideration.*

The Court continued to note at pages 12 and 13, thus;

> *If the evidence of the complainant is credible, convincing and consistent with human nature as well as the ordinary course of things, it can be acted upon singly as the basis of conviction - see section 127 (6) of the Evidence Act.*

In sexual offences like the one at hand, the victim's credibility becomes important matter for consideration. If the victim is coherent,

consistent and credible, the Court my proceed to convict notwithstanding the absence of other corroborative evidences. The conviction become even quicker if such evidence if given by the child of tender ages. In this case, PW1 (victim) did not seem have been telling lies. His evidence was corroborated closely by PW3 (his mother) and PW5 (medical doctor). The story was divulged at first to PW3 of 11th July 2023 evening. It could appear PW3 could not believe the story, as such, she had then to ask him in the morning of 12th July 2023 where PW1 repeated the same story.

Mr. Mbedule forcefully argued that, the learned trial Court Magistrate in her Judgement never considered the credibility of PW1 and truthfulness of his testimony. He cited the case of ***Method Leodiga Komba @Todi & Another Vs. Republic (supra).*** I have carefully examined the impugned Jugdement and noted that, at page 8 thereof, the learned Magistrate resolved in favour of the prosecution. He relied on the testimonies of PW1 and PW5. That alone has the meaning that he considered them to be credible witnesses and believed in their testimonies. I see nothing in controversy.

The learned counsel continued to discredit the credibility of PW1 in view of the testimony of DW2 who tendered Exhibit D2. DW2 narrated that, she had no subjects on 10th July 2023 at around 06:00 am to 07:00 am and thus she could not have permitted PW1 to attend a call of nature.

Similarly, that, DW2 could not have permitted the victim as she had no subjects to teach on 11th July 2023 around 06:00 am to 07:00 am. As said before, the learned Magistrate convicted basing heavily on the testimonies of PW1 and PW3. In their testimonies, they did not mention exactly what time the offence was committed. I would have disregarded the PW4's testimony as to the time when the offence was committed as she was not present at the area of scene. In that circumstance, PW1's credibility was not shaken.

Credibility involves the issue whether the witness appears to be telling the truth as he believes it to be. In essence, this entails reliability, worthiness and or accuracy of the information given during hearing. The information given can be acted upon having assessed the trustworthy, demeanor and or credibility of the witness. In this case, I am satisfied that PW1 was credible and was accordingly believed by the trial Court. In ***Salum Ally Vs Republic, Criminal Appeal No. 106 of 2013 (unreported)*** the Court stated that:

> *on whether or not, any particular evidence is reliable, depends on its credibility and the weight to be attached to such evidence. We are aware that at its most basic, credibility involves the issue whether the witness appears to be telling the truth as he believes it to be. In essence, this entails the ability to assess whether the witness's testimony is plausible or is in harmony with the preponderance of probabilities which a practical and informed*

person would readily recognize as reasonable in the circumstances particularly in a particular case. The test for any credible evidence is supposed to pass, were best summarized in the case of ***Abbdalla Teje @ Ma lima Mabula Vs Republic, Criminal Appeal No. 195 of 2005 (unreported)****, to be:*

(i) Whether it was legally obtained;

(ii) Whether it was credible and accurate;

(iii) Whether it was relevant, material and competent;

(iv) Whether it meets the standard of proof requisite in a given case, otherwise referred to as the weight of evidence or strength or believability.

The learned counsel for the Appellant faulted prosecution evidence for failure to lay evidence on the availability of male semen found in the victim's anus. Indeed, there has been no such requirement that there must be findings relating to male semen before a person is convicted of the sexual offences. What is needed is the credibility and reliability of the witness or evidence in respect to penetration of male organ into the victim's anus. No need also for sophisticated scientific evidence to link the Appellant with the alleged offence. In ***Hamis Shabani @ Hamis (Ustadhi) Vs. Republic, Criminal Appeal No. 259 of 2010 (unreported),*** the Court observed:

there is no legal requirement that in offences of this kind, "sophisticated scientific evidence' to link the appellant and the offence is required. It is not the requirement, for example, that the assailant's spermatozoa, red and white blood ***(or even DNA)***

should be examined to prove that he is the one who committed the offence. If there is other, independent evidence to implicate the accused with the offence and the court is satisfied to the required standard (that of proof beyond reasonable doubt), that in our view, is sufficient and conclusive.

The learned counsel for the Appellant insisted that, the PW1 was beaten by his mother (PW3) in search for the reason as to why he was limping. That, in that stance, he was in the position to name anyone. With respect such evidence cannot be traced from the records. According to PW3, she pleased PW1 that she will talk to the Appellant not to beat him. As a result, PW1 narrated the whole story to PW3. In the circumstances, the assertation by the learned counsel is the evidence from the bar that cannot be traced from the records.

It was submitted by the learned counsel for the Appellant that there were some contradictions between PW1, PW2 and PW3 on when the Appellant was arrested. He added that, while PW2 testified that the arrest was done on 10th July 2023, PW1 and PW3 both testified that the arrest was done on 13th July 2023. I closely examined the records and noted that the counsel's assertion is true. I should however note here that, the forgetfulness on the date of particular event or on some other facts not material to the commission of the offence may be caused by lapse of

memory, lapse of time or lack of rehearsal before hearing (see ***Onesmo Laurent @ Salikoki Vs. Republic (supra).***

In the case of ***Tafifu Hassan @ Gumbe Versus Republic, Criminal Appeal No. 436 of 2017, Court of Appel at Shinyanga,*** the court said;

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

In our case, the contradictions addressed related to the date of arrest of the Appellant. The same have nothing to do with the offence to which the Appellant was charged with. It's not all contradictions or discrepancies will dismantle the prosecution evidence. The contradictions addressed did not go the root of the prosecution evidence. They are minor can be overlooked. However, the Appellant confirms that he was arrested on 13th July 2023 (see pages 24 and 25 of the typed proceedings). In such circumstances, I don't see if the argument is meritorious and I proceed to disregard it.

I need not to overemphasis that, PW1 was credible, direct, coherent and consistent pointing fingers to none other than the Appellant. In the circumstances I agree with the learned state attorney that the offense to which the Appellant was charged with was proved to the required standards, that is beyond reasonable doubts. In the premises, the first,

second and fourth grounds of appeal are devoid of merits and I proceed to dismiss them accordingly.

Arguing on the on the fifth ground of appeal, Mr. Mbedule complained that, the learned trial Magistrate grossly erred in law by convicting the Appellant basing on the testimonies of PW1 which was wrongly moved under ***Section 127 (2) of the Evidence Act (supra)*** as amended by ***Act No. 4 of 2016***. He added further that, PW1 promised to tell the truth to the Court but he did not promise not to tell lies. The learned state attorney did not find it worthy purchase. She was satisfied that PW1's promised served the purposes under the law. She reminded this Court of the ***section 127(7) of the Evidence Act (supra)*** as amended by ***the Legal Sector Laws (Miscellaneous Amendments) Act, 2023.***

I closely examined the questions and answers at page 5 of the typed script of the proceedings and this is what I gathered;

> *QN: Do you promise to tell the truth?*
> *ANS: Yes, I promise to tell the truth*

The learned trial Magistrate was satisfied that the provisions of ***Section 127(2) of the Evidence Act (supra)*** were satisfied. In my considered opinion, PW1 promised to tell the truth as opposed to lies. Promising to tell the truth has an opposite meaning that you are promising

not to tell lies. The fact that the words "not lies" could not feature in the proceedings has no meaning that PW1 did not promise not to tell lies. Besides, even if there was something wrong on the aspect as alleged, still the anomaly would have been cured by ***section 127(7) of the Evidence Act (supra)*** as amended by ***the Legal Sector Laws (Miscellaneous Amendments) Act, 2023.*** I find therefore no merit on this and I dismiss it.

On the fourth ground of appeal Mr. Mbedule submitted that, the trial Magistrate erred in law and fact by ignoring the fact that the Appellant was never present at school during the time of commission of purported offence. To support, he relied on Exhibits D1 and D3 and the testimony of DW4. Earlier on, he complained of the trial Court's act to expunge Exhibit D3 from the records. Indeed, I went through the impugned Jugdement and noted that, Exhibit D3 was expunged from the records for reason that, DW4 failed to comply with ***section 18(2) of the Electronic Evidence Act, 2015*** (sic). I will first determine whether the evidence was worthy it.

Section ***64A (3) of the Evidence Act (supra)*** defines electronic evidence as follows;

> *For the purpose of this section, "electronic evidence" means any data or information stored in electronic form or electronic media or*

retrieved from a computer system, which can be presented as evidence.

As how the same should be dealt with, sub section (2) provides;

The admissibility and weight of electronic evidence shall be determined in the manner prescribed under section 18 of the Electronic Transaction Act.

In view of ***section 18 (3) of the Electronic Transactions Act Cap 442 RE 2022*** there must presumptions as the authenticity of the evidence. For clarity, the section provides as follows;

The authenticity of an electronic records system in which an electronic record is recorded or stored shall, in the absence of evidence to the contrary, be presumed where-

(a) there is evidence that supports a finding that at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of an electronic record and there are no other reasonable grounds on which to doubt the authenticity of the electronic records system;

(b) it is established that the electronic record was recorded or stored by a part to the proceedings who is adverse in interest to the part seeking to introduce it; or

(c) it is established that an electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a part to the proceedings and who did not record or store it under the control of the part seeking to introduce the record.

From the above, it is evident that, evidence must be laid to support a finding that at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating

properly did not affect the integrity of an electronic record and there are no other reasonable grounds on which to doubt the authenticity of the electronic records system. In this case, PW4 only narrated that the information was kept on a **DVA – digital video recorder**. He was silent on whether the system was working properly or not. In the circumstances, Exhibit D3 was indeed worthless as it did not satisfy the requirement of the law.

Even if it was to be remained on records, still it could have not saved the day because as alluded by DW4, there was no cameras in the toilets, a place where the offence is alleged to have been committed. In fact, the said Exhibit D3 had nothing to offer to the defense. I would have accorded no weight due the reason that DW4 did not testify as to how and or if the system was working properly for the Court to assess its reliability.

Mr. Mbedule referred this Court to page 45 of the typed proceedings where an affidavit of authenticity was admitted. With deepest respect that is not true. I examined the records and noted that, what was tendered at page 45 of the proceedings was a black flash disk (exhibit D3) and not an affidavit of authenticity as alluded. The said Affidavit is seen to have been filed on 1st November 2023 but was not tendered by the deponent (DW4). As such, the complaint is devoid of merit and I disregard it.

Before I go for break, I would comment in a very short way on the

following by way of passing. The learned counsel for the Appellant complained that his defense of alibi was not considered in view of Exhibits D1 and D3. He however conceded to be in contravention ***section 194 (1) and (5) of the Criminal Procedure Act (supra)*** for failure to issue a notice. He relied on the fact that, the charge did not disclose the exact time when the offence was committed. That, the exact time was divulged to them through the evidence of PW4, an investigator. On her part, Ms. Mchami insisted that, it is not a requirement that a charge indicates the exact time when the offence was committed. She was of the views that, the trial Court was justified not to accord weight to the said defense.

For easy reference, I shall reproduce ***section 198 (4), (5) and (6) of the Criminal Procedure Act (supra);***

> *(4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.*
>
> *(5) Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed.*
>
> *(6) Where the accused person raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may, in its discretion, accord no weight of any kind to the defence.*

From the above, the Appellant was entitled to serve to prosecution a notice of intention to rely on the defense of alibi before the opening of prosecution case. Even if the intention came later (after the start of prosecution case), still he was entitled to issue a notice with particulars any time before the closure of prosecution case. As contended by the learned counsel for the Appellant, the exact time of the commission of the offence was divulged to them through PW4 who, as per the records, testified on 31st July 2023. The Appellant did not comply with the law despite the fact that prosecution case was closed on 17th August 2023, approximately seventeen (17) days from the day they get hold of the information through PW4. In the premises, the trial Court was justified to accord no weight to the Appellant's defense of alibi.

From what I have indevoured herein above, I wholesomely endorse and agree with the learned trial Magistrate that the offence to which the Respondent was charged with was proved beyond reasonable doubts. To that end, the Judgement of the trial Court in **Criminal Case No. 308 of 2023** is hereby upheld.

I order accordingly.

Right of appeal fully explained.

DATED at **DAR ES SALAAM** this 29th May 2024.

H.S. MTEMBWA
JUDGE