IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

CRIMINAL APPEAL N0. 31 OF 2022

(Originating from Criminal Case No. 204 of 2019, in the District Court of Morogoro, at Morogoro)

SAID KASTI PAUL..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

24th August, 2023 & 2nd April, 2024

M. J. CHABA, J.

The appellant, SAIDI KASTI PAUL was arraigned before the District Court of Morogoro, at Morogoro facing two offences pursuant to the charged sheet amended and filed before the trial court on 21st October, 2019, to wit: 1st Count: Incest by males contrary to section 158 (1) (a) of the Penal Code, [CAP. 16 R.E. 2002], now [R.E. 2022]. The particulars of the offence expose that, on 8th day of July 2019 at Kiloka area within Morogoro District in Morogoro Region, the appellant/accused person had prohibited sexual intercourse with one FS (her names withheld) a baby girl of two years old who is to his knowledge his daughter.

As for the 2nd Count: Unnatural Offence contrary to section 154 (1) (a) of the Penal Code, [CAP. 16 R.E. 2002], now, [R.E. 2022] (the Penal Code). It was alleged by the prosecution that, on the same date the appellant did have carnal knowledge of FS, a baby of two years of age against the order of nature. However, the

appellant denied the allegation upon entering a plea of not guilty on both counts. In this first appeal, the victim of the offences who was a girl aged two (2) years old shall be interchangeably be referred to as the victim or FS.

For better appreciation of the issues raised herein, it is convenient to set out albeit briefly, the background to the case as can be gleaned from the record. It goes like this: The appellant and PW1 used to live as husband and wife for a considerable period of time. Before consented to marry each other and lived together as husband and wife, PW1 had her own house built at Kiloka area within Morogoro Municipality. According to her testimony, she has six children and their names are: Ibrahim Iddi being the first born aged 19 years old; Rajabu Mohamed - second born aged 14 years old; Mwanzani Hamisi - the third born aged 12 years old; Jasmini Saidi the - the fourth born aged 8 years old; the fifth born is the victim/FS aged 2.5 years old; and the last born/sixth born - Isiaka Saidi aged 5 months, respectively. It seems that, by the time the appellant and PW1 consented to join in marriage, already PW1 had three children including Ibrahim Iddi, Rajabu Mohamed and Mwanzani Hamisi. This means that, their union or marriage was blessed with three issues who are Jasmini Saidi, the victim or FS and Isiaka Saidi (the fourth, fifth and sixth children, respectively). It therefore goes without saying that the appellant is the biological father of the victim child.

It is on record that, on 12th April, 2019, PW1 was blessed to give birth to a son, Isiaka Saidi. Before giving her birth to Isiaka Saidi, she used to sleep with the appellant/her husband and the victim on one bed. However, from 12th April, 2019 the appellant/her husband had to stop sleeping on the bed and started sleeping on the floor together with Jasmini Saidi and the victim. Other children were sleeping in

another room. On 6th July, 2019 (Saturday), his first-born one Ibrahim Iddi did travel to Dar Es Salaam Region to see his uncle. Other children remained at home. On the following day on the 7th July, 2019, the appellant told his wife/PW1 that during the night he could sleep into the children's room but PW1 refused on the ground that, the appellant is a step father to her children. However, the appellant continued to insist that he could sleep into the said room with PW1's children. Afterward, PW1 agreed but with a condition that all her children could shift from the said room and sleep into her room and the appellant could enjoy the night alone. The appellant agreed but he informed his wife/PW1 that could sleep with his daughter, the victim. PW1 did not resist because the victim is the daughter of the appellant. At night, the appellant slept with his two children (Jasmini Saidi aged 8 years old and the victim (FS) who by then was 2 years old).

At around 01:00 hours in the mid night while taking care to her new baby born, PW1 heard her daughter FS screaming. When she asked the appellant why FS was screaming or crying, the appellant replied that, the victim pooped or defecated herself (in Swahili language - FS alikuwa amejinyea). But the victim continued to cry. She once again asked the appellant/her husband, why the child is/was crying like that, what is wrong? Again, the appellant responded to this effect; I am wiping the child upon pooping/defecating herself with faeces. Due to the surrounding circumstances that existed at that particular time, it would appear that, PW1 became very worried and anxious about her daughter's health and safety. Therefore, she quickly moved to the room in which the appellant, the victim and Jasmini Saidi were sleeping. Thereby, she found the victim crying meanwhile discharging faeces from her body though not often. Her evidence shows that, the victim did not sleep from

around 02:00 hours in the mid night till early in the morning. When PW1 asked the appellant/her husband what goes wrong to their child, the appellant replied that, the victim could be taken to the hospital early in the morning for medical treatment.

After dawn, PW1 and her sister sent the victim to Kiloka Health Centre for medical examination. Thereby she explained what transpired in the night. When the victim was physically examined on both vaginal and anus, she was informed by the clinical officer to report the matter at the nearest police station because the medical examination revealed that the child was raped and sodomized. Without delay, PW1 reported the matter to the police station where she was issued with the PF3. From there, she went back to Kiloka Health Centre where she was given a referral to Morogoro Regional Hospital. On the same day, the appellant was also put under arrest and remanded at police custody. When the medical doctors conducted both physical and medical examinations, it was revealed that the victim had been raped and sodomized as well. Since the victim's condition was bad, she was admitted in the Regional Hospital for about six days. Her evidence also shows that, she told the trial court that, she had no any quarrels or grudges with the appellant/her husband. Her testimony got supports from the testimonies advanced by PW2 (Dr. Emmanuel Mkumbo), PW3 (Salima Selemani), PW4 (Cheka Selemani), PW5 (WP 4245 CPL Anisia) and PW6 (Jasmini Saidi). According to the trial Magistrate, the victim was unable to give her testimony by reason of tender age. On his part, the appellant upon affirming before the trial court, he vehemently denied the accusation and/or allegation in total.

At the height of full trial, the trial court found the appellant guilty of the offences of incest by males and unnatural offence and accordingly convicted him.

Subsequently, he was sentenced to serve the term of thirty (30) years imprisonment for the 1st Count and life imprisonment for the 2nd Count. The trial court ordered the sentences to run consecutively.

The appellant is seriously aggrieved by the conviction and sentences imposed by the trial court, hence the present appeal fronting the following grounds of complaints:

1. That, the Learned trial SRM erred in law and fact by convicting the appellant while she failed to note that, the case was tried or heard and conducted un-procedurally by different three magistrates without any justifiable reasonable cause; that is, Hon. A. Ringo, RM who conducted the preliminary hearing and proceeded to hear and recorded the testimonies of PW1, PW2, PW3, PW4, PW5 and PW6 at shown on pages 1 - 26 of the typed proceedings and Hon. E. Ushacky, RM who conducted the hearing of PW7 as depicted on pages 27 - 28 and Hon. M. R. Hamduni, SRM who presided over the matter and heard the defence testimony of the appellant (DW1) and finally composed the judgement and delivered the appellant's verdicts on 04/02/2021 contrary to the procedural law.
   (i) The succeeding magistrate who took over the conduct of the case from his colleagues and finalised did so without assigning any reason.
2. That, the Learned SRM erred in law and in fact by convicting the appellant while she failed to determine that, the 2nd Count was incurably defective as it was opened/filed as unnatural offence contrary to section 158 (1) (a) of the

Penal Code [CAP. 16 R.E. 2002] Now [R.E. 2022] as shown on page no. 1 lines 11 - 14 (of the impugned judgement) contrary to the procedural law.

3. That, the Learned trial SRM erred in law and fact by convicting the appellant relied on the discredited and unprocedural testimony of PW6 one JS aged 8 years old as shown at page 24, lines 20 - 22 while the modality used by the trial court cannot in any way be construed as met the legal requirement of recording the evidence of the child of tender age to justify whether PW6 possessed sufficient intelligence to understand the nature of an oath and the duty of speaking the truth to the court and not to tell lie in conformity with requirement under the provision of section 127 (2) of the Evidence Act, as amended by Act no. 6 of 2016.

   (i) That, (the question-and-answer session) the procedure of asking PW6 a series of questions is to determine whether PW6 promises to tell nothing but the truth and not to tell lies.

   (ii) The provision gives a requirement for the child to similarly promise not to tell lies but there is no response to that issue.

   (iii) To my understanding, nothing indicates that the trial court made an assessment before the child could promise telling the truth.

4. That, the Learned trial SRM erred in law and fact by convicting the appellant while the prosecution side failed to summon its crucial witnesses, FS a girl aged 2 years old at page 24 line 18 - 19 such trials to be conducted in camera so that children as defined under sexual offences special provision act 2019, for instance, expose to publicity which may inhibit a fair trial, subject to fear stigma and the like.

(i) To further safeguard the personal integrity, dignity, liberty and security of children, the evidence of the unsummoned child (FS) shall be adduced in proceedings conducted in camera.

5. That, the Learned SRM erred in law and fact by convicting the appellant relied on the discredited testimony of PW1 who barely stated that FS was raped and sodomised after removal of her clothes while the prosecution side failed to tender before the trial court the underpants with the stool as an exhibit in evidence to prove the charge beyond any reasonable cast of doubt whether the appellant was the perpetrator of the charge or not contrary to the procedural law.
6. That, the Learned trial SRM erred in law and fact by convicting the appellant relied on merely implication assertions of PW6 who withheld the details of sexual occurrence for quite a while.
7. That, the Learned SRM erred in law and fact by convicting the appellant while she failed to properly consider the defence evidence in its twelve-pages of the impugned judgement, the trial court apart from briefly summarising the appellant evidence did neither consider nor analysed that part of evidence and weigh it against the prosecution case contrary to the procedural law.
8. That, the Learned trial SRM erred in law and in fact by convicting the appellant relied on Exhibit PE1 (Birth Certificate) at page 9, line 19 while the trial court failed to read aloud the contents of Exhibit PE1 to determine its credibility before relied upon as a basis of conviction contrary to the procedure of the law.

9. That, the Learned trial SRM erred in law and fact by convicting the appellant relied on the incredible evidence of PW1, PW2, PE3, PW4, PW5 and PW7 in the lack of cogent evidence which linking the appellant with the charged offences while the prosecution side failed to prove its charge beyond any reasonable speck of doubt.

When the appeal was called on for hearing, by consensus, parties agreed to argue and dispose of the appeal by way of written submissions. The appellant appeared in person, and unrepresented while the Respondent/Republic was represented by Mr. Shaban Abdallah Kabelwa, Learned State Attorney. Both parties submitted their written submissions timely as scheduled by the court. Again, both parties submitted at considerable lengthy in a bid to convince the court to believe their versions for and against the present appeal.

The appellant commenced his submission by stating that, for the court to determine the instant appeal fairly, it has to look into one major issue, whether or not the trial court proved its case beyond reasonable doubt, citing the case of **SAID MOHAMED V. REPUBLIC (1987) TLR 117** to fortify his contention.

Arguing on the second ground, the appellant averred that, it is settled position of the law that a charge sheet is a foundation of a criminal trials with a purpose of informing the accused person the nature and magnitude of the charge facing him to enable him prepare his defence. He faulted the findings of the trial court by stating that, the statement of the charge sheet in the 2nd Count of Unnatural offence was supposed to read *"contrary to section 158 (1) (a) of the Penal Code [CAP. 16 R.E. 2002]"* instead of "*Unnatural offences contrary to section 154 (1) (a) of the Penal*

Code" as indicated on page 1 lines 13-14 of the impugned judgment. It was the appellant's argument that, indicating the specific provision of the law creating the offence and its punishment on the charge sheet is crucial, as **first**, it lays the foundation of criminal proceedings. To bolster his argument, he cited the case of **ZARAN ISSA V. THE REPUBLIC,** CRIMINAL APPEAL NO. 159 OF 2010 (Unreported); **second**, is to comply with the requirements of section 132 (1) of the Penal Code (Sic) – of the Criminal Procedure Act and section 135 (a) (ii) of the Criminal Procedure Act [CAP. 20 R.E. 2019] now [R.E. 2022] (the CPA) as it was expounded in the case of **JOHN MARTIN MARWA V. THE REPUBLIC, CRIMINAL APPEAL NO. 20 of 2014** (Unreported); **third,** to enable the accused to understand the nature of the offence and its seriousness. He said, since the charge sheet left him unaware that the offence, he was facing was a serious one, he relied on the decision of the Court of Appeal of Tanzania (the CAT) in the case of **ABDALLAH ALLY V. THE REPUBLIC**, CRIMINAL APPEAL NO. 253 of 2013 (Unreported), to fortify his argument. **Fourth**, is to enable the accused to be in a position to prepare an informed defence as it was underscored by the Court in the case of **SIMBA NYANGURA V. REPUBLIC**, CRIMINAL APPEAL NO. 144 OF 2008 (Unreported).

It was the appellant's submission that, he was required to know clearly the offence he was charged with and the proper punishment attached to it. According to him, failure to cite subsection (2) of section 154 of the Penal Code which is a specific provision for punishment to a person who committed an offence of Unnatural Offence to a person below the age of ten years might have led him not to appreciate the seriousness of offence and might not have been in a position to prepare his

defence, as it was held in the case of **SIMBA NYANGURA's case (s**upra), of which the end result prejudiced the appellant.

On the first ground, the appellant is faulting the findings and decision of the trial court to the effect that, his case was heard and presided over by different Magistrates without any justifiable reasons and without considering the requirements of the law. He said, initially, the matter was before Hon. A. Ringo, RM who conducted the preliminary hearing and afterwards heard and recorded the testimonies of PW1, PW2, PW3, PW4, PW5 and PW6 respectively, as shown on pages 1 - 26 of the typed proceedings of the trial court and Hon. E. Ushacky, RM who heard and recorded the testimony of PW7 as indicated on pages 27 – 28 of the trial court proceedings. Further, Hon. M.R. Hamduni, SRM heard and recorded the evidence adduced by the DW1 (the Appellant) as depicted in the impugned judgement delivered on 04/02/2021 which is fatal and against the provision of section 312 (1) of the CPA. He nourished his argument by citing the case of **OMARY ATHUMAN MAGARI AND 2 OTHERS V. THE REPUBLIC**, CRIMINAL APPEAL NO. 173 OF 2016, CAT at DSM (Unreported). His main argument on this point is that, the successor Magistrate was supposed to state the reason why the predecessor Magistrate failed to compose and write the judgement. He stressed that, illegal judgment cannot qualify to convict an accused person, and the sentence that stems from illegal proceedings and judgment cannot as well have legal effect, and retrial of the matter cannot achieve any purpose apart from giving an opportunity for the prosecution to fill its gaps.

Based on the above reasons, the appellant prayed the court to nullify the respective proceedings, quash conviction and set aside the sentence meted against him.

In respect of the fourth ground, the appellant is faulting the trial court for failure to call the material witness, i.e., the victim, one FS, a girl aged two (2) years old who was within reach without assigning any apparent reason. He submitted that, failure to call such a witness, the court may have to draw an inference adverse to the prosecution side taking into account that the duty of the appellant/accused person is only to cast doubts on the prosecution evidences to enable the court to reach to a fair and just decision. He cited the case of **RAZARO KALONGA V. THE REPUBLIC,** CRIMINAL APPEAL NO. 348 OF 2008, CAT at IRINGA (Unreported) which cited and adopted the reasoning expounded in **AZIZ ABDALLAH V. THE REPUBLIC (1991) TLR 71 (CA),** to bolster his contention.

Regarding the eighth ground, the appellant highlighted that, Exhibit PE1 (Birth Certificate of the victim) was wrongly admitted in evidence by the trial court as its contents thereof was not read out aloud before the court. He asserted that, such irregularity did occasion a serious error which amount to a serious miscarriage of justice. He was of the view that, such an Exhibit ought to have been expunged from the court record. To strengthen and reinforce his contention, the appellant referred this court to the case **of MWANJISI & THREE OTHERS V. THE REPUBLIC (2003) TLR 218.**

On the third ground, the appellant's grievance is that section 127 (2) of the Evidence Act [CAP. 6 R.E. 2022] as amended by **The Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016** was not complied with by the

trial court as there is no record which shows that the trial court ascertained whether PW6 knew the meaning of an oath and telling the court the truth. He averred that, this provision of the law paved ways to conduct a voire dire test as required by the law. He asserted that, with the new amendment of section 127 (2), it means that the court is only required to test intelligence of the child and the child should promise the court to tell the truth and not tell lies. He said, the witness PW6 had the age of 8 years old and automatically falls under tender age as provided under section 127 (4) of the Evidence Act (supra). The Law says: -

> *"For the purposes of subsections (2) and (3), the expression "child of tender age" means a child whose apparent age is not more than fourteen years".*

He argues that, looking at the evidence adduced by PW6, the provision of section 127 (2) of the Evidence Act (supra) was not adhered to. He cited the case of **GODFREY WILSON V. THE REPUBLIC**, CRIMINAL NO. 168 OF 2018, CAT at BUKOBA (Unreported) to fortify his argument. He said, since this piece of evidence has no evidential value, its remedy is to be removed from the record. He stated that, as there is no sufficient evidence to incriminate him with the present matter, it means that the prosecution failed to prove their case beyond reasonable doubt. He prayed the court to find him not guilty of the offences he stood charged, quash conviction and set him free from Prisons based on the principle of benefit of doubt.

On his part, Mr. Shaaban Abdallah Kabelwa, Learned State Attorney, vehemently resisted both the appeliant's appeal and grounds of appeal fronted by

the appellant in this court. He further counterattacked the submission made by the appellant in a bid to exonerate himself from the accusation.

Starting with the second ground of appeal which was argued by the appellant as first ground, Mr. Kabelwa admitted that there must have been a proper section of the law in the statement of the offence which prompted the trial Magistrate to record to that effect. He said, even if the section would have been wrongly cited and amount to defectiveness of the charge sheet as suggested by the appellant, the crucial question is whether such an omission is fatal or curable in the eyes of the law. He averred that, citation of inapplicable law or wrong provisions in a statement of the offence is not always fatal because this can be cured by the evidence adduced before the trial court pursuant to the provision of section 388 (1) of the CPA where the appellant is seen not to have been prejudiced. A prejudice would be available if it is shown that the appellant didn't appreciate/understand fully the offence he stood charged with and which he came to enter his defence as it was held in the case of **MASALU KAYEYE V. REPUBLIC,** CRIMINAL APPEAL NO. 120 OF 2017, CAT sitting at MWANZA at page 16 (Unreported). In this case, the Court held *inter-alia* that: -

> *"The defect in the charge may be cured, among other ways, by the evidence on record".*

He went on submitting that, in this case, right from the beginning, the charge sheet indicated Unnatural Offence as one of the offences, so are the particulars, despite the fact that the indicated provision might have been wrongly recorded. He said, the evidence adduced by the PW1 and PW7 shows that the victim was sodomized. PW7 testified that, the victim was penetrated into the anus, she was very

weak physically and the anus was expanded. With this piece of testimony, it was his profound view that, the appellant understood what he was being accused of. He asserted that, during cross-examination by the appellant, PW7 replied that the muscles of the victim's anus were damaged. Generally, even before closure of prosecution case, the appellant knew he was accused of sodomizing the victim and had that opportunity to prepare for his defence afterwards. Also, in his defence, the appellant did mention faeces or stool of the child which relates to the evidence of PW1, hence indicating that he knew that he stood charged with sodomy or sodomizing his own daughter. The State Attorney underlined that, should there be any defect in the charge sheet, the evidence available can be cured under section 388 of the CPA, as in the record there is no sign that the appellant was prejudiced by not appreciating the real offence which he was accused of.

Submitting on the first ground which the appellant argued as second ground as indicated in his written submission, Mr. Kabelwa contends that, regarding the change of Magistrates, Hon. M. R. Hamduni, RM did assign the reason why she took over the case. He argues that, as Hon. A. Ringo, RM was transferred to another duty station, that is why Hon Hamduni was obliged to step into her shoes and proceeded to handle the case to its finality as shown on page 33 of the trial court proceedings. He stated that, initially, Hon. A. Ringo, RM started as the presiding trial Magistrate, though along the way, Hons. A. Kalegeya, RM and Hon. A. Joshua, RM adjourned the case when the trial Magistrate was attending other official duties. However, none of them heard even a single witness. But when the trial Magistrate was transferred to another duty station, Hon. M.R. Hamduni, SRM took over the case

and assigned the reasons for so taking over the case as hinted above. He said, it is not true that the change of Magistrates was not accompanied with the reasons.

He went on arguing that, even if the successor Magistrate would have not so indicated, the current position is that non-compliance with the provision of section 214 of the CPA is not fatal, if the appellant/accused was not prejudiced. To cement his argument, Mr. Kabelwa cited the authorities in the cases of **BWANGA RAJABU V. REPUBLIC**, CRIMINAL APPEAL NO. 87 OF 2018, CAT sitting at Shinyanga, at page 12 (Unreported) and **CHARLES YONA V. REPUBLIC**, CRIMINAL APPEAL NO. 79 OF 2019, CAT at DSM, at pages 12 and 13 (unreported).

As for the fourth ground of appeal in the petition of appeal in which the appellant argued as the third ground in his written submission, the appellant's grievance is that, the victim was not called to testify before the trial court. On this ground, Mr. Kabelwa accentuated that, looking at page 24 of the trial court proceedings, the court recorded, thus: -

> *"Court: Witness with 3 years she cannot adduce evidence.*
>
> *Section 127 (1) of the CPA (Sic) – Penal Code, C/W. She is*
>
> *too young to make reply".*

Mr. Kabelwa submitted that, this indicates that, FS was called as a witness and brought before the trial court to testify. But upon scrutiny, the court found that she was too young to testify. He said, even where the court would have seen that the victim was not brought in court to testify, still the recent position of law is that, the law recognizes instances where charges may be proved without having the evidence of victims. He cited the case of **ISMAIL SHABANI V. REPUBLIC**, CRIMINAL

APPEAL NO. 344 OF 2013, CAT at MBEYA on page 13 (unreported), quoted the case of **HAJI OMAN V. REPUBLIC,** CRIMINAL APPEAL NO. 307 of 2009, CAT (unreported). He said, similar position was held in the case of **SIABA MSWAKI V. REPUBLIC**, CRIMINAL APPEAL NO. 401 of 2019, CAT at DSM on page 10 unreported). In this case, the Court held *inter-alia* that: -

> *"It is settled position of law that conviction can be grounded on account of the evidence of an eye witness without calling a victim to testify".*

For the eighth ground of appeal which the appellant argued as fourth ground in his written submission, his complaint is that, Exhibits PE1 the PF3 were not read aloud in court upon their admission. In principle, Mr. Kabelwa did not object such anomaly taking into account that it is a requirement of the law. However, he highlighted that, it is now settled law that if the exhibit was not read out loud in court after admission, the court will look or consider if such omission did prejudice the appellant, as the purpose of reading audibly the admitted exhibit(s) is to enable the accused person to understand the contents of the document as it was explicated in the recent decision of the CAT in the case of **ONESMO DADI @ NDISAEL & ANOTHER VS REPUBLIC, CRIMINAL APPEAL NO. 283 OF 2022 [2023] TZCA 17308** (Extracted from www.tanzlii.go.tz).

Placing reliance upon the authority of **ONESMO DADI @ NDISAEL & ANOTHER** (Supra), Mr. Kabelwa averred that, in the matter under consideration, failure to read aloud the documentary evidence did not not prejudice the appellant as he knew the existence of the exhibits before being brought before the trial court and

he also knew the contents of the Exhibit PE1 which is the Birth Certificate of his daughter, the victim.

He avowed that, if at all this court will find otherwise, the court may expunge Exhibit PE1 from the record and sustain oral accounts given by PW1, the victim's mother whose testimony is in his opinion reliable and a credible. He stated that, her evidence suffices to prove the age of the victim as it was held in the case of **WILSON ELISA & KIUNGAI,** CRIMINAL APPEAL NO. 449 of 2018 (CAT). In this case, the CAT observed at page 8 among other things that: -

> *"This Court has consistently maintained that evidence as to proof of age may be given by victim, parents, relatives, medical practitioner or where available by the birth certificate".*

In respect of the third ground, the appellant is faulting the findings and decision of the trial Magistrate that, she failed to comply with the requirement of section 127 (2) of the Evidence Act. On this ground, Mr. Kabelwa averred that, looking at the proceedings of the trial court on page 24, before the witness PW6 tendered her testimony, the trial Magistrate recorded to this effect:

> *"PW6 Jasmini Saidi, resides in Kenge street, a student/pupil, class three and 8 years old who promised this court to adduce truth evidence".*
>
> *Court: S. 127 of TEA C/W.*

Signed and dated 14/05/2020".

From the above except of the trial court proceedings, Mr. Kabelwa submitted that, the trial Magistrate complied with the provision of section 127 (2) of the Evidence Act as PW6 promised to speak the truth as shown hereinabove. He went on arguing that, it is settled law that, where a witness of tender age does not give evidence on oath or affirmation, he or she must promise to tell the truth and undertake not to tell lies. He said, given the above quotation by the Magistrate in respect of the testimony adduced by PW6, he was of the view that, section 127 (2) of the Evidence Act was complied with, and the appellant cannot say that his case was prejudiced at any point. To bolster his contention, the State Attorney referred the court to the case of **DEO JOHN V. REPUBLIC**, CRIMINAL APPEAL NO. 361 OF 2020, CAT at DSM at pages 6, 7 and 8 of the printed Judgment (unreported).

He added that, even if the court will find that there is non-compliance with the provision of section 127 (2) of the Evidence Act, the same is curable as it is now settled law that non-compliance is not fatal as the court may invoke section 127 (6) of the Evidence Act and convict the culprit (appellant) if the court believes that the victim is telling the truth. To cemented his contention, he cited the case of **WAMBURA KIGINGA V. THE REPUBLIC**, CRIMINAL APPEAL NO. 301 OF 2018 CAT at MWANZA on pages 14 - 17 (Unreported). He accentuated that, upon visiting the typed trial court proceedings in particular on page 25, it evident that the victim (PW6) gave detailed evidence regarding occurrence of the act on how the appellant used to sodomize her. He therefore, prayed the court to invoke section 127 (6) of the

Evidence Act and find that this ground of appeal unmerited on the strength of the decision of the CAT in the case of **WAMBURA KIGINGA** (Supra).

In conclusion, Mr. Kabelwa averred that, in view of the above submission, there is no doubt that the case against the appellant was proved beyond reasonable doubt because the following facts have been established in line with the standard of proof in criminal trials, to wit: -

(i) The victim was penetrated in the anus;

(ii) It is the appellant who penetrated her; and

(iii) She was below 18 years old (to qualify life imprisonment).

From the above, Mr. Kabelwa stressed that, to establish the accusation that the victim was penetrated into her anus, the Respondent/Republic relied on the evidence adduced by PW1 who rescued the victim child from the appellant on that particular night and PW7 the clinical officer who examined the victim. He said, whereas PW1 testified that the victim kept on discharging faeces throughout without control, PW7 told the trial court that the anus of the victim was loose and the victim was hospitalized for medical treatment. He added that, with this circumstantial evidence, the same establishes that, something had occurred when the victim slept with the appellant as testified by the PW1 and PW7.

Having summarized the contending written submissions made by the appellant and the Respondent/Republic for and against the instant appeal and upon carefully considering the same, the court records and the grounds of appeal, I find that the broad and singular issue for consideration, determination and decision thereon is whether the instant appeal is meritorious.

As a starting point, I am mindful that this court being the first appellate court t is duty bound to re-evaluate the entire evidence on record by reading together and subject the same to critical scrutiny. This position was articulated in the case of **FAKI SAID MTANDA VS REPUBLIC (CRIMINAL APPEAL 249 OF 2014) [2019] TZCA 126 (12 APRIL 2019)** (Extracted from www.tanzlii.go.tz) where the Court of Appeal of Tanzania (CAT) quoted with approval the decision of the defunct East African Court of Appeal in the case of **R.D. PANDYA V. REPUBLIC [1957] E.A. 336 held:**

> *"it is a salutary principle of law that a first appeal is in the form re-hearing where the court is duty bound to re-evaluate the entire evidence on record by reading together and subjecting the same to a critical scrutiny and if warranted arrive to its own conclusion".*

See also the cases of **SIZA PATRICE V. REPUBLIC, CRIMINAL APPEAL NO. 19 OF 2010 (CAT)** (unreported); **MAPAMBANO MICHAEL @ MAYANGA V. R, (CRIMINAL APPEAL 268 OF 2015) [2016] TZCA 310** and **THE REGISTERED TRUSTEES OF JOY IN THE HARVEST V. HAMZA K. SUNGURA, CIVIL APPEAL 149 OF 2017, CAT AT TABORA** (Unreported).

For a rational flow of reasoning, it is worth noting that this being the criminal case, it was the duty of prosecution to prove the case against the appellant beyond reasonable doubt. The term beyond reasonable doubt is not statutorily defined but case laws have defined it. In the case of **MAGENDO PAUL & ANOTHER V. REPUBLIC (1993) TLR 219,** the Court held that:

"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed".

Upon albeit briefly, highlighted the guiding principles, I now turn to the matter under consideration. It is worth noting as submitted by the State Attorney that, the appellant chose to argue grounds 1, 2, 3, 4 and 8 only and impliedly abandoned grounds 5, 6, 7 and 9. It is also uncontroverted issue that, the appellant on the fateful night slept with his daughters herein the victim and PW6 on one bed. That, during preliminary hearing the appellant admitted the fact that the victim is his daughter. According to the record, until the victim went to sleep with the appellant, her health condition was good and there was no any complaint concerning her health condition. Again, the victim was not called as a witness by reason of tender age as provided under section 127 (1) of the Evidence Act. The saga in respect of the victim began in the midnight of 8th July, 2019. In an attempt to deliberate on the grounds of appeal fronted by the appellant challenging both conviction and sentences imposed by the trial court against him, I will consider these grounds of appeal in pattern. In the course, I will also touch other grounds of appeal of appeal (grounds 1, 2, 3, 4 and 8) not argued by the appellant for the sake of justice.

Starting with the 2nd ground of appeal, the appellant's grievance is that the trial Magistrate erred in law and in fact when it convicted him while she failed to determine that, the charge in respect of the 2nd Count was incurably defective as it was opened/filed as Unnatural Offence contrary to section 158 (1) (a) of the Penal

Code as shown on page no. 1 lines 11 - 14 of the impugned judgement contrary to the procedural law.

I have objectively perused the trial court records including the original case file, the typed proceedings of the trial court and the impugned judgment signed by the trial Magistrate. I agree that in the course of composing the disputed judgement, the Hon. trial Magistrate cited section 158 (1) (a) of the Penal Code (supra) in both two counts as stated by the appellant. I am also in agreement with the appellant that, usually, a charge sheet is a foundation of a criminal trials with a purpose of informing the accused person the nature and magnitude of the charge facing him to enable such a culprit to prepare his defence. I also agree that, a charge sheet is a basis upon which the court can enter conviction or acquittal against the appellant/accused. However, looking at the entire record of the trial court, it is evident that throughout the trial, the evidence adduced by the prosecution witnesses were directed to the two counts laid against the appellant herein, to wit: incest by males and unnatural offence. Even the physical case file itself transpires and supports the amended charge sheet, which is the foundation of trial of the appellant, which was filed on 21st day of October, 2019 and it was read over and fully explained to the appellant/accused in his own language (Swahili) which he understood better and entered a plea of not guilty to the charge. In my considered view, the question is whether or not the error spotted on the impugned judgement prejudiced the appellant. In my view, the error committed by the trial magistrate did not defeat the foundation of the trial against the appellant created in the charge sheet. As shown in the charge sheet, it is apparent on record that the appellant was arraigned before the trial court charged with two counts as portrayed in the amended charge sheet.

For ease of reference and clarity, I find it apt to replicate the amended charge sheet presented before the trial court and filed on 21/10/2019 as hereunder: -

"IN THE DISTRICT COURT OF MOROGORO

AT MOROGORO

CRIMINAL CASE NO. 204 OF 2019

REPUBLIC

VERSUS

SAIDI KASTI PAUL

CHARGE SHEET

1ST COUNT

STATEMENT OF OFFENCE

INCEST BY MALES: Contrary to Section 158 (1) (a) of the Penal Code [Cap. 16 R.E. 2002].

PARTICULARS OF OFFENCE

SAIDI KASTI, on the 8th July, 2019 at Kiloka area within the District of Morogoro in Morogoro Region, had prohibited sexual intercourse with one, FS (her names withheld) a baby girl of 2 years of age, against the order of nature.

2ND COUNT

STATEMENT OF OFFENCE

UNNATURAL OFFENCE: Contrary to Section 154 (1) (a) of the Penal Code [Cap. 16 R.E. 2002].

PARTICULARS OF OFFENCE

SAIDI KASTI, on the 8th July, 2019 at Kiloka area within the District of Morogoro in Morogoro Region, did have carnally knowledge of one, FS (her names withheld) a baby girl of 2 years of age, against the order of nature.

Dated at **Morogoro** this 21st day of October, 2019

Signed by: .....

STATE ATTORNEY

Presented for filing this 21st day of 10 2019. .....".

As depicted in the charge sheet hereinabove, the two counts clearly demonstrates that, the offences which the appellant stood charged before the trial court was from the beginning known to the appellant and he did have sufficient knowledge of what he was facing before the trial court. This means that, throughout the trial, the prosecution adduced evidence in line with the charge sheet and the appellant was found guilty on both counts and subsequently convicted for the offence of incest by males and unnatural offence based on the charged offences. In my view, what transpired in the trial court judgement cannot, in the eyes of the law, vitiate the foundation of his trial as depicted in the chargesheet. Moreover, the appellant did not indicate how the said wrong citation of the provision of the law prejudiced him and caused miscarriage of justice. This ground of appeal is devoid of merit and accordingly dismissed.

Coming to the first ground of appeal, the appellant's complaint is that the matter at trial was handled and presided over by different Magistrates without complying with the section 214 (1) and (2) of the CPA and in absence of any justifiable reasonable cause. At the outset, I agree with the appellant on aspect that, in as much as the trial court record is concerned, initially, the case subject to this appeal was presided over by Hon. A. Ringo, RM starting from 24th July, 2019 where for the first time the appellant was brought before her and she took and recorded his plea of not guilty to the charge and afterwards proceeded to handle the matter at the stage of preliminary hearing, heard and recorded the evidences of PW1, PW2, PW3, PW4, PW5, PW6 and PW7. Upon closure of prosecution witnesses, she composed a ruling to the effect that the appellant had a case to answer on 30th July,

2020. Again, on 9th & 29th July, 2020 the matter was placed before her for necessary orders.

On 13th August, 2020 the matter was placed before Hon. A. Joshua, RM who adjourned the matter and later on 10th & 29th September, 2020, 21st October, 2020 the case file was placed before Hon. E. Ushacky, RM who also adjourned the matter on the ground that trial Magistrate Hon. A. Ringo, RM had other official duties to attend. On 30th August, 2020 the case file found its way to Hon. A. Kalegeya, SRM and the Incharge of the station at RM'S Court of Morogoro, at Morogoro. She recorded to this effect; I quote:

> ***"Court:*** *As the trial Magistrate has been transferred, this case is re-assigned to Hon. M. Hamduni, RM.*
>
> *Signed: A. Kalegeya. 30/10/2020".*

Hence, when the case file was placed before Hon. Maua Hamduni, SRM on 18th November, 2010 so that could proceed with the defence hearing, Hon. Hamaduni, SRM informed the appellant that the trial Magistrate was away on transfer and she explained to him his rights as provided under section 214 (1) of the CPA where the appellant is recorded to have said/replied that she could proceed where the case reached. That means, the appellant had no objection.

With the above piece of evidence, though the case file passed through the hands of different Magistrates, but the truth is that none of them conducted any proceedings save for ordering the matter be adjourned to another date as elaborated herein above. As hinted above, it was until 30th October, 2020 where Hon. A.

Kalegeya, SRM addressed that since the trial Magistrate (Hon. A. Ringo, RM) was transferred to another duty station, she was re-assigning Hon. M. Hamduni. SRM to proceed with the hearing of the appellant's case where on 18/11/2020 the case file was placed before her and she fully complied with section 214 (1) of the CPA. Again, this ground of appeal is unmerited.

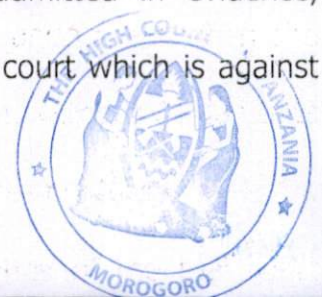
As to the fourth ground, the appellant's grievance is that the Hon. trial Magistrate erred both in law and fact upon convicting him while the prosecution side failed to summon its crucial witness, herein the victim or FS, a girl aged 2 years old as shown at page 24 lines 18 – 19 and also that its trial had to be conducted in camera. On my part, as the record speaks for itself, it is true that the victim being a crucial witness was not called as witness by reason of tender age. However, reading between lines in respect of the trial court proceedings, it appears that, the victim was summoned to appear before the trial court and upon assessment, the trial Magistrate thought it prudent and wise to decline to take and record her testimony for a reason that the victim was too young to respond to the questions posed against her, of which I subscribe to her decision. She therefore invoked the provision of section 127 (1) of the Evidence Act which provides that: -

> *"Every person shall be competent to testify* ***unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age****, extreme old age, disease (whether of body or mind) or any other similar cause".*

[Bold is mine].

However, the question which arises here is whether or not failure to call the victim to appear before in court and adduced her evidence discredited the prosecution case. On reviewing the record at trial, it is my considered view that, failure to summon the victim as a witness did not discredit the prosecution case. I say so because, it is settled law that in criminal cases the burden of proof lies on the shoulder of the prosecution side and it never shifts. See: **TAFIFU HASSAN @ GUMBE VS REPUBLIC (CRIMINAL APPEAL 436 OF 2017) [2021] TZCA 436 (27 AUGUST 2021)** (Extracted from www.tanzlii.go.tz). This means that, it is upon the prosecution side to call material witnesses to prove the case beyond reasonable doubt as no particular number of witnesses shall in any case be required for the proof of any fact as stated under section 143 of the Evidence Act. On my part, I find no harm or injury on the part of the appellant for the victim's failure to tender her testimony against the appellant. It follows therefore that, even the issue of conducting trial in camera, is not worthy of consideration under the circumstance. Hence, this ground of appeal must crumble.

Next for consideration is the eighth ground. On this ground, the State Attorney conceded the fact that, the trial Magistrate erred both in law and in fact when she wrongly admitted in evidence the Exhibit PE1 (Birth Certificate) without its contents being read audibly in court. On this aspect, I am also in agreement with both the appellant and the State Attorney for a reason that, on scrutiny of the trial court proceedings, I found that when PW1 (Himaya Waziri) tendered in evidence the said birth certificate unobjected, the trial court received and admitted in evidence, marked it as Exhibit PE1 but its contents were read aloud in court which is against



the principles of law enunciated by the CAT in the cases of **ROBINSON MWANJISI AND THREE OTHERS VS. REPUBLIC [2003] TLR 218; PETER SAGADEGE KASHUMA VS. REPUBLIC**, CRIMINAL APPEAL NO. 219 OF 2019 and **RAMADHANI MBOYA MAHIMBO VS THE REPUBLIC,** CRIMINAL APPEAL NO. 325 OF 2017 (CAT) (unreported), just to mention a few. For instance, in the case of **ROBINSON MWANJISI AND THREE OTHERS VS. REPUBLIC** (supra), the CAT held *inter-alia* that:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted before it can be read out".*

From the foregoing, I satisfied in mind that the omission vitiated the evidential value of the Exhibit PE1, hence ought to have been expunged from the court record, as I hereby do. Unlike the PF3, admitted by the trial court and marked as Exhibit PE2, when PW2 one, Dr. Emmanuel Mkumbo introduced the same in evidence, the document was cleared for admission, admitted and afterwards its contents were read out aloud in court. That being the position, I sustain the PF3 herein Exhibit PE2 and expunge from the court record the birth certificate of the victim herein Exhibit PE1.

However, as correctly submitted by the State Attorney that, despite the fact that the said birth certificate has been expunged from the records, but the evidence adduced by the PW1, the victim's mother, who testified that her child was born on 5/03/2017 and therefore her age was two (2) years old, in law, PW1 sufficiently proved the age of the victim. It is trite law that the victim's age can be proved through a parent, guardian, school teacher, birth certificate or the victim

herself/himself. **(See – DAUDI ANTHONY MZUKA VS REPUBLIC (CRIMINAL APPEAL 297 OF 2021) [2023] TZCA 165 (30 MARCH 2023)** and **ISSAYA RENATUS VS REPUBLIC (CRIMINAL APPEAL 542 OF 2015) [2016] TZCA 218 (26 APRIL 2016)** (Extracted from www.tanzlii.go.tz)**),** to mention a few. Inclusion, this ground of appeal has merit and it is hereby partly allowed.

Now reverting to the third ground of appeal, the main complaint raised by the appellant is associated with non-compliance with section 127 (2) of Evidence Act. The State Attorney though resisted this ground of appeal, but finally was of the view that, if the court finds that section 127 (2) of the Evidence Act was violated due to non-compliance of the law, the court may invoke the provision of section 127 (6) of the Evidence Act to cure the mischief. To cement his contention, he cited the case of **WAMBURA KIGINGA V. THE REPUBLIC**, CRIMINAL APPEAL NO. 301 OF 2018 CAT at MWANZA on pages 14 - 17 (Unreported).

I have gone through the trial court record and carefully read and examined the evidence adduced by the PW6 one Jasmini Saidi. It appears that, on this this ground of appeal both the appellant and the learned State Attorney failed to understand correctly whether the victim is PW6 one Jasmini Saidi, a girl of 8 years old or FS a girl of 2 years old. It is worth noting that, in this appeal, the victim was not called as witness and did not adduce any piece of evidence. The appellant also raised such a concern as hereinabove discussed in extenso. To cut the story short, PW6 testified as other six witnesses and did not testify as a victim. That being the position, the crucial issue for consideration and termination is whether or not her testimony was taken and recorded in line with the provision of section 127 (2) of the Evidence Act. If the

answer is in affirmative or negative, it is non-compliance of section 127 (2) of the Evidence Act can be invoked to cure and rescue the situation.

As indicated above, the appellant is faulting the findings and decision of the trial Magistrate on this facet that, she failed to comply with the requirement of section 127 (2) of the Evidence Act. On reviewing the trial court record, when PW6 was called to testify, the trial Magistrate began to record her testimony to this effect; I quote:

> *"PW6: Jasmini Saidi, resides in Kenge street, a student/pupil, class three and 8 years old who promised this court to adduce truth evidence".*
>
> *Court: S. 127 of TEA C/W.*
>
> *Signed: ....*
>
> *14/05/2020".*

Although, PW6 testified and elaborated how on the fateful night she slept with the appellant and her young sister, the victim and how the appellant used to undress her and inserted his penis into her private parts, felt pain and screamed but her mother did not notice or hear her cries, and the fact the her father did intimidate or threatened to kill her once she could expose her father's cruelty following inhuman act of inserting his penis into her private parts, but truly the charge sheet do not support her allegation in any way. Besides, her testimony suffers from the defect committed by the trial Magistrate as she failed to comply with the preconditions laid down under section 127 (2) of the Evidence Act and precedents. The provision

relates to competence and admissibility of evidence of a witness of tender age, as stated under subsection (4) of section 127 of the Evident Act. The law says: -

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies".*

As to how the evidence of a child of tender age should be assembled pursuant to section 127 (2) of the Evidence Act, there is a plethora of authorities on this subject both in this Court and CAT. For instance, in the case of **JOHN MKORONGO JAMES VS REPUBLIC (CRIMINAL APPEAL 498 OF 2020) [2022] TZCA 111 (11 MARCH 2022)** at pages 8 -15. In this case the Court was confronted with akin scenario and observed *inter-alia* that: -

> *"Our task in determining the first ground of appeal is narrowed down to two issues; first, whether examining a child witness of tender age on his/her competence and whether he/she knows the meaning and nature of an oath so that if not, to let him/her testify on the promise to court to tell the truth and not tell lies, is a requirement of law or not and second, whether the omission to do so is fatal.*

The foundation as to what the court should do to reach to a conclusion that the child has made that promise was expounded in the case **GODFREY WILSON VS**

REPUBLIC (CRIMINAL APPEAL 168 OF 2018) [2019] TZCA 109 (6 MAY 2019). The Court stated *inter-alia* that:

> *"The trial magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because; section 127 (2) as amended imperatively require a child of a tender age to give a promise of telling the truth and not telling lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age. The question, however, would be on how to reach at that stage.*

The Court went on expounding that:

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

3. Whether or not the child promises to tell the truth and not tell lies. Thereafter, upon making the promise, such promises must be recorded before the evidence is taken

Guided by the authority of the Apex Court in our jurisdiction and upon gauging the procedures adopted by the trial Magistrate in receiving the testimony of PW6 as demonstrated herein above and the evidence adduced by the PW6, I am satisfied that section 127 (2) of the Evidence Act was really contravened and not adhered to by the trial Magistrate. As PW6 did not promise to tell the truth to the court and not to tell any lies before giving her evidence as required by the law, the consequence thereof is to expunge her evidence from the record, as I hereby do. In the end, this ground of appeal has merit and it is answered in affirmative.

Having expunged the Exhibit PE1 (Birth Certificate) and the evidence PW6, the remaining pieces of evidences that connects the appellant with the offences he stood charged are the evidences adduced by PW1, PW2, PW3, PW4, PW5 and PW7, respectively. According the record, among all these six witnesses no one is an eye witness or was even present at the crime scene on the day/date of occurrence of the event in the night of 8th July, 2019 except PW1 who slept in another room together with her three children and the appellant, FS and PW6 (Jasmini Saidi - whose evidence has been expunged from the court record) who slept together in the other room.

Now, the decisive and most important point at issue is whether the remaining evidences on records adduced by PW1, PW2, PW3, PW4, PW5 and PW7, respectively, suffices to prove the charges levelled against the appellant beyond reasonable doubt.

To prove or disprove this issue, I will test the testimony of each witness and see if it links the appellant with the offences he stands charged and whether the evidences adduced by PW2, PW3, PW4, PW5 and PW7 corroborates the evidence of adduced by PW1.

As I have stated earlier on, the saga began in the midnight of 8th July, 2019 when PW1, the appellant, FS and other five children were asleep at their residence home. At around 01:00 hours when PW1 was taking care of her baby, Isiaka Saidi, unexpectedly she heard her daughter (FS) screaming. When she asked the appellant why FS was screaming, the appellant responded that FS had pooped and/or defecated herself (in Swahili language - FS alikuwa amejinyea). However, FS continued screaming. Being a mother to the victim, she once again asked the appellant why FS continued screaming loudly and what went wrong with her? In reply, the appellant told PW1 (his wife) that, he was wiping/rubbing the victim child upon pooping/defecating herself with faeces. Afterwards, PW1 moved direct to the other room in which DW1 (appellant), the victim/FS and Jasmini Saidi (PW6) were sleeping where she found the victim screaming loudly meanwhile discharging faeces from her body though not often. Her evidence shows that, the victim did not sleep from around 02:00 hours in the mid night until early in the morning.

Dawn early in the morning she informed her sister about the incident and explained to her what actually transpired to her victim child during night hours. PW1, FS and her sister all moved to Kiloka Health Centre seeking for medical treatment to the victim. Upon reached at Kiloka Heath Centre, they were received and welcomed by Erasto Lulandala, a clinical officer (PW7) who physically examined the victim on her private parts both vaginal and anus. His evidence shows that he noticed that the

victim was raped and sodomized. Seeing that, he advised PW1 to report the matter to the nearest police station. As PW1, FS, PW3, PW4 and DW1 were all present, they rushed to Pangawe Police Post and reported the matter. After registering all necessary information at Pangawe Police Post, PW5 (WP 4245 CPL Anisia) made a physical examination upon the victim and issued the PF3 to PW1 so as to pave the ways for the victim to be brought to the Hospital for medical treatment and allow other legal measures to follow the event. She also made a preliminary interrogation against PW1, PW3, PW4 and DW1 aiming to detect and/or discover what actually transpired against the victim. The preliminary interrogation carried out by the PW5 led to the arrest of the suspect or culprit herein the appellant (DW1). This piece of evidence also got supports from the appellant himself (DW1), PW3 (Salima Selemani) and PW4 (Cheka Selemani).

From Pangawe Police Post, PW1, FS, PW3 and PW4 followed one another up to Kiloka Health Centre where PW7 gave PW1 a referral to Morogoro Regional Hospital for more medical investigation and treatment. PW3 was obliged to remain at home taking care of the PW1's children. So, it was PW1, the victim and PW4 who travelled/moved to Morogoro Reginal Hospital. Upon arriving at the Regional Hospital, the victim was admitted in Ward No. 3. According to the evidence adduced by the PW2 (Dr. Emmanuel Mkumbo), on 8th July, 2019 while at his working station he passed through Ward No. 3 and attended the victim, an innocent child. During interrogation, PW1 informed PW2 that, her daughter was raped and sodomized. He physically examined the victim and found that she had faeces on her anus and her genital or vaginal part showed that though there were bruises but no active bleedings were detected. His evidence reveals further that, when he tried to

penetrate his fingers into the anus of the victim, he found that the muscles at the anus sprinter was loose and there was discharge from the anus which passed through without control. He told the trial Magistrate that, at in the genital or vaginal part, there was bruises.

His testimony shows further that, laboratory test showed that there was no venereal diseases and HIV respectively. He re-counted that, the victim was seen physically not normal as she sustained injuries into her anus. His medical examination concluded that, the victim was raped and sodomised by a blunt object (physical examination) and the blunt object penetrated both sides, to wit; vaginal part and anus part (laboratory test). During cross-examination, PW2 narrated that, the culprit did not penetrate to the inner part completely but did penetrate to some extent to cause injuries and the anus was open or loose. Though no sperms were detected but both physical and laboratory tests gave positive answer that the victim was raped and sodomized. His evidence shows that, when he touches onto her anus, she felt pain and cried. Her virginity was seen but there were bruises labia minora.

He said, the victim was administered with PEP to prevent her from being infected with the HIV. In medical science, Post - Exposure Prophylaxis (PEP) means taking HIV medicines within 72 hours (3 days) after a possible exposure to HIV to protect HIV infection. He further admitted the fact the victim spent some days in the Regional Hospital receiving medical treatment until recovery of her anus. Afterward, she was discharged from the Hospital. To back up his testimony, PW2 tendered in evidence the PF3 which he filled himself when he medically attended the victim under the supervision of the PW1. As the appellant (DW1) appears to have no reasons to object the PF3, it was admitted and marked as Exhibit PE2. On this facet,

As I have discussed hereinabove, I am satisfied that the Exhibit PE2 (PF3) was safely cleared for admission by the trial court and actually admitted before could be read out. **See - ROBINSON MWANJISI AND 3 OTHERS VS REPUBLIC (CRIMINAL APPEAL 154 OF 1994) [2001] TZCA 28 (13 JULY 2001).**

From the above re-evaluation of the evidence adduced by the prosecution witnesses, the question whether the evidences adduced by PW1, PW2, PW3, PW4, PW5 and PW7 suffices to prove the charges levelled against the appellant beyond reasonable doubt, in my considered view, the answer is positive. My observation has revealed that, the evidences adduced by PW2 and PW7 who are medical doctor and clinical officer demonstrates that at different occasions each of one attended the victim and discovered that she was raped and sodomised. Even the evidences given by PW3, PW4 and PW5 also corroborates the evidence adduced by PW1. Again, the PF3 which is the only documentary evidence legally admitted and marked as Exhibit PE2, basically, describes the oral account given by the PW2 (Dr. Emmanuel Mkumbo) and further gives weight to the offences committed by the appellant. This exhibit links the appellant with the evidences adduced by the prosecution witnesses and the two counts levelled against him. In other word, the chain and series of transactions from the time when PW1 heard the victim/FS screaming loudly at or about 01:00 hours in the mid-night until when she was admitted at Morogoro Regional Hospital was neither broken, nor discredited during cross-examination. In my view, throughout the trial, the prosecution witnesses were seen reliable and credible.

Further, I have considered the appellant's defence, but did not find any piece of evidence casting doubt on the evidence given by the prosecution witnesses. Although the appellant denied both counts, but he gave evidence of material particulars to

PW1 even though he used different words. In other words, his defence did not differ with the evidence testified by PW1, his wife from the time the incident occurred at or about 01:00 hours in the mid-night until when the victim was admitted at the Morogoro Regional Hospital for medical treatment. As I stated earlier on, in the course of determining the instant appeal, I also had an opportunity to consider grounds 5, 6, 7 and 9 not argued by the appellant for sake of justice. My finding on these four grounds of appeal, unveiled that the same were absorbed by my discussions when considering grounds 1, 2, 3, 4 and 8 respectively. No wonder that the appellant silently decided to abandon them without notice.

With the above findings, I fully agree with the State Attorney that, the victim was penetrated into her vagina and the anus by a blunt object. As to the question who penetrated his blunt object into her vagina and anus, the evidences adduced by the PW1, PW2, PW7 and Exhibit PE2 and corroborated by the evidences of PW3, PW4 and PW5 provides the answer. These pieces of evidences connect the appellant with the offences he stood charged and further incriminates himself to have been involved to penetrates his male organ into the victim's vagina and anus whose age is below 18 years old, hence the case against him was proved beyond reasonable doubt. I also accede to the fact that, the evidence relied upon by the prosecution side though circumstantial, irresistibly led to find the appellant guilty of the offences of incest by males and unnatural offence. In my considered view, his conviction and sentences fairly met justice of this case and I find no genuine reasons to fault the findings and decision of the trial court. It is trite law that, penetration however slight, is sufficient to constitute the sexual intercourse necessary to the offence. [See -

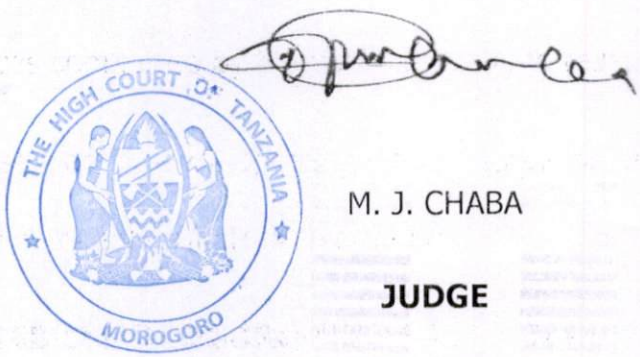
section 130 (4) (a) of the Penal Code]. I am also fortified with the authority in the case of **Omari Ahmed vs. Republic [1983] TLR 52,** where it was held:

> *"The trial court findings as to the credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court which call for reassessment of their credibility.*

In the final event, having re-evaluated and reconsidered the evidences on records, the grounds of appeal fronted by the appellant and the written submissions advanced by both sides, I am satisfied that the trial court rightly considered the facts and evidences before it and applied the principles of law and the authorities to arrive to a fair and justice decision that, the prosecution side through its witnesses proved the offences committed by the appellant beyond reasonable doubt.

Consequently, this appeal fails to succeeds and accordingly, its is hereby dismissed in its entirety. It is so ordered.

DATED at **MOROGORO** this 2nd April, 2024.



M. J. CHABA

JUDGE

02/04/2024

Court:

Judgement delivered this 2nd April, 2024, in the presence of Appellant and Josbert Kitalle (Respondent) in Chamber, via Video Conference from Ukonga Prison.

F. Y. MBELWA

DEPUTY REGISTRAR

02/04/2024

Court:

Right of the parties to appeal to the Court of Appeal of Tanzania fully explained.

F. Y. MBELWA

SGD: DEPUTY REGISTRAR

02/04/2024