IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO 73 OF 2023

(Originating from Criminal Case No. of 2023 before Manyoni District Court)

SEIF NYANGASI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 29/02/2024

Date of judgment: 13/03/2024

LONGOPA, J:

This is an appeal against conviction and sentence entered by the District Court of Manyoni for the unnatural offence C/S 154(1)(a) and (2) of the Penal Code, Cap 16 R.E. 2022. It is alleged that on 5th March 2023 during the daytime at Ujasiliamali area Manyoni Township within Singida Region, the appellant unlawfully did have a carnal knowledge of the victim (for anonymity purposes referred to simply as CM or victim) aged 9 years old boy against the order of nature.

The appellant denied the allegations that lead the prosecution to parade a total of five witnesses to establish the offence against the appellant. On the other hand, the defence had only one witness who is the appellant. At the end of the trial, the Court entered conviction against the appellant and sentenced him to serve thirty (30) years imprisonment.

The appellant was dissatisfied by the decision of the trial court i.e. both conviction and sentence thus preferred this appeal on the following grounds, namely:

> *1. That the learned trial magistrate erred in law and in fact by not drawing an adverse inference against the prosecution for them to call potential witness one called Sule (the young of the victim) to support the prosecution case.*
>
> *2. That the learned trial magistrate trenchantly erred in law and in fact due to the fact that the memorandum of undisputed facts of the PH was not read over to the accused person is fatal to render bot trial and conviction a nullity.*
>
> *3. That the learned trial magistrate erred in law and in fact for basing only on words of the victim while nothing tendered before the court by the prosecution side to prove the real age of the victim (birth certificate).*

4. That the learned trial magistrate erred in law and in fact by failing to notice that this case was fabricated and defamated one due to ground emanated on dispute between appellant and his family.

5. That the learned trial magistrate erred in law and in fact when did fail to notice that the prosecution side failed to prove the case beyond reasonable doubts.

6. That the learned trial magistrate erred in law and in fact to rely on evidence of the PW1 (victim) as the victim failed to name the appellant timely as per decision in ***Mpemba Joseph versus Republic****, Criminal Appeal No. 420 of 2019.*

7. That the trial court erred in law and in fact by failure to notice failure to call important witnesses including victim's mother and one Sule. The case of ***Lubeleje Mavina and another versus Republic****, Criminal Appeal No. 172 of 2006, CAT (Unreported).*

8. That the learned trial magistrate erred in law and fact by failure to adhere to section 10(3) and 9(3) of the Criminal Procedure Act, Cap 20 R.E. 2022 thus causing the prosecution to randomly bring witnesses.

9. That the trial court erred in law and in fact by failure of the prosecution to prove beyond reasonable doubts

including calling a teacher and attendance register to prove age of the victim.

10. That the learned trial magistrate erred in law and in fact by not noticing that cautioned statement of Seif Nyangasi contravened section 57(2) of the Criminal Procedure Act, Cap 20 R.E. 2022 and that there was no certificate signed by the appellant on his willingness to be interrogated.

11. That the trial court erred in law and in fact for its failure to notice that it was not the duty of the appellant to prove his innocence.

12. That the learned trial magistrate erred in law and in fact for failure to properly analyse the evidence of PW 3 and Exhibit PE 1 (PF 3) thus arriving at erroneous decision in particular by considering penis as blunt object while the same is stiff body flesh during intercourse (Penal erection).

13. That the learned trial magistrate erred in law and in fact by failure to inform the appellant about his right to have a lawyer to handle the matter whose penalty is so heavy.

At the time of filing of the appeal, the appellant preferred five grounds of appeal which are contained as 1st to 5th grounds of appeal. At a later stage when the appeal was scheduled for hearing the appellant made

a prayer to add more grounds. The Court granted the prayer, and grounds numbered the 6th to 13th grounds of appeal were the additional grounds.

On 29th February 2024, the parties appeared before me for viva voce submission on the appeal. The appellant appeared in person fending for himself while the respondent was represented by Mr. Francis Mwakifuna, State Attorney.

The appellant raised up and argued appeal by adopting all the grounds of appeal to form part of his submission. He asserted that this case originated from the family disputes that caused the appellant to be framed to this case. He alleged that there was a quarrel on marriage as the victim's mother who he was in relationship/ cohabiting with wanted him to change religion to follow the woman's religion. He stated that appellant's refusal made him be framed to have committed to unnatural offence against the victim child.

It was the submission of the appellant that trial court did not consider the defence evidence in the judgment and analysis of the evidence was lacking as the magistrate did not elaborate to me about evaluation of evidence.

Also, the appellant challenged the evidence of the medical doctor that it has nothing to establish against the appellant as PW 3 stated that he found nothing on the victim's anus like blood or sperms. Thus, according to appellant there was no penetration of the victim's anus.

In respect of Cautioned Statement, it was submitted that the same was not recorded as per legal requirements as the appellant asserts that he was severely beaten. Also, there was no friend or relative who was called to witness when the appellant was recording the statement. Moreover, he denies having signed the cautioned statement.

According to the appellant, when the charge was read and explained he pleaded not guilty and that the four witnesses for the prosecution. Thus, all the testimonies were hearsay evidence as there were no direct evidence.

Mr. Francis Mwakifuna, State Attorney submitted that he was not supporting the appeal. The respondent concurred with the decision of the District Court of Manyoni. Both conviction and sentence are in order in accordance with the law. Some of the grounds were argued jointly and together. These are the 1st and 2nd additional ground of appeal (7th ground); third ground and fourth additional ground (9th ground) of appeal; and the last set is the 4th ground in the petition and the 7th additional ground (12th ground) of appeal. The reasons for objecting the appeal are articulated as follows:-

In respect of the first ground on failure to bring potential witnesses especially one Sule. The witnesses brought by the prosecution were four including victim who is the best witness in sexual related offences. There was evidence of PW 3 who is the medical corroborated that the victim was penetrated on his anus. PW 1 on pages 6 to 7 of the proceedings narrated the penetration of his anus by appellant which is the vital element. This

was the victim of the offence who had established penetration of the anus. In the sexual related cases the evidence of the victim is the best evidence. The case of **Selemani Makumba versus Republic**, Criminal Appeal No. 94 of 1999, the Court of Appeal (Unreported).

This was corroborated by PF. 3 that on pages 16-17 of the proceedings. PW 3 testified on how he conducted the medical examination on the victim. It proved that there was penetration of the anus. This was Exhibit PE 1. The appellant did not object the admission of the PF 3 as Exhibit. All the elements of the offence were proved thus the ground lacks merits.

On the second ground on weaknesses of the Preliminary Hearing, it is submitted that this ground lacks merits as page 4 of the proceedings the PH was properly conducted and agreed facts were signed by the appellant in the Memorandum of the Agreed Facts. The appellant cannot come back to deny what he is signed himself at page 5 of the proceedings.

On the third ground regarding age of the victim, we are submitting that the age of the victim was established on page 6 of the proceedings where victim is stated to be aged 9 years old. It is evident that the age may be proved by the victim, or parent or school records. The case of **Hassan Bundala @ Swaga vs Republic**, Criminal Appeal No. 386 of 2015 CAT (Unreported)- It was stated that age of the victim can be proved by the victim, medical doctor, school register, clinic card etc. Therefore, this ground of appeal lacks merits.

On the fourth ground relating to fabrication of the case, it is submitted that these allegations are not true as during cross examination in page 23 of the proceedings he denied existence of any family dispute between the appellant and any other person including the victim's mother. This ground also lacks merits.

The fifth ground is on failure to prove the case beyond all reasonable doubts. The prosecution brought witnesses to establish the elements of the offence and the commission of the same. There were four witnesses. PW 1 narrated how his anus was penetrated by the appellant. This was corroborated by PW 3 who is the medical doctor.

Also, the local leader/ ten cell leader was called as PW 2. This witness was immediately informed about the incident. He is the one who arrested and submitted the appellant to police station and assisted the victim's mother to send the child for medical examination at the hospital.

Another PW 4 an investigation officer who recorded the cautioned statement of the appellant. The Cautioned Statement was admitted as Exhibit PE. 2. There was no objection regarding the admission of the same in the Court. The prosecution proved the case beyond any reasonable doubts.

For the remainder of the additional grounds of appeal, the first on failure to name the appellant timely. The victim informed his mother. Immediately, the victim was taken to PW 2 who is the ten-cell leader where the child narrated the story. From that point, the matter was reported to police station. Later, on PF 3 was issued for medical examination at the

hospital. The occurrence was reported on the same date. The victim named the appellant as the one who sexually abused the victim. This ground also lacks merits.

On the third additional ground of appeal which is based on section 9(3) and 10(3) of the Criminal Procedure Act, Cap 20 R.E. 2022. This reason has no merits at all. Section 143 of the Evidence Act, Cap 6 R.E. 2019 does not require a specified number of witnesses. All the witnesses who testified to establish the offence they managed to do so. The sections referred to relate to the persons reporting to be called as witnesses. Thus, the witnesses brought were involved in one way or another.

On the fifth additional ground related to violation of section 57(2) of the Criminal Procedure Act, Cap 20 R.E 2022 on cautioned statement – the absence of certificate, it is submitted that the cautioned statement was recorded under section 58 of the CPA thus the provisions of section 57(2) was not applicable. PW 4 stated the appellant is one who narrated the story in the cautioned statement. This ground has no merits as well.

On the sixth additional ground related to conviction based on weakness of the defence, it is submitted that it is true that it is not the duty of defence to prove its innocence as a principle. The Court do rely on the witnesses' testimonies, exhibits and other documents to decide. The trial court was satisfied with testimonies of PW 1 to PW 4. They established all the ingredients of offence. The court found that the evidence was watertight to leave no any reasonable doubts.

The seventh additional ground challenges the PF 3 contents that stated that the anus of the victim was penetrated by "blunt object" while penis is not blunt object but "stiff body flesh." It is submitted that PW 3 was a Practising and registered medical doctor certified to conduct medical examinations of victims. The opinion of PW 3 should be objected by another medical doctor report that penis is not blunt object but stiff body flesh. Further, the blunt object does not mean sharp object thus penis is blunt object. The opinion of medical doctor can only be discredited by another medical report.

The last additional ground is on legal representation that appellant is blaming the trial court for not informing him on that right, it is submitted that it is not the duty of the court to inform the appellant. It was upon him to so request. It is not a valid ground at all as the appellant never requested for a lawyer. He decided to defend on his own without any other witnesses. It is not the duty of the Court to find advocate for the accused persons.

On the cautioned statement that the appellant was beaten, PW 4 testimony and Exhibit PE 2 which was admitted without any objection is evidence that the same was properly admitted. The issue of being beaten is an afterthought. Signing of the cautioned statement by the appellant is an indication that the same was taken voluntarily.

In a brief rejoinder, the appellant stated that he objected to evidence of PW 3 and PW 4. The testimonies of PW 1 differ from that of PW 3. The

medical doctor stated to have not found sperms nor blood at the victim's anus which means the victim was not penetrated.

PW 2 was not a local leader as I requested to be sent to the Street /Mtaa Chairman, but they refused. The ten cell-leader requested me to fix the television set dish. They tricked me before arresting me.

Having heard both sides, I have dispassionately considered the grounds of appeal, trial court's proceedings and judgment to be able to analyse the merits or otherwise of this appeal. I shall address the grounds in sets of related grounds.

Evaluation of the evidence of both side sides is one of the vital elements of fair trial in Tanzania. It is upon the trial court to ensure that evidence of both sides is weighed before it rules out on guilty or otherwise of the accused person. In the case of **Hassan Singano @ Kang'ombe vs Republic** (Criminal Appeal 57 of 2022) [2022] TZCA 261 (11 May 2022), the Court of Appeal at pages 11-12, noted that:

> *We have carefully examined the record and satisfied ourselves that, indeed the appellant's defence was not considered by the trial court. The position of the law on that aspect is settled. The trial court, before determining the guilty or otherwise of the accused, is obliged to consider both the prosecution and defence evidence. Where such a duty is omitted by the trial court, it is trite law, the first appellate court is bound so to do.*

The record in the instant case especially the judgment of the trial court indicates that both parties' evidence was considered and evaluated dispassionately by the court before it arrived at its determination. Pages 1-4 of judgment cater for the summary of evidence of both sides. Further, pages 5 to 7 reveal the analysis and evaluation of evidence in determination of the issues. Thus, evidence of the defence was fully considered before the trial court arrived to the finding that appellant was guilty of the offence as charged.

The appellant challenged that age of the victim was not proved. In my view, age is not always relevant for the unnatural offence except in enhancing the sentence. It is generally an offence to have carnal knowledge of any person against the order of nature under section 154(1) (a) of the Penal Code, Cap 16 R.E. 2022. The age question is covered in section 154(2) of the Penal Code to enhance sentence and oust the discretion of the court in imposing sentence once the victim is below age of eighteen years old.

However, I shall address the question of age for two purposes. First, to ascertain the validity of appellant's challenge. Second, the appropriateness of the sentence imposed on the appellant. Age of the victim can be proved by different mechanisms including the evidence of the victim, parents, school records or medical record that has indicated the age. In the case of **Hassan Bundala @ Swaga vs The Republic** (Criminal Appeal 386 of 2015) [2015] TZCA 261 (23 February 2015), at page 4 the Court of Appeal observed that:

Not only was the age of the victim mentioned in the charge sheet but the medical evidence through PW6 and the PF3, exhibit PE1 showed that the victim was aged 8 years when she was raped. The appellant did not challenge this evidence then and he can't be heard at this stage to say that the age of the victim was not proved.

Given the fact that PF.3 which was tendered and admitted without objection on its admissibility and contents as Exhibit PE 1 contains age of the victim to be 9 years old, it is my considered view that there was a proof of age of the victim. Also, it is stated categorically by the appellant in Cautioned Statement which is Exhibit PE 2 that he stays with his wife and three children and victim/CM is aged 9 years old. In the circumstances, the complaint by the appellant that age of the victim was not proved lacks merits.

In the case of **Jafari Juma vs Republic** (Criminal Appeal 252 of 2019) [2023] TZCA 216 (3 May 2023), the Court of Appeal of Tanzania stated that:

It is a peremptory principle of law that in statutory rape cases like the one before us, the age of the victim must be proved. Mr. Mtoi, referred us, to the case of ***Leonard Sakata (supra)*** *where the Court underlined in imperative terms that in cases of statutory rape, age is an important ingredient of the offence which must be proved. There is in this regard an array of authorities to support this settled*

position of the law, see for example ***Rwekaza Bernado v. Republic,*** *Criminal Appeal No. 477 of 2016,* ***Mwami Ngura v. Republic****, Criminal Appeal No. 63 of 2014 and* ***Solomon Mazala v. Republic,*** *Criminal Appeal No. 136 of 2012 (all unreported).*

Further, in my perusal of the proceedings of the trial I have noted that the question of age of the victim was sufficiently addressed. On 07/03/2023 when the matter was scheduled for Preliminary Hearing it is indicated that the appellant admitted among others, that: the accused person admit that the victim is 9 years old; and the accused person admits knowing the victim and that he is a stepfather of the victim.

It is on evidence that appellant did sign the Memorandum of Agreed Facts containing these statements regarding age of the victim. Therefore, it is evident that question of age of the victim needed no evidence as parties were not disputing about that age. There was no need to call any teacher or bring any school attendance register nor need to produce birth certificate as parties had agree that such age of 9 years old is not disputed. As such 3rd and 9th of grounds of appeal lack merits and are hereby discarded.

Cautioned statement of the appellant was vehemently challenged by the appellant in this appeal. The grounds for challenging the Cautioned Statement are based on two aspects. First, that it did not comply with the

provisions of Section 57(2)(a) and (b) of the Criminal Procedure Act, Cap 20 R.E. 2022 namely absence of certificate signed by the appellant waiving his rights to call relative or a lawyer of his choice. Second, that the same was procured through use of force by beating the appellant at the police station.

My perusal of the evidence on record indicates the following: First, the cautioned statement was recorded voluntarily. Second, police officer recording the cautioned statement informed the appellant all his rights before recording the same. Third, it was recorded within the statutory timelines i.e. within four hours of restraint. Fourth, it was read over to the appellant, and he admitted being correct thus signed it. Fifth, it complied with all admissibility requirements. Sixth, the appellant was afforded opportunity to challenge its admissibility and cross examined on the contents of the same.

I shall hasten to state that the trial court record at pages 18-20 of the proceedings does not indicate that at any point in time during the tendering of PW 4 evidence has the appellant raised any issue regarding the voluntariness of the cautioned statement. Indeed, raising the aspect of voluntariness of the cautioned statement at this appellate stage is a clear afterthought.

Generally, admission and confessions made by the accused person are acceptable as sufficient evidence to find guilty of the accused person. In the case of **Chamuriho Kirenge @ Chamuriho Julius vs Republic**

(Criminal Appeal 597 of 2017) [2022] TZCA 98 (7 March 2022), the Court of Appeal stated that:

> *It is settled that an oral confession of guilt made by a suspect before or in the presence of reliable witnesses, be they civilian or not, maybe sufficient by itself to ground conviction against the suspect... The Court insisted that such an oral confession would be valid as long as the suspect was a free agent when he said the words imputed to him. It means therefore that even where the court is satisfied that an accused person made an oral confession, still the trial court should go an extra mile to determine whether the oral confession is voluntary or not.*

In this case, in absence of documentary evidence of confession the Court may be entitled to convict the accused if it is satisfied that oral confession was made voluntarily. However, the instant appeal does not have oral confession but there is a confession reduced into writing which had complied with all admissibility criteria. Such cautioned statement reveals nothing but the participation of the appellant in commission of the offence he stood charged.

Exhibit PE 1 is a Cautioned Statement of the appellant. It reveals that appellant was accorded all rights before recording the cautioned statement. The appellant signed the same prior to stating the contents. Further, he confirmed the truthfulness of the contents of all the recorded statement by

both his own handwriting as well as his right thumb print. I have no doubt whatsoever in my mind that lamentation of failure to accord necessary rights of the appellant has no iota of truth.

To sum up the matter on Cautioned Statement, the appellant in his own words admits the commission of the offence. He stated that:

> *...huwa usiku ninaamka na kumwingilia kinyume na maumbile mtoto CM (victim). 05/03/2023 majira ya 0900 hours nikiwa nyumbani nilimwingilia kinyume na maumbile CM ambapo kabla sijamaliza haja zangu aliniponyoka na kukimbia nje na kulalamikia kwa mama yake akiwa uchi akisema kwamba nimemfanyia vitendo vibaya. Ni kweli mimi ninakiri kwamba nilimwingilia kinyume na maumbile mara nyingi kwa kuwa nilipitiwa na shetani.*

This evidence was not objected by the appellant. The appellant essentially admits all the ingredients of the unnatural offence and the contents therein which were read out and explained to the appellant represent correct situation on this matter. It is direct evidence from the doer of the act.

I am settled that such confession of the appellant falls squarely on the solid evidence to establish guilty of the appellant. In the case of **Chande Zuber Ngayaga & Another vs Republic** (Criminal Appeal 258

of 2020) [2022] TZCA 122 (18 March 2022), the Court of Appeal of Tanzania, at page 13 stated that:

> *It is our considered view, and as rightly found by the trial court,* ***that the appellants' statements provided overwhelming evidence of their participation in the commission of the offence.*** *In the said statements both appellants clearly admitted that they were the ones who transported the trophy on 20th January 2018 for sale on a hired motorcycle. That, upon seeing the motor vehicle of the game reserve officers, they abandoned the trophy and the motorcycle and ran away.* ***It is settled that an accused person who confesses to a crime is the best witness*** (Emphasis added).

I subscribe to this binding precedent that confession made by the appellant is the best evidence as it cements the available evidence of the prosecution that point to the same direction that appellant did commit the unnatural offence against the victim child.

Any complaint by the appellant regarding the cautioned statement at this stage is unwarranted and cannot be given weight. To use the words of the Court of Appeal of Tanzania in the case of **Halfan Rajabu Mohamed vs Republic** (Criminal Appeal 281 of 2020) [2023] TZCA 178 (6 April 2023), at pages 14-15, where it stated as follows:

We are fortified in that regard because, as gathered from page 35 of the record of appeal, the appellant through his learned counsel did not raise objection on the admissibility of the cautioned statement in evidence and the trial court properly treated the cautioned statement that it was voluntarily made. In the circumstances, the appellant's complaint that his conviction was based on a cautioned statement which he was not aware of and that it was not voluntarily made, in our considered view is an afterthought.

Having noted that there are no merits on the cautioned statement lamentations, I shall proceed to dismiss the 10th ground of appeal.

Another set of grounds of appeal relates to failure to prove the case beyond reasonable doubts. This shall be addressed through four aspects. First, by analysing ingredients of the offence. Second, that it was not duty of the appellant to prove his innocence. Third, credibility and reliability of the PW 1 (victim). Fourth, that the case was fabricated against the appellant due to family quarrels.

The offence the appellant stood charged has the following elements as per Section 154(1) (a) and (2) of the Penal Code. The most important element is proof of penetration however slightest of the anus. This aspect was reiterated in the case of **Sospeter John vs Republic** (Criminal

Appeal 237 of 2020) [2021] TZCA 329 (28 July 2021), pp.17 -18, the Court of Appeal stated that:

> *We wish to start with unnatural offence, the appellant was charged with two counts of unnatural offence contrary to section 154 (1) (a) of the Penal Code. For such an offence to stand, there ought to be proof of penetration, however slight into the anus, with or without consent (see the case of* ***Joel s/o Ngailo v. The Republic****, Criminal Appeal No. 344 of 2017 (unreported)). PW6 corroborated that evidence because after he had examined the girls' anuses, he found bruises and blood. He thus concluded that there was forceful penetration by sharp or blunt object in the girls' anuses. There is also on record the evidence of PW7 who established the girls' age to be below 10 years. In totality, we are satisfied that the evidence brought before the trial court was enough to prove the essential ingredients of unnatural offence contrary to section 154 (1) (a) of the Penal Code.*

It was the evidence of PW 1 who is the victim stated categorically that he was penetrated his anus by the appellant. The victim narrated the ordeal eloquently and in a lucid manner. The testimony of the victim at page 7 of the proceedings reveals that: *"my father called me and undressed my trouser and took his saliva and put on my buttocks.*

Alichukua mbolo yake na kuweka mkunduni kwangu (He inserted his penis in my anus). Similarly, in cross examination, the victim reiterated that: *You inserted your penis in my anus...I told my mother that "umenibaka".*

In essence, these words means that there was penetration of the victim's anus by the appellant. This evidence was corroborated by evidence of PW 3 and PW 4. PW 3, the medical doctor who testified that he examined the victim thus concluded that there were loose sphincter muscles which meant there was a blunt object penetrated on victim's anus. Exhibit PE 1 reflects this aspect of penetration of the anus of the victim.

Also, the evidence of PW 4 cements on this aspect. It was the appellant who confessed before PW 4 that he committed the unnatural offence against the order of nature to the victim. Exhibit PE 2 is evident that the appellant confessed in the cautioned statement.

In totality of evidence of prosecution witnesses, namely PW 1, PW 2, and PW 3 points to only one conclusion the appellant committed unnatural offence against the victim. Thus, the offence was proved beyond any reasonable doubts.

I concur with the submission of the respondent that the prosecution managed to prove that unnatural offence was committed by the appellant against the victim. I cannot agree with the appellant's version of story that the prosecution case was not proved.

The other limb is that credibility of PW 1 for failure to name the appellant timely. This ground lacks basis as it is in evidence that the offence was committed against the victim on 05/03/2023. The victim reported to his mother on the same morning, he was taken to police and to the hospital in the same day. At all these places the victim named appellant is the perpetrator of the sexual molestation of the victim.

I concur with the appellant that the case of **Mpemba Joseph vs Republic** (Criminal Appeal No.420 of 2019) [2023] TZCA 17623 (18 September 2023) is relevant to circumstances of this case. In that case at page 9 the Court of Appeal of Tanzania stated that:

> *It is trite law as stated in the case of **Selemani Makumba v. Republic** [2006] TLR 384, that in sexual offences, the evidence of a victim alone, if believed, is sufficient to found conviction. In this case, PW1 mentioned the appellant as the person who raped her. She did so after she had become pregnant. While the offence is alleged to have been committed in June, 2017, she mentioned the appellant as the person who is responsible for the pregnancy in September, 2017. The record bears that, PW1 failed to name the appellant at the earliest point and no justifiable reasons were given for the delay. The evidence of PW1 also shows that there was no threat ever made by the appellant to her to justify her action. On that*

account, it is our strong view that PW1 was not a credible and reliable witness.

I fully subscribe to the position of the Court of Appeal that the evidence of the victim may sufficiently establish the conviction of the accused person and that failure to name the assailant timely may be applied to draw adverse inference against the evidence of the victim if the same is not reported within reasonable time and without a good cause for so withholding. Conversely, the case at hand is different. The victim reported the matter to his mother within the shortest time available of the occurrence of the offence. As such, all other steps were taken in the same day save for arraignment in court of the appellant which was done on 06/03/2023 which was a day after the incident.

In short, evidence of PW 1 is credible and reliable evidence. I am certain that there is nothing to indicate otherwise as the trial court was satisfied that he was credible and reliable witness. Given the consistent and complementary nature of the prosecution evidence, the evidence of PW 1 tallies squarely with that of PW 3 and PW 4. In those circumstances, the decision in the case of **Ally Ngozi vs Republic** (Criminal Appeal 216 of 2018) [2020] TZCA 1786 (24 September 2020), the Court of Appeal reiterated that:

It is trite law that every witness is entitled to credence and must be believed, and his testimony accepted unless there are cogent and good reasons for not believing the witness

which include the fact that, the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. See – ***Goodluck Kyando vs Republic*** *[2006] TLR 363 and* ***Mathias Bundala vs Republic****, Criminal Appeal No 62 of 2004 (unreported).*

I have no doubt whatsoever to believe that PW 1's evidence was credible and reliable to establish the unnatural offence committed by the appellant.

The third limb is whether the appellant was convicted on the weaknesses of the defence case. This is due to the challenge on evidence of the prosecution whereas the appellant argued that it was not a duty of the appellant to prove his innocence.

Having perused the record, I am of the settled view that at no point in time trial court relied on the weaknesses of the defence case to convict and sentence the appellant. At pages 7-8 of the judgment, the learned trial magistrate stated that: "the testimony adduced, and exhibits tendered by the prosecution side by no any means can be weakened by the evidence adduced by the defence. The prosecution has proved that CM was really sodomised. It was the accused person who sodomised the victim. Therefore, he is guilty of a charge of unnatural offence C/S 154(1)(a) and

(2) of the Penal Code, Cap 16 R.E 2022 and is accordingly convicted for offence charged. It is so ordered."

It is obvious that the appellant was convicted on the strengths of the prosecution case. The evidence of the prosecution established without any flicker of doubts all ingredients of the offence. It left nothing unproved to warrant lamentations by the appellant.

Having demonstrated that evidence of record is sufficient to establish the case against the appellant beyond any reasonable doubt, it goes without saying that fabrication of the case against the appellant does nor arise. It was defence evidence that he has been living peacefully and in harmony with every person. He testified that he has not conflict or grudges against the victim, ten cell leader nor the police. This is reflected in page 23 of the trial court proceedings. In the circumstances, I am inclined to find out that lamentation of being framed in this case is a clear afterthought. It has no iota of truth.

I am of the settled view that at this juncture I can safely conclude that the 4th, 5th, 6th, and 11th grounds are destitute of merits thus they collapse naturally for their voidness.

The question of weaknesses of the Preliminary Hearing (PH) in the trial is another ground posed by the appellant. Indeed, this ground needs to be addressed on two main limbs. First, revelation of the available court

record. Second, what are the effect of weaknesses of the Preliminary Hearing, if any.

The record of trial court reveals that the charge was read over and explained to the appellant. The appellant stated that it is not true thus Plea of not guilty was then entered. At that juncture, the prosecution narrated all facts of the case. The appellant admitted only six facts out of eight facts that were narrated. It is also revealing that the Memorandum of Undisputed Facts was read over and explained to the appellant who did not disqualify them. That was evidenced by the appellant appending his signature to the Proceedings in question. Pages 3 to 5 of the typed proceeding reveals this aspect of Preliminary Hearing.

I am certain that available record is straightforward that Preliminary Hearing in this matter was in order as per the requirements of Section 192 of the Criminal Procedure Act, Cap 20 R.E. 2022.

Indeed, it is the legal position in Tanzania that in circumstances where Preliminary Hearing is marred with irregularities, it cannot be defeated. The Court shall always consider the available evidence on record if supports conviction or otherwise and not vitiate proceedings on account of irregular PH. In recent decision in the case of **Daktari Jumanne vs Republic** (Criminal Appeal No. 602 of 2021) [2023] TZCA 18020 (28 December 2023), the Court of Appeal stated that:

From settled case law in this jurisdiction, a trial of a case will not be vitiated for failure to conduct a preliminary hearing or for conducting it improperly. In the case of ***Benard Masumbuko Shio v. Republic****, Criminal Appeal No. 123 of 2007 (unreported), the Court held that a trial will not be vitiated by a defective preliminary hearing. Same position was held in decisions in* ***Mkombozi Rashid Nassor v. Republic****, Criminal Appeal No. 59/2003;* ***Joseph Munene and Another v. Republic****, Criminal Appeal No. 109/2002 and* ***Christopher Ryoba v. Republic****, Criminal Appeal No. 26 of 2002 (all unreported).*

At this juncture, I shall dismiss the 2nd ground of appeal for being destitute of merits.

Another crucial ground of appeal focused on challenging the evidence of the medical doctor and tendering of PF 3. The medical report is supporting evidence to the oral testimonies in establishing the ingredients of the offences. In the case of **Christopher Marwa Mturu vs Republic** (Criminal Appeal 561 of 2019) [2022] TZCA 652 (27 October 2022), at 10-11 the Court of Appeal of Tanzania, stated that:

Furthermore, in sexual offence cases, the testimony of the doctor is not the only evidence to prove the offence, other

evidence on the record can as well prove it. Specifically, in Edward Nzabuga (supra), the Court having considered as whether the expert's opinion or production of medical report (PF3) overrides oral evidence by witnesses who witnessed the incident, it stated that the sexual offence can be proved orally without an expert opinion or oral evidence by experts i.e. without a doctor who examined the victim testifying in court and/or tendering a PF3. Similarly, in the case at hand, we are satisfied that, even without the evidence of the doctor, the testimony of PW2 and PW3 is quite sufficient to prove the offence the appellant was charged with.

The evidence of the medical doctor is an expert opinion. Normally expert opinion intends to inform the court on information that is not within the scope of the trial court to apprehend. Expert opinion is an expression of the opinion of an expert on given set of facts. In the case of **Kidai Magembe vs Republic** (Criminal Appeal 228 of 2021) [2022] TZCA 346 (13 June 2022), the Court of Appeal observed that:

An expert is not to find facts but to express his opinion on the basis of assumed facts. It is based on the above-cited authority that we do not expect PW7 to have conjectured that nothing else could have been inserted into the victim's private parts other than a man's manhood. To that end, we

do not entertain any doubts whatsoever that the findings by the medical expert witness proved that the offence stated in the charge had been committed against PW6 as penetration which is one of the ingredients of the offence of rape was proved beyond reasonable doubt.

The Court noted that it is not expected that a medical doctor would certainly state that penetration was by a particular thing. It suffices to state in general terms acceptable to medical profession that it would appear to have been penetrated by blunt object as contrasted to sharp object. It is obvious that that in medical terms penis is not a sharp object.

I concur with the respondent that the evidence of PW 3 and tendering of the Exhibit PE 1 was in order. First, PW 3 demonstrated that he has prerequisite qualification namely bachelor's degree in medicine from recognised university. Second, he explained the procedure of conducting examination to include physical and laboratory examination. Third, he ably expressed his opinion that when examined the anus of the victim he found the sphincter was so loose which is not normal to human beings thus concluded that a blunt object must have penetrated that anus. Fourth, the PF 3 was admitted without objection from the appellant. Fifth, the appellant did not cross examine as to its contents when availed opportunity to do so. It means that the appellant agreed with the opinion that penis penetration to the anus amount to blunt object penetrating the same.

At this juncture, the appellant cannot be heard to complain that penis is not regarded in his opinion to be blunt object rather a stiff body flesh as he puts it.

The role of expert opinion cannot be underestimated. In the case of **Mussa Ernest vs Republic** (Criminal Appeal 463 of 2019) [2022] TZCA 655 (27 October 2022), the Court of Appeal observed that:

> *As for PW4, being an expert witness, her evidence was specifically intended to provide the trial court with the information which was outside the experience and knowledge of the trial magistrate. In other words, an expert witness is required to provide the court with a statement of his or her opinion on any matter in dispute calling for the expertise by the witness provided that they have the necessary qualification to give such an opinion. It is instructive to observe that, in view of the above stated role, it would be a serious violation and indeed a disregard of the cognitive organs which are available to the grasp of any ordinary human-kind if the court were to press an expert witness in a criminal trial to give a first-hand description or narrative of occurrence of a criminal incident, to which he was not eyewitness.*

It is certain that PW3's description that penetration of the anus was by blunt object suffices in the circumstances to prove that there was

penetration. It is the other pieces of evidence that when taken conjunctively lead to the conclusion that such penetration was by penis. In the instant case, oral account of PW 1 and the PW 4 taken together with Exhibit PE 2 the cautioned statement concludes that the victim's anus was penetrated by penis of the appellant. I dismiss the 12th ground of appeal for being devoid of merits.

The last set of grounds may be termed as procedural irregularities which the appellant complains to have caused miscarriage of justice. First, the non-compliance to sections 9(3) and 10(3) of the CPA. Second, failure to call some important witnesses. Third, failure to inform the appellant about his right to legal representation.

This set of grounds is not difficult to dispose. The first limb regarding non-compliance with the provision of section 9(3) and 10(3) of the Criminal Procedure Act, Cap 20 R.E. 2022, it is my settled view that they are irrelevant, and they do not apply to the circumstances of the case. Section 9(3) relates to the situation where an offence is reported directly to the magistrate thus magistrate should take certain action. This is when there is no formal charge. The other section 10(3) concerns the need for the police to examine all those acquainted with the facts of the reported crime. Simply, from those persons police officer interviews or interrogates some may end up being witnesses in court of law if reported crime have sufficient evidence to prosecute. These are relating to the earliest stage of

reporting the alleged crimes only. They are not related with conduct of criminal trial once a charge has been instituted in court.

The second limb is the lamentation on failure to call important witnesses. This also should crumble for being unmeritorious ground. The reasons are straightforward that a party to a case has discretion to choose which witnesses to call and which witnesses not. That is why Section 143 of the Evidence Act, Cap 6 R.E. 2019 states clearly that no particular number of witnesses is required to be called in court. Indeed, a single witness may be able to prove a case. In the **Christopher Marwa Mturu vs Republic** (Criminal Appeal 561 of 2019) [2022] TZCA 652 (27 October 2022), the Court of Appeal has categorically observed that:

> *We wish to emphasize that, pursuant to the provisions of section 143 of the Evidence Act, [Cap. 6 R.E. 2022], there is no legal requirement for the prosecution to call a specific number of witnesses. What is required is the quality of evidence and the credibility of witnesses.*

I entirely subscribe to this position of law that the most important aspects in proof of cases is the reliability and credibility of witnesses and not the number of witnesses. The prosecution in the instant case relied of the credible and reliable evidence of PW 1, PW 2, PW 3, PW 4 to prove beyond all reasonable doubt that the appellant sexually molested the victim against the order of nature. There was no need of calling any other

persons as witnesses. If the appellant thought that the so labelled crucial/important witnesses he was at liberty to call them to build up his defence case.

The last limb in this part is the failure by trial magistrate to inform the appellant of his right to have a legal representation. I should state at the outset that entitlement to legal representation through the court is not an automatic right. Generally, the law in Tanzania except for a child when is an accused or offences attracting capital punishments like murder and treason where the legal service should be availed at the expense of the government through public funds any other offences have not automatic legal representation.

Section 33 of the Legal Aid Act, Cap 21 R.E. 2019 caters for such aspects. For all sexual offences, legal representation at the public expenses is not automatic. It is the discretion of the Court which must be exercised judiciously. In the circumstances of this matter, trial court was not bound by any law or judicial precedent applicable in Tanzania to avail free legal aid to the appellant for sexual molestation of the victim. In the circumstances of this appeal, I am inclined to state at this juncture that the 1st, 7th, 8th and 13th grounds of appeal crumble for being devoid of any merits.

Before I pen off, I am of the view that I should restate about issues. First, the admissibility of documentary evidence and exhibits. Second,

sentence. Exhibits in terms of documentary evidence and real items form a major part of criminal trials. They are important in cementing oral testimonies tendered in court as the exhibits tend to corroborate oral evidence. Tendering of the exhibits can build or destroy the party's case. It is on this important role the exhibits play in determination of criminal cases that the Court of Appeal has always emphasized on adherence to proper procedure on admissibility of documentary evidence.

The procedure for admission of documentary evidence of documentary has been re-emphasized in the case of **Wambura Kiginga vs Republic** (Criminal Appeal 301 of 2018) [2022] TZCA 283 (13 May 2022), at pp 22-23, where the Court of Appeal stated that:

> *In any event, in appropriate circumstances, the proper procedure to be followed by trial courts when accepting documentary exhibits,* ***is that after the document is cleared for admission and accepted in evidence and properly marked,*** *the document as soon as practicable,* ***has to be read audibly in a language understandable to the accused.*** *Short of complying with that procedure, generally acceptance of the exhibit is unlawful and the remedy is to expunge it.*

It is a three- stage process, namely clearing the document for admission, actual admission and reading out of the contents before the

Court of law. Failure to adhere to this procedure has always vitiated validity of such documents thus the same are expunged from the record.

In trials, a witness would lead some evidence in court that a particular documentary evidence exists and state/describe the way such document would be recognised by the witness so testifying before even the document is shown to that witness. That is clearance of the document for admission. In actual admission it is expected that the prayer should be made by the witness to tender the same, the court should avail the other party with such document thus opportunity to object or otherwise before it is admitted and marked if it complies with legal requirements on admissibility. Finally, once the document is admitted and properly marked it is necessary to it should read out in the court. This last stage is so crucial to inform the other party to the case to know exactly contents of the admitted document. It allows such other party to prepare a defence either by cross-examining the witness to impair the credibility of that witness or otherwise.

Commendably, two Exhibits in the instant case i.e. Exhibit PE 1 which is the PF 3 and Exhibit PE 2 which is the cautioned statement of the appellant adhered strictly to the admissibility of documentary exhibits. Such compliance has made it so difficult to impeach credibility of those documents.

The appellant challenged so much on the proof of the age of the victim. As I have demonstrated that there are mainly three aspects that

proved the age of the victim to be 9 years old. First, the Memorandum of Undisputed Facts contains age of the victim as one of the uncontested issues. Second, the PF 3 and Cautioned Statement have confirmed the same. Totality of the evidence above regarding the age of the victim to be 9 years made the issue of age to be proved without any doubt.

Having observed that the age of the victim was proved without any flicker of doubts, the law does not give options to the trial court to impose sentence upon conviction. The appellant stood charged, convicted and sentence to serve 30 years imprisonment. The offence was charged under section 154(1)(a) and (2) of the Penal Code, Cap 16 R.E. 2019 which essentially require that where a person is convicted of unnatural offence against the order of nature for a child below eighteen years, the convict shall be sentenced to life imprisonment.

The victim being a child of tender age i.e. 9 years old, it is certain that the trial magistrate erred in law to impose such lenient sentence. I am prepared to enter a proper sentence. I shall not disturb the conviction of the appellant as such conviction is proper and validly entered against the appellant based on the available evidence.

The inclusion of subsection (2) of the Section 154 of the Penal Code, Cap 16 R.E. 2022 in the charge was not made without intention. That provision intends to curtail the discretion of the Court in sentencing if the victim is below the age of 18 years.

Section 154 (2) of the Penal Code, Cap 16 R.E. 2022 in my view is couched in mandatory nature. It does not give a room for discretion on the trial magistrate to impose a different sentence. It states as follows:

> *(2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment.*

In the instant appeal, the victim was a child of 9 years of age thus the only penalty upon conviction is life imprisonment. This is despite the fact that mitigation indicated that the appellant was a first offender. Such mitigation had nothing to reduce in the circumstances of the case as the only available penalty is life imprisonment. Simply stated, trial magistrate has a discretion to impose sentence ranging from 30 years to life imprisonment when only Section 154(1) (a) of the Penal Code is used as the charging section. There is no such pleasure to use his discretion once subsection (2) of that section is included. Trial magistrate is bound to impose only life sentence imprisonment once he is satisfied that the case is proved beyond reasonable doubt against the accused of unnatural offence where the victim is a child under the age of 18 years.

In totality of events, all the preferred grounds of appeal have been demonstrated to lack any cogent merits; I shall proceed to dismiss all the grounds of appeal for being destitute of merits. I uphold the conviction of

the appellant for committing unnatural offence against the victim 9 years old boy.

In exercise of powers vested on this Court under section 373(a) of the Criminal Procedure Act, Cap 20 R.E. 2022 I hereby set aside sentence of the thirty (30) years imprisonment imposed by trial court and substitute it with a sentence of life imprisonment as per the requirements of section 154(2) of the Penal Code, Cap 16 R.E. 2022. The appellant shall serve a life sentence forthwith.

The appeal stands dismissed in its entirety. It is so ordered.

DATED at **DODOMA** this 13th day of March 2024

Longopa.

E.E. LONGOPA
JUDGE
13/03/2024.