IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 39711 OF 2023

(Arising from District Court of Kongwa, Criminal Case No. 71 of 2021)

RAMADHANI MAJID..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 06/03/2024

Date of Judgment: 14/03/2024

LONGOPA, J.:

This appeal challenges the decision of the District Court of Kongwa which convicted and sentenced the appellant to serve life imprisonment for committing Unnatural Offence contrary to sections 154 (1) (a) and (2) of the Penal Code, Cap. 16 R.E. 2019.

It was alleged that on 19th June 2021 at about 09:00 hours at Mbagala area in Kibaigwa Township within Kongwa District in Dodoma Region, appellant did have carnal knowledge against the victim, a child aged 2 years old against the order of nature. As a result, the appellant was arraigned before the District Court of Kongwa. The appellant denied the charges against appellant and the prosecution called a total of four witnesses to testify to establish the case against the appellant. Upon

conclusion of the hearing of the case, the appellant was convicted and sentenced thereof. Being aggrieved by both conviction and sentence, the appellant decided to challenge decision by way of appeal on fifteen grounds, as reproduced hereunder for easy of reference: -

1. *THAT, the learned trial magistrate erred in law and fact by convicting the accused person (appellant) while the prosecution side failed to prove the case against the appellant beyond all reasonable doubts.*

2. *THAT, the learned trial Magistrate erred in law and fact when convicted the appellant while he was not sufficient identified at the scene of the crime due to the fact that the prosecution witness failed to give out the detailed description of the suspect when she reported the incident at the police station leave alone whether she identified the suspect from the back or front and from what distance.*

3. *THAT, the learned trial magistrate erred in law and fact when convicted the appellant while the trial was un procedurally conducted, whereby it is not clear from the court record whether memorandum of undisputed facts of the preliminary hearing were read over to the accused person (appellant), hence fatal as per section 192(3) of the Criminal Procedure Act (Cap 20 R.E 2022).*

4. *THAT, the learned trial magistrate erred in law and fact by failing to ask himself that if the incident was really occurred at the house of sister and brother-in-law of the appellant and why the prosecution side failed to call even the one amongst them as a witness to testify during the trial without undisclosed reasons.*

5. *THAT, the learned trial magistrate erred in law and fact by not drawing an adverse inference against the prosecution side by failing to call even the one from village authority leave alone the neighbours of the victim during the trial.*

6. *That, the learned trial magistrate erred in law and fact by failing to notice that the age of the victim was not proved.*

7. *THAT, the learned trial magistrate erred in law and fact when relied on the evidence of PW3 (Doctor) which was not properly scrutinized on respect of the issue of penetration which is the vital element since the penis is not a blunt object but is a stiff body fresh during penal erection as per section 130(4)(a) of the Penal Code (Cap 16 R.E 2022).*

8. That, the learned trial magistrate erred in law and fact by failing to warn himself about the evidence of the witnesses with interest to serve has to be corroborated first.

9, That, the learned trial magistrate erred in law and fact when sentenced the appellant without observing the requirement of section 312(2) of the Criminal Procedure Act (Cap 20 R.E 2022).

10. That, the learned trial magistrate erred in law and fact when relying on the evidence of caution statement basing on the reasons that there was no proof if the appellant given such rights as alleged by the recorder of the statement as required by the law under section 53 (c)(i)(ii) of the Criminal Procedure Act (Cap 20 R.E 2022).

11. That, the learned trial magistrate erred in law and fact by failing to comply with provision of section 10(3) and 9(3) both of the Criminal Procedure Act (Cap 20 R.E 2022) as this enable the prosecution witness and building up its case from the case already heard in court.

12. That, the learned trial magistrate erred in law and fact by convicting the appellant basing on the evidence

of visual identification which was not watertight to ground conviction to the appellant.

13. That, the learned trial magistrate erred in law and fact by finding the appellant guilty relying on inconsistent and contradictory evidence of PW1 and PW2 whereby PW1 clarified before the court that she was the one who informed PW2 about the incident contrary to PW2 who told the court he was being informed by unknown woman that his daughter has been sodomised by Ramadhani (see page 2-3 of C/P)

14. That, the learned trial magistrate erred in law and fact by failing to notice that there is no dispute that PW1 and PW2 were only the competent and compellable witnesses, they were also very material witnesses for reasons already shown and had they been called we have believed (PW1 and PW2).

15. That, the learned trial magistrate erred in law and fact when he determines that this court does not consider his defence because he has not called a person who was with him on farm to prove that he was at that place at the material time while its trite law that it is not the duty of the accused person to prove his innocence (see page 9 of the copy of judgement)

The appellant prays to this Honourable Court to allow this appeal, by quashing the conviction and setting aside the sentence of life imprisonment. Consequently, he prays that this court order his immediate release from the custody.

On 06/03/2024 when this appeal called for hearing, the appellant appeared in person while the respondent was represented by Mr. Francis Mwakifuna learned State Attorney.

In support of the appeal, the appellant stated that cautioned statement was recorded by force, as he was beaten severely. Also, he requested that both the appellant and victim should be subjected to the medical examination to verify that there was penetration of the anus.

Further, it was appellant's submission that during the hearing of the matter in the trial court he was not given the chance to defend himself as required by the law. Moreover, he submitted that he was denied the right to be heard by not being afforded the opportunity to defend himself. It was only the respondent's evidence that was considered to find him guilty of the offence.

Mr. Mwakifuna the learned State Attorney on his submission stated that, the respondent does not support the appeal. He reiterated that the respondent concurs with the conviction and sentence entered against the appellant. He argued that on first ground, the case was proved beyond reasonable doubts as there were witnesses and exhibits that were tendered namely PF3 and Cautioned statement of the appellant.

The most important witness was PW1, mother of the victim, at page 12 of the proceedings testified about the occurrence of the offence. PW1 stated the circumstances she found her child at the appellant's place crying and the appellant was seen coming out of the house and ran away. The PW1 found there were blood from the anus of the victim and when PW1 asked the victim the response was that the appellant is the one who sexually abused the victim.

According to him, this evidence was corroborated by PW3, a professional medical doctor. In the evidence of PW3, the source of bruises of the victim's anus was the forcibly penetration of blunt object. This evidence is found on page 21 of the proceedings on the final analysis of the medical doctor.

Further, the cautioned statement of the appellant was tendered by PW4. It appears on page 29 of the proceedings that the appellant admitted that he has carnally known the victim against the order of nature. Tendering and admission of the cautioned statement was not objected by the appellant. The evidence of witness of the prosecution therefore established that the offence was proved beyond reasonable doubts through testimonies and exhibits.

On the second and twelfth ground regarding identification of the appellant, it was submitted jointly that the identification was proper at the scene of crime. The appellant was not stranger to PW1 as the appellant was seen directly coming out of the house. The appellant is well known to PW1 as they live in the neighbourhood.

The offence was committed at around 09:00 am in broad day time where there was adequate light to properly identify the appellant. This identification question was not challenged by the appellant when PW1 stated to have seen the appellant at the scene of the crime and the appellant never challenged that he was not at the scene. He admitted to the evidence of the prosecution. It was proper identification as per case of **Waziri Amani vs R [1980] TLR 250.**

It was argued that the victim managed to name and identify the appellant as she named to her mother that the guy running was the one who sexually abused her against the order of nature as PW1 testimony. It was proper identification.

Further, on the third ground regarding unprocedural conduct of PH, it was submitted that pages 8 and 9 of the proceedings indicate that PH was conducted properly. The agreed facts in the memorandum were read and the appellant agreed as per section 192 of CPA thus there was compliance. There was nothing tangible to complain against.

For the fourth and fifth ground regarding failure to call the witness in the household and village leadership/authority, it was argued that they are not good grounds. The prosecution brought witnesses that established the ingredients of the offence. PW1, the victim's mother saw the appellant at the scene of crime. Also, after enquiring on the victim she named the appellant as the abuser.

It was submitted that Section 143 of the Evidence Act provides that no number of witnesses that are required to establish the claim. All the witnesses of the Respondent were sufficient to establish the offence. The evidence of PW1 who saw the appellant at the scene of crime, PW3 medical doctor who tendered PF3 and PW4 the investigation officer who tendered the cautioned statement as exhibit P2 was sufficient. The contents of exhibit P2 supported the evidence of the PW1 and PW3 as the appellant admitted that he committed the offence. For those two reasons therefore, these grounds lack merits as the witnesses and exhibits established the ingredients of the offence to the required standard.

In the sixth ground on lack of proof of the age of the victim, it was submitted that PW 1, mother of the victim, at page 12 of the proceedings stated that the victim is 2 ½ years old. PW2, victim's father, also on page 14 of the proceedings confirmed the age of victim to be 2 ½ years old. The parents are among those who can establish/prove the age of the child. This ground of appeal lacks merits as both the parents of victim established the age of the victim.

The seventh ground challenging the PF3 on blunt object while the penis is stiff body fresh. The medical report is a professional opinion, the same should be challenged by another qualified medical professional report. This ground of appeal lacks merits. PW3 managed to prove that aspect of the PF3, medical examination that support the commission of the offence.

In the eighth ground, it is submitted that corroboration of evidence was there as the respondent's side has argued in the first ground. The witnesses of the prosecution were corroborated. PW1 stated the occurrence of the incident where the appellant was residing where she found victim with stains of blood from anus as she was naked. The appellant was seen coming out of the housing running. The victim named the accused as the one who sexually abuse her. This was corroborated by the medical doctor PW3 who examined the victim and filled in the PF3 as Exhibit P1. It was also corroborated by PW4 testimony who also tendered caution statement as exhibit P2. All those testimonies corroborated each other. Accordingly, it was submitted that this ground lacks merits in those circumstances.

On nineth ground regarding violation of section 312 (2) of CPA, it is argued that the provision was complied with. This provision deals with contents of judgment. All issues were identified for determination, convicted the accused/appellant and sentenced him within the requirements of the law. He urged this court that this ground should be dismissed.

The tenth ground is about affording rights during recording of cautioned statement. It was submitted that there are no merits. PW4, an investigation officer, on page 27 of the proceedings stated there was observance of rights of the appellant prior to recording the cautioned statement including the right to call relative or lawyers of his choice to witness the recording of the cautioned statement. The same was read and signed by the appellant to validate the contents therein. Exhibits P2

was properly tendered, admitted and it was not challenged by the appellant.

On eleventh ground, it is submitted that Section 10 (3) and 9 (3) of CPA recording of statement of all persons involved. All crucial witnesses were interviewed, and their testimonies were heard by the court. The police did comply with the requirements of Section 10 (3) and 9 (3) of the CPA. PW1, PW2, PW3 and PW4 all appeared and testified. The occurrence of the incident was reported to police and their information was recorded on that material date.

On the thirteenth, conviction on contradictory evidence of PW1 and PW2, it was submitted simply that such evidence is not contradictory. PW 2 confirms what PW 1 had stated to have asked a neighbour to call her husband following the occurrence of the incident and fleeing of the appellant.

On fourteenth ground, it was argued by the respondent that all witnesses who were compellable and competent appeared in court. The produced witnesses who were important to establish the prosecution's case.

Moreover, regarding the fifteenth ground on alleged failure to accommodate the defence evidence and not being afforded the right to defend to the appellant, it was denied. The Court was informed that on page 31 of the proceedings, the appellant stated that he would adduce his evidence on affirmation and would have no witnesses or exhibits. It was reiterated that on page 33 the appellant was afforded opportunity

to present the defence evidence after the case to answer was made. The judgment on page 8 and 9 had analysed the defence evidence.

It was thus summed up that there is no merits all grounds challenging the defence of the appellant. The appeal lacks merits. The respondent prayed for dismissal of the appeal. In sexual assault cases, it is only the victim who is subjected to medical examination and not the doer of the incident. There is no merits on this aspect. The respondent prayed that the court uphold the conviction and sentence of the appellant. Thus, he urged for dismissal of this appeal.

In the rejoinder the appellant denied signing any document at police station, there was no cautioned statement that he signed, and that he did not say anything before being arraigned in court where he knew about his offence.

Upon the perusal of the record from the District Court of Kongwa on this matter as well as the submissions by the parties to ascertain whether the appeal before me is meritorious. I am constrained to analyse the available evidence from the record to ably determine the issues raised in the grounds of appeal.

The analysis shall be in subsets of related grounds of appeal and in so doing the 1st ground on failure to prove the case beyond reasonable doubt by the prosecution shall be argued last. The reason being that ground alone if established is sufficient to dispose of the

appeal. However, I am inclined to analyse other grounds of appeal prior to so determine on the burden and standard of proof being met.

The first set of the grounds relates to the identification of the appellant. This caters for the second and twelfth grounds whereby the appellant challenges that he was not sufficient identified at the scene of the crime.

Identification of the accused at the scene of crime is one of necessary aspects of fair trial in Tanzania. Fair trial would call for a proper identification of the accused to ensure that it is the actual wrongdoer who is arraigned in court. In the case of **Niyonzimana Augustine vs Republic** (Criminal Appeal 483 of 2015) [2016] TZCA 669 (22 February 2016), the Court of Appeal on identification stated that:

> *There is no shadow of doubt that the appellant was the one who raped PW1.* ***The conditions were favourable to positive identification. The incident occurred at 6:00p.m. before darkness had set in.*** *The appellant was known by all the witnesses.*

I have perused the proceedings of this case and found that evidence of PW 1 is the one that touches the identification of the appellant. PW 1's evidence is to the effect that on 19/06/2021 at around 08:00 hours went to a neighbour's house to look for child (victim). The first thing she saw was the victim while naked. The second aspect is she saw the appellant coming out of that house and ran away. PW 1 stated

that she knows the appellant by name and face as the appellant stays with her sister in the PW1's neighbourhood. PW 1 stated that she normally sees the appellant there and his name is Ramadhani was present in court. PW 1 managed to point the appellant in the trial court.

In the case of **Isaya Loserian vs Republic** (Criminal Appeal No. 426 of 2020) [2024] TZCA 138 (23 February 2024), the Court analysed in detailed manner on treatment of identification evidence. The Court of Appeal at page 15 stated that:

> *Evidence relied on is visual identification and particularly by recognition. Trite legal stance is that such evidence is of the weakest nature and should not be relied on unless the court is satisfied that all possibilities of a proper and unmistaken identification are eliminated, that is to say the evidence must be watertight. Generally, night times are associated with darkness and the conditions are taken to be difficult and hence unfavourable for a proper and unmistaken identification. For assurance, the Court has occasionally insisted that the identification evidence must meet certain thresholds. In* ***Waziri Amani vs Republic*** *(supra) some guidelines were set out to include, but not limited to, time the culprit was under the witness's observation, distance (proximity) at which observation was made, the duration the offence was committed, and where the offence is committed at night, the source and intensity*

of light at the scene to facilitate a positive identification and whether the culprit was familiar to the witness.

The evidence of PW 1 leaves no spec of doubts that appellant was identified properly. PW 1 personally saw the appellant coming out of the house and ran away while her daughter was at the place this appellant was. It was during the day i.e. around 08:00 hours when PW 1 saw the appellant running away. This was direct evidence within the meaning of section 62(1) (a) of the Evidence Act, Cap 6 R.E. 2019 which states that:

62.-(1) Oral evidence must, in all cases whatever, be direct; that is to say- (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it.

I am certainly confident that evidence of PW 1 was sufficient to identify the appellant as the assailant of the victim. That being the case, the identification of the appellant has no legal impediments at all.

The second limb on this aspect is that PW 1's evidence was not challenged by the appellant when availed opportunity to cross examine. It is settled legal principle that failure to cross examine is an admission that such testimony is true.

There are precedents that clearly articulate the effect of failure to cross examine on material issue. For instance, in the case of **Issa**

Hassani Uki vs Republic (Criminal Appeal 129 of 2017) [2018] TZCA 361 (9 May 2018), the Court of Appeal at page 17 stated that:

> *The appellant did not challenge the testimony of the witness. This connotes that he was comfortable with the contents of the testimony of the witness. Had he any query or doubt as to the veracity of PW1's testimony, he would not have failed to cross-examine on the same.* ***It is settled in this jurisdiction that failure to cross-examine a witness on a relevant matter ordinarily connotes acceptance of the veracity of the testimony*** *- see.* ***Damian Ruhele v. Republic,*** *Criminal Appeal No. 501 of 2007,* ***Nyerere Nyague v. Republic,*** *Criminal Appeal No. 67 of 2010 and* ***George Maili Kemboge v. Republic,*** *Criminal Appeal No. 327 of 2013 (all unreported).*

I shall therefore without a flicker of doubts find that that evidence of visual identification was watertight to ground conviction to the appellant as occurrence happened on the broad light and PW 1 saw with her own eyes the appellant's escaping immediately after having found the victim naked at the place where the appellant was.

Second set of grounds cover the third ground of appeal related to failure to read out the memorandum of undisputed facts of the preliminary hearing is fatal to the trial of the appellant. It is couched that Preliminary hearing was unprocedurally conducted by failure to read over to the accused person (appellant) the memorandum of undisputed

facts hence fatal as per section 192(3) of the Criminal Procedure Act, Cap 20 R.E 2022.

To underscore this aspect, it is important to analyse the contents of the provision in question. The provision is quoted for easy of reference: -

> *(3) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed.*

The records of the trial court in particular the proceedings at page 9 indicates the following: First, the charge was read over and explained to the appellant. Second, the facts constituting the offence were narrated to the appellant. Third, the appellant stated clearly on each of the facts whether he admits it or otherwise. Fourth, the appellant admitted only two main aspects relating to identity and arraignment in Court. Fifth, the parties signed the Memorandum of undisputed facts. In my view, proceedings present a different story whatsoever from allegations of the appellant. There was compliance to provision of law governing the preliminary hearing.

It is evident that the appellant upon being informed of the facts he had agreed namely his name and address on one hand and admission

on the date of arrest and arraignment in court on the other hand, appellant signed memorandum of undisputed facts. This proves that memorandum of undisputed facts was read over and explained to the appellant in a language that he understands, that is why he signed. The reason for so finding is the fact that each of the facts were ready over and explained to the appellant before he was asked to admit or otherwise.

It should be stated at this juncture that Preliminary Hearing per se is not hearing. It intends to accelerate trials only as such all the admitted facts need not to be proved. In the instant appeal the appellant denied all facts relating to the commission of the offence he was charged with including the age of victim, absence of penetration or having carnal knowledge of the victim against the order of nature.

Eventhough, the Preliminary Hearing would have been irregular I would have been prepared to rule that such irregularity did not prejudice the appellant as save for his name and address there is nothing material that affected his rights as the prosecution had to establish all the facts that were denied by the appellant.

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).*

In the circumstances, I am bound by the precedent from the superior court in our land that any irregularities on the Preliminary Hearing does not vitiate the trial. As such, that ground of appeal is not meritorious.

Another set of grounds of appeal is relates to the fourth, fifth, eighth, and fourteenth grounds of appeal. These grounds cater for failure to call some witnesses, failure to draw adverse inference for failure to call any person from village/local authority, absence of corroboration of the evidence of persons with interest, and that PW 1 and PW 2 were the only competent and compellable witness who if called would have been believed (sic!).

This set of grounds is not difficult to dispose. First, there are plethora of authorities in Tanzania that number of witnesses is not the most important aspect in trials in Tanzania. The most important aspect is the quality of the witnesses in terms of credibility. Section 143 of the

Evidence Act, Cap 6 R.E. 2019 states clearly that no specific number of witnesses 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) (TANZLII), 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, and 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.

In **Jafari Mohamed vs Republic** (Criminal Appeal 112 of 2006) [2013] TZCA 344 (15 March 2013) (TANZLII), the Court of Appeal observed that:

> *It is trite law that credibility is an issue of fact, and the trial magistrate or judge is the best judge of this fact.*

The trial magistrate found that the evidence of witnesses of the prosecution was credible and reliable. I have nothing to doubt such findings of the trial magistrate as the available evidence on record reveals that such evidence is strong evidence. My perusal and analysis of the evidence on record presents nothing but consistent and corroborating each other on the prosecution's evidence. All the four witnesses were credible and reliable to establish the prosecution's case to the required standard.

That is in line with the decision in **Galus Kitaya vs Republic** (Criminal Appeal 196 of 2015) [2016] TZCA 301 (13 April 2016) (TANZLII), the Court of Appeal observed that:

> *In the case of Shabani Daudi V Republic Criminal Appeal No. 28 of 2000 (unreported) the Court held that: ...the credibility of a witness is the monopoly of the trial court but only in so far as the demeanor is concerned. The credibility of the witness can also be determined in two other ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including the accused. "(Emphasis ours)*

In the circumstances of the appeal at hand, there was no need for the prosecution to call any other witnesses. In the wisdom of the

prosecution, the witnesses who adduced evidence were sufficient to establish the offence against the appellant. There is no need to draw any adverse inferences as it was not the prosecution witnesses who stated about the other persons who appellant considers important. That is why in the case of **Jafari Mohamed vs Republic** (Criminal Appeal 112 of 2006) [2013] TZCA 344 (15 March 2013) (TANZLII), the Court of Appeal had this to say:

> *In view of our above holding, we are constrained to observe in passing that failure to call as a witness Tofique's brother did not prejudice the appellant at all. The appellant had every right and was given every opportunity to call any witness to discredit the three prosecution witnesses if he sincerely believed that they had not told the truth. He did not do so.*

If the appellant considered calling his brother-in-law or local authority leadership, he was would have called any of them. He was afforded opportunity to do so but he opted that he would not call anyone.

In respect of corroboration, the record is evident that evidence of PW 1 and PW 2 who are the victim's parent was corroborated by the evidence of PW 3 and PW 4. The case of **Fredy Jason Shelela @ Masoud & Another vs Republic** (Criminal Appeal No. 628 of 2020) [2024] TZCA 27 (12 February 2024) (TANZLII), the Court of Appeal observed that:

We understand that when corroboration of a confession is required, independent proof must confirm, validate, and strengthen the force of the confession in its material details. It is trite that the corroborating evidence does not necessarily need to confirm or validate all the details and particulars in the confession We are, therefore, satisfied that, on the strength of the confessional statements and the corroborating evidence as summarised above, the trial court was entitled to find that the appellants were the perpetrators of the killing of the deceased.

See also ***Director of Public Prosecutions vs Jilala Mahembo Jihusa*** *(Criminal Appeal No. 539 of 2021) [2024] TZCA 38 (14 February 2024); and* ***Erick s/o Michael vs Republic*** *(Criminal Appeal No. 80 of 2020) [2024] TZCA 149 (1 March 2024).*

It is clearly observed that the PW 1's evidence that he saw the appellant running after discovery of the occurrence of offence tallies with that of PW 4 that appellant confessed/admitted that he committed the unnatural offence against the victim. Also, PW1 testimony of finding blood on the victim's anus is corroborated by the evidence of the PW 3.

At this juncture, I am in concurrence with the submission of the learned State Attorney that there was sufficient corroboration of the prosecution evidence to warrant proof of the case against the appellant to the required standard of proof beyond reasonable doubt.

Regarding PW 1 and PW 2 being the only competent and compellable witnesses, I am of the view that the two witnesses gave their evidence before the trial court. I do not see any need to doubt their evidence as the appellant was afforded all the opportunities to challenge the same.

At this point, I am of the settled opinion that the fourth, fifth, eighth, and fourteenth grounds of appeal are devoid of merits thus they deserve to be dismissed. I shall proceed to dismiss them.

The appellant complained on sixth ground regarding failure of the prosecution to establish the age of the victim. It is a settled law that age of the victim can be established through different ways. These include oral testimonies of the victim, parents or guardian of victim, medical reports and birth certificate when the same is available. In the case of **Issaya Renatus vs Republic (**Criminal Appeal 542 of 2015) [2016] TZCA 218 (26 April 2016) (TANZLII), the Court of Appeal observed that:

> *It is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate.*

In the instant appeal there are three types of evidence that indicate the age of the victim. On 20/9/2021, PW1 and PW2 are the parents of the victim stated that their daughter has 2 ½ years at the

time of adducing evidence. This evidence of the victim's parents falls with the ambits of those who can legally prove the age of the victim. It is concrete, viable and reliable proof of the age.

The second set of the evidence on age is that of PW 4 who testified that the appellant admitted that he had carnal knowledge against the order of nature of 2 years of age. This was some months prior to adducing the evidence of PW 1 and PW 2. This is also corroborated by PW 3 who testified that a girl aged 2 years old was sent to PW 3 on 19/06/2021 for medical examination.

Third proof of the age is documentary in nature i.e. the PF 3 and the Cautioned Statement which are Exhibits P1 and Exhibit P2 respectively. The age stated in those documentary evidence is 2 years of age. It is my settled view that the age of the victim was lucidly establish by all these set of evidence available on record.

Another issue is seventh ground which is the evidence of PW3 (Doctor) which was not properly scrutinized on respect of the issue of penetration which is the vital element since the penis is not a blunt object but is a stiff body fresh during penal erection as per section 130(4)(a) of the Penal Code (Cap 16 R.E 2022). For easy reference section 130(4)(a) of the Penal Code (Cap 16 R.E 2022) states that:-

> *(4) For the purposes of proving the offence of rape—*
> *(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;*

The appellant was charged with rape but unnatural offence contrary to Section 154 (1) (a) and (2) of the Penal Code, for easy reference provides inter alia that:-

> *154. Unnatural offences*
>
> *(1) Any person who— (a) has carnal knowledge of any person against the order of nature; commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.*
>
> *(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.*

Essentially, unnatural offence shares one crucial element with the offence of rape. That element is penetration. The difference is only in that in rape penetration should be of a vagina while in the unnatural offence it is penetration of victim's anus.

The ingredients of the unnatural offence were reiterated in the case of **Sospeter John vs Republic** (Criminal Appeal 237 of 2020) [2021] TZCA 329 (28 July 2021) (TANZLII), 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.*

The evidence of PW3 (the doctor), states that after receipt of the victim with PF 3 , PW 3 did examine the child physically on the whole body from the head to the toe. PW 3 also stated to have examined the anus and vagina of the victim. It was the findings of the PW 3 that in the victim's anus there were clotted blood, bruises and victim felt pain whenever she was touched at her anus. PW 3 reiterated that there was no sign of rape as her vagina was in order. It was upon conclusion of the examination that PW 3 filled the PF 3. It was PW 3 conclusion that it was discovered that a blunt object forcibly penetrated the victim's anus. Therefore, the evidence of PW3 shows that the child was penetrated against the order of nature.

This evidence is also corroborated by the evidence of PW 4 who reiterated that the appellant admitted that he committed the unnatural offence against the victim aged 2 years. Exhibit P1 is culmination of the admission by the appellant to have penetrated the anus of the victim.

PW 1 stated that she found her child at neighbour's house crying and suddenly Ramadhani ran away from that house. PW 1 evidence is to the effect that she found that when PW 1 looked at her child found her naked. Upon physical examination noted that there was blood on the victim's anus. When PW 1 asked her daughter what happened she narrated the ordeal of being sexually molested against the order of nature by the appellant. The victim stated that "*mkaka kukimbia kaniumiza huku nyuma*" meaning that the person who ran is the one who sexually molested her at her anus. Thus, totality of these pieces of evidence is clear demonstration that element of penetration existed in the circumstances of the case.

The only issue of contention on PF 3 is that appellant argue that penis is not blunt object but stiff body flesh. I cannot agree with the appellant since he has not demonstrated that he an expert in medical field. 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 evidence of PW 3 being expert opinion which based on professional skills, knowledge and practice cannot be challenges easily as trial court found it credible. 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.

Furthermore, there are complaints on the nineth ground about failure of trial magistrate to observes the requirements of section 312(2) of the Criminal Procedure Act (Cap 20 R.E 2022). This aspect of the appeal is not difficult to address. The reason is that it relates to the judgment writing especially contents of the judgment.

The Criminal Procedure Act, Cap 20 R.E. 2022 provides, *inter alia*, that:-

312. (1) N/A

(2) In the case of conviction the judgment shall specify the ***offence of which, and the section of the Penal Code or other law under which, the accused person is convicted*** *and the punishment to which he is sentenced.*

Upon the perusal of the judgment at page 9, the trial magistrate was more specific in the judgment as "*I find him guilty for the offence*

he is charged with and I convict him for the Unnatural offence contrary to Section 154 (1) (a) and (2) of the Penal Code Cap 16 R.E 2019.

Those contents of the judgment on part of conviction is lucid and straightforward. That is what are the requirement of section 312(2) of the Criminal Procedure Act (Cap 20 R.E 2022) which I am sure that they were strictly observed when the trial magistrate entered conviction against the appellant.

There is no doubt the trial court observed the tenets of the law in respect of conviction. There was conviction in the instant appeal and the provisions of the law under which the appellant was convicted with were categorically stated.

Furthermore, on the tenth ground the appellant is complaining that trial court erred in relying on the evidence of caution statement basing on the reasons that there was no proof if the appellant given such rights as alleged by the recorder of the statement as required by the law under section 53 (c)(i)(ii) of the Criminal Procedure Act (Cap 20 R.E 2022).

It was testimony of PW 4 that the appellant admitted that he committed the unnatural offence against the victim. PW 4 narrated that appellant on his own willingness admitted that he undressed the victim and penetrated her anus on 19/06/2021 at his brother-in-law house. These are well recorded on pages 27 to 28 of the proceedings.

Exhibit P.2 which is the Cautioned Statement reveals what the appellant stated at the police station. For easy of reference, I shall quote the same in verbatim as follows:

> *Nakumbuka mnamo tarehe 19/06/2021 majira ya 08:00 hours huko Mtaa wa Mbagala mji mdogo wa Kibaigwa (w) Kongwa (m) Dodoma nilikuwa nyumbani kwa dada nimekaa sebureni ndipo alipokuja mtoto wa jirani yetu mwenye umri wa miaka 2 ni mtoto wa kike ambaye jina lake simfahamu. Baada ya kuja aliingia sebureni ambapo nilikuwa nimekaa ndipo nilimvua gauni pamoja na chupi kisha nilimlawiti akaanza kulia niliendelea kumlawiti nilivyoona anazidi kulia nikaamua kumuachia. Nikamvalisha gauni na chupi yake akaondoka. Wakati namlawiti nilikuwa peke yangu ndani dada yangu alienda gulioni na shemeji alienda shambani.*

In essence, this Exhibit P.2 categorically reveals admission/confession of the offence by the appellant to have penetrated the anus of the victim. It states the way the appellant committed the offence. He narrated the whole process from the entry of the victim on the appellant's sister sitting room, undressing of the victim and penetration of the anus of the victim.

The appellant admitted having committed the offence of unnatural offence against a child of two years. The Cautioned Statement indicates that: the appellant was informed of the offence he was accused of and

informed of all his rights prior to recording of the Cautioned Statement. Second, the appellant signed on his own hand to signify that he was informed about his rights. Third, regarding calling of a relative, friend or a lawyer to witness the appellant on his own volition stated that he will be alone. Fourth, the appellant signed at the end of the statement to verify the truthfulness of the recorded statement.

In the case of **Chande Zuber Ngayaga & Another vs Republic** (Criminal Appeal 258 of 2020) [2022] TZCA 122 (18 March 2022) (TANZLII), 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).*

It is certainly that all legal requirements on the recording of the cautioned statements were dully observed, and the appellant has nothing to complain. In fact, he was availed opportunity to challenge its admissibility, but appellant opted not to challenge it. Also, the appellant

was afforded the right to cross-examine PW 4 who tendered the cautioned statement on all material facts that would discredit this evidence, but he chose not to. As I have pointed out earlier the case of **Issa Hassani Uki vs Republic** (Criminal Appeal 129 of 2017) [2018] TZCA 361 (9 May 2018) (TANZLII) is illustrative on the effect of failure to cross examine on material issue. It is lucid that appellant was informed of all his rights about cautioned statement prior to recording it, during recording and after recording the statement. Appellant was also fully versed with the right to cross examine the witness.

Under exhibit P2 which is caution statement the appellant was informed by PW4 that he was not obliged to say anything about his accusation unless it is wilfully and the appellant signed the same caution statement on 24.6.2021 and on 29.12.2021 when PW4 tender it as an exhibit he did not object, as appear on page 29 of the typed proceedings. Therefore, the appellant was informed about his rights and it was in his wish not to call anyone including a lawyer, relative or friend. The tenth ground fall short of merits whatsoever and it stands dismissed.

The eleventh ground of appeal is on court's failure to comply with provision of section 10(3) and 9(3) both of the Criminal Procedure Act, Cap 20 R.E 2022 as this enable the prosecution witness and building up its case from the case already heard in court.

Upon perusal of court proceedings, prosecution had four witness and two exhibits. Those, four witness adduced their evidence under oath

and exhibits where tendered and the appellant was present before the trial court. So, the case was not building up from the case already heard in court. This ground of appeal is dismissed for want of merits.

The appellant has raised that trial Court erred for not considering an alibi defence adduced by the appellant as the 15th ground of appeal. The defence of alibi is one of the defences intending to water down the prosecution evidence on participation of the accused in the commission of the alleged offence. For this defence to be valid and legally acceptable, the law demands that it should not be raised as a surprise in court. It must be categorically stated at the commencement of the case or sometimes late but prior to closure of the prosecution's case.

My perusal of the proceedings reveals that the defence of alibi was not raised at the earliest stage as required by the law. That is the reason on page 9 of the judgment that the trial court did not consider the defence of alibi because it did not comply with the procedures. Furthermore, the appellant failed to call a person allegedly they were together at the farm to prove that he was at that place at the material time.

While its trite law that it is not the duty of the accused person to prove his innocence, however, in applying the defence of alibi he is obliged to that he was not at the scene of the crime. It must be inconsistent with the prosecution evidence to raise reasonable doubts as per decision in **Hamisi Saidi Butwe vs Republic** (Criminal Appeal 489 of 2007) [2010] TZCA 56 (15 October 2010) (TANZLII).

In resolving the question on the defence of alibi raised by the appellant, I shall apply the procedure for raising a defence of alibi which is governed by Section 194 (4), (5) and (6) of the Criminal Procedure Act. The Act provides that:

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

Therefore, for the defence of alibi to stand, the law requires: First, the accused should give a notice to that effect to the court and the prosecution before the commencement of the hearing. The law does not give any format of the notice. Second, if the notice is given after the commencement of the hearing, particulars of alibi should be furnished to the prosecution. Lastly, the law permits the trial court to consider the defence of alibi even if no such notice has been given to the prosecution. The law does not require the accused to prove his defence of alibi.

Thus, for defence of alibi to succeed, the accused person should show inconsistencies in the prosecution case. The records in this appeal are silent about the notice of alibi by the appellant during the trial. The effect of not adhering to notice to rely on defence of alibi makes the whole defence untenable in law thus bound to be dismissed. In the case of **Paschal s/o John Munisi vs Republic** (Criminal Appeal No. 155 "A" of 2021) [2024] TZCA 71 (20 February 2024) (TANZLII), the Court of Appeal had this observation, to wit:

> *The law requires the person relying on the defence of alibi to notify the court during preliminary hearing or to furnish the prosecution with the particulars of his alibi before the closure of prosecution case. We agree with Ms. Kowero that, the defence of alibi was considered by the learned trial judge and dismissed it for failure to comply with the procedure.*

The evidence of PW 1 that she saw in her own eyes the appellant on the material date in that broad light and evidence of PW 4 that appellant admitted that he was at the scene of crime on material dated of incident have watered down the defence of alibi. The prosecution evidence is more palatable that the appellant was at the scene of crime, and he is the wrongdoer in sexually molesting a child of 2 years against the order of nature. The fifteenth ground is determined in the negative due to its voidness of merits.

I shall finalize this analysis by articulating the last set of grounds. These are the first and thirteenth grounds of appeal on failure to prove the case beyond reasonable doubts by the prosecution and reliance on contradictory evidence.

Simply, these two grounds sum up the whole appellant's case as all other grounds intended to poke holes on the prosecution's case that it had not managed to prove the case to the required standard.

The allegedly contradiction is that PW 1 evidence contradicts PW 2 testimony. I have perused the record on this aspect. It reveals that PW 1's testimony is to the effect that on material date she was looking for her child and she found her naked at the neighbour's place. She had blood on her anus and the appellant came out of the house running to a hiding place. It was PW 1 version of evidence that she saw the appellant who is known to her as they live in the neighbourhood running away.

PW 2 testified to had been informed by a neighbour while at Kibaigwa market that at home there was occurrence of the unnatural offence being committed against his child, the victim. Thus, PW 2 knew about the incidence upon being informed by the neighbour. In my view there is nothing contradictory on this evidence.

On proof of criminal case against the appellant to the required standard, I should state that it is settled law that it is the duty of the prosecution to prove the case against the accused person beyond all reasonable doubt. Thus, the duty to prove a criminal case lies on the prosecution and the standard of proof is beyond reasonable doubt.

In the case of **Chausiku Nchama Magoiga vs Republic** (Criminal Appeal No. 297 of 2020) [2023] TZCA 17810 (9 November 2023) (TANZLII), the Court of Appeal observed that:

> *The duty of the prosecution to prove a criminal case beyond reasonable doubt is universal and, in our case, it is statutorily provided for under section 3 (2) (a) of the Evidence Act, Chapter 6 of the Revised Laws. Further, in the case of* ***Woodmington v. DPP*** *[1935] AC 462, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is 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] T.L.R. 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."*

The main issue is whether in the circumstances of this appeal had the prosecution discharged the burden of proof to the required standard. I am certain that the answer is in the affirmative. The analysis of the evidence of the case at hand has revealed that the prosecution case was proved beyond reasonable doubt.

The totality of evidence of PW 1 who was eyewitness of finding the victim naked with blood at her anus set the ball rolling. It was PW 1 testimony that she saw in broad light the appellant fleeing from the house was to hiding after PW 1 had noticed the condition of the victim. At that point, PW 1 stated that the victim narrated to her the ordeal that it is the appellant who fled that did penetrate her anus. This evidence is corroborated fully by oral testimonies of PW 3 (Clinical officer/Medical doctor) and PW 4 (Investigation Officer). The evidence of PW 3 is to the effect that upon physical examination of the victim it was found that the victim was penetrated in her anus by a blunt object. PW 4 on the other hand, testified that the appellant did confess/admit that he had carnally known the victim against the order of nature on that material date. Exhibits P 1 and Exhibit P.2 which are the PF 3 and Cautioned Statement cement it all. The contents and these Exhibits taken together with the oral testimonies of PW 1, PW 2, PW 3 and PW 4 provide strong, consistent, reliable and credible evidence to warrant conviction of the appellant. There was nothing on record in the defence evidence to raise any meaningful doubts that the trial court would have to interpret in favour of the appellant.

As submitted by the counsel for respondent, indeed the prosecution through testimonies of the witnesses brought before the trial court and exhibits tendered managed to prove the case to the required standard of proof beyond reasonable doubt. The prosecution duty was sufficiently discharged. It is on those premises that at page 9 of the judgment of trial court the learned Magistrate stated categorically that trial court was satisfied that the charge against the accused had been proved beyond reasonable doubt and proceeded to convict

accordingly. The 1st and thirteenth grounds of appeal are devoid of merits thus dismissed.

In totality of the events, this appeal lacks merits as the prosecution proved the case beyond reasonable doubt. The appeal deserves only one conclusion which is dismissal on its entirety. I uphold both conviction and sentence of the appellant as entered by the District Court of Kongwa. The appeal stands dismissed in its entirety for lack of merits.

It is so ordered.

DATED at **DODOMA** this 14th day of March 2024.

Longopa/r.

E.E. LONGOPA
JUDGE
14/03/2024.