

TANZANIA / JUDGMENT

ABDALLAH NJAU

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IN THE HIGH COURT OF TANZANIA DODOMA SUB-REGISTRY AT DOPOMA DC. CRIMINAL
APPEAL NO. 135 OF 2023 (Originating from Criminal Case No. 52 of 2022 of the District Court of
Singida at Singida) ABDALLAH DEOGRATIUS NJAU APPELLANT
VERSUS THE REPUBLIC..... RESPONDENT

JUDGMENT

12th September, 2024 HASSAN, J.: The accused person was arraigned in the District Court of Singida, at Singida at Singida where he stood charged with two counts depict under the Penal Code as follows: In the first count, the accused person was charged with the offence of Rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, [Cap. 16 R.E. 2019]. The particulars of offence leading to the charge reveals that on unknown dates between January, 2018 and May, 2022 at Mitunduruni area, Mitunduruni Ward, within the District and Region of i Singida, the accused person did have sexual intercourse with one, MON a girl of 9 years old. In the second count, the accused person was charged with Unnatural Offence contrary to section 154 (1) of the Penal Code, [Cap. 16 R.E. 2019]. The particulars of offence leading to the charge reveals that on unknown dates between January, 2018 and May, 2022 at Mitunduruni area, Mitunduruni Ward, within the District and Region of Singida, the accused person did have carnal knowledge of one, MON against the order of nature. The accused person was convicted of both counts and sentenced to serve life imprisonment for each count. Aggrieved, the appellant uploaded the instant appeal to be determined by this court. In the petition of appeal, at first, the appellant loaded seven (7) grounds of appeal essentially alleging that the prosecution case at the trial Court was not proved beyond reasonable doubt. When the appeal was called up for hearing on the 30th day of May, 2024, the appellant was represented by Ms. Salma Mussa, learned counsel. While the respondent Republic was represented by Ms. Bertha Kulwa, learned State Attorney. The appellant's counsel firstly pled by consolidating the 1st and 2nd grounds of appeal into one ground. Also, the 4th and 5th grounds were fused to one ground. And finally, she begged to drop the 7th ground of appeal. Thus, she remained with four (4) grounds to submit. Thus, the new grounds read as follows:

1. That, the trial Magistrate erred in law and fact by convicting the appellant basing on contradictory evidence that was given by the victim and all the prosecution's witnesses to prove that the appellant committed the crime beyond reasonable doubt

2. That the trial magistrate erred in law by receiving evidence of PW1 as per section 127 (2) of the Tanzania Evidence Act, without prove of the age of PW1.
 3. That the trial court erred in law by convicting the appellant on an incurable defective charge sheet
 4. That, the trial court erred in law by allowing prosecution to proceed with PW4 and PW5 to testify under witness protection via section 188 (1) (a), 9b), (c), (d), section 188(2) and 392 A
- (1) of the criminal Procedure Act, Cap 20 RE 2022 without the ruling that allowed such document be admitted in court as evidence. The appellant's counsel started to submit on the 1st ground that, the District Court had erred in law and evidence to convict the appellant without proof beyond reasonable doubt. She went on submitting that, Section 110 of Tanzania Evidence Act (TEA) provides that, to attain conviction, the offence has to be proved beyond reasonable doubt. That, although the definition of reasonable doubt was not given in the Evidence Act, but number of decided cases have provided for the same. For instance, in the case of Paul Magendo & Another v. Republic (2013) TLR 219. The appellant's counsel went on submitting that, there is contradictions and inconsistency of the prosecution's witnesses and evidence. Thus, starting with the evidence of victim (PW1), she testified that she reported at the police station after being escorted by a Samaritan as at page 9 paragraph 5, who was a lady, whereas, at page 31 paragraph 3, she mentioned the Samaritan was a man and not a woman. Also, looking on the Samaritan's evidence (PW5), he testified that he met the victim (PW1) in the street and she informed him that she does not know where about of her house and also, she does not know where she was going. Therefore, for those reasons, he (PW5) decided to take the victim to the police station. While PW2, a social welfare officer testified that the victim (PW1) was taken by the Samaritan and sent to the hospital because she was discharging faeces and blood in her anus and vagina. But looking on the evidence of PW1 at page 10 in cross examination, she did not testify that she was discharging anything as a result of this incident. Also, PW1 testified that she did not run away from her home but she went to the neighbours. Therefore, the learned counsel for the appellant argued that the evidence was not consistent. In addition, she pointed out that, looking on the evidence of PW4 at page 29, a Medical Doctor testified that the child had bruises and oozed faeces as they cleaned her and that the muscles were loose and that her vagina was open. Following that observation, PW4 called a social welfare officer, whereas, PW1 in her evidence testified that, they met a social welfare officer at police station where she reported with her father. Learned counsel for appellant submitted further that PW3, a police officer at Gender department testified that she was the one who called a welfare officer. Ms. Salma, learned counsel for the appellant submitted further that, there are a lot of discrepancies of which goes into the root of the matter by not showing with certainty what had really happened. More so, she pressed that, it also questions the credibility of the witnesses who testified for prosecution case. Thus, in totality, she argued that the prosecution's evidence was not credible and thus such evidence should not be given weight by the court. To impress the court of her argument, she referred the case of Mohamed Saidi Matula v. Republic, (1995)

TLR. 3 and Yasini Ramadhani Chana V. Republic, (1999) TLR 489. To conclude on this point, she argued that due to those discrepancies this case was not proved beyond reasonable doubt. Submitting on the 2nd ground of appeal, that the trial magistrate erred in law by receiving evidence of PW1 as per section 127 (2) of the TEA without proof of the age of PW1. Arguing on this point, she submitted that section 127 (2) of the TEA indicates how evidence of a child has to be adduced. She added that neither of the prosecution witnesses had proved that the victim was a child and of what age. She therefore contended that, with that omission, it is difficult to conclude with certainty that the victim was actually a child. Ms. Salma added that, for what has happened, it is equally to say that the victim's age is unknown and thus, ill deprived the accused person an opportunity to prepare his defence of what he was accused of. The appellant's counsel cited the case of Ally Shabani @ Nzige v. Republic, Criminal Appeal No. 12 of 2021 and 6 Toidotto S/O Kissima v. Republic, Criminal Appeal No. 525 of 2021 (both unreported). Arguing on the 3rd ground of appeal, that the charge sheet was incurably defective. She submitted that section 132 and 135 of the CPA requires charge sheet to reveal among others, the particulars of the offence, nature of the offence and details of the offence on how the offence occurred. Thus, in the instant charge sheet, she argued, based on the evidence given, the appellant was supposed to be charged with the offence of incest and not rape as it has been charged. Ms. Salma stressed that, in law, there is no offence of rape for blood or biological father against his daughter when he has a carnal knowledge of her, instead, the appellant should have been charged with the offence of Incest. Thus, she submitted that the impact of charging person with non-existing offence is as such there was no charge before the court. To concretise her point, she cited the case of Hamis Maliki Ngoda v. Republic, Criminal Appeal No. 7 of 2017 (unreported), where the court of appeal referred the case of Abdallah Ally v. Republic, Criminal Appeal No. 253 of 2013 (unreported) of which at page 9 of the judgment it provides: "Being found guilty on a defective charge based on wrong and non-existing provision of the law it cannot be said that the appellant was fairly tried in the court below." Further to that, learned counsel went on submitting that, by reflecting on the count of unnatural offence, the appellant was charged under section 154 (1) (a) of the Penal code which does not show the sentencing provisions which is subsection (2) of section 154 of the Penal code. To the learned counsel's view, with such earmarked omission, the appellant was unfairly tried since he did not know the gravity of the sentence he might face. She thus made reference to the case of Godfrey Simon & Masai Yosia v. Republic, Criminal Appeal No. 296 of 2018 (unreported). Finally, moving to the 4th ground of appeal, the appellant's counsel submitted that, by reflecting on the proceedings of 22/11/2022 the learned State Attorney prayed to supply the trial court with a Ruling which granted an order for protection of witnesses. With such undertaking, she argued, consequently the appellant objected for its admission for a reason that he was not involved in the ex parte hearing but the trial court overruled his objection. That being the case therefore, learned counsel for appellant submitted that the court had a duty to inform the appellant of what was going on and the reasons thereto. Additionally, Ms. Salma contended further that she did not see the logic why prosecution had decided to protect the witness while during hearing of other prosecution's witnesses

who were similarly led by prosecutor, they had mentioned the name of the witness who was purported to have been protected. Thus, it is unknown that PW4 is the same Doctor NEEMA who has examined the victim or is another person. Provided that, she stressed, that Doctor NEEMA was well known by the appellant because at page 46 of the proceedings, the appellant has indicated that he knows Doctor Neema who work at Regional Hospital where he was directed to send his daughter by officers who work at the gender desk, and that Doctor Neema was the one who filled the PF3. Thus, DW1 had good knowledge of the Doctor and PF3 was handed over by PW7 to DW1 and the same was veiled. Thus, in the circumstance, learned counsel for the appellant was of the view that, the whole procedure undertaken has vitiated the proceedings and therefore, she prayed the court to nullify the entire proceedings and thereafter, set free the accused person (appellant) and not to order for retrial. She further argued that, if retrial is ordered the prosecution will be availed with an opportunity to correct their discrepancies, and thus, will lead to unfair trial to the appellant. In the end, learned counsel prayed the court to allow the appeal, quashed conviction and sentence meted out by the trial District Court of Singida. On her side, Ms. Bertha Kurwa, learned State Attorney in response to what has been submitted by the appellant's counsel, she started her submissions by reflecting on the 1st count (rape) as charged, of which she readily conceded to the defects submitted by the appellant's counsel. However, to be more precise, she added that the appellant was not charged with non-existing offence but rather, he was charged with the wrong provision of law and hence, the offence of rape was not proved. Consequently, she prayed conviction and sentence arrived by the trial court to be quashed and set aside respectively. As for the 2nd count of unnatural offence. The learned State Attorney linked it with the 2nd ground of appeal and argued that prosecution managed to prove the age of victim (PW1). On that point, she avowed that, DW1 who is a biological father of the victim testified that the victim was born on January, 2014. Learned State Attorney submitted further that age of the victim can be proved by the victim herself, her parents or by a birth certificate. She therefore, made 10 reference to the case of Omary Ahmed v. Republic (1983) TLR 5. She further pressed that, other witnesses including PW6, PW3 and PW4 also proved that the victim was a child to corroborate the testimony of the DW1. Replying on the 3rd ground of appeal, Ms. Kurwa submitted that, the charge on the second count was properly framed to the extent that omission of subsection 2 of section 154 of the Penal code does not affect the validity of the charge, since section 154 (1) has created an offence and its punishment. Therefore, she argued, subsection (2) is just specifying sentence by making reference to section 154 (1) of the Act. She further made it known that, the offence of unnatural offence does not consider the age of victim, regardless if the victim is a child or an adult. She argued that what matters is an extent of the sentence. Hence, in her view, to omit citing subsection (2) of section 154 of the Act, does not deprive any right to the accused/appellant provided that the sentence remains the same. The learned State Attorney further contended that, the appellant was convicted under section 154 (1) and (2) of the Penal Code as it appears at page 20 of the judgment, therefore, in her view the omission is not fatal. li Moving on the 4th grounds of appeal, thus about concealing of witnesses (PW4 and PW5). In response to the argument raised by appellant's counsel, learned state attorney

contested by submitting that the application for protection of witnesses is an ex parte application as per section 188 of the Criminal Procedure Act, and therefore nothing was prejudiced. Navigating on the point that PW4 who was protected under section 188 was flawed since the witness was not in fact protected provided that prosecutions themselves have led their witnesses to unveil the name of the witness who was concealed. Ms. Kurwa, learned State Attorney conceded on the flaw that, by doing so, there was no fair trial because the appellant was not made aware of the contents of the exhibit PI. Therefore, it was the respondent's prayer that, the evidence of PW4 and exhibit PI be expunged from the record of proceedings. With respect to the 1st ground of appeal which deals with contradictions and inconsistency of the witnesses, Ms. Kurwa referred the court to the famous case of *Selemani Makumba v. Republic*, Criminal Appeal No. 94 of 1999 (unreported) where the court held that the best evidence in sexual offences is that of the victim. Thus, she prayed the court to give weight to the evidence of PW1 and consider that it is the 12 only evidence for prosecution case, of which, the victim testified that she was tired of the act, and that is why she decided to run away. Though, the respondent's counsel conceded that there were contradictions in the evidence of other witnesses but she argued that the same were just minor and was just corroborating the testimony of PW1, but it does not go into the root of the matter. Touching about DW7, the Doctor who had examined PW1 and observed that PW1 was not sexually abused, learned State Attorney argued that, it was two days later and the report was not tendered in evidence. In the end, Ms. Kurwa finalized her submissions by arguing that, the second count of unnatural offence was proved beyond reasonable doubt and the court should uphold the conviction and sentence meted by the trial court subject to the discretion of the court. Touched by some inputs from prosecution's submission, in rejoinder, the learned counsel for the appellant, first reiterated her submission in chief and adding to that, she started with the 1st ground about the age of the victim, Ms. Salma contended that the counsel for the republic averred that age of the victim was proved by DW1, whilst it is prosecution who had obligation to prove the charge and not defence. 13 Thus, even if age of victim was mentioned by DW1, but it was not indicated for the purpose of helping prosecution to prove their case. Coming to the 2nd ground that charge sheet is incurably defective she rejoined by recalling what has been indicated in the case of *Godfrey* (supra) that, omission to cite subsection (2) of section 154 (1) is fatal as it deprived the appellant to defend his case. And that, the respondent's counsel failed to provide authority which supports her standpoint. On the last ground that best evidence in the sexual offences comes from the victim themselves, the appellant's counsel submitted that the same has to pass the test of reliability. That is, to check whether victim is telling the truth, when we ascertain the evidence of other witnesses. In her standpoint, the learned counsel for appellant maintained her submissions that the evidence of PW1 is not credible and thus, the appellant should be set free. In the light of the submissions fronted by the counsels, firstly, I must be appreciative to the counsels for their insightful submissions in support of and against the appeal. Next, I am conscious that, what requires determination of the court is the question whether or not prosecutions have proved the case beyond reasonable doubt. 14 In the first place, at least I am conscious that, normally, doubt is the starting point of all

wisdom. For this reason, it is true in our criminal justice system and even universally recognised, that it is the duty of prosecution in the criminal law paradigm to prove the case beyond reasonable doubt. This is not a unique situation to my mind, for instance in *Simon Edson @ Makundi v. The Republic*, Criminal Appeal No. 5 Of 2017 CAT (unreported) the Court of Appel of Tanzania once held that: "It is trite iaw that the burden o f proof in criminal case lies on the prosecution and it never shift to the accused." See also decisions in *George Mwanyingili v. R*, Criminal Appeal No. 335 of 2016, *Nchangwa Marwa Wambura v. R*, Criminal Appeal No. 44 of 2017 and *Mohamed Haji Ally v. Republic*, Criminal Appeal No. 225 of 2018 (all unreported), only to mention but just a few. Similarly, it is important to note in advance that in *Selemani Makumba v. Republic* (supra) it was held that: "The best evidence in sexual offences is that o f the victim." 15 That being the case, sailing with the first issue as raised by appellant' counsel, that the appellant was wrongly charged in the first count with the offence of rape. In their submissions, both counsels held the same view that in this particular count, the charge was flawed. Given the content of the witnesses' evidence from both sides, notably, PW1, PW3, PW5 and DW1 himself, the victim and the appellant have blood relationship; which means the appellant is the biological father of the victim. See for instance at page 8 of the proceedings when PW1 testified, clearly her transcript reads: 7 know my biological father, his names are Abdullah Deogratius Njau. He is here in the court, (she pointed a finger to the accused person). We have stayed together at Singida Mjini Mitunguruni. Before that, I was living with my grandmother (my father's mother). When my grandmother died, I went to stay with my father. We were only two in the house, me and my father.... "[sic] In the circumstance, considering the paternal relationship existing between the victim and the apppellant as clearly demonstrated by PW1 hereabove, and, as adherence to the statutory law and precedents 16 requires, on my firm view, a proper charge for the appellant to stand should have been for the offence of Incest by Males in terms of section 158 (1) (a) of the Penal Code, Cap. 16 R.E 2019. For clarity this section provides: "Any male person who has prohibited sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother, commits the offence o f incest, and is liable on conviction—

- (a) if the female is o f the age o f less than eighteen years, to imprisonment for a term o f not less than thirty years;" Looking on the instant charge sheet, it is apparent that it consists of two counts, the first offence is Rape and the second offence is Unnatural Offence. That means, instead of charging the appellant with the offence of Incest by Males contrary to section 158 (1) (a) of the Penal Code as the requires, he was charged with the offence of Rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, of which based on their paternal relationship demonstrated in the evidence, the charge was wrongly manifested. 17 As a result, I have the same view as rightly thought by the two learned counsels from prosecution and defence sides that, owing to the evidence adduced specifically for the first count, it directly depicts the offence of Incest by Males and not Rape. Thus, I am unhesitatingly holding the view that prosecutions have failed to prove the offence of Rape as charged. And, since the offence of Incest by Males is not cognitive to the offence of Rape,

thus, the same cannot be substituted. Consequentially, for the charge of Rape in particular, conviction and sentence imposed by trial court should be reversed thus, I hereby do.

Turning to the second count of unnatural offence. Initially, this offence is created under section 154 of the Penal Code, [Cap. 16 R.E. 2019]. For further references and clarity, the whole section 154 of the Penal Code depicts: "154 (1) Any person who—

- (a) has carnal knowledge of any person against the order of nature; or
- (b) has carnal knowledge of an animal; or
- (c) permits a male person to have carnal knowledge of him or her 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." Whereas, a contested charge of Unnatural Offence which has been framed and filed in court by prosecution, as it appears hereunder, it reveals in verbatim as thus: "2nd COUNT STATEMENT OF OFFENCE UNNATURAL OFFENCE; contrary to section 154 (1) fa) of the Penal Code, [Cap. 16 R.E. 2019]. PARTICULAR OF OFFENCE ABDALLAH S/O DEOGRATIUS NJAU: on unknown dates between January, 2018 and May, 2022 at Mitunduruni area, Mitunduruni Ward, 19 within the District and Region of Singida did have carnal knowledge of one, XYZ against the order of nature." Starting with the 1st ground of appeal that prosecution's evidence was marred with contradictions and inconsistency. In her submissions, learned counsel for the appellant was precise in pinpointing the alleged contradictions and inconsistencies which she noted. On that, she indicated that, PW1 testified at page 9 paragraph 5 that she reported the event at the police station after being escorted by a Samaritan who was a lady, whereas, at page 31 paragraph 3, when she was cross examined, she mentioned the Samaritan who escorted her was a man and not a woman anymore. Ms. Salma Also contended that, looking on the Samaritan's evidence (PW5), he testified that he met the victim (PW1) in the street and he was informed her that she does not know where about of her house and also, she does not know where she was going. Therefore, seeing that, PW5 decided to take the victim to the police station. While on the other hand, PW2, a social welfare officer testified that the victim (PW1) was taken to hospital by the Samaritan because she was discharging faeces and blood in her anus and vagina. But looking on the evidence of PW1 in cross examination at page 10, she did not testify that she was discharging anything as a result of this incident. Similarly, 20 PW1 testified that she did not run away from her home but she went to the neighbours. In addition to that, learned counsel for the appellant further pointed out that, looking on the evidence of PW4 at page 29, a Medical Doctor, he testified that the child had bruises and oozed faeces as they cleaned her and that the muscles were loose and her vagina was open. And that, due to that observation, PW4 called a social welfare officer, whereas, PW1 in her evidence testified that, they met a social welfare officer at police station where she reported with her father. Learned counsel for appellant submitted further that PW3, a police officer at Gender department testified that she was the one who called a welfare officer. In totality, Ms.

Salma, learned counsel for the appellant argued that the evidence was not consistent. Further to that, she contended that there are a lot of discrepancies of which goes into the root of the matter by not showing with certainty what had really happened. More so, she pressed that, all these raised a question of credibility of the witnesses who testified for prosecution case. Entirely, Ms. Salma argued that, the prosecution's evidence was not credible to the extent that, such evidence should not be given weight by the court. To impress the court of her argument, she referred the case 21 of Mohamed Saidi Matula v. Republic, (1995) TLR. 3 and Yasini Ramadhani Chana V. Republic, (1999) TLR 489. To conclude on this point, she argued the court to perceive that, due to those discrepancies this case was not proved beyond reasonable doubt. However, in spite of conceding to the discrepancies noted in the prosecution's case by the appellant's counsel, the counsel for respondent simply acknowledged the faults but she further argued that, the discrepancies and inconsistency were only minor, and they do not go into the root of the matter. In my endeavour looking on the arguments, in the first place, I feel obliged to mention the legal transcripts which deals with the credibility of child evidence. For instance, section 127 (6) of the Evidence Act, [Cap 6, R. E 2019], section 115 (3) of the Child Act, Cap 2019 which read together with section 127 (6) of the Evidence Act, Cap 6, R. E 2019 provides, thus; "127. (6) Notwithstanding the preceding provisions of this section; where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may after assessing the credibility of the evidence of the child of tender years or of a victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth." See also section 115 (3) of the Evidence Act, Cap 6 R. E 2019 provides, thus; "115. (3) Notwithstanding the provisions of this section, where in any criminal proceedings involving sexual offence the only independent evidence is that of the child or victim of the sexual offence, the court shall receive the evidence and may after assessing the credibility of the child or victim of sexual offence, on its own merits, notwithstanding that evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth. 23 The test of witness's credibility has been reiterated by this Court in the case of Salum Ally v. Republic, Criminal Appeal No. 106 of 2013 (unreported) which was referred in the case of Nyakuboga Boniface v. Republic, Criminal Appeal No. 434 of 2016 where the Court stated that: "...on whether or not, any particular evidence is reliable, depends on its credibility and the weight to be attached to such evidence. We are aware that at its most basic, credibility involves the issue whether the witness appears to be telling the truth as he believes it to be. In essence this entails the ability to assess whether the witness's testimony is plausible or is in harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in the circumstances particularly in a particular case. That said, what I have observed in the instant case is that, indeed there were some contradictions and inconsistency here and there with regard to the

prosecution evidence. However, after I have critically assessed it, I am in agreement with learned State Attorney that the contradictions and inconsistencies are only minor which did not go into the 24 root of the matter. In my view, there is no fault on the identification of the appellant that he is a person who committed the Rape. There is no contradiction as commission of the offence. The only contradictions and inconsistencies noted are ones which emerged after the offence has been already been committed. Issue as to gender of Samaritan who escorted the victim to the police station is too peripheral to affect the prior act of unnatural offence. In the similar vein, inconsistency of other witnesses such as PW3, PW4, PW5 and PW6 on the point as to who had sent the victim to hospital or whether victim has been chased from the house by his father or she just escaped herself had not affected the cause of what had exactly happened to the victim. In my view, the evidence adduced by the victim with respect to what had happened was clear and straight forward. She was able to testify as to who and how she was unnaturally affronted by his father. In the circumstance, I am alive that based on the principle given in the case of *Selemani Makumba v. Republic* (supra), it was held that the best evidence in sexual offences is that of the victim. For that note, upon consideration the credibility of PW1 was well tested and the trial Magistrate was satisfied thus, she was able to tell the truth, then I have no reason to doubt the same. Which means, even if the evidence or other 25 witnesses will not be considered, the victim's evidence can stand alone and prove the alleged offence beyond any reasonable doubt. For this reasons, I find the first ground of appeal lacks merit and thus, it is hereby discounted. Coming to the 2nd ground of appeal regarding proof of age. As it was rightly submitted by Ms. Kurwa that the charge of unnatural offence does not require proof of age, thus, I subscribe to her submission as it has been provided under section 154 of the Penal Code, [Cap. 16 R.E. 2019] of which the age of victim has not been made part of the element of offence. Consequentially, allegations made by the defence counsel about the failure to prove age of victim becomes futile. Therefore, the case of *Omary Ahmed v. Republic* (1983) TLR 5 she cited is irrelevant to the matter at hand. For this reason, the 2nd ground of appeal is also dropped for lack of merit. On the 3rd ground of appeal that the appellant was convicted on incurable defective charge. Indeed, the appellant was charged with Unnatural Offence contrary to section 154 (1) (a) of the Penal Code, Cap 16 R. E 2019 of which subsection (2) was omitted. From the outset, it is clear to me as it has been well submitted by counsels that subsection (2) of 154 (1) (a) of the Penal Code provides for the sentence. Now, the 26 question to be answered is, what if it is omitted, will the charge become incurably defective. Thus, from the appellant counsel's view, the charge is defective. She averred that, with such earmarked omission, the appellant was unfairly tried since he did not know the gravity of the sentence he might suffer if he will be convicted. She made reference to the case of *Godfrey Simon & Masai Yosia v. Republic*, Criminal Appeal No. 296 of 2018 (unreported). Whereas, on the other hand, Ms. Kurwa, learned State Attorney contended that the charge was properly framed to the extent that omission of subsection 2 of section 154 of the Penal code has not affected the validity of the charge. She pressed that section 154 (1) has created an offence and its punishment thus, she argued that, subsection (2) is just specifying sentence by making reference to section 154 (1) of the Act. Adding to that, she

also argued that the offence of unnatural offence does not consider the age of victim, therefore, it is immaterial if the victim is a child or an adult but what matters is an extent of the sentence. In her view, she stressed that to omit subsection (2) of section 154 of the Act does not deprive any right to the appellant provided that the sentence remains the same. The learned State Attorney further contended that, the appellant was convicted under section 154 (1) and (2) of the Penal Code as it appears 27 at page 20 of the judgment, therefore, in her view the omission is not fatal. Going through the argument, it is clear that subsection (2) of section 154 of the penal code was not cited in the charge sheet as rightly submitted by the counsels. However, in my view, I join hand with the opinion of the learned State Attorney that the omission was not fatal as it has not occasioned any miscarriage of justice. The position of the law under section 132 and 135 of the CPA, requires a charge sheet to reveal among others, the particulars of the offence, nature of the offence and details of the offence on how the offence occurred. For clarity these sections stipulate as thus: "132. Every charge or information shall contain; and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." Furthermore, section 135 of the CPA, which governs the mode and format of charges or information, expressly enacts that as long as a charge or 28 information is framed in accordance with its provisions it cannot be open to objection in respect of its form or contents. It stipulates thus: "135. The following provisions of this section shall apply to all charges and information and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section—

- (a) (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence; (ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence; 29 (iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary, save that where any rule of law limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required; (iv) the forms set out in the Second Schedule to this Act, or forms conforming to them as nearly as may be, shall be used in cases to which they are applicable; and in other cases, forms to the like effect, or conforming to them as nearly as may be, shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case;" To make it more insightful I have painted the content of section 135 (a) (ii) above to stress the peremptory requirement that the "statement of offence" in every charge or information must describe the offence concerned in ordinary language and, if the offence charged is one

created by enactment, it must contain a "reference to the section of the enactment creating the offence". Undoubtedly, there is no mention of a reference to the punishment provision. It seems to me that if the legislature had intended to impose the obligation to indicate in the statement of offence, the applicable punishment provision along with the provision of the law creating the offence charged, it would have stated so in express terms. Furthermore, I contemplate that it is not fortuitous but deliberate that the forms of charges or information set out in the Second Schedule to the CPA, prescribed under section 135 (a) (ii) above, to be used as models for drawing up charges or information, but they do not cite in their respective statements of offence the applicable penalty provision along with the section creating the charged offence. It appears, that the statements of offence in the prescribed forms in respect of the offences of rape, murder, accessory after the fact to: murder, manslaughter, wounding and theft, to name but a few, evidently only contain a reference to the section of the Penal Code creating the offence and nothing else. Thus, literally, sentencing provision has not been made part of the requirements of the content of charge sheet. At this juncture, I am alive that there was conflicting views in the Court of Appeal about this issue, 31 decision of which binds this court. For instance, in the case of *Godfrey Simon & Masai Yosia v. Republic* (supra) the omission to cite sentencing provision was held fatal. See also the case of *Said Hussein*

- v. *Republic, Criminal Appeal No. 110 of 2016 and Mussa Nuru @ Saguti v. Republic, Criminal Appeal No. 66 of 2017* (both unreported) which took the same view. However, the position was acknowledged and varied in the case of *Abdul Mohamed Namwanga @ Madodo v. The Republic, Criminal Appeal No. 257 of 2020*, thus; We acknowledge that, in the aforesaid cases, we took the view that the omission to cite the applicable penalty provision warranted reversal of the conviction. However, we arrived at that conclusion having not fully considered the import of sections 132 and 135 of the CPA, which, as discussed above, do not expressly require the citation of the penalty provision." Besides the above cases, in other decision, the court of appeal has also taken similar route to see the omission to cite sentence provision in the charge sheet not fatal. Reference should equally be made in the case of *Burton Mwipabilege v. Republic, Criminal Appeal No. 200 of 2009*; *Jafari Salum @ Kikoti v. Republic, Criminal Appeal No. 370 of 2017*; *Paul Juma Daniel v. Republic, Criminal Appeal No. 200 of 2017*; and *32 Juma Hassan v. Republic, Criminal Appeal No. 458 of 2019* (all unreported). In these cases, the apex court has held that such an omission was inconsequential and curable. For example in *Burton Mwipabilege* (supra), it was held that: "... this is curable under section 388 of the CPA, because the irregularity has not in our view, occasioned a failure of justice." Similarly, in *Jafari Salum @ Kikoti* (supra), while following the position in *Burton Mwipabilege* (supra), the Court of Appeal excerpted from the decision of the erstwhile Court of Appeal for Eastern Africa in *R v. Ngidipe Bin Kapirama & Others* (1939) 6 EACA 118 and applied the following holding: "An illegality in the form of a charge or information may be cured as long as the accused persons are not prejudiced or embarrassed in their defence or there has otherwise been a failure of justice." Additionally, in the most recent judgment, such as in *Peter Kabi* (supra), the court of appeal took the same view thus:

33 "On our part, we are inclined to agree with the learned State Attorney that the provision of the law that was invoked in charging the appellants was improper in the sense that the provision providing for punishment was not indicated. However, we find that this is no longer an incurable anomaly in the wake of the case of Jamal Ally @ Salum v. Republic, Criminal Appeal No. 52 of 2017 (unreported) where it was held that failure to cite the punishment provision 15 in a rape case was curable under section 388 of the CPA." The relevant passage in Jamali Ally (supra) referred to in the above quotation which goes as follows: "... we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388 of the CPA " Based on the foregoing discussion, it is in my view that citation of wrong penalty provision in the statement of offence in the instant case was not a violation of any express provision of the governing law, that is the CPA, but a necessity born out of laudable practice and caselaw. Even 34 if it were so, it would still be curable under section 388 of the CPA as we are unpersuaded that the appellant in the instant case was prejudiced or embarrassed in preparing and mounting his defence. Nor is it discernible that a failure of justice was occasioned because the punishment which was ultimately imposed on him was levied in terms of the law as the mandatory penalty. Accordingly, the 3rd ground of appeal with respect to the 2nd count fails. For the 4th ground of appeal, regarding witness protection under section 188 (1) (a), (b), (c), (d), section 188(2) and 392 A (1) of the Criminal Procedure Act, Cap 20 RE 2022. The appellant submitted that he was denied the right for fair trial since one of the witnesses purported to be protected by the prosecution was well known to the appellant as the medical doctor (PW4) whom conducted medical examination of the victim and the appellant is the one who took the victim to her. More so appellant's counsel argued further the prosecutions themselves had led their witnesses to unveiled the identity of PW4 who was purported to be concealed. In response to the claim, Ms. Kurwa, learned State Attorney had readily conceded to the flaws that, by doing so, there was no fair trial because the appellant was not made aware of the contents of the exhibit 35 PI. Consequently, it was Ms. Kurwa's prayer that, the evidence of PW4 and exhibit PI be expunged from the record of proceedings. On my side, after perusing the proceedings thoroughly, I find it apparent that unnecessarily the appellant has been denied access to defend his case under the shadow of witness protection. However, realistically there was nothing concealed due to the deliberate unveiling of the witness who purported to have been concealed. Logically, section 188 (1) and (2) of the Criminal Procedure Act, Cap 20, R. E 2022 has not been loosely crafted to skin witnesses but it is there with qualifications. In deliberating the same, I feel inclined to reproduce the provision of section 188 (1) and (2) of the Criminal Procedure Act, Cap 20, R. E 2022 for purpose of orientations. It entails: "188-(1) Notwithstanding any other written law, before filing a charge or information, or at any stage of the proceedings under this Act, the court may, upon an ex parte application by the Director of Public Prosecutions, order-

- (a) a witness testimony to be given through video conferencing in accordance with the provision of the Evidence Act; 36

- (b) non-disclosure or limitation as to the identity and whereabouts of a witness, taking into account the security of a witness;
 - (c) non-disclosure of statements or documents likely to lead to the identification of a witness; or
 - (d) any other protection measure as the court may consider appropriate.
- (2) Where the court orders for protection measures under paragraphs (b) and (c) of subsection (1), relevant witness statements or documents shall not be disclosed to the accused during committal or trial." The purpose of the above provision is clear that concealing of witness is to protect the witness's identity. In the case of DPP Vs. Farid Ahmed and 35 others, Misc. Criminal Application No. 145/2020, and in Misc. Criminal Application No 9 of 2022; DPP Vs Majaliwa Mohamed Ngarama and 20 others this position of the law was cemented. But in the instant case, the prosecutions themselves, in spite of having been granted an order for protection of witness which in my view, based on the circumstances of this case was loosely granted, though they 37 went on to deliberately reveal the identity and whereabouts of (PW4) who was the protected witness. Hence, in such circumstance, there was nothing more than denial to fair trial on the part of the appellant by limiting his access to the medical examination Report, Exhibit PI. In the circumstance thereof, I hold the same position with the learned counsels that the appellant was unfairly denied his right to fair trial, hence I hereby expunge from the records of proceedings the evidence of PW4 together with exhibit PI as proposed by learned State Attorney. In the end, after thorough perusal of the evidence in totality and by paying full determination of procedural steps, I find no loophole to question either for irregularity or feebleness of evidence. Thus, all said and done, since the 2nd count was well proved, I find the appeal lacking merit to that extent, and the same is hereby dismissed in as far as the 2nd count yielding the charge of an unnatural offence is concerned. In other words, conviction and sentence imposed by the trial court with respect to the 2nd count is upheld. It is so ordered. 38 DATED at DODOMA this 12th day of September, 2024.
- s. h.'hassan JUDGE 12/09/2024 This judgment delivered this 12th day of September, 2024 in presence of the appellant and his advocate, and state attorney was also present. S. H. HASSAN JUDGE 12/09/2024 39

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Prepared on 13 October 2026 · Esheria