

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB-REGISTRY AT ARUSHA CRIMINAL APPEAL NO. 154 OF 2022 {Arising from Criminal Case No. 175 of 2020 in the Resident Magistrate's Court of Arusha at Arusha.) ALLY S/O HAMISI APPELLANT VERSUS REPUBLIC RESPONDENT

JUDGMENT

03/06/2024 & 05/07/2024 BADE, J. The Appellant herein was arraigned at the Resident Magistrate's Court of Arusha at Arusha and charged with one count of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, (Cap 16 R.E 2022). After a full hearing, the trial court found him guilty and according to the warrant of commitment he was given 30 years imprisonment. Page 1 of 35 Aggrieved by the aforesaid conviction and sentence, the Appellant lodged this appeal on the following grounds as presented on the petition of appeal:

- i. That, the learned trial magistrate grossly erred in law and fact to convict and sentence the Appellant in a case where there were serious procedural irregularities as the judgment has no sentence passed while the accused is in jail serving an unknown sentence. ii. That, the trial magistrate grossly erred in law and fact to convict the Appellant as the judgment has not considered the defense case which is fatal and vitiates the conviction. iii. That, the trial magistrate grossly erred in law and fact by failure to draw adverse inference to the prosecution side after it had failed to summon or call a material witness that is the person at Mangi shop who as alleged by the prosecution, saw the accused with the victim at the day of incidence. iv. That, the trial magistrate grossly erred in law and in fact to convict and sentence the Appellant basing on hearsay evidence of the prosecution witnesses, which is not corroborated. Page 2 of 35
- v. That, the trial magistrate grossly erred in law and in fact to convict and sentence the Appellant after he failed to note that there was a variance between exhibit P3 adduced by PW5 and the evidence adduced by PW1. This raised doubts to the prosecution side. On his supplementary petition of appeal, the Appellant raised five further grounds of appeal to the effect that: I. That, the trial court erred in law and fact by convicting the Appellant while he was not identified properly as a person who committed the offence. II. That, the trial court erred in law and in fact by convicting the Appellant basing on the identification parade which was conducted against the law. III. That, the trial court erred in law and in fact by

convicting the Appellant based on contradictory evidence by the prosecution side during the trial. IV. That, the trial court erred in law and in fact by convicting the Appellant while there was a variance between charge sheet and prosecution evidence. Page 3 of 35 V. That, the trial court erred in law and in fact by convicting the Appellant while the prosecution side failed to prove its case beyond reasonable doubt. Before going to the merit of this appeal, a brief review of the case is called for to get the contextual background that led to this appeal. It was the prosecution case that on 09/07/2020 at Sombetini area within the City, District, and Region of Arusha, the Appellant had carnal knowledge with a boy of thirteen (13) years old, who will be referred to as a "victim" or "PW1" for purposes of concealing his identity. PW1 testified that he was a resident of Rombo in Kilimanjaro Region. On the mentioned date at 00:00 hrs while making his way to the Amani Center (Center for street children) he met the Appellant around Mbauda, befriended him, and asked about his details. PW1 told him that he is from Rombo, trying to escape from his home since his father refused him to come close to his mother. The Appellant is said to have taken PW1 to a nearby shop and called someone by a name of Mchagga telling him that he has found a child. Mchagga told the Appellant to take him to the police station. However, contrary to the said advice, he took him to his house, and upon reaching it, the Appellant directed him straight to his room. While at the room Appellant started to drink alcohol and PW1 Page 4 of 35 fell asleep. To his surprise when he woke up, he found the Appellant undressed. PW1 asked the Appellant what was he doing, to which he replied that he had helped him, and now it was his turn to help him too. PW1 told him that he could not help him since he is a man, to which he responded he did not ask for his sexual orientation. PW1 begged him to open the door and let him go or else he will raise an alarm but the Appellant took a knife from the basin which was under the table and put it on his neck, covered him with the sheet, and penetrated his penis to his anus. The Appellant then told him to sleep. Once again he woke him up and penetrated his penis into his anus, after which he ordered him to go back to sleep. Later he awoke him and ordered him to shower, he did not heed, nevertheless, the Appellant penetrated his penis to his anus again. In the morning the Appellant opened the door and ordered him to leave. PW1 went to Amani Center which is situated at Kaloleni area. At the Center, he meets PW2 to whom he related what had happened. He in turn called PW3 who is a social worker asking her to speak with the victim. PW1 narrated to them what happened to him. According to the testimony of PW2 they took the victim to the police station, where they obtained a PF3 and took the victim to Mount Meru Hospital. The victim was asked to where the scene of the crime was, and managed to take Page 5 of 35 them to the salon the Appellant was working, they found him, he was arrested and taken to police station. According to the prosecution witnesses, the victim was taken to PW9, a medical doctor who undertook to medically examined. His findings were that the victim's anus had bruises and was oozing water. In his opinion there was penetration in the victim's anus by a blunt object possibly an erected penis or a finger. At this point the case was handed over to the police officers for further investigation. PW5, WP 261 D/Sgt Winfrida was the first police investigator handling the case. She traced the victim back to Amani Center at Kaloleni, Arusha. She interrogated him on what had happened to him. He was positive that the Appellant was his assailant. After an

identification parade where he had identified the suspect, they went to the scene of the crime with both the victim and the Appellant where he managed to identify the black-lined white sheet, which they used to cover up on the material day, as well as the knife with a blue handle near the bed. They handed the said exhibits to PW7 who kept them for further handing over to PW8 who was the exhibit keeper. PW4 was the police officer who conducted identification parade, and his testimony revealed that on 13/07/2021 he supervised the identification / Sage 6 of 35 parade. He found people paraded as the Appellant was brought in by DC James, he explained to him the purposes of the identification and explained his rights. The victim was instructed to pass through and touch the shoulder of the suspect if he identified him there, where the victim identified the accused/appellant by touching his shoulder as instructed. That is what the prosecution's case is made of. On the defense side, the Appellant had not much to say, other than narrating how he was arrested and arraigned before the court and stood charged with an unnatural offence. This appeal was disposed of by way of written submissions. The Appellant was represented by Mr. Mrosso, learned advocate while the Respondent Republic was represented by Mr. Charles Kagirwa, learned State Attorney. With regard to the 1st ground in the supplementary grounds of appeal, Mr. Mrosso submitted that the alleged offence took place at night hours, but the prosecution failed to explain the intensity of the light in the room which enabled the victim to identify the Appellant. In his view, there was a possibility of mistaken identity. Referring this court to page 7 and 9 of Page 7 of 35 the typed proceedings, it is recorded that after PW1 complained and the matter was reported to the police, he led the police officers to the scene of the crime where the Appellant lived. They found him there and arrested him. However, the prosecution failed to explain how PW1 identified the Appellant as the person who sodomized him during the night. The counsel argued in contradiction, on page 11 of the typed proceedings, PW2 testified that he found the Appellant at the salon where he works and arrested him. The question Mr. Mrosso asked is how the same Appellant was arrested twice at his home sleeping and at his salon working. That raises doubt that the Appellant was never identified. To support his position, he cited the case of Waziri Amani vs Republic [1980] TLR 250. On the 2nd ground of appeal on the supplementary petition, Mr. Mrosso submitted that the identification parade was against the law and the same should not have been acted upon. Expounding, PW1 testified that he took the police to the Appellant's house where he recognized him, and he was arrested. Meanwhile, PW2 testified that the Appellant was arrested at his work place, a salon after it was pointed by PW1. In his view, this means PW1 identified the Appellant, and he is the one who Page 8 of 35 led the police to arrest him, hence the identification parade had nothing to serve. Further, the identification parade was conducted on 09/07/2021 while the incident is alleged to have taken place on 09/07/2020, referring this court to page 16 of the typed proceedings. During the four days of the investigation, the Appellant was with the victim, which made the identification parade useless because PW1 testified to have known the Appellant from the date of the incident and he was the one who directed the police officers to arrest him. He insists that the identification parade was conducted while the victim was already aware that the Appellant is the one who is accused of sodomizing him. To support his position, he cited the case of

Raymond Francis vs Republic, [1994] TLR 100. On the 3rd ground on the supplementary petition, Mr. Mrosso submitted that the evidence from the prosecution was full of contradictions to the extent of raising a lot of doubts which should have been resolved in the Appellant's favor. Pointing the contradictions in the prosecution case, he picked on the date of commission of the offence. His argument is that during preliminary hearing the prosecution states that the incident took place on 09/07/2019 but at the hearing PW1 stated that the incident took place on 09/07/2010 while the records reads that the offence was Page 9 of 35 committed on 09/07/2020. Secondly, referring this court to pages 5, 7, and 14 of the trial court typed proceedings, PW4 testified that he conducted an identification parade on 09/07/2021 while this case was already being instituted in court and was about to be concluded as indicated on page 16. At the same time, PW5 testified that the same was conducted on 13/07/2020. Thirdly, PW1 stated that they arrested the Appellant at his home while PW2 testified that the Appellant was arrested at the salon where he was working. Fourthly, referring to this court on pages 9 and 11 of the typed proceedings, PW5 testified that when he interrogated the victim, the victim told him that the name of the suspect is Ally Hamisi but according to the victim's testimony the Appellant was stranger to him. The question in his opinion is how the Appellant knew his name before even he was arrested, referring this court to page 19 of the typed proceedings. Fifth, PW6 testified that the place where the incident took place is known as "Kirika A" but this place was never mentioned by any other witness apart from PW6. In the counsel's views, those contradictions go to the root of the case, cementing his position citing the case of Hamis Said vs Republic, Criminal Appeal No. 529 of 2016 (unreported) and the case of Maramo Slaa Hofu and 3 Others vs R, Criminal Appeal no. 246 of 2011. With regard to the 4th ground of appeal, Mr. Mrosso submitted that the prosecution evidence was at variance with the charge sheet, since the charge sheet mentioned the place where the incident took place as Mbauda while PW6 who was the street leader, testified the place of incident was Kirika A, referring this court to page 24 of the typed proceedings. The counsel argues that another variance is that PW1 testified that the incident took place on 09/07/2010 while other witnesses testified that the incident took place on 09/07/2020, maintaining that this variance between the charge sheet and the evidence adduced renders the charge sheet defective. He added that a charge sheet being the foundation of a criminal trial against the accused person, its particulars must be informative enough to enable the accused to prepare a proper defense. To support his position, he cited the case of Remina Omary Abdul vs Republic, Criminal Appeal No. 189 of 2020. Moreover, on the 5th ground as found in the supplementary petition of appeal, Mr. Mrosso submitted that the prosecution failed to prove all ingredients of the offence beyond the reasonable doubt. / Coming to the 2nd ,3rd and 5th grounds of appeal appearing on the petition of appeal, Mr. Mrosso submitted the trial magistrate did not consider the Appellant's defense and he did not assign any reason for the said disregard, despite the Appellant proving that he is not the one who committed the offence. Mr. Mrosso further argues that the prosecution failed to call a material witness to testify which raises doubts on the prosecution case. That PW1 mentioned a very important witness who was the first person who claimed to have advised the Appellant to take him to the street chairman or the police.

Mr. Mrosso added that the said witness is called "Mchagaa" but strangely the prosecution failed to call him. He referred to this court at page 8 of the typed proceedings. In his view, this person Mchagaa was a material witness who could have proved whether the allegations by the prosecution side were true allegations or not. He insisted that with failure to bring material witnesses without sufficient reasons, the trial court should have drawn adverse inferences against the prosecution. To support his position, he cited the case of Ahmad Salum Hassan @ China vs Republic, Criminal Appeal No. 386 of 2021. In further submission, he maintains that there was a variance between exhibit tendered by PW5 and the evidence adduced by PW1. He argues 12 of 35 that PW1 did not mention all the things seized in exhibit P3, therefore raising unanswered questions on where did they collect those exhibits from. That, the prosecution was duty bound to prove that those exhibits in P3 were in the knowledge of PW1 who is the victim, and who is the source of the said search, seizure, and arrest. Opposing the Appeal, with regard to the issue of identification, Mr. Kagirwa submitted that PW1 spent the whole night up to the next day in the morning with the Appellant in his house, thus, the victim was able to clearly identify him as a person who committed the offence enumerating several facts; one, the victim clearly explained that commission of the offence started from the night and went on to the next morning. In his opinion, the offence was committed in two phases, at night and in the morning. On the argument that the witness failed to explain the intensity of the light in the room where the incident took place, Mr. Kagirwa argues that the case of Waziri Amani (supra) cited by counsel for the Appellant fit perfectly to this situation, especially at page 4 since it coincides with favorability of the conditions in respect of disputed identity among, them being the time the witness had the accused under observation as well as the distance at which he observed him. That, connecting such position to the evidence in the instant matter is very Page 13 of 36 similar to PW1 and the Appellant spent time together from the whole night up to the next day in the morning while the Appellant was sodomizing PW. This made the victim being able to observe the Appellant for a long time and identify him. Also since the incident took place under zero distance, no one can say that there was a mistake in the entity of the Accused / Appellant. Mr. Kagirwa added that it is impossible for a person with common sense to fail to recognize a person who has been with him all night until the next morning, and took him out of his room when the morning dawned. It is Mr. Kagirwa's contention that evidence of PW1 was also corroborated by that of PW2 to the effect that it was PW1 who led to the arrest of the Appellant testifying that he clearly identified the Appellant at the time of incident. The State Attorney further submitted that the second time that the victim was clearly able to identify the Appellant is during cross examination. That, during the trial, the Appellant never raised a question about the amount of light that was present at the scene that made the victim to recognize him. In his view, by not questioning as such, he simply meant that he admits that the victim recognized him. It is also his contention that as a matter of principle, a party who fails to cross examine a witness on a certain Page 14 of 36 matter is deemed to have accepted that matter and he will be estopped from asking the trial court to disbelieve what the witness said. To buttress his position, he cited the case of Nyerere Nyague vs Republic, Criminal Appeal No. 67 of 2010. With regard to

the argument that there was a contradiction on the prosecution case, Mr. Kagirwa conceded with the fact that PW1 stated that the Appellant was arrested at home while PW2 stated that the Appellant was arrested at his salon working. In his opinion, this contradiction is minor as it does not go to the root of the case. On the 2nd ground of appeal, the learned State Attorney submitted that the counsel for the Appellant failed to show how the identification parade was conducted in contravention of the law. The Appellant did not show how he was prejudiced by the identification parade being conducted while the victim had already identified him when they went to arrest him. Moreover, the learned State Attorney submitted that the counsel for the Appellant was misleading this court by saying that the identification parade was conducted on 13/07/2021, a date which is one year after the incident took place, while at page 19 of the typed proceedings, PW5 testified that the identification parade took place on 13/07/2020 which is /Mge 15 of 35 four days after the date when the incident took place, adding that in consideration of the record as per the typed proceedings, it is clear that there is variance of dates between PW4 and PW5 pertaining to the year when the identification parade was conducted, but invoked section 234 of the Criminal Procedure Act as well as the holding in the case of EX. G. 2434 PC. George vs Republic, Criminal Appeal No. 08 of 2018, whose position is that such variance is not fatal. On the 3rd ground of appeal, the State Attorney concede with the argument that during preliminary hearing it was read that the incident took place on 09/07/2019; he contended that looking at page 14 of the typed proceedings, this problem was solved on 19/01/2021 when the charge sheet was substituted amending the year and the date when the incident took place. Regarding the date of the incident which is recorded as 09/07/2010 as per the trial court typed proceeding's page 7, the handwritten court proceedings have recorded the actual date as being 09/07/2020 which is similar to the date mentioned on the charge sheet, concluding that this was a typical typing error. Moreover, Mr. Kagirwa submitted that the Appellant's counsel is misleading the court in arguing that there is variance between the /We 16 of 35 testimony of PW4 and PW5 concerning the date when identification parade was conducted. As per the testimony of PW4, the same was conducted on 13/07/2021 when he was instructed to supervise the same, and he did it on the same day. At page 19 PW5 testified that it was conducted on 13/07/2020. Admitting this variation in the year the identification parade was conducted, he suppressed it as a minor error which might be caused by a slip of the pen or the typing machine if the mistake was from the court's side; or slip of the tongue if it is mentioned by PW5. More importantly, he argues such error does not go to the root of the case and should be disregarded. With regard to the argument that there were contradictions between the testimony of PW1 and PW5 about the place where the Appellant then Accused was arrested, Mr. Kagirwa submitted that not every contradiction and inconsistency is fatal to the case maintaining that minor contradictions is a healthy indication that the witnesses did not have a rehearsed script of what to testify in court. To support his argument, he cited the case of EX. G. 2434 PC. George (supra). The State Attorney argued that the variances which occurs in the prosecution case do not shake the credibility of the victim's evidence with respect to the offence, adding that the judgment of the trial court mostly relied on Page 17 of 35 the evidence of the victim which is the best

evidence in sexual offences, as well as that of PW9; a medical doctor, to reach its decision since the trial court believed them. He insisted that every witness is entitled to credence, they must be believed and their testimony accepted unless there are good and cogent reasons of not believing the witness. To buttress his position, he cited the case of Edson Simon Mwombeki vs Republic, Criminal Appeal No. 94 of 2016. On the argument that PW6 mentioned the place known as Kirika A, which place was not mentioned by other witnesses, Mr. Kagirwa argued this is not fatal as according to the testimony of PW6 in the handwritten proceedings of the trial court, Kirika A is a street within Mbauda area of Arusha City. With regard to the 4th ground on the supplementary ground of appeal, Mr. Kagirwa submitted that there was no variance between the charge sheet and the prosecution evidence.

Expounding, maintains that the variance on dates when the incident took place is just a slip of pen or a typing error since it does not make sense that PW1 would mention a year which is ten years back before the year of the incident, against the testimony of all other witnesses on the date that the incident took place, as well as the charge sheet which mentioned the date of incident to be /Page 18 of 35 the 09/07/2020. Mr. Kagirwa added that to prove it was a just slip of the pen or a typing error, in the typed proceedings of the trial court the date and the month of the incident are similar with that of PW1 and other witnesses except for the year. On the 5th ground, Mr. Kagirwa submitted that the evidence of PW1 who explained how and when the Appellant sodomized him is corroborated with the evidence of PW9, who conducted medical examination to the victim and tendered PF6 that shows there was penetration into his anus. The fact that the victim's testimony is the best evidence in sexual offences, and the same is corroborated as explained above, it shows how the prosecution prove the case beyond reasonable doubt; that the Appellant did sodomize the victim as charged, countering that the Appellant did not raise any reasonable doubt to shake the prosecution case. With regard to the 2nd, 3rd and 5th grounds of appeal on the petition of appeal, Mr. Kagirwa while conceding that the trial court did not consider the Appellant's defense, he argued in proposition that this court as the first appellate court should step into the shoes of the trial court and consider the Appellant's defense which is found under page 5 and 6 of the typed proceedings so as to see whether it raises a doubt on the Page 19 of 35 prosecution case. To cement his position, he cited the case of Shabani Haruna @ Dr. Mwangilo vs Republic, Criminal Appeal No. 396B of

2017. The State Counsel also pointed out that in his opinion, the Appellant's defense failed to prove that it is not him who sodomized the victim. The evidence of the victim still points a finger towards him. In responding to the allegation that prosecution failed to call a key witness, Mr. Kagirwa submitted that there is no particular number of witnesses that the prosecution is required to testify before the court for a proof of any fact, supporting his argument with section 143 of the Evidence Act. He added that the testimony of one "Mchagaa" who the Defense side would have wanted to be called would not have proved any of the elements of unnatural offence. To cement his position, he cited the case of Emmanuel Kabelele vs Republic, Criminal Appeal No. 536 of 2017. On the issue of variance on exhibits listed on exhibit P3 tendered by PW5 and the evidence of PW1, the State

Counsel conceded that it is true that PW1 did not mention all the things seized in exhibit P3. He was quick however to dismiss it as a minor discrepancy on details due to lapse of memory on account of passage of time, taking into consideration that PW1 is a child and this kind of discrepancy should Page 20 of 35 always be disregarded since only fundamental discrepancies should be considered in discrediting the witness, compounding his argument through the case of EX. G. 2434 PC. George ((supra), as he insisted that the doubt was cleared by PW5 who tendered exhibit P3 before the trial court. Rejoining, Mr. Mrosso reiterated his submission in chief and added that counsel for the Respondent concede to the fact that there was contradictions on places where the Appellant was arrested which means the Appellant was wrongfully identified as the place where he was arrested is unknown. He also discern that in his views, it also means two different persons were identified and arrested for the commission of the offence, and this must be resolved in favor of the Appellant. Mr. Mrosso added that the argument that the contradictions are minor does not hold water. It is Mr. Mrosso's contention that the case of EX. G. 2434 PC George (supra) cited by Respondent's counsel is distinguishable and inapplicable to this case at hand because in the cited case the contradiction is minor, while in this case the contradictions are fundamental and go to the root of the case, raising questions on the credibility of the prosecution Page 21 of 35 witnesses on their truthfulness, and the only cure in his view, is for the court not to act on their testimonies. After going through the court's record, the grounds of appeal, and the rival submissions by the parties, I have condensed three issues to be determined by this court. First, whether PW1 properly and without any doubt identified the person who sodomized him on the material date as the Appellant, Second, whether the identification parade was conducted according to the law; and Third, whether the prosecution proved the case against the Appellant beyond reasonable doubts. Starting with the first issue hinging on visual identification, it was held in a number of Court of Appeal decisions that where a witness is testifying on identifying another person in unfavorable circumstances, like during the night, he must give clear evidence that leaves no doubt that the identification is correct and reliable. To do so, the identifying witness will need to mention all the aids to unmistakable identification like proximity to the person being identified, the source of the light and its intensity, the length of time the person being identified was within view and also whether a person was a familiar person or a stranger. While I do not attempt to exhaust the circumstances for accurate identification, this Court has on many occasions emphasized the need to cautiously Page 22 of 35 consider evidence of visual identification. In the cited case of Waziri Amani vs Republic (supra) it was held: "The first point we wish to make is an elementary one and this is that evidence of visual identification, as courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight" Looking at the matter at hand, it is not in dispute that the Appellant and the victim were a stranger to each other on the date of the incident. It is also not in dispute that on the date of the incident, the Appellant and the

victim met at night hours. Mr. Mrosso argues that the offence took place at night hours and the prosecution failed to explain the intensity of the light in the room which would have enabled the victim to identify the Appellant. It is true that the prosecution did not explain the intensity of the light in the room, but what Mr. Mrosso failed to note is that according to the testimony of the victim, the offence did not only occur on the night hours but throughout the night to the morning. The victim explained in details how he met the Appellant who took him to his room, Page 23 of 36 and sodomized him throughout the night, they slept together. The victim was begging him to let him go. The Appellant ordered the victim to take a shower but the victim refused, and he kept on sodomizing him. In the morning, the Appellant ordered the victim to leave the place. Taking into consideration the time the victim spent with the Appellant it is hard to believe that the victim would be unable to identify the Appellant as the one who sodomized him. The situation would have been different if the offence had taken place when they met and then the Appellant left, but the Appellant took the victim to his room and slept with him on the same bed sharing the same sheet all the way to the morning. To ensure that the victim identified the Appellant, he led police to the place where he met the Appellant, which is the salon where the Appellant was working, where the Police arrested him. I do not see how failure by the prosecution to explain the intensity of the light prejudiced the Appellant bearing in mind that the Appellant was with the victim till the morning lights. In the case of Waziri Amani (supra), the court proceeded to hold in guidance: "Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed Page 24 of 35 identity, it seems dear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions such as the following posed and resolved by him; the time the witness had the accused under observation, the distance at which he observed him, the conditions in which such observation occurred, for instance whether it was day or night-time, whether there was good or poor lighting at the scene and further whether the witness knew or had seen the accused before or not". Taking the circumstances in the matter at hand, as correctly argued by Mr. Kagirwa the time that was spent by the Appellant with the victim and the zero distance that they were together as the Appellant slept with the victim on the same bed sharing the same sheet throughout the night to the morning it would have been baffling that the victim was unable to properly identify the Appellant as his assailant. Not only had he enough time to observe the Appellant in close proximity, but also, the Appellant had initially cajoled the victim to go with him as a good Samaritan. I am inclined to think the victim had good time of observing Page 25 of 35 the Appellant without any pressure and for a helpful act. Such an act would naturally have impressed itself upon the victim to not only observe him but also casually engage each other and remember him. With regard to the second issue, Mr. Mrosso was faulting the identification parade by arguing that it was conducted in contravention of the law, maintaining that the same was meaningless as it was conducted after the victim had already known the suspect as he was the one who led the police to arrest him. In understanding this issue, I propose to first look at the purpose of the

identification parade as guided through case law. In the case of Flano Alphonse Masalu @ Singu and Others vs The Republic, Criminal Appeal No. 366 of 2018, the Court had observed : "An identification parade presupposes that the person to be identified was identified at the scene of the crime" The Court further quoted the holding in the case of Ahmad Hassan Marwa vs Republic, Criminal Appeal No. 264 of 2005 thus: 'We wish to restate the law that an identification parade is itself not substantive evidence, but only admitted for collateral purposes. It derives its corroborative value from section 166 of the Page 26 of 35 Tanzania Evidence Act. So, if well conducted, its value is only to corroborate the evidence of the identifying witness" This understanding of the purpose of the ID parade as explained above, is wholly illustrating of the point that visual identification of the Appellant by the victim was sufficient. For the sake of argument, even if it is held that the ID parade was unreasonable or uncalled for under the circumstances, the most it can be said about it is that it was superfluous. Nonetheless, the counsel for the Appellant has not shown how the Appellant was prejudiced by the said identification parade. I am not persuaded that the parade had affected the prosecution case one way or the other. Turning to the last issue, it was argued by the Appellant's counsel that the prosecution failed to prove the charge against the Appellant beyond reasonable doubt as not only was the charge sheet defective but also there were lots of contradictions in the testimony of the prosecution witnesses. Before I delve deeper in the issue, revisiting the legal position of proof beyond reasonable doubt is appropriate. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, (See Ali Ahmed Saleh Amgara vs R [1959] EA 654). The prosecution / Wge 27 of 35 has the primary duty of proving that the accused has committed the actus reus elements of the offence charged, with the mens rea required for that offence, it means when the testimonies by the prosecution are brought together, the evidence must be strong enough to leave no reasonable doubt to the criminal culpability of the accused person. Starting with the argument that the charge was defective as it was not supported by the testimonies of the prosecution witnesses since the place of incident mentioned in the charge sheet is different from the one mentioned by the prosecution witnesses; and also that the date of the incident is different from the one mentioned in the charge sheet. Going through the prosecution evidence, it is notable that in the charge sheet, the place of incident is Sombetini and PW6 mentioned that the place of incident is "Kirika A". It is clear from the testimony of PW6 who was a ten-cell leader of the place that "Kirika A" is a place within Sombetini, so there is no variation between the charge sheet and the prosecution evidence as alleged by the counsel for the Appellant. Furtherstill, on the issue of the different date of the incident, it is true that during the preliminary hearing the incident was stated to have taken place on 09/07/2019 but as correctly argued by the State Attorney, this mistake was corrected when the Republic prayed for the Zr^ge 28 of 36 amendment of the charge sheet on 19/01/2021 to substitute a charge with another one that had the correct year as the offence was committed on 2020 and not 2019. Notably, this prayer was granted. Further on the issue of contradictions in the prosecution witnesses, the counsel for the Appellant argues that prosecution case was full of doubts as the witnesses contradicts each other especially on the date of the commission of the offence. Raking

through the prosecution testimonies, I have not found any contradiction as alleged. The typed proceedings indicated that PW1 testified that the incident took place on 09/07/2010 but certainly this is a typing error. I had revisited the original handwritten proceedings of the trial court the and the date of incident mentioned by PW1 and recorded by the trial court is 09/07/2020. Counsel for the Appellant also pointed the differences on the date the identification parade was conducted. Going through the record I have established that PW4 testified the identification parade was conducted on 13/07/2021 while PW5 testified that the identification parade was conducted on 13/07/2020. As correctly argued by Mr. Kagirwa, this is a slip of the pen, as it does not make sense that the identification parade would be conducted after the accused had been arraigned before the court. One more indication that convinced me that this is simply a slip of Page 29 of 35 the pen is that the date and month are similar, with the difference in the year. It cannot be a coincidence that the parade would have been conducted and recorded with such discrepancy. Another difference pointed out by counsel for the Appellant is the place where the Appellant was arrested. PW1 testified that the Appellant was arrested in his room sleeping while PW2 testified that the Appellant was arrested at the salon. I have revisited the record and have ascertained this to be a typing error. In the trial court handwritten proceedings, it is indicated that PW1 stated that the Appellant was arrested at the salon; not in his room sleeping as it appears on the typed proceedings. The Counsel also pointed out that there was a variance between the exhibits tendered by PW5 and the ones mentioned by PW1, as PW1 did not mention all the things tendered on exhibits P3. It is on the record that the exhibits tendered by PW5 were one knife and one bed sheet. PW1 in his testimony testified that he was threatened by this knife. I do not see the basis of Mr. Mrosso's argument because PW1 testified that he was indeed threatened with knife by the Appellant. The bed sheet which was tendered by PW5 was seized during the cause of investigation, hence one cannot say there was a variance between the exhibits mentioned by PW1 and the one tendered by PW5. / Page 30 of 35 Another argument raised by the Counsel is that the prosecution failed to call a material witness, one "mchagaa" whom they alleged had directed the Appellant to take the victim to the police station. Mr. Mrosso did not explain how the failure to call this witness "mchagaa" has prejudiced the Appellant. In any case, the Appellant had every right and was given every opportunity to call any witness to discredit the prosecution's evidence if he sincerely believed that they had not told the truth. It did not seem that the Appellant had done so. Finally, on the argument that faulted the trial court for not considering the Appellant's defence, which fact was readily conceded by the State Attorney. This I undertake while mindful of the legal position that it is a misdirection and fatal to not consider the accused person's defence. Going through the trial court's judgment, the trial magistrate was not bothered to consider the Appellant's defence. Be that as it may, this court being the first appellate court has the mandate to step into the shoes of the trial court and evaluate the Appellant's evidence, which I now so do. In all fairness, while the trial magistrate did not bother to analyse whatever was said by the accused as his defence, the judgment did reproduce what the Appellant said when he was asked to enter his /Page 31 of 36 defence (pp 5,6 of the judgment), but went no further. Suffice to say that the trial court should have

subjected the evidence to a critical analysis of both the prosecution and the defence cases, which is required as per the guidance of the Court of Appeal in *Abel Masikiti vs R*, Criminal Appeal No. 24 of 2015 while expounding its own position in *Leonard Mwanashoka vs R*, Criminal Appeal No. 226 of 2014 (unreported) thus : "The Court directed that considering the defence, was not ail about summarizing it because....It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at ail in the evaluation or analysis." True to the spirit of what is guided above, I have carefully scrutinized the testimonies adduced during the trial. In his defence, the Appellant only narrated how he was arrested and arraigned before the court. See pg 38 of the typed proceedings. I revisited both the handwritten notes and the typed proceedings and found out that the Appellant's defence was a mere evasive denial. In any case while at it, he corroborate^ PW1 Page 32 of 35 that he was arrested at the salon which is his workplace, and was brought to the Central Police Station, which removes the discrepancy in the contradictions earlier pointed out by the counsel for the Appellant. I must point out that while the duty of the prosecution is to prove the case beyond reasonable doubt, the Appellant is required to raise some doubts in the prosecution case. The Appellant here did not raise any doubts on the prosecution's case. Except for the fact that he did not know why he was brought in, denying that he committed the offence charged, and denying knowing the victim, he did not offer alternative explanations or rebut the testimony of the witnesses for the prosecution. This is despite the fact that in criminal cases, the guilt of the accused is never gauged on the weakness of his defence, rather conviction shall be based on the strength of the prosecution's case. See *Christina s/o Kale and Rwekaza s/o Benard vs Republic*, TLR [1992] 302 and *Marwa Wangiti Mwita and Another vs Republic*, 2002 TLR 39. Having said so this appeal is dismissed for want of merits. I uphold the conviction and the sentence of the trial court. However, before I pen off, there was a concern raised by the Appellant on the first ground of appeal in his petition of appeal, unfortunately, his counsel did not submit that concern which was about the failure' of the / Page 33 of 36 issue/ground was dropped by the Appellant's counsel, I am inclined to make a finding on the same as ideally the Appellant has a right to know what sentence he was given and for how long he will serve the said sentence. More importantly, if this was the case, then it would have been an irregularity which needed to be cured. So while going through the judgment of the trial court, after the trial magistrate had found the Appellant guilty and convicted him, the judgment did nor reflect a sentence passed on him. Normally, a sentence is passed after the trial court has called upon and heard the convicted person on mitigation and or aggravation on the sentence to be passed. Punishment is among the content of the judgment. See section 312 (2) of the Criminal Procedure Act, [Cap 20 R.E 2022]. This means a judgment must contain a sentence. Suffice it to say that the trial magistrate ought to have included the sentence after convicting the Appellant and having heard the Appellant on the aggravating and mitigating factors. The handwritten proceedings do contain this procedure, and the Sentence. So there is no irregularity that

would have vitiated the proceedings. However, for the records, this file should be remitted back to the trial magistrate for him to include the sentence in his Judgment as per the law. / Page 34 of 35 It is so ordered. DATED at ARUSHA this 05th day of July 2024 A. Z. Bade- Judge 05/07/2024 Judgment is delivered in the presence of the Appellant and the Respondent / their Representative in chambers on the 05th day of July 2024. A. Z. BADE JUDGE 05/07/2024 The right of Appeal is explained to the Appellant. A. Z. BADE JUDGE 05/07/2024 Page 35 of 35

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