

TANZANIA / JUDGMENT

# DIDAS MAGESA FINAL 1 PR

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA GEITA SUB-REGISTRY AT  
GEITA CRIMINAL APPEAL NO. 35366 OF 2024 (Original Criminal Case No. 74 of 2023 of Resident  
Magistrate's Court of Geita before S.L MAWEDA PRM) DIDAS S/O  
MAGESA----- APPELLANT VERSUS THE  
REPUBLIC----- RESPONDENT

## JUDGMENT

Date of last order: 22 January 2025 Date of Judgment: 03 March 2025 K. D. MHINA, J. The appellant, DIDAS MAGESA, was sentenced to a jail term of thirty (30) years by the Resident Magistrate's Court of Geita, consequent upon his conviction for the offence of unnatural offence contrary to section 154 (1) (a) of the penal code, Cap 16 R.E 2022. The particulars of the offence were that on 26 August 2023 at Lwezera village within Bugando in the district and region of Geita, the accused person did have carnal knowledge of one boy aged 19 years, who, for purposes of concealing her identity, will be referred to, in this judgment, as the victim, against the order of nature. After the appellant unequivocally denied the charge, the prosecution evidence, which the trial court found sufficiently proved the charge against him, was made by six witnesses and one exhibit. To appreciate the essence of the appeal, I find it necessary to set out its factual background briefly as follows; According to PW4, the Medical Practitioner stationed at Nzera Hospital, on 26 August 2023, around 12: 00 p.m., while at the hospital, he medically examined the victim (PW1). According to Police Form No. 3 (PF3), he was directed to examine if the victim was sodomized. Thereafter, he physically examined the victim's anal part from outside and inside. In his examination, he found that when he touched the victim's anal part, he was feeling pain. Also, he found bruises. He stated the anus was penetrated possibly by a blunt object From the prosecution's evidence, it all started at midnight on 26 August

2023. According to the elder brother of the victim (PW3) and the twin brother of the victim (PW2), that night, they heard crying noises coming from the house where the victim and the appellant had slept. Upon arriving at the house, they asked the victim what was happening. The victim told them that the appellant had sodomized him. The two brothers forcefully, by pushing the door, entered inside. Inside the house, they found the victim holding the appellant's hands so that he could not flee from the scene. PW2 rushed to the ten-cell leader and the chairman, and later, they went to the police station. That night,

their mother was not at home as she attended the night fellowship prayers at the church. As to what happened prior to that night, which led to the appellant and the victim sleeping in the same house, the prosecution evidence reveals the following; On 24 August 2023, the victim met the appellant on his way back from watching a football match at Kwa Msingo Social Hall. When they met, the appellant told the victim that he was looking for a shopkeeper for his shop. The victim told him he should seek permission first from his mother. The appellant met the victim's mother, who demanded money to buy soap, a request the appellant promised to fulfil. That issue was confirmed by the victim's mother (PW5), who testified that the appellant had promised to give money to buy soap as a token. According to the victim, on 25 August 2023, he met with the appellant. In their meeting, the appellant asked him who he was sleeping with, and the victim informed him he was sleeping with his younger brother. After that, the appellant told the victim that he would visit their home so that he could teach him how to run a business. At 09:00 p.m., the appellant arrived as he promised, and together with the victim, they entered a room, and the victim fell asleep. On his side, PW2, who used to sleep with the victim in the same room, testified that on a fateful night, he did not sleep in the same room with the victim because when the appellant went to their home, he asked for private moments with the victim so that they could discuss business. Around 12:00 midnight, the victim woke and found the appellant sodomizing him. He cried aloud, and his brothers went to the room. When the ten-cell leader arrived at the scene, he found that PW1 and PW3 had apprehended the appellant. Then, he sent the appellant to the hamlet chairman. In his defence, the appellant stated that he was suffering from erection dysfunction as his penis was not erecting. Also, his penis was so small in size. He also testified that he did not sodomize the victim. The problem was that he was claiming money from PW5 after clearing her cassava farm. On the morning of 26 August 2023, when he went to PW5's house, he met with PW1, who told him he was tasked to pay him, but he wouldn't pay. At that moment, another PW5 child arrived, and they started to grab him. Later, PW6 joined PW1 and his siblings, and he was taken to the VEO office and was alleged to have sodomised PW1. The appellant, aggrieved with the trial court's decision, has now come to this Court. He preferred eight (8) grounds of appeal as follows;

- i. That the appellant was charged, convicted and sentenced to serve 30 years of imprisonment for the offence of Unnatural Offence Contrary to section 154(1)(a) and (2) of the Penal Code (Cap.16 R.E.2022), Offences which he had never committed.
- ii. That; the trial Magistrate Court erred in Law and Facts to convict and sentence the Appellant on the offences of rape and Unnatural offence, which were not proved beyond a reasonable doubt.
- iii. That; the Trial Magistrate Court erred in law and facts for unreasonably convicting and sentencing the appellant based only on the weak evidence from PW-1 Kulwa Claud, who is said to be of the age of 20 years having the age of majority with full capacity of understanding what is good and bad but also telling the truth as why and how was it possible of him being in the position of being sodomized without his awareness as there is nowhere testified to be admitted anything narcotic in his body during the commission of the alleged offence.
- iv. That; the

Trial Magistrate Court erred in law and facts for unreasonably convicting and sentencing the appellant based only on the weak evidence from PW-2Doto Klaudi and Pw3- Gerald Klaud, the young brothers of the victim was only the hearsay evidence as they had never caught me committing the charged offence at the time of the commission of the alleged offence off which was also contradictory in nature with regard to the date and time of the commission of the alleged offence as he testified that it was around 12:00pm on 25/08/2024 contrary to Pw 1 who testified that it was around 12;00 the midnight on 26/08/2024.

- v. That; the Trial Magistrate Court erred in law and facts for unreasonably convicting and sentencing the appellant based only on the evidence adduced from the prosecution side as the case was conducted to its finality based on contradictory evidence from PW1, PW2, PW3, PW4, PW 5 and PW 6 in relation to the dates and time of the commission of the alleged offence. vi. That the trial magistrate Court erred in Law and Facts to convict the Appellant based only on the weak evidence adduced from PW1, PW2 and PW3 as it is nowhere stated at the time of the commission of the alleged offence. vii. That, the trial magistrate Court erred in Law and Facts to convict the Appellant based only on the evidence adduced by PW4 Christopher Deogratus Sahani, the Medical Doctor, the evidence which only proved the victim being sodomized with the due presence of the bruises in the Anus of the victim but not proving who did commit or the principal offender of the alleged of unnatural offence as he actually testified that on 26/08/2023 around 12:00pm being at work he examined the Anus of the victim and found bruises with blood and the Anus resulted to the conclusion that the blunt object has penetrated in the Anus of the victim the question comes what was that blunt object? Was it the penis of the appellant? Can also the penis being said to be a blunt object causing such injury/bruises in the Anus of the victim This evidence is actually not water tight evidence proving the appellant being a principal offender of the offence of rape. viii. That the trial magistrate Court erred in Law and Facts to convict the Appellant based only on the evidence adduced by the prosecution side despite the plea of being impotent from being born, the Magistrate Court continued to convict and sentence me. At the hearing, the appellant appeared on his own, while Mr. Liberatus Lwabuhanga, learned State Attorney, resisted the appeal on behalf of the respondent Republic. On his side, the appellant had nothing to add; however, he prayed his grounds of the appeal to be considered. Resisting the appeal, Mr. Lwabuhanga argued the 1st, 2nd, and 3rd grounds jointly because they revolve around the complaint that the offence was not proven to meet the required standard. He submitted that the evidence at the trial proved the offence beyond a reasonable doubt. The proof was watertight and proved the offence of unnatural offence c/s 154 (1) (a) of the Penal Code. In amplification of the grounds, Mr. Lwabuhanga explained that the witnesses proved that, one; the victim was penetrated. That was proved by PW1 (victim) and PW4 (Medical practitioner). Further, PW2, PW3, PW5 and PW6 proved that the appellant was caught immediately after an act. He further explained that in sexual offences, the best evidence comes from the victim, as per the case of Selemani Makumba vs. Republic, 2006 TLR 379. Therefore, the appellant's complaints in the 1st, 2nd and 3rd grounds of appeal are devoid of merit. Arguing the 4th, 5th and 6th grounds of appeal, which contain the appellant's grounds

that there were contradictions in the evidence regarding the date and time of the commission of the offence, Mr. Lwabuhanga submitted that the appellant complained that while the victim stated the offence was committed on the night of 26 August 2024 at 00:00 hours, other witnesses stated that the offence was committed at 12:00 hours on 25 August 2024. On this, he argued that there were no contradictions in the evidence at all because, according to PW1, the offence was committed at 00:00 hours on 26 August 2024. On the other hand, PW2 and PW3, who were in the same compound, stated that they heard a crying alarm while sleeping on 26 August 2024, around 00:00 hours. They went to open the door of the room and found PW1 holding the arms of the appellant. PW1 informed that when they were sleeping, the appellant sodomized him. According to PW4, at 12:00 hours on 26 August 2024, he received the victim for medical examination. Therefore, there were no contradictions. He further argued that if this court found contradictions, the same would still be immaterial. To bolster his argument, he cited *John Stephano and five others vs. Republic*, Criminal Appeal No. 251 of 2021 (Tanzlii) at page 8, where the Court of Appeal elaborated that the variance between the charge and evidence in respect to the time at which the offence was committed is immaterial. On the 7th ground, Mr. Lwabuhanga submitted that the purpose of the PW4 (medical practitioner) evidence was to prove or disprove if there was penetration. It is corroborative evidence which complements other evidence. Further, PW4 was not present when the victim was penetrated, and by which object penetrated the victim. Regarding the 8th ground in which the appellant complained that he was impotent, Mr. Lwabuhanga submitted that during the defence hearing, the appellant's male part was shown to the court. However, the trial court ruled out his claims by declaring that his male part was normal. He further submitted that there was no medical report indicating that the appellant suffered from erection dysfunction. He concluded on this ground of appeal by submitting that in sexual offences, penetration is the key to be proved. He cited *Hussein Salim Kassim vs. Republic*, Criminal Appeal No 175 of 2021 (HC-MZA-Tanzlii), at page 12, where it was held that penetration, even the slightest degree, is sufficient to constitute the offence. Having gone through the grounds of appeal, the submissions and the entire records of appeal, I will start with the 8th ground of appeal in which the appellant claimed that despite his plea of being impotent, the trial court convicted him of unnatural offence. On this, during the trial, the appellant, in his defence, pleaded that he had erection dysfunctions, his male organ was not erecting and so small that he could not perform sexual intercourse. This ground should not detain me long; this is because; One, it was the appellant's duty to prove that he was impotent, but he failed to do so. On revisiting and analysing his defence, apart from mere words, he failed to tender any medical proof to substantiate his defence. It was the appellant's duty to prove that he was impotent because that fact was within his knowledge. This is a position of law as per section 114 (1) of the Law of Evidence Act, Cap 6. That provision of law reads: "Where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to the operation of the law creating the offence with which he is charged, and the burden of proving any fact especially within the knowledge of such person is upon him". Further, in *Nguza Vikings @Babu Seya*

and three others vs. Republic, Criminal Appeal No. 56 of 2005, where a similar claim to this case arose, the Court of Appeal held that; "...the question of the potency of the 1st appellant was within his own knowledge and the burden of proof was on him to prove that his penis was not functioning". Two, since there is no cogent evidence from the appellant on the claim of sexual dysfunction, the degree of impotence, whether partial or full, is not known. This was very important because penetration, however slight it may be, is an essential ingredient and constitutes the offence the appellant charged. On this, there is a plethora of authorities on the issue of penetration, such as Maligile Maingu vs. Republic, Criminal Appeal No. 432 of 2021 (Tanzlii), where the Court of Appeal held that; "...penetration, however slight, is sufficient to constitute the sexual intercourse necessary to the offence". On the premises, the appellant's defence at the trial failed to prove that he was impotent because the prosecution has no duty to prove that the appellant was not potent. This is the position in the cited case of Nguza Vikings (Supra), where it was held that; "Section 114 (2) (b) of the Evidence Act is also relevant. It does not impose on the prosecution, the burden of proving that the 1st appellant was not impotent". Further, the issue of potency should be proved by evidence presented to the Court at the hearing, as I elaborated above. However, at the trial, the trial magistrate, after the appellant's claims of sexual dysfunction, inspected the appellant's male private parts and recorded his findings/ observations. This is what happened at the trial. "I suffer from erection dysfunctions problem as my penis do not erect and I cannot perform sexual intercourse at all. Further, my penis is so small in size I can invite the court have a look on my penis. Court: Upon having looked at the accused person's private parts, I am satisfied that the penis is in its normal shape. The accused person's version that his penis is abnormally small is rejected". The approach above by the trial court was already discouraged by the Court of Appeal. It is improper for the trial court to inspect the private organs of a party to the case. To put it clear on what was discouraged and what is supposed to be done, I quote the decision of the Court of Appeal in Butongwa John vs. Republic, Criminal Appeal No. 450 of 2027 (Tanzlii), where it was held that; ".....but before we do so, there is one little observation we need to make in relation to a procedural issue. It must be recalled that the appellant had earlier wanted PW2 to state whether he was circumcised or not. Later in his defence, the appellant appears to have demonstrated in court that he was uncircumcised, and the record clearly shows: Court: Accused shows the court and he is uncircumcised. Was it proper for the learned Magistrate to go to that extent and record what he personally observed? Would that procedure apply if the Magistrate and accused happened to be of opposite sex? In our view, this was too much of an indulgence on the part of the learned Magistrate because in an adversarial system as ours, the court ought not to risk taking part in such an inquiry. If the learned Magistrate considered that fact relevant for the determination of the case before him, he should have ordered the appellant examined by medical personnel who would then submit a report. Therefore, I shall end here. Otherwise, the 8th ground of appeal is devoid of merit. Now, reverting to the 7th ground of appeal, in which the appellant complained that he was convicted based on the evidence of the PW4 (Medical Practitioner) who proved that the victim was sodomized due to the presence of bruises in the anus but failed to prove who committed the offence. This ground

of appeal also should not detain me long. As rightly submitted by Mr. Lwabuhanga, the duty of the medical practitioner was to prove or disprove if there was penetration; the evidence is corroborative, which complements other evidence. At the trial, PW4 did not testify whether he was present at the scene. He only examined the victim after he went to the hospital for medical examination. The law is clear that medical practitioners who examined the victims of crimes prepared medical examination reports after examining the victims. They are not eye witnesses, and their evidence is based on the reports they prepared. In *Gabriel Simon Mnyele vs. Republic*, Criminal Appeal No. 437 of 2007 (Tanzlii), the Court of Appeal held that; “It is the presence of the report or intention to produce one in court that gives rise to the need to call the medical practitioner to court for examination, and not the other way round. He was not an eye witness, but an expert and his evidence, that of an opinion based on the examination he conducted.....” [Emphasis provided]. Therefore, it was not the duty of PW4 to prove who unnaturally penetrated the victim. His evidence was based on what he had found after medically examining the victim. Thus, the 7th ground of appeal lacks merit. I now come to the 4th, 5th and 6th grounds of appeal, in which the appellant complained that there were contradictions in the evidence regarding the date and time of the commission of the offence. In the 4th ground, the complaint was the contradictions between the victim on one hand and PW2 and PW3 on the other hand. While the victim stated that the offence happened at 12:00 midnight on 26/08/2024, his brothers, PW2 and PW3, said it was 12:00 pm on 25/08/2024. In the 5th ground, the appellant complained that there were contradictions between the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 in relations to the date and commission of the offence and in the 6th ground the complaint was in the evidence of PW1, PW2 and PW3, there was nowhere the time of the commission of the offence was not stated. When resisting the appeal, Mr. Lwabuhanga submitted that there were no contradictions at all. On this, the evidence at trial in connection with the date and time of the commission of the offence. The key witnesses in this aspect are PW1 (the victim), PW2, PW3 and PW6. This is because PW4, as a medical practitioner, was not at the scene of the crime, and PW5, the mother of the victim, was not at home when the alleged offence was committed. Had PW5 testified on the time and date of the commission of offence, her evidence would have remained hearsay. For PW4, his evidence would have remained the evidence of the expert on the possibilities of when the offence was committed. Thus, the evidence of PW1, PW2, PW3 and PW6 was as follows; The victim (PW1) stated that on 25 August 2023, the appellant arrived at their house around 21:00 hours to teach him how to do business. When they went to sleep around 00:00 hours in the midnight he found the appellant sodomizing him. Furthermore, PW2 stated that the appellant arrived at their home on 25 August 2023 at 21:00 hours and slept in the same room with the victim, and an offence was committed at midnight, around 00:00 hours on 26 August 2023. Furthermore, PW3 stated that the appellant went to their house on 25 August 2023, and the offence was committed at midnight on 26 August

2023. On the other hand, PW6 stated that at midnight of 26 August 2023, PW2 went to his home to report the ordeal. When arriving at the scene the same night, he found PW1 and PW3 were holding the appellant so that he could not take to his heels. When the appellant was arraigned before the trial court, the charge sheet indicated that the offence was committed on 26 August 2023. From the above evidence, it is clear that there were no contradictions. This is because, according to PW1, PW2 and PW3, the appellant went to their home on 25 August 2023 at 21:00 hours, and on the same night at midnight, the offence was committed. Also, on this, when the prosecution witnesses testified at the trial, the appellant never cross-examined the witnesses in relation to the time and date of the commission of the offence. In law, it is trite that failure to cross-examine crucial evidence means the evidence is taken to be admitted. It implies the acceptance of the truth of the witnesses' evidence, and there is a litany of authorities in this. For instance, in *Nyerere Nyague vs. Republic*, Criminal Appeal No. 67 of 2010 (Tanzlii), the Court of Appeal held that; "It is a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said." In the appeal under my consideration, it is clear that the appellant did not criticize the witnesses on the date and time of the commission of the offence. Therefore, it is taken that he accepted what they told the court as being nothing but the truth. From the above discussion, contrary to what the appellant raised in his 4th, 5th and 6th grounds of appeal, not only were there no contradictions, but also, the prosecution witnesses stated the time and date of the commission of the offence. Therefore, the 4th, 5th and 6th grounds of appeal are dismissed for lack of merits. Lastly, it is on the determination of 1st, 2nd, and 3rd grounds, which are intertwined and revolve around the complaint that the offence was not proven to meet the required standard. On this, the entry point is the elementary law that for the offence of which the appellant was convicted, the best evidence comes from the victim. See *Seleman Makumba (Supra)* and *Nimo Samu vs. Republic*, Criminal Appeal No. 31 of 2019 (Tanzlii). However, before relying on the victim's evidence to enter conviction, courts must scrutinize that evidence and satisfy itself that the evidence is truthful, coherent and reliable. This was insisted by the Court of Appeal in *Mohamed Said vs. Republic*, Criminal Appeal No. 145 of 2017 (Tanzlii), where it was held that; "We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and S. 127 (7) of Cap. 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases". In scrutinizing and assessing the testimony, there are ways in which the credibility of a witness can be evaluated. The Court of Appeal in the cited case of *Nimo Samu (Supra)*, while noting its earlier decision of *Shabani Daudi vs. Republic*, Criminal Appeal No. 28 of 2001(unreported), held that; "The credibility of a witness can also be determined in other two ways, that is one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses". In the instant appeal, as previously alluded, the victim testified that on 25

August 2023, the appellant went to their home for the purpose of teaching him how to do business. They shared the same room. At midnight, when he found the appellant sodomizing him. The victim raised an alarm and held the appellant so that he could not flee from the scene. His two brothers responded to the alarm and hurried to the scene. When the two brothers entered the room, they found the victim holding the appellant. The victim revealed to them that the appellant was sodomizing him while he was asleep, as he found him when “startled” from sleep. Unfortunately, at that point, the appellant had already penetrated him. When considering the victim’s evidence in relation to the evidence of other witnesses, I find that his brothers (PW2 and PW3), after hearing an alarm, rushed to the scene, where they found the victim holding the appellant. The matter was reported to the ten-cell leader (PW6) on the same night and later to the police station, and the victim went to the hospital for medical examination. When he was clinically examined, PW4 found that victim had pain and bruises in his anus. Also, he stated the anus was penetrated possibly by a blunt object. According to him the examination was conducted on 26 August 2023, that means the same date the alleged offence was committed. From above, one, there is no question of mistaken identity because the appellant was caught in the course of an act, and two, the offence was reported at the earliest moment. In criminal law, it is common that early reporting of the suspect strengthens the prosecution case. This is a holding in *Marwa Wangiti and another vs. Republic*, Criminal Appeal No. 6 of 1995 (Tanzlii), where it was held that; “The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his credibility, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry”. Having discussed as above, I find that the evidence of the victim was not only truthful and credible but also coherent and reliable that he was the appellant who sodomized him. Further, the evidence of PW2 and PW3 revealed that the appellant was caught after the act before fleeing from the scene. Also, the evidence of PW4, who medically examined the victim on the same day of the act, indicated that the victim was penetrated. Therefore, nothing indicated that the victim was not telling the truth. In the 3rd ground of appeal, the appellant raised an issue of how the victim, who was 20 years old, was in a position of being sodomized without his awareness and while he had not raised whether he was on narcotics. In my view, I dismiss this doubt raised by the appellant because the victim’s evidence was clear that he was asleep and then “startled” from sleep at the point the appellant was sodomizing him. He raised an alarm, and his brothers rushed to the scene. Though that evidence was from relatives, it is credible, and there is no rule of practice or law which requires the evidence of relatives to be discredited unless there is ground for doing so. See *Michael Igalaba vs. Republic*, Criminal Appeal No. 257 of 2017 (Tanzlii). In his defence, the appellant stated that he was “framed” because he demanded his payment from PW5 (the mother of the victim, PW2 and PW3) after clearing her cassava farm. However, when PW5 testified, the appellant did not question her on that issue during cross-examination. Therefore, that defence not only failed to raise doubt against the prosecution case but also it was devoid of merits. The appellant raised it while trying to save his “skin” during the defence. Therefore, the doubt raised is immaterial. It is discernable from the

prosecution's evidence that the appellant gave a clear and detailed account of what befell him on the night the offence was committed. His evidence was corroborated by the evidence of PW2, PW3 and PW6, who went to the crime scene and the evidence of PW4, who clinically examined him. Like the trial court, I see no reason to disbelieve the prosecution. Having deliberated as above, the complaint in the 1st, 2nd and 3rd grounds of appeal do not have merits. Thus, I dismiss both grounds. In view of the foregoing, both grounds of appeal are devoid of merit, and I found no reason to interfere with the trial court's findings on the appellant's guilt on the charged offence. Consequently, I find no merit in the appeal and dismiss it entirely. It is so ordered. K. D. MHINA JUDGE 03/03/2025  
Court: The right to appeal is fully explained to the parties. K. D. MHINA JUDGE 03/03/2025  
Liberatus Lwabuhanga -SA

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