

TANZANIA / JUDGMENT

FADHILI SHAIBU HALIDI Vs

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10 March 2025

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IN THE HIGH COURT OF TANZANIA (MTWARA SUB REGISTRY) AT MTWARA CRIMINAL
APPEAL NO. 31887 OF 2024 (Arising from the decision of the District Court of Masasi at Masasi
dated 29/04/2024 in Criminal Case No. 93 of 2023 before Hon. B. K. Kashusha, SRM) FADHILI
SHAIBU HALIDI.....APPELLANT VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 10th March, 2025 Date of Judgment: 28th March, 2025 E. E. KAKOLAKI, J In this first appeal the Court is moved to overturn the decision of the District Court of Masasi handed down on 29/04/2024, that found the appellant guilty of the offence of Unnatural Offence; contrary to section 154(1)(a) of the Penal Code, [Cap 16 R.E 2022] as charged, convicted and sentenced him to life imprisonment. The dissatisfied appellant has demonstrated his grievances in six (6) grounds of appeal going thus: 1

1. That, the trial judge erred in both law and fact by convicting the appellant while the requirement of section 127 (2) of TEA was not complied with.
2. That, the trial judge erred in both law and fact by convicting the appellant relying on extra judicial statement which was taken contrary to the CJ's instructions for JP.
3. That, the trial judge erred in both law and fact by convicting the appellant relying on the confession statement which was taken contrary to the law as four (4) hours was already expired.
4. That, the trial judge erred in both law and fact by convicting the appellant basing on contradictory, uncredible evidence of PW3.
5. That, the trial judge erred in both law and fact by convicting the appellant while the defence of the appellant was not considered and no weight of any kind was given.
6. That, the trial judge erred in both law and fact by convicting and sentencing the appellant while the offence was not proved beyond reasonable doubt. In view of the above grounds of appeal and as already hinted herein above the Court is invited by the appellant to quash his conviction and set aside the sentence meted on him while ordering for his release from prison. Briefly it was prosecution's case that, on the 25/08/2023 at Chiwale village within

Masasi District, Mtwara Region, the appellant did have carnal knowledge of ZKJ, a girl aged three years and eleven (11) months against the order of 2 nature. When called to plead to the charge the appellant returned a plea of not guilty the response that forced the prosecution to parade five (5) witnesses and tender in court four (4) exhibits namely victim's birth certificate (exh. P1), her PF3 (exh. P2, appellant's extra judicial statement (exh. P3) and his caution statement (exh. P4), in a bid to prove its case. The summoned prosecution witnesses were the victim's mother (PW1), the victim herself (PW2), the medical doctor who attended the victim (PW3), the justice of peace who recorded appellant's extrajudicial statement, exhibit P3 (PW4) and investigator of the case who also recorded appellant's cautioned statement (exhibit P4) as PW5. On the other side the appellant was the sole defence witness and relied on no any exhibit. After having assessed and analysed both parties' evidence the trial court was convinced that indeed the appellant had committed the offence he was booked with, hence proceeded to find him guilty as charged, convicted and sentenced him to life imprisonment. Discontented the appellant is now before this Court protesting his innocence on six (6) grounds of appeal as spelt herein above. At the hearing of this appeal, the appellant appeared in person unrepresented while the respondent serviced by Mr. Jagadi Jilala and Ms. Atuganile Nsajigwa, both learned State Attorneys. Both parties were heard viva voce. 3 When invited to argue his appeal, the appellant prayed the Court to consider his grounds of appeal and allow the appeal by quashing his conviction and setting aside the sentence meted on him on the ground that, the same were self-explanatory and that, he could not explain further for being a lay person. However, he later on entered his rejoinder submission, after the reply submission from the respondent, essentially reiterating his earlier statements. Opposing the appeal, the respondent informed the Court that, the same was devoid of merit. Thus, deserved dismissal. The learned State Attorneys chose to canvass first the 4th and 6th grounds of appeal and argue them jointly for being analogous in that, appellant's charge was not proved beyond reasonable doubt, while responding to the rest of the grounds of appeal separately. Having considered all the grounds of appeal presented by the appellant as well as both parties' fighting submission, I wish to start addressing the 1st ground of appeal in which the appellant's grievance is centred on none compliance of section 127(2) of the Evidence Act in that, the trial court was in error to convict the appellant basing on victim's evidence despite of visible infraction of the said provision. In his response, Mr. Jilala took the contrary view when submitted that there was no any infraction of the law by the victim (PW2) as provided under section 127(2) of the Evidence Act, since she promised to tell the truth 4 and not lies as indicated in the trial court's findings at page 8 of the typed proceedings despite of court's failure to indicate whether some questions were put to him to establish whether she understood the nature of oath or affirmation. He relied on the case of Mohamed Juma Vs. R, Criminal Appeal No. 434 of 2020 (CAT) to drive home the point that, absence of questions to prove how the court's finding was reached is not fatal in as long as the court made its findings. He further argued that, even when the court finds there was non-compliance of the said law still that omission is not fatal and does not render evidence of the child of tender age inadmissible. To fortify his argument, he cited to the Court the amendment of section 127 of the Evidence Act as brought in under section 32(a) of

the Legal Sector Laws (Miscellaneous Amendment) Act No. 11 of 2023 that amended section 127 of the Evidence Act by adding subsection (7) immediately after subsection (6) stating that, non-compliance of subsection 2 of the section does not render evidence of child of tender age inadmissible. In view of that legal position the learned State Attorney implored upon the Court to find the evidence of PW2, admissible, credible and reliable hence its reliance on by the trial court to convict the appellant was justifiable. The appellant had nothing to say in rejoinder to this ground. 5 Having closely investigated this complaint by consulting the record and considering the submission by the learned State Attorney, I disagree with Mr. Jilala that, PW2 was in compliance with the provisions of section 127(2) of the Evidence Act providing that, a child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving such evidence, promise to tell the truth to the court and not to tell any lies. I so do as there is nowhere it is indicated in the proceedings that, she did promise to tell the truth and not telling lies as Mr. Jilala would want this Court to believe nor is it depicted in the trial court's findings found at page 8 of the proceedings as asserted, leave alone absence of questions expected to be put to the witness to establish whether she understands the meaning of oath or affirmation. For the purposes of this judgment, I find it imperative to reproduce the trial court findings in compliance of the law as appearing at page 8 of the typed proceedings: Court: The accused is of tender age, but tested her whether she know the truth and vice versa, she proved to know the truth. And also is guided by SWAO. (Emphasis added) What is gathered from the above cited trial court's findings is the uncontroverted fact that, the trial court made an inquiry for the purposes of 6 establishing whether the child witness knew the meaning of truth or not and not whether she understood the meaning of oath or affirmation and/or whether was promising to tell the truth and not tell lies, which procedure no doubt is a clear desecration of the provisions of section 127(2) of the Evidence Act. Now the follow up question is whether such non-compliance of the requirement of section 127(2) of the Evidence Act rendered the evidence of PW2 inadmissible and valueless or not. The position taken by this Court and Court of Appeal in plethora of authorities when interpreting the said provision was to the effect that, infraction of subsection (2) for not putting some questions to the child witness for the purposes of determining the manner in which his/her evidence could be recorded and court's failure to record its finding on child's promise to tell the truth to the Court and not lies, rendered his/her evidence invalid as the same ended up being treated as inadmissible or disregarded. See the cases of Yusuph Molo Vs. Republic, Criminal Appeal No. 343 of 2017, Godfrey Wilson Vs. R, Criminal Appeal No. 168 of 2018 and Issa Salum Nambaluka Vs. R, Criminal Appeal No. 272 of 2018 (all CAT) Tanzlii. However, later on in some cases the same provision gained a relaxed interpretation that seemed not to affect the value of child witness's evidence more so when the promise is reflected in the court's finding that, she/he promised to tell the court the 7 truth and not tell lies, despite of absence of some questions indicating how the trial Court arrived to that conclusion. See the cases of Baraka Steven Vs. The R (Criminal Appeal No. 541 of 2020) [2024] TZCA 879 (12 September

2024) and Mohamed Juma Vs. R (Criminal Appeal No. 434 of 2020) [2023] TZCA 17648 (25 September 2023). However, with the recent amendment of the law brought in by section 32(a) of the Legal Sector Laws (Miscellaneous Amendment) Act No. 11 of 2023 by adding subsection (7) to section 127(2) of the Evidence Act, the position of the value or treatment of evidence of the child of tender age despite of violation of the mandatory requirement of section 127(2) of the Evidence Act, has changed. The said amendment as read from section 32 of Act No. 11 of 2023 provides:

32. The principal Act is amended in section 127

(a) adding immediately after subsection (6) the following:

(7) Notwithstanding any other law to the contrary, failure by a child of tender age to meet the provisions of subsection (2) shall not render the evidence of such child inadmissible.” (Emphasis supplied) My understanding of the above cited law is that, non-compliance of subsection 2 of section does not render evidence of the child of tender age inadmissible. In other words, the mandatory requirement of the child of 8 tender age to promise to tell the truth to the Court and not to tell lies which with all intent was aimed to provide safeguards to the accused’s rights before such evidence of the child of tender age is acted upon by the Court to convict him, is now rendered redundant. The trial Court in my considered view can omit it though couched in a mandatory term but still the recorded evidence of such witness acted upon to convict the accused person, the position which I believe was not the intention of the parliament when enacting the provision of section 127(2) of the Evidence Act that sought to provide safeguards to the accused person before acting on evidence of the child of tender age. My views as aired above that, such mandatory requirement of section 127(2) is now rendered redundant is supported by what is found in the bill providing for amendment of the said section 127 of the evidence Act as published in the Government Gazette No. 32 Vol 104 of 16th August, 2023, which no doubt carried the intention of not only drafter of the bill but also the parliament that passed the amendment of section 127 of Evidence Act by adding subsection (7) immediately after subsection (6) of the same provision that reads thus: Part IX of the Bill proposes to amend the Evidence Act, Cap. 6 whereby section 127 is amended in order to enable the evidence of a child of tender age to be admitted in court regardless of not 9 fulfilling the test provided for in the Act or any other written law regarding admissibility of evidence of a child of tender age. The aim of the proposed amendment is to address challenges observed in the court’s interpretation of the provision whereby, the evidence of a child of tender age is not awarded any weight if the child fails to promise to tell the truth or not tell a lie. (Emphasis supplied). In view of what is contained in the above cited bill I have no difficulties in embracing Mr. Jilala’s proposition that should this Court find the evidence of PW2 was obtained in contravention of the provisions of section 127(2) of the Evidence Act, which indeed is the findings of this Court, still under subsection

- (7) of the same Act as amended, such evidence is admissible. It is from that position of the law I find the appellant's complaint that the trial court erred to rely on the evidence PW2 merely because of violation of subsection (2) of section 127 of the Evidence Act, is devoid of merit and I dismiss it as what matters now is the weight to be accorded to such evidence in line with other available evidence on record as it will be seen soon when considering other grounds of appeal. Next for determination is the 2nd ground in which the appellant is assailing court's act of convicting him basing on extrajudicial statement obtained in 10 contravention of the CJ's guide for Justice of Peace in recording extrajudicial statements. There is no further explanation from the appellant on how the said CJ's guidelines were disobeyed. In response Mr. Jilala held the contrary view when argued that, there was no any infraction of the said CJ's guide and therefore appellant's complaint came in as an afterthought as his extrajudicial statement was admitted without his objection. When probed by the Court as to whether the procedure for its admission was in order, the learned counsel quickly admitted that there were procedural flaws as the statement was read before its admission hence prayed the Court to expunge it from the record. The law as stated in several cases is very clear that, before a document is admitted in court the same must be cleared first and upon being admitted read loudly for every party to hear and understand its contents. Reading the document before its admission in evidence in my conviction is wrong and prejudicial to the opposite party. See the cases of Omary Mrisho Vs. R, Criminal Appeal No. 13 Of 2010 –(HC-Tanga), Robison Mwanjisi and Others Vs. R [2003] TLR 218 and Emmanuel Lohay and Udagene Yatosha Vs. R, Criminal Appeal No. 278 of 2010 (CAT-unreported). In Robison Mwanjisi (supra) on similar subject matter the Court of Appeal had this to say: 11 "Whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out. Reading out a document before they are admitted in evidence is wrong and prejudicial." (Emphasis supplied). In light of the above position of the law and given the fact in this case where the extrajudicial statement by the appellant was read before its admission, it is the findings of this Court that, such error was not only fatal but also prejudicial to the appellant. Consequently, exhibit P3 is expunged from the record and further hold that, it was wrong for the trial court to rely on such evidence to convict the appellant. In the 3rd ground of appeal, the appellant is complaining on the trial court's act of relying on the cautioned statement (exhibit P4) allegedly illegally obtained to convict him as the same was recorded after four hours had already passed on his arrest. Countering this ground Ms. Nsajigwa for the respondent politely admitted that, the record was silent as to when the accused person was arrested hence unable to disprove appellant's assertion. It is true, the law under section 50(1)(a) of the Criminal Procedure Act, [Cap. 20 R.E 2022] (the CPA) requires an interview and recording of suspect's cautioned statement to be concluded within the period of four (4) hours of his 12 arrest commencing at the time when he was taken under restraint in respect of the offence charged with. That period or time to my knowledge can be extended for another eight (8) hours as provided under section 51(1)(a) of the CPA, upon notifying the suspect the reasons for such extension. Otherwise, further extension of time must be sought from the Court upon submission of an application. A deep eye on the available record in this

matter has unearthed the undisputed fact from PW1's evidence that, the appellant was arrested by militia men on the incident day, i.e. 25/08/2023, evening time and after the report was made to the Village Executive Officer's office and taken to the same village office. As correctly submitted by Ms. Nsajigwa the record is silent as to when he was taken to the police station or subjected to police custody since the only available evidence in record is related to the PF3 issued by the police officer to the victim on 26/08/2023 at 10.00 am when the incident was reported at the police. In her evidence the investigator (PW5) gave a rather contrary story on the day in which the appellant was arrested referring it as 26/08/2023 though not coming out clearly in her testimony as to who arrested him on the said 26/08/2023 before she (PW5) was instructed to record down his cautioned statement at 20.00 hours. In my humble opinion it was for the prosecution to clear that contradiction on the date and time in which the appellant was arrested as in his evidence the appellant is claiming to have been arrested on 15/08/2023. Much as there is no evidence from the prosecution to establish to the Court's satisfaction as to when was the appellant arrested, I then agree with Ms. Nsajigwa that, it is difficult to discount appellant's assertion that, the said cautioned statement was illegally recorded after expiry of four (4) hours from his arrest. I further embrace her proposition on the remedy to be invoked to a statement illegally obtained and proceed to order that, the appellant's cautioned statement admitted before the trial court as exhibit P4 is expunged from the record. The 3rd ground of appeal therefore is merited to such extent. Coming to the 4th ground of appeal, the appellant is assailing trial court's decision for basing its decision on contradictory and unreliable evidence of PW3, as the doctor who examined the victim. In response Ms. Nsajigwa submitted that, there is no any contradictions in PW3's evidence and further that, every witness deserves credence and must be believed unless there are reasons for not doing so. She called upon the court to dismiss this ground. Having investigated appellant's complaint in respect of PW3's evidence and compared it with other prosecution witnesses' evidence, I am unable to embrace his unfounded allegations as the same is verifying and corroborating PW1 and PW2's evidence. As rightly observed and submitted by Ms. Nsajigwa, the submission which I also own, the settled law is that, every witness deserves credence and his/her evidence has to be believed unless there is cogent ground for disbelieving him. See the cases of Goodluck Kyando Vs. R, (2006) TLR 363, Aloyce Maridadi Vs. Republic, Criminal Appeal No. 208 of 2016 and Peter Joseph Kimath Vs. R, Criminal Appeal No. 373 of 2020 (both CAT- unreported) Tanzlii. In Aloyce Maridadi (supra) the Court of Appeal observed thus: "Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reason for not believing a witness." In this case relying on the above position of the law, since there is no good and cogent reasons to disbelieve the evidence of PW3, I find the appellant's complaint in the 4th ground of appeal wanting in merit and dismiss it too. Next in consideration is the 5th ground of appeal on appellant's lamentation that, his defence was not accorded a deserving weight. Submitting against this ground Mr. Jilala maintained that, the trial magistrate as can be seen in the 4th and 7th pages of the impugned judgment considered appellant's defence and satisfied that the same did not shake prosecution's case, hence a submission that this ground must fail too. 15 Glancing at the said attacked judgment

this Court is satisfied that, apart from narrating appellant's defence there is nowhere it is visible that the trial court analysed and accorded it even little weight. It is trite law that, accused's evidence must be accorded equal weight as to that of prosecution side so as to enable the court to weigh whether the same has raised any reasonable doubt to the prosecution case since the accused person has no duty to prove his innocence rather raise doubt on prosecution case. That clear position of the law was adumbrated in the case of Pascal Yoya @Maganga Vs. Republic, Criminal Appeal No. 248 of 2017 (CAT-Unreported) Tanzlii, when the Court of Appeal stated that: "It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, the prosecution must prove its case beyond a reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case, and he need not prove his innocence." (Emphasis is mine). With the above legal stance, the issue pending for determination is whether failure of the trial court to accord weight to the appellant's defence fatally vitiates appellant's conviction. In my humble view it does not as this being the first appellate court is legally empowered to revisit the entire evidence including 16 appellant's defence and come up with its own finding since the first appeal is in the form of rehearing. See the cases of Demaay Daati Vs. Republic, Criminal Appeal No. 80 of 1994 (CAT-unreported), Siza Patrice Vs. R, Criminal Appeal No. 19 of 2010 and Kaimu Said Vs. R, Criminal Appeal No. 391 of 2019 (both CAT-unreported) Tanzilii. In the case of Kaimu Said (supra) the Court of Appeal on the powers of the 1st appellate court to rehear the appeal had this to explain: "We understand that it is settled law that a first appeal is in the form of a rehearing. As such, the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary." (Emphasis added) In this matter since the appellant's defence was not considered at all apart from narrating his evidence, I find the ground meritorious as this Court is now set to consider the same in the next ground of appeal. The last ground of appeal raised an issue as to whether the trial court was justified to convict and sentence the appellant with the offence booked with in which he asserts was not proved beyond reasonable doubt. In this matter the uncontroverted fact is that, appellant was facing the charge of Unnatural Offence; contrary to section 154(1)(a) of the Penal Code, [Cap 16 R.E 2022]. 17 It is elementary law that, under sections 110(1) and (2) and 112 of the Evidence Act, [Cap. 06 R.E 2022], whoever alleges existence of any fact and invites the Court to enter judgment in his favour carries the burden of proving existence of that fact. And in so proving in criminal matters, the set standard of proof as per section 3(2) (a) of the Evidence Act, [Cap. 6 R.E 2022] is that of beyond reasonable doubt. It is so as the burden of proof never shifts unless otherwise provided by statute or any other written law, since suspicion alone is not sufficient evidence to prove accused's guilty, more so in serious offence attracting life sentence like the one faced by the appellant. See the cases of Mohamed Said Matula Vs. R [1995] T.L.R. 3 (CA) and Nathaniel Alphonse Mapunda and Another (supra). It is it also settled law that, accused person is not under any duty to prove his innocence but rather cast doubt on prosecution case. See the cases of Said Hemed Vs. R [1986] TLR 117 and Aburaham Daniel Vs. R, Criminal Appeal No. 6 of 2007 (CAT-unreported). It is so as conviction is never premised on weakness of defence case but rather

on the strength of prosecution case. See the cases of Mohamed Haruna @ Mtupeni and Another, Criminal Appeal No. 259 of 2007 (CAT-unreported). 18 With the above guiding principles, I now turn to consider the last ground of appeal as raised by the appellant, as alluded to herein above in the issue for determination by this Court. It is an established law as adumbrated in the case of Allen Francis Vs. R, Criminal Appeal No. 327 of 2019 (CAT) Tanzlii that, in the charge of Unnatural Offence that faced the appellant herein under section 154 (1) (a) of the Penal Code, the prosecution is duty bound to prove only three elements of the offence namely, one, victim's age, second, penetration and third, appellant's identity as offender. In the said case on the elements of the offence the Court of Appeal adumbrated that: "...proof of the offence under section 154 (1) (a) of the Penal Code entailed proof of three ingredients namely; the penetration, age of the victim and identity of the culprit." (Emphasis is mine). To start with the element of age, it was Ms. Nsajigwa's submission that the same was proved by PW2's mother (PW1) whose evidence is found at pages 6 and 7 of the typed proceedings, who also tendered her birth certificate as exhibit P1 to that effect. The charge preferred against the appellant was to the effect that, the child victim alleged to be carnally known by the appellant against her order of nature was three (3) years and eleven (11) months old at the time of the commission of an offence. Upon revisiting the evidence of PW1 19 who said PW2 was born on 04/09/2019 as well as exhibit P1, this Court is satisfied that, the child victim (PW2) was born on 04/09/2019 and therefore was four (4) years old at the time of giving her testimony in court, hence the child below the age of ten (10) years and majority age which is eighteen (18) years old. The Court is so satisfied as the law is very clear that, age can be proved by the victim himself/herself, relative, parent, guardian, medical practitioner or birth certificate if any as it was also pronounced in the cases of Issaya Renatus (supra), Edson Simon Mwombeki Vs. R, Criminal Appeal No. 94 of 2016 and Mohamed Jumanne Vs. R, Criminal Appeal No. 569 of 2021 (both CAT) Tanzlii. PW1 and exhibit P1 is corroborated by the evidence in PF3 (exhibit P2) in which PW3 disclosed therein that age of the person whom he examined to be four (4) years. In view of the above evidence, it is now to the satisfaction of this Court that the element of age was proved by the prosecution beyond reasonable doubt. Next in determination is the second element whether the victim was penetrated. In this element the Respondent as per Ms. Nsajigwa's submission relied on the evidence of PW2, the victim, as well as evidence of PW1, her mother and the doctor who examined her (PW3) and the PF3 carrying doctor's findings after medically examined PW2. It was Ms. Nsajigwa's submission 20 relying on the case of Peter Joseph Kimath Vs. R, Criminal Appeal No. 373 of 2020 (CAT) which cited the case of Selemani Makumba Vs. R (2006) TLR 379, that, in sexual offences the best evidence comes from the victim. She elaborated that, in her evidence the victim (PW2) told the court on how the appellant inserted his penis in her anus, leaving her with great pains before he gave her some oranges, the evidence which was corroborated by her mother who confirmed that, the appellant left her home in company of the victim promising to give her oranges but later on she came back crying and on examining her, PW1 noted that she was penetrated in her anus. And that, that is when the decision to report the matter to the village authority was made whereby the VEO issued them a letter before PW2 was attended by PW3 at Chiwale

Health Centre and later on, on the next day collected a PF3 from the police which was filled in by the doctor. According to Ms. Nsajigwa PW2 mentioned the appellant to her mother (PW1) as the person who sexually abused her hence the submission that, PW2 was a credible and reliable witness for mentioning appellant at the earliest possible time, the position of the law which to her is stated in the case of Francis Paul Vs. R, Criminal Appeal No. 251 of 2017 (CAT) at page 16-17 citing the case of Marwa Waginti Mwita and another Vs. R (2002) TLR 39. With that cogent evidence, the learned 21 State Attorney implored upon the Court to find that, this element was established too. In his rejoinder submission the appellant had nothing more to tell the Court in countering this element. It is true as correctly submitted by Ms. Nsajigwa that, in sexual offences the best evidence comes from the victim. See the cases of Peter Joseph Kimath (supra), Selemani Makumba (supra) and Fahadi Khalifa Vs. R, Criminal Appeal No. of 2020 (CAT). In Seleman Makumba (supra) the Court of Appeal on evidence of victim in sexual offence had the following observation to make: "True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration." (Emphasis supplied). Similarly, in Fahadi Khalifa (supra) the same Court held that: "To that extent, we agree with Ms. Sinyaw that the prosecution proved that PW2 was raped taking into consideration that in sexual offences the best evidence comes from the victim - See: Selemani Makumba v. Republic [2006] TLR 149. With the above principle in mind having revisited the evidence of PW2 corroborated by that of PW1 and PW3 as well as the PF3 (exhibit P2) which 22 shows that, the examined patient had multiple lacerations, bleedings and swellings of muscles of anus, this Court is fully satisfied and therefore endorses Ms. Nsajigwa's submission that, the prosecution proved beyond reasonable doubt, PW2's anus was penetrated. I so find as the medical examination to PW2 by PW3 was conducted soon after the incident, meaning on the same evening of the event and PW2 herself confirmed that, she was penetrated in her anus. Lastly is the third element in which the issue for determination is whether it is the appellant who carnally known PW2 against the order of nature as charged and convicted by the trial court. As alluded to herein above victim's evidence is the best one more particularly in sexual related offences in which for purposes of this matter is PW2's evidence. On identity of her assailant, PW2 whose evidence is treated admissible under section 127(7) of the Evidence Act even when her evidence is recorded in infraction of the mandatory requirement of the law under section 127(2) of the same Act, is recorded to have stated in her testimony at page 8 of the typed proceedings, thus: "I know Ringi (accused) is there (she pointed on him by finger), aliniingizia mbolo yake mkunduni kwangu, is my father, he 23 sodomised me in my anus by his penis. I felt painful, then he went to drink local beer, he gave me oranges." When cross examined this witness responded as hereunder: Cross examination: You sodomised me at home we found only babu at your home. That is all. From the above excerpt of PW2's evidence, it is undoubtedly noted that, the witness identified the appellant as the person who abused her sexually by inserting his penis in her anus whereby, she felt pains. I so hold as one, identification took place during day time. Secondly, when cross examined this witness remained focused with her answers intact that, it is the appellant who sodomised

her. Her evidence is beefed up with her mother's testimony (PW1) confirming that, on 25/08/2023 at 4.00 hours the appellant who had come at her home for greetings purposes when leaving the home left with the victim while promising to give her oranges saying "twende ukachukue machungwa" before the later came back home after sometimes crying with oranges in her hands, when she noted that she was sodomised. And that, on asking as to who had done that act to her, she mentioned the accused as her father, the evidence which tallies with the identity made by PW2 in her testimony as cited above. 24 In his defence the appellant told the Court that, on 15/08/2023 he had gone at Chiwale to visit her mother for the purposes of asking her about inheritance related issues but no positive response was received from her apart from evasive answers. And that, after some hours he was arrested by police officers and arraigned before the Court for the allegations not well known to him. As intimated before herein above accused's duty in defence is to raise doubts to the prosecution case and not prove his innocence. Looking at appellant's defence which was so brief as narrated herein above, I am far from being convinced that, the same tried even to raise a grain of doubt to the strong prosecution case. I so view as he never denied to have visited PW1's home on the 25/08/2023 as testified by her or met PW2 or knowing the two before, the facts which could have raised doubt as to whether he met the victim on that day or not. He further never even explained as to why was he arrested, as it is not enough in my considered opinion to merely allege that, he was arrested for unknown offence and arraigned in court. One would wonder as to whether there was any reason for PW2 to point a finger of accusation to him as the man who sodomised her in absence of any grudges or misunderstandings with her personally or her family. In short after considering appellant's defence as a whole, there is nothing suggestive that he raised any doubt to the 25 prosecution case leave alone reasonable one. I therefore answer positively the issue raised herein above that, the trial court was justified to convict and sentence the appellant with the offence of Unnatural Offence; contrary to section 154(1)(a) of the Penal Code, [Cap 16 R.E 2022] since the same was proved beyond reasonable doubt. All said and done, this appeal is devoid of merit and the same is hereby dismissed in its entirety. Order accordingly. Dated at Mtwara this 28th day of March, 2025. E. E. KAKOLAKI JUGDE 28/03/2025. Court: The Judgment has been delivered at Dodoma today on 28th day of March, 2025, in the presence of the appellant in person, Ms. Atuganile Nsajigwa, State Attorney for the Respondent and Ms. Amina Salim, Court clerk. Right of appeal explained. 26 E. E. KAKOLAKI JUGDE 28/03/2025. 27

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