

TANZANIA / JUDGMENT

Halfan Hamadi Tofiki

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THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (MOROGORO SUB-REGISTRY) AT MOROGORO CRIMINAL APPEAL NO. 21144 OF 2024 (Originated from the District Court of Mvomero at Mvomero in Criminal Case No. 1999 of 2024) HALFAN HAMAD TOFIKI APPELLANT VERSUS THE REPUBLIC RESPONDENT Date of Last Order:11-11-2024 Date of Judgment: 29/11/2024

JUDGEMENT

MAGOIGA,J. The appellant, HALFAN HAMAD TOFIKI was arraigned before the District Court of Mvomero (the trial court) for one count of rape contrary to section 130(1), (2)(e) and section 131(3) of the Penal Code,[Cap. 16, R.E 2022]. It was alleged that on 24-11-2023 at Kimambila and at her home the appellant did have carnal knowledge of the LaCo (pseudo name) a girl aged 8 years. The appellant was arrested and matter was reported to police who mounted investigations and later charged the accused person. The appellant at all material time denied to the charge and distanced himself from the Page 1 of 32 allegations. Having heard the case on merits, the trial court found the appellant guilty as charged and convicted him to serve life imprisonment. Aggrieved by both conviction and sentence, the appellant preferred the instant appeal to this Court armed with 12 grounds of appeal namely: -

1. That, the learned trial Magistrate erred in law and fact in convicting the appellant based on the evidence of PW2 and PW3 whose testimonies were received in contravention of law Cap 6 R.E 2022.
2. That, the learned trial Magistrate erred in law and fact in convicting the appellant based on the evidence of PW1, PW2 and PW3 whose testimonies were incredible untruthful, improbable and unreliable to ground the appellants conviction as charged.
3. That, the learned trial Magistrate erred in law and fact in convicting / . I i ! ' .!1 the appellant as charged without drawing on inference adverse to the prosecution for the failure to trace and parade the crucial / vital witness to testify in court and prove the facts in issue i.e. militia men and village chairman.
4. That, the learned trial Magistrate erred in law and fact in convicting the appellant basing on the evidence of Pw6 who failed to tell the court where he acquires his knowledge as a medical officer. Page 2 of 32

5. That, the learned trial Magistrate erred in law and fact in failing to make proper and/or critical evaluation analysis assessment, determination and consideration on the defence evidence the omission which resulted to a serious misdirection amounting a miscarriage of justice and constituted a mistrial.
6. That, the learned trial Magistrate erred in law and fact in convicting the appellant a case where the prosecution failed to prove the charge against the appellant beyond all reasonable doubts as mandatorily required by section 3(2)(a) and 110(1)(2) of Cap. 16 R.E 2022.
7. The trial court erred in law and fact by convicting the appellant while the issues raised for determination was left unresolved.
8. That (the trial court erred in law and fact by admitting Exh. PI which was procured illegally for want of PwG's competency.
9. That the trial court erred in law and fact by convicting the appellant while it had no jurisdiction for want of reassignment order from Hon. Ngwega to Hon. Ngowi.
10. That the trial court erred in law and fact by convicting the appellant while there was non-compliance on 5.127(2) of the Evidence Act Cap. 6 R.E 2022 in respect with PW2 and PW3.
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11. That the trial court erred in law and fact by not holding that the Preliminary Hearing Proceedings was nullity for non-compliance with S. 192(2)(3) of the Criminal Procedure Act, Cap. 20 R.E 2022. 12. That the trial court erred in law and fact by not holding that the delay in the arraignment of the appellant tantamount to reasonable doubt. The facts of this case are straight forward that, on 24th day of November 2023 at Mji Mwema area, in Kimamba village within Mvomero District in Morogoro region, the appellant had carnal knowledge with one LaCo(pseudo name) a giri aged 8 years old. The matter was subsequently reported to parents, police and the appellant was subsequently charged, then, convicted and sentenced to life imprisonment, hence, this appeal to contest for his innocence. The appellant prayed that this Court be pleased to allow his appeal, set aside the judgement, conviction and sentence of the trial court and set him free. When this appeal was called on for hearing, the appellant appeared in person, unrepresented and was ready for hearing. The respondent. Republic was represented by Ms. Monica Matwe, learned State Attorney and was ready for hearing. The appeal was disposed of by way of written submissions and both sides complied to the timeline set by the Court. Page 4 of 32 The appellant on the ground of the appeal, argued that the evidence of PW1 and PW3 was procured contrary to S. 127 (2) of Cap. 6 R.E 2022 which requires the child of the tender years to promise tell the truth to the court and not tell any lies. He cited the case of Geoffrey Wilson vs R, Criminal Appeal No. 168 of 2018(unreported) the court held. "The trial court can ask the witness of a tender age such simplified questions which may not be exhaustive depending on the circumstances of the case,
 - i. The age of the child.

- a. The religion which the child professes and whether he/she understands the nature of oath. Hi. Whether or not the child promises to tell truth and to tell lies. The appellant expounded that in the instant case the trial court came with its own view that the child promises to tell the truth. The appellant pointed out that, the record is silent as to when was the children asked whether or not they promise to tell the truth and not lies. He further argued that, the trial court record was silent as to whether there were any questions which were put to PW2 and PW3 for them to promise to tell the truth and Page 5 of 32 not lies. And if any, the questions should have been recorded in the proceedings of the trial court. The appellant argued that, since the proceedings are silent, the court shall make inference under S. 122 of Cap. 6 that PW2 and PW3 were not tested if they promised to tell the truth and not lies. The appellant stated that since the trial court failed to observe the said provision, is fatal as it renders the evidence of PW2 and PW3 expungable, and since PW3 was the victim, it renders the prosecution case weak. Arguing the 2nd ground of appeal, the appellant pointed out that PW2 claimed to have founded the appellant on top of PW3 in the room of Mama Latifa; to the contrary, PW3 said that PW2 found the appellant raped her in the room of PW3's brother. The appellant told the court that the discrepancy was material as it went to the root of the case and corroded the credibility of PW2 and PW3. Butressing his argument, he cited the case of Dickson Elia Nsamba Shapwata & Another vs. R, Criminal Appeal No.92 of 2007 (unreported), where the court held. "... while normal discrepancies do not corrode the credibility of a party's case material discrepancies do..." Page 6 of 32 The appellant stated further that on the other hand PW1 said that she was told by Mwanaidi Seleman that PW2 found PW3 and the appellant were doing sex, however, Mwanaidi Seleman was never testified hence the testimony of PW1 was hearsay, hence, inadmissible and of no value. He cited the case of Zamir Rahim vs Republic, Criminal Appeal No.418 of 2018 (unreported) the court observed that; "the evidence of the witness who was informed by other person whose evidence was never tendered in the court is hearsay and of no value." The appellant argued that PW1 stated further in order to confirm the words of the Mwanaidi Seleman, she called Asnati who confirmed that it was true that she saw the appellant raping PW3, however, that version of story was never corroborated by PW2, hence, doubtful and that it casts the credibility of PW1. Arguing the 3rd ground of appeal, the appellant pointed out that, PW1, said to have been informed about the incident of rape by Mwanaidi Seleman and she notified a village chairman who through hamlet leader called police jamii who arrested the appellant. The appellant expounded that, none of the, Page 7 of 32 three above testified in the trial court, so he prayed this court to draw adverse inference against the prosecution for their failure to summon the said Mwanaidi Selemani, village chairman and police jamii to the effect that have they been called they could have testified against the interest of the prosecution. He cited the case of Kisonga Ahmad Issa & Ramadhani Kassanga Vs Republic. Criminal Appeal No.171 of 2016 consolidated with Criminal Appeal No.36 of 2017 (unreported) for emphasis. The appellant stated that Mwanaidi Seleman was material witness to confirm if it was true that PW2 told her to have witnessed the appellant raping PW3 and she was the one who informed PW1 about the incident. As to the village chairman and police jamii were material to prove that the appellant was arrested in connection with

the rape of PW3 taking into account the fact that the appellant denied to have been involved with the offence in issue, so the omission is fatal. Arguing the fourth ground of appeal, the appellant argued that, PW6's competency was not established prior to the admission of his evidence, since he did not state his level of education, whether or not he was registered to practice as medical practitioner and if he was registered, what his roll number. The appellant expounded that PF3 is prescribed under general Page 8 of 32 orders No. 170 of 2016 issued by inspector general of police pursuant to the power vested to him under S. 7(2) of the Police Force and Auxiliary Services Act, Cap. 322 R.E 2002, PF request a medical practitioner to conduct medical examination. He cited the case of Gatheru s/o Njagwara vs. the Republic of Kenya (1954) 21,384 KENYA the court held, "The competency of an expert witness should in all cases be shown before his evidence is properly admitted." The appellant further argued that since the PWS's competency was not established prior to the admission of his evidence, the same deserve to be expunged and or discarded from the court record. Arguing the fifth ground of appeal, the appellant argued that the trial court did not consider properly the defense evidence at all in its analysis. He stated that omission was fatal as it renders the whole judgement nullity and he cited the case of Fred John Vs R, Criminal Appeal No.17 of 2018 (unreported) and Hussein Idd and another V,(1986)T.L.R 166 to draw his emphasis. Page 9 of 32 Arguing the 7th ground of appeal, the appellant submitted that the trial court proceeded to convict the appellant leaving the Issues raised unresolved. He expounded that In the course of composing Its judgement the trial court raised one major Issue namely, whether the accused had carnal knowledge with the LaCo of the girl of 8 years old. He said, however, that the trial court did not answer the said Issue rather than concluding that the case against the appellant was proved beyond reasonable doubt and later convicted the appellant. He cited the case of Abubakar I.H. Kilongo & another vs. R, Criminal Appeal No.230 of 2021 (unreported) It was held, "It is plain that though the judgement contains the purported findings of facts, the reasoning and conclusion thereon, there is glaringly that was narration of the evidence that was tendered but both sides of the case at the trial court and the analysis of the said evidence and applicable law upon which the trial judge drew his conclusion on the points for his conclusion on the points for determination of the case." The appellant, thus, argued that applying the above guideline to the Instant matter, the omission to answer the Issue was fatal as stated In the , Page 10 of 32 case of Abubakar I.H. Kilongo & Another vs R,(Supra)the court further held that; "interest of justice will be served if the judgement of the trial court would be nullified." Arguing the eighth ground of appeal, the appellant submitted that, Exhibit PI was procured illegally since the competency of P6 was never disclosed prior to the admission of his evidence. The appellant stated as earlier stated, it is trite law that the competency of an expert shall be established prior to the admission of his/her evidence. He cited the case of Harun Harun vs. R,(1968) HCD37 the court held, "It would be most unsafe to base conviction on the bare evidence of police constable that he knows bhangi without any inquiry as to how he acquired his knowledge." (Emphasis is mine). The appellant further stated that in this case Exhibit PI if expunged the prosecution case will be rendered weak. Arguing the ninth ground of appeal, the appellant made his argument that, S. 214 (1) of the Criminal Procedure Act Cap. 20

requires that upon Page 11 of 32 change of the magistrates, there shall be reassign order within which the reason for the change of magistrate shall be assigned. To buttressing his argument, the appellant cited the case of Abdi Masoud (@Ibamba & 3 others vs. R, Criminal Appeal No. 116 of 2015(Unreported) it was held, "In our view under S.215(1)of CPA it is necessary to record the reasons magistrates. It is a requirement of the law and has to be complied with. It is prerequisite for the second magistrate's assumption of Jurisdiction. If this is not complied with the successor magistrate would have the successor of jurisdiction to try the case." The appellant stated that in the instant matter there was no reassignment order with reason as to the changes from Hon. Ngwega to Hon. Ngowi. In the circumstances, Hon. Ngowi had no jurisdiction over the matter. The appellant expounded that in other words, the trial court had no jurisdiction to convict and sentence the appellant for want of reassignment order to Hon. Ngowi, and concluded that it renders the whole proceedings of the court nullity. Page 12 of 32 Arguing the tenth ground of appeal, the appellant prayed to reiterated what he had submitted herein above when he discussed ground number one. Arguing the eleventh ground of appeal, the appellant argued that, there was non-compliance with S. 192(1)(2)(3) of Cap. 20 which requires the court to prepare the memorandum of the matters agreed during preliminary hearing. Furthermore, the appellant stated that the same shall be read over and explained to the accused signed and advocate. If any, and file It. He stated that In this appeal, the memorandum of the agreed fact was never read over and explained to the appellant and It was not filed to form part of the court record. He cited the case of Mohamed Juma vs. Republic, Criminal Appeal No.434 of 2020(2023)TZCA176 48(25 September 2023)Tanzania the court held; "The law is now settled violations of the provisions of 192 of CPA does not vitiates the entire proceedings but only preliminary hearing proceedings". In that premises, the appellant argued that the court to nullify the preliminary hearing proceedings. Page 13 of 32 Arguing the twelveth ground of appeal, the appellant argued that he was delayed to be arraigned before the trial court. He stated that according to PW1, the appellant was arrested on 24/11/2023 and that the record shows the appellant was arraigned before the trial court on the 24/01/2024 which was two months after he was arrested that creates doubt taking into account that PW2 testified to catch the appellant red-handed when doing sex with PW3. He cited the case of Abdulaziz Omary vs. R, Criminal Appeal No.536 of 2019 (Unreported) the court held that; "what is mind-boggling is that the appellant was arrested on 12/4/2017 as testified by most of the prosecution witnesses, why was he arraigned in court on 5/6/2017 almost two months later his arrest the delay of his arraignment in court, it leaves doubts." Arguing on the sixth ground of appeal, the appellant argued that the case was not proved beyond reasonable doubt. Buttressing his argument on this ground the appellant cited the case of Mariki George Ngendakumana vs. Republic, Criminal Appeal No.353 of 2014 (Unreported) It was held that; Page 14 of 32 "It is the principal of law that in criminal case the duty of the prosecution is in two folds, one, to prove that the offence was committed and two, that is the accused who committed it" And the case of Luhemeja Buswelu vs. R, Criminal Appeal No.164 : 2012(Unreported) the court held; "The prosecution always bears the burden of proving beyond reasonable doubt every essential ingredient of the offence preferred against an accused." The appellant argued that applying

the above guidelines to the instant matter, the charge against him was not proved beyond reasonable doubt. He stated that the competency of PW6 was never established hence the possibility of having wrong medical findings could not be overruled and Exhibit PI if expunged, since in the absence of it, the prosecution case is rendered weak. He stated further that the evidence of PW2 and PW3 was tendered contrary to S.127 (2) of [Cap 6 R.E.20 and was not proved beyond reasonable doubt that PW2 and PW3 promised to tell the truth and not tell lies could be overruled worse, since PW3 was the victim, it casts doubt on the prosecution case. Page 15 of 32 ; ; The appellant submitted that while PW2 said that PW3 was raped by him in the room of Mama Latifa, PW3 said that the appellant, raped her in the room of PW3's brother. He argued that as it may, the prosecution failed to prove their beyond reasonable doubt and for the same reason and the question of retrial cannot arise since the prosecution will fill in gaps in their case. He cited the case of *Fatehali Manji vs. R.* [1988] E.A. 343, the court held. "In general, a retrial may be ordered only where the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence for purpose of enabling the prosecution to fill gaps in its evidence." Hence the appellant submitted that for the above reasons and the grounds stated herein above, he prayed the appeal be allowed, conviction be quashed sentence be set aside and he released from prison. In response, the Republic by Ms. Monica Matwe learned State Attorney contested this appeal. On her part she argued jointly grounds of appeal numbers one and ten because they are on the same issue on non-compliance of > section 127 of TEA. According to the learned Attorney, the appellant misdirected himself, because the position of law has now changed and there Page 16 of 32 ^ is no need to write down question asked, much as the child of tender age has promised to tell the truth. The learned Attorney pointed out that in this appeal at hand, the testimony of PW1 and PW2 do not contravene rules of evidence because at page five (5) of the proceedings both promised to tell the truth. She cited the case of *George Jonas Lesilwa vs. Republic*, Criminal Appeal No. 274/2020 CAT MOSHI (reported at Tanzlii) at page 18-19 provides that where promise to tell truth is recorded requisite of *voir dire* is waived. In response to the second ground of appeal, Ms. Matwe argued that the complaint against PW1, PW2 and PW3 on their credibility can best be replied by holding in the case of *Donard Mwanawima vs. DPP*, Criminal Appeal No. 352/2019 CAT Sumbawanga at Page 11 (Reported in Tanzlii) provides that every witness to be believed unless the witness has given improbable or implausible evidence or has been contradicted another/ witness. The learned State Attorney stated further that the evidence of PW1, PW2 and PW3 are intact and there is no any chance of contradiction, PW2 never explain about who owns rooms which was used to commit crime. Page 17 of 32 however, PW3 who is the victim went miles in explaining that it was the appellant brother's room where last rape was committed. Further, Ms. Matwe submitted that, however, PW1 evidence is direct evidence on age of PW3 and because PW1 was not around during commission of rape thus part of evidence is hearsay. Therefore, that is not contradiction rather what was stated was what prosecution witness has encountered. Responding to third ground of appeal, the learned State Attorney briefly and to the point contended that the appellant prayed that adverse inference to be drawn to prosecution case due to failure to summon MWANAIDI

SELEMAN, police jamij and the Chairperson but, according to her, all of them were not present at the crime scene. Buttressing her submission Ms. Matwe cited the case of Ahamad Salum Hassan @ Chinga vs. Republic, Criminal Appeal 386/2021 CAT at Dar es Salaam pg 12 (Reported in Tanzlii) it was held that; "... it is thus now settled that, where a witness who is in a better position to explain some missing links in party's case, is not called without sufficient reason being shown by the Party. An adverse Page 18 of 32 inference may be drawn against that part even if such inference is only permissible". According to Ms. Matwe, in this appeal WANAI DI SELEMAN, police jamii and Chairperson all of them were not present at the crime scene, hence, they do not have any important link to connect in this rape case hence status of their evidence is hearsay evidence. She, thus urged the court to dismiss this ground.

Responding to the fourth and eighth grounds of appeal, Ms. Matwe learned State Attorney argued jointly acceded that it is true that PW6 did not tell where he acquired knowledge in his evidence but was quick to argue that is not fatal since the court believed his testimony, hence, this was a matter subject to cross examination. The learned State Attorney further stated that, nevertheless, PW6 introduced himself as a medical officer meaning he possesses qualifications of a medical officer. Responding to fifth and seventh grounds of appeal argued jointly, the learned State Attorney contended and expounded that failure to evaluate, determine and consider defense also issue raised remain unsolved, She said in page 3 up to 5 of the judgement of the court prove that Page 19 of 32 evaluation, determination, defense was considered and issues were resolved, and lastly the trial court found that the prosecution proves the case beyond reasonable doubt. Responding to eleventh ground of appeal, Ms. Matwe replied that preliminary hearing was done and meet the requirement of the law and at the end memorandum of agreed facts by the appellant is prepared as evidenced under page 2 of the proceedings of the trial court. Responding to twelfth ground of appeal, the learned State Attorney acceded that it is true that there was a delay to arraign the accused person to court, however, she was quick to argue that was bailiable offence and there is no place which the appellant complained about denial of bail and cited the case of Safari Antony @ Mtelemko and Another vs. Republic. CR Appeal No.404/2021 (Tanzlii)"To gauge the effect of non-compliance or mis compliance with any rule of procedure the rest is always whether the breach of that rule has in any way prejudice the accused and lead to miscarriage of justice. c^v Page 20 of 32 Ms. Matwe thus stated that with the above guidance there is no any miscarriage of justice, hence, it was her humble view that this ground of appeal be dismissed as it lacks merit. Guided by the demerits of the grounds of appeal, Ms. Matwe, learned State Attorney argued that, all argued by the appellant in ground six are baseless because the prosecution proved their case beyond reasonable ■ doubt. To cement her point cited the case of Antony Kinanila and Another vs. Republic, CR Appeal 83/2021, CAT Kigoma Page 14. It was held that:- "The prosecution bears the burden to prove beyond reasonable doubt not only the offence was committed but also committed by the accused person". According to the learned Attorney, the prosecution proved that the appellant had sexual intercourse with the victim and she prayed that this appeal to be dismissed in its entirety and the court to uphold decision from the trial court. In rejoinder, the appellant had nothing to submit. Page 21 of 32 I have duly considered the grounds of

appeal raised and argued by the appellant, I have also gone through the trial court record and the rival arguments by Ms. Matwe the learned State Attorney for the respondent while replying to the grounds of appeal. The only issue for determination is whether this appeal is meritorious. Having considered the rivaling parties' submissions, this court wish to state that, the cardinal principle; it is a trite law that in criminal proceedings the burden of proof lies on the prosecution as rightly provided for under Section 110 of the Evidence Act[CAP.6 R.E 2022] read together with Section 3(2)(a) of the Act. This position was also held in the case of Jonas Nkinze vs. Republic,[1992]T.L.R 213, held;- "The general rule In criminal prosecution that the onus ofproving the charge against the accused beyond reasonable doubt lies on the prosecution; Is part ofour law, and forgetting or Ignoring It Is unforgivable, and Is a peril not worth taking" Certainly, therefore, as a general rule, the prosecution has a unwavering noble duty to establish a prima facie case and prove the offence against the accused beyond reasonable doubt. Page 22 of 32 To do justice to parties, I wiil determine each ground argued by parties and repiied thereto. Starting with the first and tenth grounds of appeai, whose main compiaint was that the conviction of the appellant was based on evidence of PW2 and PW3 who were chiidren of tender age but did not promise to teil the truth and not iies. The appellant in the strongest terms, relied on the failure by the thai court to record questions and urged this court to find that their testimonies were taken in contravention of the law and be expunged. And once expunged, the case for prosecution crumbles. On the other hand, the learned Attorney, was of the view that guided by the case of George Jonas Usilwa Vs Republic (supra) the law has changed and what is on record is enough and their testimonies are at home and dry with the law. I have on my part very carefully considered the rivaling argument and having read the contents of decision in George Jonas Lesilwe (supra) and the cases of Felick Kilipas Vs. Republic, Criminal Appeal No.260 of 2021 at Tanziii and Wambura Kiginga ys. Republic, Criminal Appeal No.301 of 2018 at Tanziii which binds me and discussing the non- compliance of sub section (2) of section 127 of [Cap 6 R.E 2022] held that subsection (6) stiii can be used to convict an accused person despite the non-compliance, if for reasons to be recorded, the court believed the Page 23 of 32 testimony of the child of tender years and for reasons to be recorded. In the present case the record is as clear as day light that the trial court recorded as correctly argued by the learned State Attorney, and correctly so in my view, that the children promised to tell the truth. This without much ado was enough. It is on these reasons, even without employing the provisions of subsection (6) of section 127 find these grounds without any useful merits and are hereby dismissed. The trial court record is loud the children promised to tell the truth and that was dry and home with the law that is subsection

- (2) subject of this complaint. On that note, I find these two grounds without any useful merits. This takes me to the second ground whose main complaint was that the testimonies of PW1, PW2 and PW3 were untruth, improbable and unreliable. The appellant complaint is based on whose room was rape dpne, because PW2 said it was in the mama Latifa's room and PW3 said in his brother's room and to him this gops to the root of the matter. On the hand, the learned Attorney never saw that as any contradiction and argued that PW3 who was the

victim said on that day it was in the brother's room. She urged to dismiss this ground. Having carefully considered this ground of appeal along with the testimonies of PW2 and PW3, it is immaterial, in my considered opinion, if Page 24 of 32 rape was done in whose room. Much as the complaint is on rooms and not that rape was not at all done, I find this ground technical one and wanting in merits and same is hereby dismissed. Next is ground number three whose main complaint was that the prosecution failed to call material witnesses and prayed that an adverse inference be drawn for prosecution case. The said witnesses are Mwanaidi Selemani, police jamii and village chairman. The learned Attorney had different view that yes were witnesses but were not material witnesses as they never witness anything and urged to dismiss this ground. Having carefully followed the trial record proceedings and what transpired, with due respect to the appellant, the said witnesses were not material witnesses and had nothing material to the prosecution case. As correctly argued by the learned Attorney, and rightly so in my opinion, the three witnesses not being called had nothing useful to build the prosecution case and as such not material because they never witnessed rape and has nothing to advance the prosecution case and as such their non- calling did not affect at all prosecution case. This ground too has to fail and is hereby dismissed for want of merits. Page 25 of 32 This takes me to the fourth and eighth grounds of appeal whose main complaint was that the medical officer (PW6) evidence was wanting for failure to tell where he acquired his knowledge. The learned Attorney had different view that much as PW6 told the court is medical officer and was not cross examined on this point, she finds his evidence was proper and as such urged this court to dismiss this ground as well. Having heard the rivaling submissions on this point, with due respect to the appellant, these grounds will not detain me much because PW6 introduced himself as Assistant Medical officer and works with Mzumbe Dispensary at that capacity to my opinion this was enough. This ground too is found wanting of merits and is hereby dismissed. Next are grounds fifth and sixth whose main complaints were there was no critical evaluation, analysis, assessment, determination and consideration of defence evidence and consequently issues raised remained unresolved. The learned Attorney argued briefly that all the above complaints were fully considered, and eventually, the trial court found the case by prosecution was proved beyond reasonable doubt. I have carefully read the trial court's judgement and with due respect to the learned Attorney, found this ground has merits. The trial magistrate raised one issue that whether the accused has carnal knowledge of LC, the Page 26 of 32 girl aged 8 years old and summarized briefly the evidence on both sides and ended up convicting the appellant. This is evidenced at pages 3-5. What I gathered from those pages is not what is expected of critical analysis of evidence, evaluation or assessment but general blanket of assessment of evidence. Worse still no reason was given why defence evidence was not believed. With that note, I find merits in this ground. However, this being first appeal, this court. Is now a settled law in our jurisdiction, can enter into trial court record and appraise the evidence and come to its own conclusion. I will do that for the interest of justice. In the first place, in my reading of the trial court record, I find that there are facts not in dispute between parties. These are: One, there is no dispute that the appellant and victim know each other well. Two, no ill- motive was ever raised between

PW2 and PW3 as against the appellant. Three, the appellant used to go to the home of mama Latlfa- the victim's mother. With that note, I have carefully considered the evidence of PW2 and PW3 carefully and found credible, coherent and reliable worth to be believed. And In rape cases It's a trite law that the best evidence comes from the victim. As noted above, no ill-motive between the two girls and the appellant. The Page 27 of 32 defence of the appellant was too general to constitute a defence in the circumstances. The appellant himself admitted to committing the offence and ask for forgiveness as testified by PW1. In deed the appellant in his defence collaborates the evidence of PW1. I have as well revisited the evidence of PW3 the victim and for easy of reference she had: - mother is called Walivyo. My class teacher is called Muhina. The accused is called Halfan. Asnat lives at Kimambila is my neighbour. Halfsan normally gives me money for burns(Maandazi) and juice. He gives me at home. He usually came home anytime. He usually come when my mother is at the farm. Many times he gives me money and mandazi. I used to go to school at 10 :00 am when I was in class two. While waiting to go to school he raped me. he raped me several times, he usually rape me at home, our house has two bedroom and sitting room. He used to rape me in my brother room. By that time no one is at school and the other at farm he undressed me and told me to lie on bed and removed his clothes and started to rape me. He slept on top of me na kuniinaizia mdudu wake sehemu zana za siri. And he dressed back his clothes I don't feel anything. Halfan told me not to tell anybody. Asnat found us Page 28 of 32 taking juice and when she came later she found him raping me. Halfan dressed up and I dressed up to was putting on a gown. I gave Asnat Tshs.100 and asked not to tell anybody. I washed myself and went to school at 18 is when my mother asked me. My mother also asked Asnat. I have forgotten the time went to police and hospital. He used to rape at home and sometimes kwa mama ndala in the bushes. I did not tell my teacher that Halfan raped me. He used to give me 200/= and spend it at school."(Emphasis mine) The above evidence from the victim tells all what was happening between the appellant and the victim. It was well narrated and much as the appellant had raped the victim several times and she washed herself and went to school is the reasons no bruises were noted. With that note, having considered both evidence, I find that the prosecution proved their case and there is ample evidence on record to prove the charges that were facing the accused. The accused defence was general defence which when compared to that of the victim did not shake the evidence of both PW2 and PW3. In the case of Leonard Joseph @Nyanda Vs.Republic, Criminal Appeal No. 186 of 2017[2020]TZCA 51 it was held that general denial is fundamentally a weak defence; negative and self-serving which cannot impress the court. hIK Page 29 of 32 Guided by the above, in this appeal I was not impressed by the appellant's defence. Next was the eleventh ground of appeal that the trial court failed to conduct preliminary hearing. The learned Attorney has it that PH was done and no complaint of miscarriage of justice. Having considered this ground, I found it is without merits and is hereby dismissed as even failure to conduct one do not by itself vitiate proceedings. This took this court to the twelfth ground whose complaint was that the delay in taking the accused in court. The learned Attorney conceded to this delay but was quick to point out that no miscarriage of justice was done. Having considered this ground and what happened, I find much as not miscarriage of

justice was done and proved, this alone cannot be ground of setting the appellant free. Same Is noted with the advice to the prosecution and investigators to comply with the law. This ground as well has to fail and is hereby dismissed.

- The last ground is ground number six that the case for prosecution was not prove beyond reasonable doubt. This ground has to fail on reasons given in when dealing with grounds numbers 5 and 7 above Page 30 of 32 With that note, eventually I found the entire appeal without any useful merits and is hereby dismissed in its entirety. The conviction and sentence of the trial court is confirmed though on different reasons. Order accordingly. Dated at Morogoro this 29th day of November, 2024 S. M. MAGOIGA JUDGE 29/11/2024 COURT: Judgement delivered today in chambers in the presence of the appellant and in the presence of Ms. Monica Matwe, learned State Attorney for the Republic at Morogoro. r S. M. MAGOIGA JUDGE 29/11/2024 Page 31 of 32 1 COURT: Right of appeal fully explained. (. L..A /!./ S. M. MAGOIGA JUDGE 29/11/2024 Page 32 of 32

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