

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO

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IN THE UNITED REPUBLIC OF TANZANIA IN THE HIGH COURT OF TANZANIA IN THE SUB-REGISTRY OF MTWARA AT MTWARA CRIMINAL APPEAL NO. 29318 OF 2024 (Arising from the decision of the District Court of Masasi at Masasi in Criminal Case No. 71 of 2023) KILIAN THOBIAS HOKORORO.....APPELLANT VERSUS THE REPUBLIC.....,..... RESPONDENT

JUDGMENT

& 1st December 2024. DING 'OHI, J; The appellant, Kilian Thobias Hokororo was charged in the District Court of Masasi district at Masasi (trial court) with Unnatural Offence contrary to section 154 (1) (a) and (2) of the Penal Code. The particulars of the offence as given in the charge sheet were that between the year 2022 and on the 24th day of May 2023 at Namali Village within Masasi District in Mtwara Region, the appellant did have carnal knowledge of the girl aged 11 years old. To conceal the identity of the victim I will throughout this judgment, where appropriate, refer to the girl as PW2 or the victim. The appellant denied the charge. The case then proceeded to a full trial against him. Page 1 of 26 In an attempt to prove the charge against the appellant at the trial court, the prosecution side called six witnesses to wit; Sofia Said (PW1), a victim (PW2), Bakari Abdallah (PW3), Sophia Zakayo Tula (PW4), F 8964 D/CPL Mohamed (PW5), and Dr Damas Michael MaChiro (PW6). They also tendered a victim's school academic progressive report which was admitted as Exhibit Plz and Police Form No. 3 (PF3) which was also admitted as Exhibit P2. On the other side/ the defense part had a total of three witnesses namely; Kilian Thobias Hokororo - the appellant (DW1), Saveria Thobias (DW2), and Agatha Kilian (DW3). The brief facts of the case against the appellant/ as reflected from the testimonies of the parties and respective witnesses at the trial, are that the appellant and Sofia Said (PW1) were husband and wife, respectively. They were blessed with one child, by the name of Agatha Kilian (DW3). The victim is the stepchild of the appellant. According to the testimony of PW1 before the trial court, sometime in May 2023, the victim felt sick. She claimed to have experienced diarrhea. When PW1 (mother of the victim) took out the victim's clothes, upon checking she found them dirty. The PW1 told the trial court that she found also that when the victim went to the toilet to ease herself, she cried in Page 2 of 26 severe pain. That state of affairs scared PW1. She subsequently decided to take the victim to the pharmacy for examination. And, after examination, the pharmacy attendant told the PW1 that the victim was defiled. She was advised to take the victim to the hospital. As a means to improve the strategy, PW1 went to the victim's school and reported the incident to the

'Haki Elimu' unit. On the same day, the Namali Village Executive Officer (PW4) was also informed. In response thereof, people from 'Haki Elimu' and PW4 went to PW1's house. The victim was asked as to who unnaturally knew her, but she remained silent. The matter was then taken to Ndanda police station. On interrogation by PW5, the victim mentioned the appellant to be the one who committed the incident to her. The victim was then taken to Ndanda Hospital for medical examination. There she was examined by PW6. The medical examination report revealed that there was something blunt, hard, and round penetrated the victim's anus. At the trial, the victim testified as PW2. She told the trial court that one day, her mother (PW1) was not at home. The appellant remained with the victim. It is alleged, the appellant then called the victim to his room. When in the room the appellant told the victim to take off her clothes. It would appear that was done. The appellant also took off his clothes, and what happened thereafter, the victim is quoted to have told the trial court that; 'Akanibaka. AHnambia inama akatoa mdudu mbele, akaweka sehemu ya s/ri yangu, sehemu ya nyuma/ After doing the act, the appellant, it is alleged, the appellant told the victim not to disclose anything. It would appear the victim obeyed the instructions because when PW1 (mother) arrived from where she went the victim did not disclose anything to her. It is alleged that this was because the appellant had earlier threatened to kill her if she could disclose the incident. The victim testified further that on another day the appellant sent her to a shop to buy him a cigarette. On the way back home, the appellant followed her and drugged her to the pea farm. He then asked her to take off her clothes. The appellant also partly took off his trousers. He took out his penis and proceeded to know her against the order of nature. For the avoidance of doubt, the victim was recorded telling the trial court that; 'akatoa mdudu wake akaniwekea sehemu ya siri ya kutolea haja kubwa'. The victim shouted for help, but no one showed up. After that, she returned home. By then the PW1 was also already at home. However, the Page 4 of 26 victim did not tell her mother (PW1) anything because she was afraid of being killed by the appellant. As the days went by, the victim still experienced pain. When trying to defecate was in pain and when she was trying to defecate she failed. She ended up crying in pain. The victim was seen by one Eriria crying. Eriria told the victim's mother (PW1) that she saw the victim crying. After PW1 was told, she took her to the pharmacy. Later on, to the police station and then to the hospital. PW2 concluded by saying that the appellant was the one who carnally knew the victim against the order of nature. On his part, the appellant denied committing the offence charged. He contended that in May 2023, he and her wife (PW1) arrived home from the farm. The victim was seen sleeping. When asked what was wrong, the victim disclosed that she was suffering from stomach. PW1 took her daughter to a drugstore to find some medicine for stomach aches. Three days passed without relief. Given the circumstances, the appellant told the trial court that they agreed with his wife (PW1) that the victim be taken to the hospital for further medical checkup. Page 5 of 26 But before going to the hospital a rumor spread that the victim had been raped. Subsequently, PW4 and PW1 took the victim to the hospital. Moreover, the appellant went on to tell the trial court that, PW1 asked the victim who raped her and she said Haji who is her uncle was involved. According to him, on the second day, the police came to arrest him and he was brought before the trial court and charged with this offence. DW2 and DW3, the appellant's younger brother and his daughter respectively, told the trial court that the appellant is not the one who committed unnatural acts to the victim.

After hearing the evidence of both sides, the trial court found that the prosecution side had proved the unnatural charge against the appellant beyond all reasonable doubt. The appellant was thus convicted as was charged. He was sentenced to serve thirty years imprisonment. Discontented with the above trial court conviction and the aforementioned sentence the appellant made a knock before this court holding the following grounds; Z That, the trial court erred in law and fact by convicting the appellant without considering /or giving the right the appellant to mitigate Page 6 of 25 and thus lead to the miscarriage of appellant justice the need to consider mitigation before sentences. ii. That, the trial court erred in both law and fact by convicting the appellant basing on the evidence of the victim PW2 which was full of contradiction and did not collaborate at all. Hi. That, the trial court erred in both law and fact by convicting the appellant basing on the evidence adduced by PW2 the victim which did not comply with the requirement of Section 127 (2) of the evidence Act. iv. That, the trial court erred in both law and fact by convicting the appellant while the trial magistrate failed to take cognizance of defense of the accused and accord no weight of any kind of such defence.

- v. That, the trial court erred in both law and fact by convicting the appellant while the prosecution did not prove the offense at a required standard of the law as it was emphasized under Section 3(2) of the Evidence Act. Page 7 of 26 At the hearing of the appeal, the appellant appeared in person without legal representation. Mr. Edson Laurance Mwapili, the learned State Attorney, represented the respondent Republic. When invited to argue his appeal, the appellant submitted that he was charged in the absence of any strong evidence against him as the victim did not mention him as the one who committed the offence. According to him, the victim has made two statements, one at the Ndanda police station and the second, at home. The appellant submitted further that the victim has mentioned Ally Jafetty and Haji to be the ones who committed the offence. Thus, according to the appellant, this case was fabricated by PW1 who was his lover because at that time they had some disputes. That the victim was only instructed and forced to say untrue things against him. He concluded that even the prosecution witnesses told the trial court that the appellant did not commit the complained offence. Submitting in reply, Mr. Mwapili, the learned State Attorney contended in the first place that going by the evidence given by the prosecution side it is his view that it was strong enough against the appellant. Therefore, he is against this appeal. Page 8 of 26 Concerning the first ground of appeal which the appellant complains that he was not availed a chance to make mitigation of the sentence, Mr Mwapili contended that, admittedly, the record shows that the appellant was not given the chance to mitigate before the sentence was passed against him. However, according to him, that did not prejudice the appellant's rights. According to the learned state attorney where a person is convicted of an unnatural offence the highest sentence is life imprisonment. The minimum sentence is 30 years imprisonment. Since the appellant was given the minimum sentence of 30 years' imprisonment the mitigation factors whatever good is would have changed nothing. To bolster his position, the learned state attorney referred me to the case of Issa Mustapha Gora & Another vs Republic (Criminal Appeal 330 of 2019) [2022] TZCA. On the second ground of appeal, the learned State Attorney submitted that there was no

contradiction in the victim's evidence. His stance was based on two reasons; First, as reflected on pages 15 to 17 of the trial court's proceedings, the learned State Attorney submitted that PW2 explained all that transpired and what was done to her by the appellant on the material day. For instance, Mr. Mwapili illustrated from the trial court records that when PW1 asked the victim who did the unnatural offence to her, it is alleged Page 9 of 26 the victim did not mention the appellant but other persons. However, when asked, the victim stated that she did not mention the appellant because the appellant threatened to kill him if she would have mentioned him. Second, there was a time PW2 stated that he was raped and another time she stated that she was penetrated against the order of nature. According to Mr Mwapili, the difference in naming the acts was caused by the victim's level of knowledge on how to differentiate those two words. That was the main reason the victim named the acts interchangeably though she meant the offence of which the appellant was charged. Responding to the appellant's complaint on the third ground of appeal that the victim's testimony was recorded in non-compliance with section 127

- (2) of the Tanzania Evidence Act. The learned State Attorney briefly submitted that the record is clear that the law was complied with. He thus prays that the complaint be dismissed. As regards the fourth ground of appeal in which the appellant faulted the trial court for basing its conviction and sentence without considering the defence evidence, Mr. Mwapili submitted that the trial court magistrate properly, analyzed and evaluated the evidence of both sides. He contended however that if this honorable court finds otherwise, and since this is the Page 10 of 26 first appellate court, it may step into the shoes of the trial court and reevaluate the evidence in the trial court record and reach its conclusion. The complaint on the last ground of appeal is to the effect that a charge in the trial court was not proved to the required standard. The learned State Attorney submitted that they had been able to prove the charge beyond any doubt. In so doing they had the evidence of the PW2, the victim, who stated that she was penetrated by the appellant against the order of nature as shown on pages 15 to 17 of the trial court's proceedings. Mr. Mwapili contended further that the evidence of the victim to that effect was corroborated by the evidence of the PW1, PW3, PW4, PW5, and PW6. According to the learned state attorney, their respective evidence was concrete and reliable. In conclusion, Mr. Mwapili is of the view that the findings on the conviction and sentence imposed on the appellant by the trial court were proper. He prays that this appeal be dismissed. In a brief rejoinder, the appellant reiterated his earlier prayer that his appeal be allowed. He insisted that the evidence against him was fabricated. He did not commit the offence. Page 11 of 26 I, have considered the submissions by both parties and found the major issue for determination is whether this appeal has merit In determining the merit of this appeal, I shall first start with the third ground of appeal. The issue extracted from that ground is whether or not the evidence of PW2 was accorded per the requirements of the provisions of section 127 (2) of The Tanzania Evidence Act. In answering the above-posed question, it is wise to lay down here what the said provision provides; it stated that; '127(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to

the court and not to tell any lies/ The interpretation of the aforementioned provision was made very clear by the Court of Appeal of Tanzania in the case of Godfrey Wilson vs. Republic (Criminal Appeal 168 of 2018) [2019] TZCA 109. The court said; 'Our understanding, the above-cited provision as amended, provides for two conditions. One, it allows the child of a tender age to give evidence without affirmation. Two, before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies.' Page 12 of 26 A quick question now is whether the trial court magistrate has complied with the above requirement stated in the above-cited case law. To answer this question, I wish to spell out what transpired on the 26th of July 2023 before the victim started giving his testimony. The records revealed on pages 13 and 14 of the trial court typed proceedings as follows; PW2: victim's name, 11 yrs old, Islam, a pupil, Makua, resident of Chukukwe. Court: Unasoma darasa ia ngapi? PW2: Darasa ia fine Court: Unasoma shuie gani PW2: Chukukwe Court: Je huwa unaswahi PW2: Hapana Court: Je mama amewahi kuwafundisha chochote kuhusu Mungu PW2: Hapana Court: Je ukiwa unafahamu kitu fulani haiatu mtu akakuuiza ukasema tofauti na unavyofahamu unakuwa umefanyaje Page 13 of 26 PW2: Unakuwa umedanganya Court: Kudanganya ni Nini? PW2: Nidhambi Court: Nani amekufundisha kuwa kudanganya ni dhambi? PW2: Bibi Court: Je mama alikwambia mnaenda wapi leo? PW2: Mahakamani Court: Kufanya Nini? PW2: Kuja kusema ukweii Court: Kwahiyo Unaahidi kusema ukweii katika Mahakama hii? PW2: Naahidi kusema ukweii Court: This court is satisfied that the witness 11 years old is able to answer question put to her and she has promised to speak nothing but the truth as per section 127 (2) Tanzania Evidence Act Cap 6 R.E2022. She does not know the nature of oath this court will proceed to take her testimony Page 14 of 26 without oath. Section 127 (2) of the Evidence Act is complied with.' Going by the above extract and the position of the law, it is crystal clear that the trial court magistrate has been able to establish that the victim does not understand the meaning of the oath but she promised to tell the truth as required by the law. It is a trite position of the law that after the amendment of section 127 (2) of TEA, the court may receive the evidence of a child of tender age after he/she has promised to tell the truth to the court and not lie. This position has been underscored by the Court of Appeal of Tanzania in the case of Zilim Hamis vs. Republic (Criminal Appeal No. 489 of 2022)

[2024] TZCA 402 with lucidity, the Court observed inter alia that; 'In this appeal, as correctly noted and submitted by the learned Senior State Attorney, the trial court complied with the prevailing position of the law by requiring the witness to promise to tell the truth and not lies. The record of appeal shows, at page 15 that, PW1 promised to tell the truth. Similarly, it is evident at page 19 of the record of appeal that PW2 promised to tell the truth. In that regard, we are satisfied that the evidence of PW1 and PW2 was received according to the dictates of the Page 15 of 26 provisions of section 127 (2) of Evidence Act. Accordingly, we find this ground of appeal is without merit. We proceed to dismiss it,' Having said so, I think this ground should not detain me much. Suffice it to say that I am satisfied that the testimony of PW2 was taken in conformity with the requirement stipulated under section 127 (2) of TEA. I thus, dismiss this ground. Concerning the 2nd

ground of appeal the appellant is of the view that there was a contradiction in the victim's evidence. Mr Mwapili in his submission argued that the said contradiction, if any, is minor. That there was a time the victim was recorded saying that she was raped and there was a time when she said that she was penetrated against the order of nature. That happened because of the victim's age and her level of understanding. Otherwise, according to Mr Mwapili, there was no contradiction in the victim's testimony. It is the position of the law that minor contradictions, inconsistencies, or discrepancies in evidence for the prosecution do not corrode the strength of its case as where there are material contradictions, inconsistencies, and discrepancies. Page 16 of 26 In Omary Said @ Lubawa vs. Republic (Criminal Appeal No. 31 of

- 2023) [2024] TZCA 486, The Court quoted the landmark case of Marmo s/o Slaa Hofu & 3 others v. R, criminal Appeal No.246/2011 (unreported) where it was stated that; '...normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor inconsistencies, embellishments, or improvements, on trivial matters which do not affect the case of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.' From the above point of law and after having revisited the evidence on record, particularly the testimony of PW2 on pages 15 and 16 of the trial court-type proceedings there were no serious contradictions in which the credibility of PW2 could be challenged or rejected in its entirety. The reasons for my stance are that the victim has made clear while giving his testimony that is the appellant who has carnally knowledged her against the order of nature. I will thus agree with the submission made by Mr. Mwapili that there Page 17 of 26 are no material contradictions to the extent of affecting the credibility of PW1. This ground is also unfounded. Turning to the fourth ground of appeal, the appellant faulted the trial court magistrate for convicting and sentencing him without considering the defence evidence. There is no dispute that before arriving at convicting an accused person the trial court has to consider the prosecution evidence together with the defence evidence. The prosecution evidence should be of the weight of proving the charge beyond all reasonable doubt. Otherwise, the accused person is entitled to an acquittal. On the point the Court of Appeal in the case of Zilam Hamas vs. Republic (Criminal Appeal No. 489 of 2022) [2024] TZCA 504, observed as follows; >4s ive pronounce ourselves on this ground, we need to restate the settled position which is that, courts are enjoined to consider defence testimony when they make findings in criminal trials. Consideration of the said testimony must be done alongside the evaluation of the prosecution's factual account. This means, therefore, that, in law, failure to consider defence evidence is an irregularity of fatal effect. It Page 18 of 26 results in the vitiation of the conviction and the sentence imposed on an accused person.' From this ground, the question that I need to resolve is whether the appellant's defence was properly considered by the trial court. The appellants complaint takes me to pages 3 to 5 of the trial court's judgment in which the learned trial court magistrate in analyzing the evidence of both parties, did put the defence evidence in

a scale. It is when then he properly found that the charge against the appellant was proved beyond reasonable doubt. After having perused the trial court judgment, especially on page 4 of the sixth paragraph, I am satisfied that the trial court did consider the evidence of the appellant who unsuccessfully challenged the evidence that the victim mentioned another person called Haji to be the one who unnaturally knew the victim. Next, is the complaint on the fourth ground whereby the appellant is faulting the trial court for convicting him while the prosecution side has not proved the case beyond a reasonable doubt. According to Mr Mwapili, they have been able to prove the case to the required standard as they brought the victim whose evidence was credible, They also brought other witnesses Page 19 of 26 including PW1, PW3, PW4, PW5, and PW6 whose testimonies were well corroborated by the testimony of the victim. The issue now is whether the case before the trial court was proved to the required standard. I am aware that in the instant case, all witnesses brought by the prosecution side before the trial court, except the victim alone, none of them have witnessed the appellant committing the complained offence. Can the victim's sole testimony prove the offence against the appellant? It is now settled that the true and best evidence of a sexual offence is that of a victim. See; Bayo Paschal @ Banga @ Bayo Sambiye vs. Republic (Criminal Appeal No. 679 of 2021) [2024] TZCA 730. The position is in line with section 127 (6) of the Evidence Act [CAP 6 RE.2019] which states:

'Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender age or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case maybe the victim of sexual Page 20 of 26 offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender age or the victim of the sexual offence is telling nothing but the truth.' Given the stated position of the law, I found it necessary to revisit what was testified by the victim at the trial court. On pages 15 and 16 of the typed trial court proceedings, the victim avowed that the appellant regularly used to know her against the order of nature. The victim was recorded telling the trial court this way; 'Kilian is my step father one day my step father called me in his bed room, he told me to take off my clothes he also took off his trousers.... Akanibaka. AHnambla inama, akatoa mfufu mbeie, akaweka sehemu ya sir! yangu, sehemu ya nyuma... My stepfather told me not to say anything. My mother came home in the evening, I did not tell her what happened to me because my stepfather threatened to kill me. On the other day my step father sent me to a shop to buy him a cigarette, on the way back home my father followed me. He drugged me on pea's farm. He told me that mbona umerudi sasa hivi, he asked me to take Page 21 of 26 off my clothes. I took off my skirt and underpant My stepfather partly took off his trousers and under pant "boxer" he akatoa mdudu wake akaniwekea sehemu ya sir! ya kutokea haja kubwa I shouted for help but no one came. After that I returned home... I did not tell my mother because my step father said he will kill me/ I am aware of the position stated in the landmark case of GOODLUCK KYANDO VS REPUBLIC, [2006] TLR 363 that ever/ witness is entitled to credence and must be believed and his testimony

accepted unless there are good and cogent reasons not believing a witness. The exception to the above general rule has been explained in the landmark case Mathias Bundala vs. Republic (Criminal Appeal 62 of 2004) [2007] TZCA 175, where the Court of Appeal stated that; 'The assumption will always be that the testimony is true unless the witness's character for veracity has been assailed some motive on his or her part to misrepresent the facts has been established his or her bias or prejudice has been demonstrated and he or she has given fundamentally contradictory or improbable evidence or has been irreconcilably contradicted by another witness or witnesses.' Page 22 of 26 Having fully subscribed to the above provision of the law. It is my considered view that the victim was credible to the extent that she sufficiently proved that the unnatural act was committed to her and nobody else but the appellant who unnaturally knew the victim. The evidence to that effect as seen herein above was consistent and not materially contradicted. The evidence of the victim was well assisted with the evidence of the PW1, PW6, PW5, and PW4 whose testimonies booked the appellant for the offence he committed. Under the circumstances, I find this ground is unfounded and it is hereby dismissed. The last complaint by the appellant is on the first ground of appeal in that the appellant had not been availed a chance to make mitigation of the sentence. This complaint was conceded by the learned State Attorney. However, he contended that that alone did not prejudice the appellant who was given the minimum sentence per the law. There is no dispute that before the accused person is sentenced, he has not been given the chance of mitigation. It is trite law that the mitigation allows an accused person to give relevant information which the court may consider in reducing the intended sentence. This information may be about the accused's age, antecedents, Page 23 of 26 previous good character (if appropriate), responsibilities to his family, the impact of a sentence upon him or others, and any remorse or explanation that led to the commission of an offence. In the instant appeal, as explained herein above, the appellant was charged with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code. The punishment of this offence as stipulated under sub-section 2 of section 154 of the Penal Code is life imprisonment. That is a mandatory sentence. The section reads; '154 (1) Any person who-

- (a) has carnal knowledge of any person against the order of nature;
 - (b) has carnal knowledge of an animal; or
 - (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence, and is liable to Imprisonment for life and in any case to imprisonment for a term of not less than thirty years. Page 24 of 26
- (2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment.' (Emphasis supplied). In the instant appeal, the appellant was somehow lacking because he was sentenced by the trial court to serve thirty years imprisonment. That was against the sentence provided by the above-cited provision of law. I am of the view that mitigation under the circumstances of this case therefore would not reduce the mandatory sentence provided by the law. In my

view, the failure of the trial court to avail the appellant an opportunity to mitigate on sentence has not prejudiced the appellant under the circumstances of this case. In the fine, I find that the appellant's appeal against the conviction and sentence will not succeed. However, since the appellant was sentenced to serve thirty years imprisonment after being convicted of the unnatural offence committed to the child (victim) who was under 18 years old at the time of the commission of the offence, I find that that sentence was illegal. I set it aside and substituted it with the sentence of life imprisonment. Page 25 of 26 Save for the variation of the sentence, this appeal is otherwise dismissed. It is so ordered. DATED at MTWARA this 16th December 2024. S.R. DING'OHI JUDGE 16/12/2024 COURT: Judgment delivered this 16th day of December 2024 in the presence of Mr Edson Laurance Mwapili, the learned State Attorney for the Republic and the appellant who appeared in person. 16/12/2024 Page 26 of 26

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