

TANZANIA / JUDGMENT

Criminal appeal No

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB
REGISTRY AT DAR ES SALAAM CRIMINAL APPEAL NO. 19791 OF 2024 (Arising from the
Judgement of the Resident Magistrate's Court of Kivukoni (Hon. N.E. Mbaba, RM) in Criminal
Case No. 58 of 2023 dated 30th May 2023)

MOHAMED SALUM SEIF..... APPELLANT VERSUS
REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last order: 16th December 2024 Date of Judgement: 27th February 2025 MTEMBWA, J.:
This Appeal stems from the decision of the Resident Magistrate's Court of Kivukoni in Criminal
Case No. 58 of 2023 dated 30th May 2023, where the Appellant was convicted on two counts. In the
first count, it was alleged that on diverse dates between 5th December 2022 and 8th December
2022, at Manzese Midizini area within Ubungo District in Dar es Salaam Region, the Appellant
had sexual intercourse with a girl aged ten (10) years (name withheld) contrary to section 130 (1)
and (2) (e) of the Penal Code, Cap 16, R.E 2022. In the second count, it was alleged that the
Appellant, on the exact dates and 1 place, had sexual intercourse with the same victim against the
order of nature contrary to section 154 (1) (a) and (2) of the Penal Code (supra). For purposes of
this Appeal, I shall refer to the victimized girl as "the Victim" or "PW1". The Appellant resisted the
charge. Consequently, the prosecution paraded five (5) witnesses and tendered two (2) exhibits.
The Appellant relied on his affirmed brief testimony and tendered no exhibit. Having evaluated
the evidence adduced during hearing, the trial Court was satisfied that the Appellant committed
the alleged crimes and proceeded to convict him as charged on both counts. The trial Court then
sentenced the Appellant to serve life imprisonment on both counts. Dissatisfied, the Appellant
laid before this Court the following grounds of appeal and I quote in verbatim;

1. That the trial court erred in law and fact by convicting appellant whiles it had no jurisdiction.
2. That the trial court erred in law and fact in conducting the preliminary Hearing contrary to s. 192(1)(2) and (3) of the Criminal Procedure Act Cap 20 RE 2022.

3. That the trial court erred in law and fact by convicting the appellant basing on the evidence of PW1 which was recorded contrary to s. 127(2) the evidence Act Cap 6 RE 2022.
4. That the trial court erred in law and fact by convicting the appellant without considering the failure of the victim to 2 mention the appellant tantamount to a reasonable doubt.
5. That the trial court erred in law and fact by convicting the appellant while there was variance between charge and evidence.
6. That the trial court erred in law and fact by convicting the appellant basing on the evidence that was tainted with the discrepancies.
7. That the trial court erred in law and fact by convicting the appellant while the age of the victim was not proved beyond reasonable doubt.
8. That the trial court erred in law and fact by convicting the appellant basing on the evidence of PW4 whose competency was not established prior to the admission of his evidence.
9. That the trial court erred in law and fact by convicting the appellant basing on Exh P2 which was procured illegally.
10. That the trial court erred in law and fact by not complying with S.231 (1)(a)(b)|b)(3)(4) of Cap 20.
11. That the trial court erred in law and fact by accepting the prosecution evidence at large then turning to the defence evidence to find if the defence casts doubt on the prosecution evidence.
12. That the trial court erred in law and fact by convicting the appellant without considering the delay of the appellant's arraignment tantamount to a reasonable doubt.
13. The trial court erred in law and fact by convicting the appellant while the prosecution failed to prove their case beyond reasonable doubt. 3 When the matter came for orders on 21st August 2024, the Appellant appeared in person while Mr. Daudi Basaya, the learned state attorney, represented the Respondent. By consent, the parties agreed to argue this Appeal by way of written submissions. However, it could appear the Appellant failed to serve the Respondent a copy of written submissions in chief on time. Upon a prayer of extension of time on 7th October 2024 by Mr. Cathbert Mbilingi, the learned state attorney, I vacated my previous scheduling orders to allow the Respondent to file the reply submissions out of time and so the rejoinder submissions by the Appellant. Before I venture any further, I will look into the submissions of the parties. Arguing on the first ground of appeal, the Appellant submitted that the trial Court had no jurisdiction to hear and decide the matter in issue because the trial Magistrate was never assigned to do so. He added further that the record is silent as to when the trial magistrate was assigned for that purpose. To bolster his argument, he cited the cases of Robert Kadaso Mgani vs. Republic, Criminal Appeal No. 52 of 2023 (unreported) and Halfani Sudi vs. Abieza Chichili

[1998] TLR 527, where the Court observed that Court records 4 accurately represent what actually transpired in court, and should not be easily impeached. Regarding the second ground, the Appellant faulted the trial Court for failure to comply with section 192 (1) (2)(3) of the Criminal Procedure Act, Cap 20. R.E 2022 (hereinafter “CPA”). He added that on 9th February 2023, the trial Court held the preliminary hearing from which it prepared the memorandum of the matters agreed. However, the same was not read to the Appellant before signing it. Further, the record does not show that the memorandum was filed. To reinforce his argument, he cited the case of Mohamed Juma vs. Republic, Criminal Appeal No. 434 of 2020 [2023] TZCA 176 48 (25th September 2023), where it was observed that violation of the provisions of section 192 of CPA do not vitiate the entire proceedings but only preliminary hearing proceedings. Arguing on the third ground of appeal, the Appellant faulted the trial Court for failure to comply with section 127(2) of the Evidence Act, Cap 6, RE 2022. On that, he argued that there was no record that PW1 promised to tell the truth and not lies. Close to that, there was no accuracy testing by asking questions before concluding that she promised to tell the truth. He faulted the trial Court for concluding 5 that PW1 promised to tell the truth and not lie before testing her accuracy. He cited the case of Geoffrey Wilson vs. Criminal Appeal No. 168 of 2018 (unreported). On the fourth ground of appeal, the Appellant complained that the victim never mentioned the Appellant's name before and during hearing. He cited the case of Marwa Wangiti Mwita and Another vs. Republic (2002) TLR 39, where it was observed that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of the accusations. Arguing on the sixth ground of appeal, the Appellant submitted that the prosecution evidence was tainted with material discrepancies that go to the root of the case. He cited the case of Dickson Elia Nsamba Shapwata & Another vs. Republic, Criminal Appeal No. 92 of 2077 (unreported). Close to that, he pointed out the discrepancies in the date and time on which PW4 medically examined PW1. On the seventh ground of appeal, the Appellant argued that PW1 or the victim's age was not proved beyond reasonable doubt. He cited the case of Isaya Renatus vs. Republic, Criminal Appeal No. 542 of 2015 (unreported), where it was observed that the age can be proved by the victim's relative, parent, medical practitioner, or a birth certificate. He contended further that PW1 testified that she was born in 2012 and was ten years old. Similarly, PW3 testified that PW1 was born in 2012 and that she was ten years old. He resolved that a human born in 2012 cannot attain the age of ten years in 2023. He considered the omission fatal because the age of the victim is a predeterminant factor in rape cases before the sentence is entered. Arguing on the eighth ground of appeal, the Appellant submitted that the competence of PW4 was not established. He cited the Kenyan case of Gatheru Njagwara vs. Republic (1954)21, 384 Kenya, where it was observed that the competency of an expert witness should, in all cases, be shown before his evidence is properly admitted. He added that PW4 testified that he worked at Sinza Hospital as a general practitioner and was trained at Bombo as an assistant medical officer. He cited the case of Faraji said vs. Republic, Criminal Appeal No. 172 of 2018 (unreported), where a medical practitioner was defined as a person holding a degree, advanced Diploma or certificate in medicine or dentistry from an institution

recognized by the medical council of Tanganyika established under the Medical, Dental and Allied Health Professionals Act No. 11 of 7 2027 with his level of competency, registered and enrolled or enlisted to practice as such. Based on that, he faulted PW4 for failure to disclose his enrolment number, and thus, he implored this Court to expunge his evidence. On the ninth ground of appeal, the Appellant argued that Exhibit P2 was procured illegally since the Appellant was never cautioned prior, contrary to section 57 (2) (d) of CPA. He cited the case of Ishimbe vs. Republic, Criminal Appeal No. 3 of 1988 (unreported). Arguing on the tenth grounds of appeal, the Appellant faulted non-compliance with section 231 (1)(a)(b)(c)(3)(4) of CPA. He added that it is apparent from the record that the Court stated that the Appellant was only addressed according to the cited law, but it did not specify which subsection(s) was (were) complied with. He cited the cases of Ulilo Hassan vs. Republic, Criminal Appeal No. 196 of 2018 and Cleopa Mchiwa Sospeter vs. Republic, Criminal Appeal No. 51 of 2019 (unreported). On the eleventh ground of appeal, the Appellant argued that the trial Court accepted the prosecution evidence while the defense evidence cast doubt on it. He considered the analysis of the evidence 8 underserving. He cited the case of Malando Badi and three others vs. Republic, Criminal Appeal No. 64 of 1993 (unreported). As for the twelfth ground of appeal, the Appellant argued that there was a delay in arraigning him in Court. He referred this Court to the testimony of PW2, who testified that the incident had been known since 11th December 2022, but the Appellant was arraigned in Court on 24th January 2023. He cited the case of Abdulaziz Omary vs. Republic, Criminal Appeal No.536 of 2019 (unreported), where it was observed that a delay in the arraignment of the suspect creates doubt. On the thirteenth ground of appeal, the Appellant complained that the trial court erred in law and fact by convicting the Appellant while the prosecution failed to prove their case beyond reasonable doubt. He cited the cases of Mariki George Ngendakumana vs. Republic, Criminal Appeal No. 353 of 2014 (unreported), and Luhemeja Buswelu vs. Republic, Criminal Appeal No. 164 of 2012 (unreported). The Appellant contended that the prosecution's duty is twofold: one, to prove that the offense was committed and two, that it is the accused who committed it. The prosecution always bears the burden of proving beyond reasonable doubt every essential 9 ingredient of the offense preferred against an Accused. He reiterated that the victim's credibility was not tested in view of section 127 (2) of the Evidence Act. In his further argument, the Appellant faulted the victim's failure to mention or name him at the earliest stage. He added that the victim testified to have been raped on 5th December 2023 whereas the Charge indicates that the offence was committed on 5th December 2022. He insisted that the prosecution failed to prove the case beyond reasonable doubt. Based on that, the Appellant implored this Court to allow the appeal and set aside the conviction and sentence mated against him. In response to the first ground of appeal, Mr. Cathbert Mbilingi, the learned state attorney, argued that the assignment of the presiding magistrates is an administrative issue that does not affect the Court's jurisdiction. The Appellant has not demonstrated any prejudice resulting from such an anomaly. He considered the cited case of Robert Kadaso Mgani (*supra*) distinguishable. Regarding the second ground of appeal, the learned state attorney referred this Court to

page 2 of the trial Court proceedings, which indicates that the memorandum was indeed read over and explained to the Appellant in a language he understood as required by 10 section 192(3) of CPA. He implored this Court to dismiss the second ground of appeal. On the third ground of appeal, the learned state attorney refuted the argument by the Appellant that section 127(2) of the Evidence Act was not complied with. It was added that it is important for a child witness to promise to speak the truth however, the promise itself does not solely determine the validity of her or his testimony. The credibility of a witness is established through other means, such as cross-examination and observing the witness's demeanor. He cited the case of Wambura Kigingi vs. Republic, Criminal Appeal No. 180 of 2017, Court of Appeal at Mwanza where it was observed that, even if a child's testimony was obtained in violation of section 127(2) of the Act, it could still be credible and admissible if the testimony was found to be original, consistent and authentic. He considered such a stance to comply with section 127(6) of the Evidence Act, which provides flexibility in considering the evidence of a child of tender age. Responding to the third ground of appeal, the learned state attorney argued that it is not a legal requirement that the victim knows the Accused person. He added that identification can be established through physical characteristics such as appearance, voice, or attire. 11 He contended that PW1 is a stepdaughter to the Appellant, so there was no harm in calling him "father" rather than using his real name. He cited the case of Masamba Musiba @ Musiba Masamba vs. Republic, Criminal Appeal No. 138 of 2019 (unreported), where it was observed that identification through recognition of a familiar person is more reliable and reassuring than the identification of a stranger. In reply to the fourth ground of appeal, the learned state attorney reiterated the same arguments that it is not a legal requirement for a witness to know the Accused's name since identification can be established through physical characteristics such as appearance, voice, or attire. He cited the cases of Masamba Musiba @ Musiba Masamba vs. Republic, Criminal Appeal No. 138 of 2019 (unreported) and Marwa Wangiti & Another vs. Republic (2002) TLR 39. On the fifth ground of appeal, the learned state attorney denied the Appellant's allegations that the charge and the evidence were inconsistent. He added that the Appellant was not precisely clear and direct on how the evidence varied with the charge. He contended that the Appellant was charged of rape in the first count contrary to section 12 130(1) (2)(e) of the Penal Code and an unnatural offence in the second count contrary to section 154(1) (a) & (2) of the same Act. The evidence presented was consistent with these charges as revealed by the proceedings. On the sixth ground of appeal, the learned counsel observed that the inconsistencies pointed out by the Appellant were minor and do not go to the root of the matter. He cited the cases of Deus Josias Kalala vs. Republic, Criminal Appeal No. 191 of 2018 and Said Ally Ismail vs. Republic, Criminal Appeal No. 242 of 2010 (unreported), where the Court noted that the discrepancies among witnesses are unavoidable. The core issue is that the victim was medically examined, and the findings supported the charge of rape. Arguing in reply to the seventh ground of appeal, the learned state attorney observed that the interval between 2012 and 2023 is indeed 11 years, and calculating the age involves considering the birth, month and day. A person born in 2012 could still be considered 10

years old in 2023. As such, any minor discrepancy is negligible and does not affect the legal assessment that PW1 was below 18 years. Thus, the difference between 10 and 11 years does not undermine the essence of section 130(1) (2) (e) and section 154(1) (a) (2) of 13 the Penal Code. He cited the case of Raphael Majalisi Kalembwe vs. Republic, Criminal Appeal No. 107 of 2022. On the eighth ground of appeal, the learned state attorney submitted that the competency of the witnesses is governed by section 127(1) of the Evidence Act which states that every person is competent to testify unless the Court finds him or her incapable of understanding the questions due to tender age, extreme old age, illness, or similar reasons. In this case, the trial Court was satisfied that PW4 was competent, as demonstrated in the Court records. As an expert witness, he testified under oath, revealing his qualifications and experience, including 32 years as a medical officer at Sinza Hospital. He referred this Court to page 11 of the typed proceeding. He cited the case of Goodluck Kyando vs. Republic (2006) TLR 363. In response to the ninth ground of Appeal, the learned state attorney faulted the Appellant for not objecting the admissibility of Exhibit P2. He contended further that issues not raised during the trial cannot be introduced on appeal. The prosecution witnesses testified that the incident was promptly reported to the police and the Appellant was identified as a suspect. The authenticity and relevance of Exhibit P2 were properly established during the trial, and any objections 14 should have been made at that time. The prosecution's evidence was found to be credible, and the Appellant's claim does not undermine the strength of the case. On the tenth ground of appeal, the learned state attorney submitted that the trial Court complied with section 231(1) of the CPA because the Appellant was informed of his right to testify on his behalf, which he did under affirmation, in compliance with subsection (1)(a). He was also informed of his right to call witnesses in line with subsection (1)(b), but he chose not to call any. While the record may not explicitly indicate that the trial Court addressed him on these provisions, no prejudice was caused because he exercised his right to defend. He cited the case of Musa Mohamed vs. Republic, Criminal Appeal No. 216 of 2005 (unreported). Close to that, the learned counsel observed that any minor procedural oversight in this case does not invalidate the trial proceedings. Arguing in reply to the eleventh ground of appeal, the learned state attorney observed that the Appellant's defense failed to counter the prosecution's case. The trial Magistrate's assessment was based on the strength of the prosecution's evidence, which multiple witnesses corroborated. The Appellant's general denial was not supported by any 15 specific facts or evidence that could have cast doubt on the prosecution's case. Arguing on the twelfth ground of appeal, the learned state Attorney submitted that the incident was promptly reported to the police on 11th December 2022, and the subsequent medical examination and investigative procedures were conducted without unnecessary delay. The prompt reporting of the matter and subsequent steps taken by law enforcement agencies do not indicate any irregularity that could affect the validity of the prosecution's case. On the thirteenth ground of appeal, the learned counsel observed that in criminal cases, the prosecution bears the burden of proving the accused's guilty mind beyond all reasonable doubt, as underscored in Christian Benard vs. Republic (1992) TLR 302 and Aidan Mwakalinga vs.

Republic, Criminal Appeal No. 207 of 2006, Court of Appeal of Tanzania at Dodoma (unreported). He added that during hearing, the prosecution provided consistent and credible evidence through multiple witnesses, including PW1, PW2, PW3, and PW4. Their testimonies were corroborated by medical evidence (Exhibit P3) and expert analysis, which confirmed the findings consistent with the allegations. The trial Court adhered to the legal 16 requirements for taking evidence under section 127(2) of the Evidence Act. The prosecution's case was coherent and remained unshaken during cross-examination, thus meeting the legal threshold for proving the charges against the Appellant. Based on that, the learned state attorney implored this Court to dismiss the appeal. The Appellant also filed the rejoinder submissions. I have gone through them and noted that they are replicas of his submissions in chief. It suffices here to note that I have considered the arguments in his rejoinder. For that reason, I will not re-discuss them. Considering the parties' rival arguments, the question would be whether the appeal is meritorious. To determine this, I shall be guided by the decision of Ahmad Omari vs. Republic, Criminal Appeal No. 154 of 2005, Court of Appeal of Tanzania at Mtwara (unreported), where the Court observed that in a criminal case, the burden of proof is on the prosecution and the standard of proof is beyond reasonable doubt. This aligns with section 3(2) (a) of the Evidence Act, Cap 6 RE 2022. It follows, therefore, that a person is found guilty and convicted of a criminal offense because of the strength of the prosecution evidence against him, which establishes his 17 guilt beyond reasonable doubt (see also John Makolobela Kulwa Makolobela & Another alias Tanganyika vs. Republic (2002) TLR 296). In determining this Appeal, I shall also seek the guidance of the Court of Appeal of Tanzania in Mapambano Michael @ Mayanga vs. Republic, Criminal Appeal No. 258 of 2015, where it was observed that the first appellate Court must subject the entire evidence on record to a fresh re-evaluation to arrive at a decision that may coincide with the trial Court or may be different altogether. Arguing on the first ground of appeal, the Appellant submitted that the trial Court had no jurisdiction to hear and decide the matter in issue because the trial magistrate was never assigned to do so. On his part, the learned state attorney argued that the assignment of the presiding magistrates is an administrative issue that does not affect the Court's jurisdiction. He contended that the Appellant has not demonstrated any prejudice from such an anomaly. Indeed, I revisited the trial Court proceedings and this is what I encountered; 12/2/2023 Coram: Hon I. B Kuppa, PRM 18 S/A: Absent Cc: Filomena Accused: Absent RE – ASSIGNMENT ORDER: Due to the retire of the Trial Magistrate the case file is hereby re- assigned to hon Nabwike Mbaba, RM. I.B KUPPA, RMi/c Therefore, looking at the records, it is not true that the trial magistrate was not assigned to conduct the matter. I think the Appellant misapprehended the records, and as a result, he came up with such a ground of appeal. In the premises, the first ground of appeal has no merit. On the second ground of appeal, the Appellant faulted the trial Court for failure to comply with section 192 (1) (2)(3) of CPA, alleging that the memorandum of the matters agreed was not read to him before signing it. On his part, the learned state attorney observed that the Appellant did not indicate whether such an anomaly prejudiced him. Section 192 (3) of the CPA provides that; At the conclusion of a preliminary hearing held under this section,

the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused person in a language that he understands, signed by the accused person and his advocate, if any, and by the public prosecutor, and then filed. The quoted passage means that the contents of the memorandum of the agreed matters should be read over to the accused and explained in the language he or she understands, and that should be reflected in the records. In the case of Efraim Lutambi vs. Republic (Criminal Appeal 30 of 1998) [1999] TZCA 33 (10 June 1999), the Court observed that; Any exhibits, including cautioned and extra-judicial statements, which are not in dispute should have them referred to and given exhibit numbers in the memorandum of undisputed matters. The contents of the memorandum, including the exhibited statements, if any, should be read over and explained to the accused (in a language he understands), and the fact that has been done should be reflected on the record.

(Emphasis mine) In Mnyameza Franswa vs. Republic, Criminal Appeal 56 of 2006, Court of Appeal of Tanzania at Mwanza, the Court faced with an akin situation, and it stated at page 11 of the typed script that; Thus, the position is clear that it is the accused who is required to say which matters are not in dispute. Also, it's mandatory that the contents of the memorandum of undisputed facts be read and explained to the accused in the language he understands, and the records must show clearly that the contents of the memorandum of undisputed facts have been read over and explained to the accused in the language he understands. (emphasis mine) As correctly alluded to by the Appellant, the records should reflect that the memorandum of the agreed facts was read and explained to the Accused in the language he understands. I looked at the records and this what I observed; Non disputed facts:

1. Admitted his names and particulars
2. Admitted to be a step father and living in the same house with the victim.
3. Admitted to be at Manzese Mdizini on 5-8/12/2022 Disputed facts: Dispute the offence of rape and unnatural offence. Accused: Signed S/A: Debora Mushi Magistrate: H. Msongo, SRM Court: S. 192 of CPA complied with. H. MSONGO, SRM 9/2/2023 The record clearly shows that the learned trial Magistrate (as she then was) complied with section 192 of the CPA. Since the Court 21 records reflect what transpired in Court, the allegations that it did not comply with the cited section is manifestly flawed. Even if the memorandum of agreed facts is disregarded or expunged, it will serve no purpose because failure to conduct the preliminary hearing or conducting it improperly is not fatal. However, Courts are urged to perform it properly to save time and accelerate trials. That said, the second ground of appeal is devoid of merit. Regarding the third ground of appeal, the Appellant faulted the trial Court for failing to comply with section 127(2) of the Evidence Act. He contended that there was no record that PW1 promised to tell the truth and not lie. The learned state attorney did find the allegation worth pursuing. He insisted that the cited section was accordingly complied with and the victim promised to tell the truth and not lies. The procedure for taking the evidence of a child of tender age is provided for under section 127 (2) of the Evidence Act. For easy

reference, I reproduce the section hereunder: 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 lies. As explained in the case of Issa Salum Nambaluka vs. 22 Republic, Criminal Appeal No. 195 of 2018 (unreported), the plain meaning of the provisions of subsection (2) of section 127 of the Evidence Act reproduced above, a child of tender age may give evidence on oath or affirmation or without oath or affirmation. Where a child of tender age is to give evidence without oath or affirmation, he or she must promise to tell the truth and undertake not to tell lies. Looking at the record, the trial Magistrate recorded that PW1 promised to tell the truth. The question posed to her earlier cannot be traced from the records. Even if the questions are not traceable, the Court was satisfied that PW1 promised to tell the truth. I don't see any problem with that. In my opinion, simplified or test questions were unnecessary in this case because the witnesses did not testify on oath or affirmation. In Mathayo Laurance William Mollel vs. Republic (Criminal Appeal No. 53 of 2020) [2023] TZCA 52 (20 February 2023) the Court said; We are unable to agree with the appellant that the trial court ought to have conducted a test to verify whether the child witnesses knew and understood the meaning of oath or affirmation. In our considered view, that requirement would only be necessary if the child witnesses testified on oath or affirmation. We respectfully think that if a child of tender age is not to testify on oath or affirmation, a 23 preliminary test on whether he knew and understands the meaning of oath may be dispensed with. (Emphasis mine) From what I have tried to endeavor herein above, I entertain no doubt that the evidence of PW1 was taken in compliance with section 127 (2) of the Evidence Act, even if no simplified or test questions are traceable on records. However, it must be noted that even if there was something wrong, the anomaly would still have been cured by section 127(7) of the Evidence Act (supra) as amended by the Legal Sector Laws (Miscellaneous Amendments) Act, 2023 which provides that failure by a child of tender age to meet the provisions of subsection (2) shall not render the evidence of such child inadmissible. With that in mind, I find the third ground of appeal impotent, and I disregard it. On the fourth ground of appeal, the Appellant complained that the victim never stated the Appellant's name before and during hearing. On his part, the learned state attorney observed that it is not a legal requirement for the victim to know the accused person. He added that identification can be established through physical characteristics such as appearance, voice, or attire. He contended that PW1 is a stepdaughter to the Appellant, so there was no harm in 24 calling him "father" rather than using his real name. Indeed, according to the record, PW1 testified as follows; On 5/12/2023, I was slept my step father put off my clothes and started entering his finger in my vagina and anus. The accused threatened me that he will chase away my mother if I tell my mother or cry for help. From the records, it is clear that PW1 referred to the Appellant as "stepfather" and "Accused". This evidence tallies with the evidence of PW2 and PW3 (mother). Since there is no dispute that the Appellant is the PW1's stepfather, the allegation that he was not mentioned during hearing is meritless. As per the charge, the crimes were committed between 5th December 2022 and 8th December 2022, at Manzese Midizini area within Ubungo District in Dar es Salaam Region. According to PW2, the incident was reported to

the Police on 11th December 2022. As correctly alluded to by the Appellant, he was not named at the earliest stage. However, according to PW1 and PW2, the Appellant threatened to kill the victim if she dare tells her mother that she was raped or sodomized by the Appellant. In such a state of fear, it was difficult for her to name the Appellant at the early stage, considering her age. In *Shukuru Masunzu vs. Republic* (Criminal Appeal No 248 of 25

2023) [2024] TZHC 7196 (9th August 2024), this Court said; According to PW3, the victim was in a state of fear, having been threatened by the Appellant. It was established that the Appellant promised to kill both the victim and her mother. She was hesitant to name the Appellant before PW4. In the state of fear, depression, and anxiety, no reasonable man would have expected the naming of the Appellant at the earliest stage. The Appellant did not argue the fifth ground of appeal. Instead, he argued the sixth ground of appeal, submitting that the prosecution's evidence was tainted with material discrepancies that go to the root of the case. The learned state attorney observed that the inconsistencies pointed out by the Appellant were minor and do not go to the root of the matter. Indeed, it is a trite law that when witnesses' testimony contain inconsistencies and contradictions, the Court must address and try to resolve them when possible, and decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter (see *Matiku vs. Republic* (1995) TLR 3). In *Tafifu Hassan @ Gumbe vs. Republic*, Criminal Appeal No. 436 of 2017, Court of Appeal of Tanzania at Shinyanga, the court said 26 It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. Its is only where the gist of evidence is contradictory then the prosecution case will be dismantled. I understand that the contradictions may result from time-lapse or due to human memory frailty. That being the case, a human being is not expected to be correct in every detail when telling his or her story. As such, discrepancies on some details considered to be minor may be overlooked and disregarded by the Court. In *Gitabeka Giyaya vs. Republic* (Criminal Appeal No. 44 of 2020) [2022] TZCA 830 (28 December 2022), the Court noted; Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story we are now comfortable to recap that as human recollection is not infallible and due to the frailty of human memory and if the discrepancies complained of are on details, the Court may overlook such discrepancies. Guided by the above, the question is whether the contractions are minor and, considering the evidence available, whether they can be overlooked. Even if they are not minor, can this Court resolve them without affecting other corroborative evidence on record?. According to the records, PW1 testified that she was taken to the Hospital for medical examination. However, she did not mention the time and date. 27 According to PW2, the victim was taken to the Hospital on 11th December 2022. PW4 (the medical doctor) testified that he examined the victim on 12th December 2022. However, Exhibit P1 (PF3) reveals that the victim was examined on 11th December 2022. In such circumstances, the PW4's testimony that he examined the victim on 12th December 2022 was due to memory loss. I consider the discrepancy to be minor and can be overlooked because it is inconsistent with Exhibit P1 which he prepared and tendered in Court himself. That said, the sixth ground of appeal has no merit. On the

seventh ground of appeal, the Appellant argued that PW1 or the victim's age was not proved beyond reasonable doubt. As prefaced before, looking at the charge, the victim is ten (10) years old. During hearing, PW1 (the victim) confirmed that she was born on 3rd April 2012. Her mother, PW3, also confirmed the exact date of birth. According to Exhibit P1 (PF3), as tendered by PW4 (medical doctor), the victim was estimated to be ten years old. In such circumstances, therefore, the age of the victim was perfectly settled, that she was ten years old during the period between 5th December 2022 and 8th December 2022 when the alleged crimes were said to have been committed. In the case of Issa Reji Mafita vs Republic (Criminal 28 Appeal 337 of 2020) [2021] TZCA 404 (24 August 2021), the Court noted; Admittedly, with the removal of exhibit PI from the record, the only testimony which remains on the record regarding the age of the victim is that of the victim herself. She was consistent in her evidence that, she was 12 years old when she was being raped. Indeed, the age of the victim was clearly pleaded in the charge sheet. In accordance with the principle in Isaya Renatus vs. the Republic, Criminal Appeal No. 542 of 2015 (unreported), evidence as to proof of age can be given by "the victim, relative, parent, medical practitioner, or where available, production of birth certificate. Since the testimony of PW1 (victim) and PW3 (mother) and Exhibit P1 (PF3) reveal that the victim was 10 years old when the offenses were committed, the allegations that the age of the victim was not proved are baseless. As such, I proceed to disregard the seventh ground of appeal. Regarding the eighth ground of appeal, the Appellant complained that PW4's competence was not established. The learned state attorney observed that, considering the records, the trial Court was satisfied that PW4 was competent to testify under oath, revealing his qualifications and experience, including 32 years as a medical officer at Sinza Hospital. 29 Indeed, the competency of the witnesses is governed by section 127(1) of the Evidence Act which establishes that every person is competent to testify unless the court finds him or her incapable of understanding the questions due to tender age, extreme old age, illness, or similar reasons. In Sylvester Stephano vs. Republic, Criminal Appeal No. 527 of 2016 (unreported), the court held that; It is cardinal principle that an expert must furnish the court with necessary scientific criteria for testing the accuracy of his conclusion to enable the court to form the independent judgement by applying those criteria to the facts proven in evidence. In this case, PW4 testified that he was a general practitioner at Sinza Hospital with 32 years of experience. He was trained at Bombo as an assistant medical officer. In this respect, I do not doubt that the competency of the witness was correctly established. PW4 explained that he was a medical practitioner with 32 years of experience. He was working at Sinza Hospital when he examined the victim. In view of the decision of Goodluck Kyando vs. Republic [2006] TLR 363, I have no reason to doubt his competency to testify as an expert in the field. In the premises, the eighth ground of appeal is meritless, and I 30 disregard it. On the ninth ground of appeal, the Appellant argued that Exhibit P2 was procured illegally since he was never cautioned prior, contrary to section 57 (2) (d) of CPA. In response, the learned state attorney faulted the Appellant for not objecting to the admissibility of Exhibit P2 during hearing. According to the record, Exhibit P2 was tendered by PW5. Unfortunately, the Appellant never objected to its

admissibility during hearing. An objection that there was no witness at the time when PW5 recorded it is as good as not objected at all. In addition, there was no retraction during the defense hearing. The Accused was cautioned before PW5 recorded it. Exhibit P2 contained elaborative, detailed and relevant information connected to the commission of the crimes. It also corroborated the evidence of other witnesses. In Michael Mgowole & Another vs. Republic, Criminal Appeal No. 205 of 2017, Court of Appeal of Tanzania at Iringa, the Court observed; Second if the confession contains a detailed, elaborate relevant and thorough account of the crime in question, that no other person would have known such details but the maker (See WILLIAM MWAKATOBÉ v R, Criminal Appeal No. 65 of 1995 (unreported)). 31 Third, since it is part of the prosecution case, it must be coherent and consistent with the testimony of other prosecution witnesses, and evidence generally. (SHABAN DAI-JD/ v R, Criminal Appeal No. 28 of 2001 (unreported)) - especially with regard to the central story (and not in every detail) and the chronology of events. And, lastly, the facts narrated in the confession; must be plausible. To that end, the ninth ground of appeal is wanting of merit, and I disregard it. Arguing on the tenth ground of appeal, the Appellant faulted non-compliance with section 231 (1)(a)(b)(c)(3)(4) of CPA. He added that it is apparent from the record that the Court stated that the Appellant was only addressed according to the cited law, but it did not specify which subsection was complied with. In response, the learned state attorney submitted that the trial Court complied with section 231(1) of the CPA because the Appellant was informed of his right to testify on his behalf, which he did under affirmation, in compliance with subsection (1)(a). He was also informed of his right to call witnesses, in line with subsection (1)(b), but he chose not to call any. Indeed, on 10th October 2023, the Appellant was addressed in terms of section 231 of CPA. On 28th March 2024, he testified as 32 DW1 and closed his defense case. The learned state attorney considered the argument baseless because the Appellant was afforded an opportunity to present his case. In my conviction, failure to cite subsection to section 231 of CPA is not fatal because the Appellant was afforded a chance to present his case. He was also recorded to have closed his defense case after he entered his defense. Under the overriding objective principle, the anomaly may be overlooked. In the premises, the tenth ground of appeal is unmerited. On the eleventh ground of appeal, the Appellant faulted the trial Magistrate for accepting the prosecution evidence while the defense evidence cast doubt on it. He considered the analysis of the evidence underserving. On his part, the learned state attorney observed that, according to the records, the Appellant's defense did not cast a doubt on the prosecution's case. The trial magistrate's assessment was based on the strength of the prosecution's evidence, which multiple witnesses corroborated. I have reviewed the impugned Judgment of the trial Court and noted that the learned trial Magistrate correctly evaluated and analyzed the evidence presented by the prosecution and the defense. In fact, the brief defense evidence that the Appellant was set cast no 33 doubt on the prosecution's evidence. Unfortunately, the Appellant failed to cross-examine PW1 (victim) on the very incriminating testimony on how he committed the alleged crimes on diverse dates between 5th December 2022 and 8th December 2022, at Manzese Midizini area within Ubungo District in Dar es Salaam Region. The eleventh ground of appeal is

devoid of merit and I disregard it. As for the twelfth ground of appeal, the Appellant argued that there was a delay in arraigning him in Court. He referred this Court to the testimony of PW2, who testified that the incident had been known since 11th December 2022, but the Appellant was arraigned in Court on 24th January 2023. In response, the learned state Attorney submitted that the incident was promptly reported to the police on 11th December 2022, and the subsequent medical examination and investigative procedures were conducted without unnecessary delay. The prompt reporting of the matter and subsequent steps taken by law enforcement enforcers do not indicate any irregularity that could affect the validity of the prosecution's case. As correctly alluded to by both parties, the incident was reported to the police on 11th December 2022, and the Appellant was arraigned in Court on 24th January 2024. Mathematically, almost 44 days passed 34 without arraigning the Appellant in Court. Indeed, in the case of Abdulazizi Omary vs Republic (Criminal Appeal 536 of 2019)

[2022] TZCA 726 (22 November 2022), which the Appellant correctly cited, the delay to arraign the suspect creates doubts. In the cited case, the arraignment was delayed for two months, unlike in this case, where only 44 days passed. Although each case must be determined on its circumstances, 44 days sound reasonable considering the circumstances. Besides, as correctly alluded to by the learned state attorney, although it creates doubt, the delay in arraigning the suspect cannot affect the validity of the prosecution's evidence. However, law enforcers like the police force are enjoined to arraign the suspects as soon as possible to avoid curtailing the right to liberty. In the circumstances, I find the twelfth ground of appeal meritless, and I disregard it. On the thirteenth ground of appeal, the Appellant complained that the trial Court erred in law and fact by convicting him while the prosecution failed to prove the case beyond reasonable doubt. He reiterated that the victim's credibility was not tested in view of section 127 (2) of the Evidence Act. On his part, the learned state attorney contended that the prosecution's witnesses, including PW1, PW2, PW3, 35 and PW4, were consistent and credible. Their testimonies were corroborated by medical evidence (Exhibit P3) and expert analysis, which confirmed the findings consistent with the allegations. I examined the evidence adduced during hearing and was satisfied that PW1 (victim) was telling nothing but the truth. She was direct, consistent, credible, and coherent about what the Appellant did to her. I dispassionately followed her testimony and noted that she knew what she was talking about. Her testimony was corroborated by PW2, PW3, PW4 and PW5 and Exhibits P1 and P2. The collective prosecution evidence adduced during hearing directly points fingers at the Appellant as the one who committed the offenses. The defense evidence that it was all set to implicate him did not cast doubt on prosecution evidence. It is an elementary principle that has gained support that, in view of the inherent nature of the offense of rape or any other sexual offense where only two persons are usually involved when it is committed, the testimony of the complainant or victim is crucial and must be examined and judged cautiously. It has been held times without number that the best evidence normally comes from the victim. In this case, in view of the testimony of PW1 and given the 36 inherent

nature of the sexual offenses, it sounds convincing that the Appellant was responsible for rape and unnatural offences. The Court of Appeal of Tanzania in *Mohemed Said vs. Republic*, Criminal Appeal No. 145 of 2017, having referred to the decision of the Supreme Court of Philippines in the case of *PEOPLE OF THE PHILIPPINES vs. BENJAMIN A. ELMANCIL*, G. R. No. 234951, dated March 2019, noted as follows; In reviewing rape cases, this Court has constantly been guided by three principles, to wit: (1) on accusation of rape can be made with facility; difficult to prove but more difficult for the person accused though innocent to disprove; (2) in view of the intrinsic nature of the crime of rape where only two persons are usually involved the testimony of the complainant must be scrutinized with extreme caution; and (3) the evidence for the prosecution must stand or fall on its own merits and cannot draw strength from the weakness of the evidence for the defence. And as a result of these guiding principles, credibility of the complainant becomes the single most important issue. If the testimony of the victim is credible, convincing and consistent with human nature and the normal course of things the accused may be convicted solely on the basis thereof. In *Onesmo Laurent @ Salikoki vs. Republic*, Criminal Appeal No. 458 of 2018, Court of Appeal at Moshi, the Court observed at page 12, thus; 37 we are cognizant that in view of the inherent nature of the offence of rape or any other sexual offence where only two persons are usually involved when it is committed, the testimony of the complainant is very crucial and must be examined and judged cautiously. Indeed, in this context, we held, for instance, in *Selemani Makumba* (supra), that the best proof of rape (or any other sexual offence) must come from the complainant. Consequently, the complainant's credibility becomes the most important matter for consideration. The Court continued to note at pages 12 and 13, thus; If the evidence of the complainant is credible, convincing and consistent with human nature as well as the ordinary course of things, it can be acted upon singly as the basis of conviction - see section 127 (6) of the Evidence Act. In sexual offenses, therefore, the victim's credibility becomes an essential matter for consideration. If the victim is coherent, consistent, and credible, the Court may proceed to convict, notwithstanding other corroborative evidence. In this case, PW1 (victim) did not seem to have been telling lies. She was credible, and as said before, her testimony was corroborated by the testimonies of PW2, PW3, PW4 and PW5 and Exhibits P1 and P2. In the circumstances, the allegation that PW1 was not credible is devoid of merit. Similarly, the assertion that the case was not proved beyond reasonable doubt is, in the same way, meritless. That said, the thirteenth ground of appeal is unmerited, and 38 I dismiss it. Before I sign off, I have this to say. I reviewed the impugned Judgement of the trial Court and noted that the sentence meted against the Appellant on the first count is manifestly confusing. For easy reference, I shall reproduce the respective part thereof; As such deterrent sentence will be meted out on the accused person to set a lesson for him and bar other members from committing the same. The accused person is hereby sentenced to imprisonment for life for the offence of rape and the same for offence of unnatural offence as per section 131 (1)(3) of the penal Code (Cap 16 R.E 2022) and Unnatural offence contrary to section 154 (2) of The Penal Code [Cap 16 2019]. (sic) Reading between the lines of the sentence meted out in the first count,

it is clear that the Appellant was sentenced to serve life imprisonment. However, looking at the charge, the victim is ten (10) years old. During hearing, PW1 (the victim) confirmed that she was born on 3rd April 2012. Her mother, PW3, also confirmed the exact date of birth. According to Exhibit P1 (PF3), as tendered by PW4 (medical doctor), the victim was estimated to be ten years old. In such circumstances, therefore, the age of the victim was perfectly settled, that she was ten years old during the period between 5th December 39 2022 and 8th December 2022 when the alleged crime is said to have been committed. This is because she ceased to be under ten years old by March 2022. In such a situation, the applicable penal sentencing section was not section 131(3) of the Penal Code, which provides for life imprisonment when the victim is under ten years old but rather sections 130(1) (e) and 131 (1) of the Penal Code which provides for a minimum sentence of thirty (30) years imprisonment. For clarity, the sentence of life imprisonment is imposed only when the victim is under the age of ten years. When she is ten years old, the applicable sentence is thirty years imprisonment if the Accused is of the age of majority (see also *Zengo Benjamin vs Republic* (Criminal Appeal 562 of 2019) [2022] TZCA 660 (31st October 2022)). Under revisional powers, I hereby set aside the life imprisonment sentence imposed to the Appellant in the first count and substitute it with thirty (30) years imprisonment. To that end, I wholly agree with the trial Court that the offenses to which the Appellant was charged with were proved beyond reasonable doubt, and thus, the grounds of appeal raised in the Petition of Appeal are devoid of merit. Save for the substitution of the sentence that I have made herein above in the first count, I uphold 40 and sustain the conviction entered and the sentence meted out against the Appellant by the trial Court. I order accordingly. The right of appeal is fully explained. DATED at DAR ES SALAAM this 27th February 2025. H.S. MTEMBWA JUDGE 41

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