**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: LUANDA, J.A MZIRAY, J.A. And LILA, J.A.)**

**CRIMINAL APPEAL NO. 322 OF 2015**

**ABDALLAH KONDO..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)**

**(Korosso, J.)**

**dated the 30th March, 2015**
**in**
**Criminal Sessions No. 60 of 2013**

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# JUDGMENT OF THE COURT

6th & 28th September, 2016

**LILA, J.A.:**

Abdallah Kondo, the appellant, was convicted by the District Court of Kilosa of unnatural offence, contrary to section 154(1)(a) of Penal Code, Cap 16, R.E. 2002 and he was sentenced to life imprisonment. Aggrieved, he appealed to the High Court. His appeal was dismissed. Still aggrieved, he has come to the Court protesting his innocence before us for a second appeal.

The facts which lead to the appellant's conviction and sentence can be summarized thus.

On 13/2/2011, the fateful day, Abdallah Saidi (Mkopwa) and Juma Adamu, PW2 and PW3 respectively were enjoying their day by taking local brew at a pombe shop owned by Baba Dotto at Ulaya village within Kilosa District. PW2 went to a toilet to attend a call of nature. He found the toilet full of people. He thus decided to serve himself in the bush. Thereat he heard a child crying for help. He went back to the club to look for assistance. He met PW3 with who he went to the bush whereat they found the appellant ravishing a child aged 3 years. They saw the appellant, a person they live with in the same village and they knew for over three years with his trouser half dressed. On seeing them (PW2 and PW3), the appellant ran away. The two (PW2 and PW3) took Ashraf, the victim, to Ally Shomari (PW4) his father. PW4 was informed that it was Abdallah Kombo also known as Pangu Pakavu who had carnally known his boy (victim) who was aged only three (3) years. PW4 and his wife took the victim to hospital that very day after obtaining a letter from the village leader. Dr. Alex Mgimba (PW1), a Medical Doctor at Ulaya Health Centre, received the victim at 17:30 hours on 13/7/2011. Upon examining victim's anal part he saw it full of stool and there were bruises. He instructed a laboratory test be conducted but no spermatozoa were

found. He thereafter filled a PF3 (Exhibit P.1). He said the bruises seen proved carnal knowledge.

The appellant, in his affirmed defence disassociated himself from the offence. He said, on a day he could not remember he was at a club with friends namely Hamisi and Said where he was arrested taken to VEO's office and later to police. He was then charged. On being cross examined he said he was arrested on 12/7/2011 at 07:00 hours by militiamen. He said on 13/07/2011 at 14:00 hours he was at home.

On the basis of the above facts, the appellant was convicted and sentenced as above by the trial court. As hinted, he is still protesting his innocence hence this appeal.

The appellant have raised the following grounds of appeal in his memorandum of appeal. These are;

1. *That the first appellate Judge grossly erred in law and fact to find the error of the trial magistrate to close prosecution case as curable.*
2. *That the first appellate judge grossly erred in law when be upheld conviction and sentence in the appellant in the case where the trial magistrate*

*did not make a ruling after the close of the prosecution case in compliance with the mandatory provisions of law.*

3. *That the magistrate and the first appellate the first appellate judge grossly erred in law and fact by not drawing an adverse inference for prosecutions side failure to summon the victim of the crime without any plausible explanation.*
4. *That the first appellate Judge erred in law and fact by not reassessing exhaustively the circumstances under which the identifying witnesses alleged to see and recognize the appellant at the bush as they failed to describe the attire he put on the fateful day.*
5. *That the credibility of PW1 and PW2 was not properly scrutinized as to why they decide to go to the scene of crime only the duos instead of asking the company of many peoples (sic) who frequented the pombe club on that time.*
6. *That the charge is defective as it did not give proper information to enable the appellant to give his defence as the word unlawful is omitting (sic) in the charge sheet.*

The appellant had raised substantially the same grounds of appeal in his appeal to the High Court. The High Court found that the trial magistrate complied with the requirements of section 230 and 231 and the appellant opted to defend himself without calling any witness or tender any exhibit. It also found PW2 and PW3 credible witnesses. On allegation by the appellant that the trial magistrate closed the plaintiff's case, the High Court found it an error on the part of the trial magistrate but it did not prejudice the appellant, instead, it was in his favour. Applying the principles for proper identifications laid down in **Waziri Amani v. Republic** [1980] TLR 250, the High Court found PW2 and PW3 were close to the appellant, saw and identified the appellant as the offence was committed during the day light and the two knew the appellant and they named him to PW4. It came to a conclusion that the appellant was properly identified. On failure by the prosecution to call the victim as a witness the High Court found it not necessary and that an accused can be convicted on the evidence of other witnesses. It added that it was upon the prosecution to decide which witnesses to call to prove their case. The sentence handed down was also found to be proper bearing in mind that the victim was of the age below ten years. The High Court dismissed the appeal, hence this appeal.

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At the hearing of the appeal the appellant appeared in person unrepresented. Ms. Faraja George and Anna Chimpaye, learned State Attorneys represented the Respondent Republic. The appellant urged the Court to adopt his grounds of appeal he had lodged and he chose to let the Respondent submit first.

In her submissions in respect of the first and second grounds of appeal Ms. Faraja stated that after closing the prosecution case, the trial magistrate informed the appellant a ***Prima Facie*** case was made and that it is indicated so in the proceedings that section 231 was complied. That following the above the appellant opted to defend himself and had no witnesses or exhibits. She further contended that after the prosecution had failed to call the would be last witness for five months, the trial magistrate was proper to close the prosecution case. She said these grounds hold no water.

Submitting on ground 3, Ms. Faraja contended that the prosecution was not bound to call as a witness the victim who was just three years old. While citing section 143 of the Evidencing Act it was her view that the prosecution is not bound to call any number of witnesses. She added that even in the absence of the evidence by the victim still the evidence of PW2

and PW3, the eye witnesses, and the doctor (PW1) who examined the victim was sufficient to establish the appellant's responsibility with the commission of the offence.

In respect of ground 4, Ms. Faraja pointed out that PW2 and PW3 are eye witnesses, the offence was committed during the broad day light, PW2 and PW3 knew well the appellant as they lived together, were at a distance of 8 and 10 steps and they even went further to say the appellant had a half dressed trouser during the incidence. She concluded that the appellant was properly identified as all conditions set out in Waziri Amani case (supra) were met.

On credibility of PW1 and PW2 which is ground 5 of appeal Ms. Faraja contended that PW1 was a doctor who did not witness the incident while PW2 and PW3 gave a consistent testimony and they lived with the appellant in the same area. She further stated that there was no evidence proving ill will to the appellant. She urged the Court to find them credible as did the two courts below.

On the complaint by the appellant that the charge sheet leveled against him was defective for failure to insert the word "unlawfully", Ms. Faraja

argued that carnal knowledge against order of nature is not justified by any law hence it is a restricted act and there was no need to insert the word "unlawfully". She according urged the Court to dismiss this ground of appeal.

On his hand, the appellant insisted that justice was not done to him and urged this Court to consider him. He raised his concern as to why only PW2 and PW3 out of many people at the pombe shop allegedly went to the scene. He further said the two did not describe the attire won by the assailant hence there was no proper identification. He further contended that he had grudges with the witnesses. He urged this court to properly consider ground 5 of appeal on the issue of identification.

We have carefully considered the rival arguments by the parties.

We have decided to consider the appeal grounds as presented.

In the first ground of appeal the appellant is faulting the trial magistrate for closing the prosecution case and the High Court finding that the defect is curable.

The trial court proceedings dated 29/05/2012 clearly show that after the trial magistrate (Hon. T. Swai RM) had granted adjournments from

15/12/2011 when PW4 gave evidence for reasons that their last witness one DC Stephen was not available to give evidence, on 29/05/2012, the trial magistrate, seemingly tired with the prosecution excuses to bring such last witness, closed the prosecution. In his own words, this is what he stated.

> *"**Court:** its last date for pros to call witness is not called yet (sic). It appears no further witness. Pros Case is closed...."*

It is thus apparent that it is the trial magistrate who closed the prosecution case not the prosecution. The crucial issue here is whether the trial magistrate was justified to so do.

The conduct of Criminal trials in both the District, Resident Magistrates's Courts and the High Court is governed by the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA). The provisions of section 229 (1) of the CPA in very clear terms provides:

> *"If the accused person does not admit the truth of the charge the prosecutor shall open the case against the accused person*

*and shall call witnesses and adduce evidence in support of charge."*

Further, section 230 of the CPA states:

*"(1) if at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused sufficiently to require him make a defence either in relation to the offence with which he is charged or in relation to any other offence of which under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall dismiss the charge and acquit the accused person."*

It will be noted that while the law (section 229 (1) of the CPA) clearly shows that the prosecutor shall open the case against the accused and call the witness to prove the charge there is no specific provision stating that he (the prosecutor) shall close the prosecution case against the accused. However it is now a well-established principle of law and the provisions of section 219 and 230 of CPA above quoted clearly indicate that it is the prosecutor who opens the case against the accused who is obliged to close the case for the prosecution upon being satisfied that the witnesses called to give evidence in support of the charge have duly discharged that duty. The number of witnesses and substance of their evidence is determined by

the prosecutor who calls such witnesses. That position of the law was enunciated in the Court's decision in **Director of Public Prosecutions vs Idd Ramadhani Feruzi,** Criminal Appeal No. 154 of 2011 (unreported). In that case the High Court (ZNZ) (Hon. Mwampashi, J.) after several adjournments of about five months at the instance of the prosecution on allegation that their last witness could not be found, went ahead and closed the prosecution case. By then five witnesses had already testified. In closing the prosecution case and after giving a brief background of the case, in part, he stated:

> *".... It is hereby taken that the prosecution has failed to prosecute the case and the case for the prosecution is hereby closed..."*

Dissatisfied with the order closing the prosecution case, the Director of Public Prosecution appealed to the Court. On appeal this Court held:

> *"it is settled that the prosecution has control over all aspects of Criminal prosecutions and proceedings (**Public Prosecutor v. Suleiman and Another**, [1986] SC, LRC. Crim. 320 followed).* ***It is not therefore either the court or the defence to determine when the prosecution should close its case, or in respect of the court to make an order for such closure."*** (emphasis ours).

The Court then proceeded to declare that the Judge had no power to order for the closure of the prosecution case. And after quashing and setting aside the judge's order the matter was remitted to the High Court for it to proceed with the hearing from the stage it had reached before closure of the prosecution case.

As indicated above, the position is now settled that a magistrate or judge has no power, under our laws, to close the prosecution case. I would add that the same applies in the case of defence case that a magistrate or judge is not mandated to close the defence case. Both the prosecution and defence are at liberty to close their respective cases as and when they are satisfied that the evidence their respective witnesses have adduced is sufficient.

The issue which may immediately arise is what should the court do in case either the prosecution or the defence fails to take necessary steps to have their respective cases concluded and thereby close their respective cases?

The legal position obtaining in situations where the trial magistrate has found not able to tolerate the prayers for adjournment by the prosecution is that there are two courses to take. **One**, Where the case is before the Magistrates's Court (District and Resident Magistrates's Courts) Section 225 (5) of the CPA can be invoked to dismiss the charge and discharge the accused if a certificate applying for extension of time from the RCO or DPP depending on the stage reached is not filed and prosecution is not able to proceed with the hearing of the case. **Two**, which recourse can be invoked by both the subordinate Courts and the High Court is to invoke the inherent powers of the Court and dismiss the charge and discharge the accused. We, in this regard, find inclined to agree, re-affirm and adopt the principle laid down by the late Hon. Mnzavas, J (as he then was) in **R.V. Deeman Chrispin and others,** [1980] TLR 116. In that case the accused persons were charged on 2nd January, 1973 and there were numerous adjournments on grounds that investigations were incomplete and missing police case file. On 30/03/1979 the subordinate court dismissed the charge ad discharged the accused. When the matter went up to the High Court on revision it was held:

1. *A court was to have, within reason, the power to control or regulate its own proceedings in order to prevent itself from being emasculated or rendered importent.*
2. *If a court refuses an adjournment and the prosecution is unable to proceed, a court does not have to rescind its order. It is clothed with inherest power and so, in such cases of emergency, it can dismiss the charge and discharge the accused. But except in the most exceptional circumstances, an order of acquittal is unnecessary and unsuitable for that purpose."*

Having indicated the principles governing closure of prosecution case and the courses the trial Court can take out of the jam, we will now consider the matter before us.

As demonstrated above in the instant appeal it is the magistrate who closed the prosecution case after he had given them last adjournment to enable them ensure the attendance of its witness. The appellant is complaining that was irregular and is faulting the first appellate court for finding it not fatal but curable. It should be noted here that in the case of **R.V. Deeman** (supra) the matter did not go to full trial. The High Court

intervened to correct the anomaly by way of revision. In the case of **DPP v. Ramadhan Feruz** (supra) the complaint (appeal) was raised by the DPP. Indeed, the order to close the prosecution case by court affects greatly the prosecution for it blocks the prosecution from calling witnesses to prove their case. If anything, therefore, such order may have the effect of damaging the prosecution case against the accused. So while that order is prejudicial and may occasion injustice to the prosecution that order actually benefits and is in favour of the accused person. One would thereby expect the prosecution to complain as they did in **DPP v. Ramadhan Feruz** (supra). Very unexpectedly, in the instant case it is appellant who is complaining and has raised this as his first ground of appeal. There is thus a fine distinction between **Ramadhan Feruz** case (supra) and the instant one.

The issue that arises here is did the order by the trial magistrate closing the prosecution case prejudice or occasion any injustice to the appellant (then accused).

The trial court record tells it all that, after closure of the prosecution case by the trial magistrate and even after the prosecution was blocked from calling other witness (es), the matter proceeded well to its finality and the

appellant was convicted and sentenced as indicated above. The witnesses blocked were for the prosecution who were to be called to adduce evidence in support of the charge against the appellant (then accused). The prosecution whose right to call other witnesses was blocked did not complain. The closure order was in their disfavour and favoured the appellant. There is nothing showing that the appellant was prejudiced by such order and no injustice can be seen to have been occasioned to the appellant. We accordingly find that the procedural flaw was not fatal as rightly found by the first appellate judge. We therefore see no reason to fault her finding. This ground of appeal fails and is dismissed.

In ground two of appeal, the appellant is faulting the first appellate judge for upholding conviction and sentence because the trial magistrate did not make a ruling whether he had a case to answer or not.

In considering this ground of appeal we wish to make reference to the provisions of section 230 of the CPA which is relevant to the complaint we have fully quoted above. Closely read and comprehended, it does not provide that the trial magistrate should prepare a ruling so as to determine whether a case is made out against the accused to require him enter defence. That

apart, it is now a long established practice that after the close of the prosecution case, the trial magistrate prepares a short ruling in which he very briefly analyses the prosecution evidence so as to establish if the evidence adduced sufficiently incriminates the accused so as to require him account for in an effort to exonerate himself from liability. We have, not come across any decision requiring a formal ruling be prepared. Consequently, there are cases in which formal rulings are composed and is some the trial magistrate or judge have written "the accused has a case to answer". In the instant case, this is what the trial magistrate stated:-

> *Court: Its last date for pros to call witness is not called yet. It appears no further witness. Pros case is closed but* ***accused is found of the prima facie case.***
> S. 231 (1) CAP 20 R.E. 2002 is done"

Despite language predicament all that the trial Magistrate indicated is that a prima facie case was made against the accused. Was this enough? Is the issue to be determined herein?

As we have demonstrated above, there is so far no formalized way, apart from the practice, of how a trial magistrate should show that a case is

made out against the accused under section 230 of the CPA. Even where it seems there is non-compliance or partial compliance with sections 230 and 231 of the CPA, the Court have considered all the circumstances of the case to determine whether there is sufficient compliance. For instance in **Julius Justine and 4 others v. Republic,** Criminal Appeal No. 155 of 2005 (unreported) the appellants complained of noncompliance with section 230 and 231. But on examination of the trial court record, the Court was satisfied that the magistrate ruled that all of the accused persons had a case to answer as they gave evidence in defence not in a rush without any complaint and they all told the court that they had no witnesses to call. In conclusion the Court stated:

> *"That being the case then, the appellants were not denied their inalienable right to a full hearing and fair trial. For this reason, we accept, without any reservations, the contention of Mr. Mgengeli, learned State Attorney, for the Respondent Republic, that the omission to strictly comply with section 231 (1) of the CPA did not prejudice the appellants in any way. We accordingly find no merit in this particular ground of appeal and dismiss it."*

In the present appeal, the trial magistrate indicated, as quoted above, that a prima facie case was made against the appellant and he even went on to state that:-

*"S. 231 (1) CAP 20 R.E. 200 is done."*

The appellant is on 29/05/2012, recorded to have said:

*"Accused Plea – No witness no exhlbit".*

Further, the defence hearing was adjourned till 29/06/2012 when the appellant entered his defence. His defence, read properly, is in line with the accusations and evidence led against him by the prosecution. As held in **Julius Justine's** case (supra) there is no indication however slight that the short order by the trial court that he had a case to answer and "S. 231(1) of the CPA done" prejudiced the appellant. We accordingly find that the requirement of S. 230 and 231 (1) of the CPA were complied with. We cannot therefore fault the first appellate judge's finding on this ground. We accordingly dismiss this ground of appeal.

We would have stopped there but we find it prudent that we use this opportunity to direct that the interest of justice is best served if trial

magistrates and judges are to observe the now well established practice of composing a ruling on case to answer in which the material evidence implicating the accused with the offence charged is made known to the accused. This will enable the accused give a focused defence. Statements such as "the accused have a case to answer" and "section 230 or 231 of CPA is complied with or done" leave the appellant in the dark not knowing what line of defence to adopt and what are the crucial areas to concentrate in his defence.

Further to the above, as a way of complying with the provisions of section 231 of the CPA we wish to state that it is logical to categorily inform the rights the accused have when found to have a case to answer. It is quite unsatisfactory, in our view, to simply state "done" or "complied with". That section requires the trial magistrate to categorily inform the rights of the accused. That section, for certainty provides:

> " *231 (1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provision of sections 300 to 309 of this*

*Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and* ***inform him of his right –***

*(a) To give evidence whether or not on oath or affirmation, on his own behalf, and*

*(b) To call witnesses in his deffence.*

*and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer...."*

Given the above legal position, it is our view that strict compliance with the above provision of the law requires the trial magistrate to record what the accused is informed and his answer to it. The record should show this or something similar in substance with this.

*"**Court:** accused is informed of his right to enter defence on oath/affirmation or not and if he has witnesses to call in defence.*

***Accused response:**...."(record what the accused says).*

We now proceed to determine ground three of appeal. The import of this ground of appeal is that the prosecution did not without reason, call the

victim to testify hence the trial court ought to have had drawn an adverse inference in the prosecution evidence against the appellant.

In response to the above ground of appeal, Ms. Faraja, learned State Attorney, said the prosecution was not bound to call the victim who was just three years. Relying on section 143 of the Evidence Act, she said the number of witnesses is irrelevant in proving the charge. She further contended that even in the absence of the evidence by the victim the evidence of PW1, PW2 and PW3 still sufficiently establish the appellants' guilty.

In order to resolve the complaint raised by the appellant, we wish to expound the legal principle governing when is the court entitled to draw an adverse inference to the prosecution. That principle was well articulated in this Court's decision in **Azlz Abdallah v. Republic**, [1991] T.L.R. 71 where it stated that;

> *" the general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the*

*court may draw an inference adverse to the prosecution."*

The import of the above decision is that it is the prosecution which have the right to choose which witnesses to call so as to give evidence in support of the charge. Such witnesses must be those who are able to establish the responsibility of the appellant in the commission of the offence. They must be material witnesses. It is, according to the above principle, against logic and common sense not to call such material witnesses when they are readily available.

In the instant appeal, the victim (PW1) was available but was just three year old at the time he was ravished. That apart, the prosecution called PW1 the doctor who examined the victim (PW1) and who established that PW1 annal part was full of faeces and had bruices. Then PW2 and PW2 were called who testified to the effect that they saw the appellant in *flagrante delicto* ravishing PW1. The three witnesses (PW1, PW2 and PW3) are material witnesses and their evidence gave a detailed explanation of what transpired on the material date. It cannot, in the circumstances, be said that the prosecution had any ill motive not to call the victim to testify. Instead, as rightly submitted by the learned State Attorney, the prosecution found

the three witnesses who testified to be sufficient. They saw no need to call the victim. We are mindful of the fact that the best evidence is that coming from the victim but in the circumstances of this case where other witnesses (PW1, PW2 and PW3) testified sufficiently to prove the charge against the appellant coupled with the fact that the victim was too young, failure to call the victim did not cause any injury in the prosecution case. We thus find that there was nothing calling for the court to draw an adverse inference on the prosecution. We however, wish to remind the prosecution that they should be mindful of the fact that, under section 127 (2) of the Evidence Act, Cap. 6 R.E. 2002, it is only the court which is mandated to determine the competence of a child witness to give evidence after conducting a **voire dire** test. They should not, on their own, decide that a certain child, because of tender age, cannot testify in court.

We now move to determine ground four of appeal. The appellant is complaining that there was no proper identification at the scene of crime because the attire of the offender was not described. This ground of complaint need not detain us much. On the evidence the offence was committed during the day time at around 16.00 hrs during broad day light,

PW2 and PW3 found the appellant at a distance of 8 to 10 paces in *flagrante delicto* with half-dressed trouser ravishing the victim and the two (PW2 and PW3) named the appellant to PW4 immediately after the incidence. PW2 and PW3 were also very open that they knew the appellant well as they lived in the same area.

All the above circumstances considered, there is no doubt that the appellant was properly identified. He was actually recognized. The evidence of recognition is considered to be very reliable. This was held by this court in the case of **Athumani Hamisi @ Athumani v. Republic**, Criminal Appeal No. 288 of 2009 (unreported cited with approval a Kenyan case of Chea Thoye v. Republic, Criminal; Appeal No. 375 of 2006 (unreported) where it was held that:-

> *"Recognition is more satisfactory, more assuring and more reliable than identification of a stranger."*

We accordingly find that the appellant was properly recognized. This ground of appeal fails.

The appellant's complaint in ground five of appeal is based on credibility of PW1 and PW2. The appellant is raising issue why only the two went to the scene of crime while there were many people at the pombe shop (club).

Arguing on this ground Ms. Faraja had it that the evidence by PW1, a doctor, was independent and he did not know the appellant while the evidence by PW2 and PW3 was consistent and there was no any proved allegation of ill-will with him. Apparently, this ground is devoid of merit. All the prosecution witnesses gave their testimonies and the appellant did not raise, by way of cross-examination, any complains that there existed any grudges between him and PW1, PW2 and PW3. The evidence of such witnesses, as correctly submitted by the learned State Attorney, was consistent, not contradicting in any was and explained fully what transpired. The trial court saw such witnesses testify and did not doubt them. It is a well-established principle that it is the trial court which is better placed to see and assess the witnesses credibility and demeanour as opposed to the appellate court, like us, which solely depend on what is contained in the record. That legal question was solidy stated in **Ali Abdallah Rajab v.**

**Sada Abdallah Rajab and Others** [1994] TLR 132 where it was held that:-

> *(i) ..... [not relevant)*
>
> *(ii) Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record."*

Regarding the binding nature of the trial court's finding on credibility and demeanour, the position is well articulated in **Omari Ahmed v. Republic,** [1983] TLR 52 where it was stated:-

> *"the trial court's finding as to the credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility".*

In the present case, we find no any circumstance calling us to interfere with the trial court's finding on credibility of PW1, PW2 and PW3. We accordingly hold as did both the trial and first appellate court that the three

prosecution witnesses were credible and of doubtful demeanour. This ground of appeal also fails and is dismissed.

Lastly, the appellant, in ground six of appeal, is complaining that the charge sheet is defective for not inserting the word "unlawful."

Submitting on this last ground of appeal, the learned State Attorney contended that the act committed by the appellant is forbidden by law hence non-insertion of the word "unlawful" has no effect in the charge sheet.

The charge sheet placed at the door of the appellant is hereby, for clarity, reproduced.

> ***"Offence Section and Law:*** *unnatural offence c/s 154(1)(a) of the Penal Code Cap 16 of the Law (R.E. 2002).*
>
> ***Particulars of Offence:*** *That Abdallah s/o Kondo is charged on 13th day of July, 2011 at about 1:30 hrs. at Ulaya Village within Kilosa District in Morogoro Region did have a carnal knowledge of one Ashraf s/o Ally a boy of 3 years old against the order of nature."*

The relevant section (section 154(1) (a) of the Penal Code) under which the appellant is charged provides:-

*"154 (1) Any person who:-*

*(a) Has carnal knowledge of any person against the order of nature ...*

*(b) ... (not relevant)*

*(c) ... (not relevant).*

*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".*

A reading of the charge sheet leveled against the appellant and the charging section reveals one pertinent fact that the law prohibits the very act of carnal knowledge against the order of nature as rightly argued by the learned State Attorney. The law presupposes that there is no lawful carnal knowledge against the order of nature. We are of the view, therefore, that the charge sheet was properly framed. This ground of appeal therefore fails and is dismissed.

Having scrutinized all the evidence marshalled by the prosecution witnesses and the relevant law, we are satisfied that the prosecution proved the appellants guilty beyond doubts. He was properly convicted.

Regarding the sentence, the appellant was sentenced to life imprisonment. The victim was aged only three years. Under section 154 (2) of the Penal Code, life imprisonment is the statutory minimum sentence. We accordingly hold, as did the first appellate court, that the appellant was properly sentenced.

All said, this appeal fails in its entirety. It is accordingly dismissed.

**DATED** at **DAR ES SALAAM** this 23rd day of September, 2016.

B.M. LUANDA
**JUSTICE OF APPEAL**

R.E.S. MZIRAY
**JUSTICE OF APPEAL**

S.A. LILA
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

E.F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**