IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANGESI, J.A., NDIKA, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 190 OF 2014

OSWARD MOKIWA @ SUDI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)
(Teemba, J.)

dated the 24th day of March, 2014
in
Criminal Appeal No. 63 of 2013

.....

JUDGMENT OF THE COURT

30th April & 14th June, 2019

NDIKA, J.A.:

This decision resolves the appeal of Osward Mokiwa @ Sudi, the appellant, seeking to reverse and set aside the judgment of the High Court (Teemba, J.) sitting at Dar es Salaam dated 24th March, 2014 affirming the judgment of the Resident Magistrate's Court of Kinondoni at Kinondoni dated 15th August, 2011 by which he was convicted of unnatural offence, on the second count, contrary to section 154 (1) of the Penal Code, Cap. 16 RE 2002 (the Code). The appeal, too, assails the sentence of thirty years' imprisonment that the High Court imposed in the place of a life imprisonment term, originally levied by the trial court under section 154 (2) of the Code,

which it adjudged unlawful for want of proof that the victim was a child below the age of ten years.

The factual antecedents to this appeal can be stated briefly as follows: on 8th February, 2008 at noon, a child, who we shall refer to as "JM" or simply PW1 so as to protect his privacy, was called from his grandparents' home by the appellant to an adjacent property (House No. 4) at Kimweri Street, Oysterbay, Dar es Salaam where the appellant was staying. No sooner had he entered the house than the appellant set upon him, pulled down his clothing and then inserted his male member into his (JM's) anus. The appellant, on another occasion, called JM to the same place on 22nd November, 2008, again at noon, and sodomised him for the second time. On that day, he warned him against mentioning to anybody what transpired between them or else would kill him.

According to JM's father, Donasian Masunga (PW2), on his arrival from work in the evening of 22nd November, 2008 at his parents-in-law's home where JM was staying, he found JM weak and foul-smelling. PW2's mother-in-law, Judica Ombeni (PW3), was alerted to the matter a little later. On being probed, JM narrated to both PW2 and PW3 about what had befallen him at the hands of the appellant. At that time the appellant was nowhere to be found.

That same evening at 17:00 hours PW3 took JM to the Oysterbay Police Station where the matter was reported and a medical examination form (PF.3 – Exhibit P.1) issued. In a while, PW3 took JM to the Muhimbili National Hospital where he was examined by Dr. Petronila Ngilogi (PW4), a paedriatic surgeon. PW4 noticed that JM had soiled his underwear and that his anus had loose sphincter muscles. The soiling was, in her opinion, indicative of incessant stool leakage on account of loss of bowel control most probably due to having been sodomised. In view of the involuntary defecation exhibited by JM, she advised that he be taken for specialized treatment in South Africa.

There was further evidence from the police investigator of the case, C.341 D/Sgt Pascal (PW5), which was that he arrested the appellant on 29th November, 2008 at his brother's residence and then took him to court on 1st December, 2008 for trial.

In his sworn evidence, the appellant denied the accusation against him. According to him, on 20th November, 2008 while at home his friend, one Hamza, advised him to leave the place immediately as he had learnt of a "bad mission" being hatched up against him. Two days later, that is, on 22nd November, 2008, one Faraji Rashid (DW2) also called on him at his home

and told him that he, too, had learnt that he (the appellant) was soon to be arrested for an allegation of sodomy.

In his further evidence, the appellant recounted that on that fateful day JM came to his house and asked for a CD to watch presumably on television at that home. He allowed him to go upstairs in the house to pick the CD and watch as he (the appellant) remained downstairs with Hamza. About forty-five minutes later, he walked upstairs and came across JM in the staircase as he was going downstairs. JM was angry and crying that Hamza had grabbed the CD from him. The matter was sorted out and then JM left. Two days later he was told by Hamza that the police were after him. He confirmed that he was ultimately arrested on 29th November, 2008 at night.

The appellant went on taking issue with a variance between the substituted charge on the second count that the alleged act occurred on 22nd October, 2008 and the evidence tendered at the trial that the said act occurred on 22nd November, 2008. But, in cross-examination, he admitted that he had no grudges with JM or his grandfather, a certain Dr. Mbwambo, in whose residence JM was staying but wondered why JM still pointed an accusing finger at him.

There was a testimonial account of the appellant's sole witness – Faraji Rashid (DW2) – which was largely in tune with the CD tale the appellant had given. More particularly, DW2 confirmed that he was with the appellant on 22nd November, 2008 and that the alleged act did not occur on that day.

The learned trial Resident Magistrate found JM's sworn evidence credible and that it linked the appellant to the act of sodomy done on 22nd November, 2008, which was consistent with the medical evidence adduced by PW4 and unveiled by Exhibit P.1. While noting that corroboration was unnecessary in the circumstances, the learned Resident Magistrate held that the appellant's evidence and that of his witness confirmed, at the very least, the presence of JM for over forty-five minutes at the scene of the crime on that fateful day and time and that he came out angry and crying. Thereafter, JM's father (PW2) found him at home weak and foul-smelling. To the credit of the prosecution case, the learned Resident Magistrate also took into consideration that the appellant admitted that there were no grudges between him and the victim or his family. Ultimately, the court dismissed the appellant's defence, holding that it could not overturn the cogency of prosecution case on the second count.

Furthermore, in his judgment, the learned Resident Magistrate acknowledged that there was a variance between the substituted charge on

the second count that the alleged act occurred on 22nd October, 2008 and the evidence that the act occurred on 22nd November, 2008. Upon consideration of that aspect, he found the discrepancy inconsequential. For him, it was sufficient that the date of commission of the offence on the second count as stated by the prosecution witnesses tallied with the date revealed in the medical evidence as narrated by PW4 and shown by Exhibit P.1. He also added that the error complained of was on the charge sheet, not the evidence and that it was most likely a slip of the pen.

In the end, the trial court acquitted the appellant of the offence, on the first count, but convicted him of it, on the second count. As hinted earlier, the court ultimately imposed on him the mandatory life imprisonment under section 154 (2) of the Code upon finding that the victim was of the age under ten years.

As hinted earlier, the High Court dismissed the appellant's first appeal as it affirmed the trial court's finding that there was sufficient evidence to found the impugned conviction. Nevertheless, the High Court differed with the trial court on two aspects. First, the learned appellate Judge found merit, rightly so in our view, in the complaint that the PF.3 was irregularly admitted in evidence upon being= tendered by PW3 without the appellant being given an opportunity to challenge its admissibility and that the trial court omitted to

address him on his rights under section 240 (3) of the CPA to have the medical witness who examined the victim called for cross-examination. In view of that, the learned appellate Judge held the irregularities as fatal and proceeded to expunge the PF.3 from the evidence even though the medical witness was subsequently produced at the trial. That apart, the learned appellate Judge took the view that the medical expert's oral evidence could still be acted upon despite the exclusion of the PF.3.

The second aspect concerned the punishment the trial court imposed on the appellant. As stated earlier, the learned appellate Judge quashed and set aside the life sentence and substituted for it the sentence of thirty years' imprisonment, which is the minimum term under section 154 (1) of the Code. The adjustment was made upon the learned appellate Judge's finding that proof was wanting that the victim was a child under the age of ten years as prescribed under section 154 (2) of the Code.

Still believing that justice was not served by the two courts below, the appellant has come to this Court in this second appeal raising a total of five grounds of complaint, which, in our assessment, crystallise into four points of grievance: **first**, that his conviction was unsustainable for being based on a defective charge that omitted the category of the offence and the age of the victim; **secondly**, that the conviction was, in addition, unsustainable on

account of a variance between the charge on the second count and the evidence on record regarding the month in which the alleged offence was committed; **thirdly**, that *voire dire* examination on PW1 was improperly conducted rendering PW1's evidence liable to be discounted; and **fourthly**, that the prosecution did not, on the whole, establish its case beyond reasonable doubt.

The appellant appeared in person at the hearing. Having adopted his Memorandum of Appeal along with the written submissions he had duly filed, he prayed that his appeal be allowed.

It is of note that in his fairly detailed written submissions, the appellant essentially contends, in the first limb, that the charge against him was defective in that it was laid under section 154 (1) of the Code without reference to any of the categories (a), (b) and (c) enumerated thereunder. Relying on the decisions in **Jafari Mohamed v. Republic**, Criminal Appeal No. 495 of 2016, **Fredy Mwakajilo v. Republic**, Criminal Appeal No. 252 of 2011 and **Sunday Juma v. Republic**, Criminal Appeal No. 406 of 2007 (all unreported), he argues that the applicable category of the offence ought to have been stated. Placing further reliance on **Mussa Mwaikunda v. Republic** [2006] TLR 387 and the unreported decisions in **Marekano Ramadhani v. Republic**, Criminal Appeal No. 202 of 2002 and **Charles**

Mlande v. Republic, Criminal Appeal No. 270 of 2013, the appellant contends that the category of the offence should have been indicated and that the omission in this case was an incurable non-compliance with the mandatory requirement under section 135 of the CPA on the mode of charging.

In the second limb, the appellant claims that the charge was defective for failing to disclose the victim's age in the particulars of the offence. Banking on **Mashala s/o Njile v. Republic**, Criminal Appeal No. 179 of 2014 and **Charles s/o Makapi v. Republic**, Criminal Appeal No. 85 of 2012 (both unreported), both of which held, in respect of statutory rape under section 130 (2) (e) of the Code, that the prosecutrix's age must be stated on the charge and proven on evidence, the appellant urges us to find the charge incurably defective for the omission complained of.

As regards the variance between the charge and the evidence on record as to the month in which the charged offence was allegedly committed, the appellant claims that the said discrepancy casts doubt on the correct date on which the victim was sodomised. Referring to the case of **Sanke Donald @ Chapanga v. Republic**, Criminal Appeal No. 408 of 2013 (unreported), he adds that the said variance rendered the charge defective and, in the circumstances, conviction could not be sustained.

Then, the appellant faults the courts below in respect of the conduct of the *voire dire* examination on PW1, a witness of tender age. He complains that the test conducted by the learned Resident Magistrate, as revealed at pages 10 and 11 of the record of appeal, did not justify a finding that the said witness understood the nature of an oath. He elaborates that the questions put to PW1 were not rational and had no bearing on the meaning of an oath or possession of sufficient intelligence. He thus urges us to ignore PW1's evidence, insisting that PW1 was illegally sworn.

Finally, it is argued that the prosecution case, as based upon the testimonies of PW1, PW2 and PW4, was contradictory and unreliable. It is contended that while PW1 claimed that the alleged act occurred on the fateful day at noon, PW2 said in cross-examination that it happened at about 17:00 hours in the evening, as can be seen at page 14 of the record of appeal. Moreover, he claims that it is stated at page 20 of the record that PW4 adduced that she received the victim at 10:00 hours when she had just started her clinic on 22nd November, 2008. The appellant surmises that it was impossible for PW4 to have received the victim for medical examination on the fateful day at 10:00 hours in the morning, which was two hours before the alleged offence was allegedly committed as adduced by the victim himself. He beseeches us to find that the evidence on record, in the

circumstances, was insufficient thereby rendering the conviction wholly unfounded. He thus prayed that the appeal be allowed and that he be set free.

On the part of the respondent, Ms. Anna Chimpaye, learned State Attorney, who was assisted by Ms. Neema Mbana, also learned State Attorney, supports the appeal on two grounds. First, she agrees with the appellant that the omission of the category of the charged offence offended the mandatory requirement under section 135 of the CPA and that the said infraction was incurable on the authority of **Marekano Ramadhani** (supra) cited by the appellant and **Jonas Ngolinda v. Republic**, Criminal Appeal No. 351 of 2017 (unreported). Secondly, the learned State Attorney concedes to the variance complained of. She adds that the variance was particularly material and hence fatal because at the preliminary hearing the initial charge alleged that the second act of sodomy occurred on 18th October, 2008, which was subsequently changed to 22nd October, 2008 upon substitution of the charge sheet. Referring to the decision of the Court in **Mussa Mwaikunda** (supra), also cited by the appellant, Ms. Chimpaye concludes that the defect on the charge coupled with the variance were fatal to the prosecution case for breaching minimum standards of fair trial resulting in the appellant not

being able to know the nature and scope of the charge against him, on the second count.

We have painstakingly examined the record of appeal in the light of the submissions of the parties and the authorities cited. In our view, the submissions of the parties raise the following issues for our determination: **first**, whether the charge against the appellant was defective for omitting the category of the charged offence on the second count and the age of the victim and if so, whether the defect was incurable; **secondly**, whether the conviction was unsustainable on account of a variance between the charge on the second count and the evidence on record regarding the month in which the alleged offence was committed; **thirdly**, whether the *voire dire* test on PW1 was improperly conducted rendering PW1's evidence liable to be discounted; and **fourthly**, whether the prosecution established its case on the second count beyond reasonable doubt.

We wish to state at the very outset of our determination that this being a second appeal, the Court is only entitled to interfere with the concurrent findings of fact made by the courts below if there is a misdirection or non-direction made by the courts below on the evidence: see, for example, **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Dickson Elia Nsamba Shapwata & Another v. Republic**,

Criminal Appeal No. 92 of 2007 (unreported). In our determination of the appeal, we shall be guided by this principle.

We begin our determination of the appeal by addressing the first issue as formulated above, that is, whether the charge on the second count was defective, and if so, whether the defect is incurable.

To begin with, we reproduce the relevant part of the assailed charge, on the second count, as hereunder:

> ***"2ND COUNT***
>
> ***OFFENCE, SECTION AND LAW:*** *Unnatural Offence c/s 154 (1) of the Penal Code, Cap. 16 of the Sexual Offences Special Provisions Act No. 4 of 1998*
>
> ***PARTICULARS OF THE OFFENCE:*** *That OSWARD s/o MOKIWA @ SUDI charged on 22nd day of October, 2008 at daytime at Kimweri Street, Oysterbay within Kinondoni District in Dar es Salaam region did have carnal knowledge of one [JM] against the order of nature."*

It is common cause that the statement of the offence as shown above lays the charge under section 154 (1) of the Code without enumerating any one of the three distinct categories of that offence which are as hereunder:

> *"Any person who–*

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or 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."

There is no doubt that in the circumstances of this case, category (a) of the offence, as shown above, ought to have been mentioned but it was not. We would agree with the parties that this defect offends section 135 (a) (ii) of the CPA that requires every statement of the offence charged to contain an accurate reference to the provision creating the offence concerned. Notwithstanding the aforesaid defect, we are settled in our mind that the particulars of the offence, looking at them in whole, are very clear and that they disclose unnatural offence under section 154 (1) (a) of the Code as the offence charged. The details disclosed gave the appellant sufficient notice of the nature of the offence charged, the act constituting the offence, the date and place where it was allegedly committed and the name of the victim. Besides, looking at the testimonies of PW1, PW2, PW3 and PW4 as well as the appellant's relatable and thoughtful cross-examination of the witnesses and the manner in which he defended himself, we take the

view that the appellant understood that he was facing the charge of having carnal knowledge of the victim against the order of nature. He was certainly not prejudiced by the defect in the statement of the offence.

We are fortified in our view by the position we took in our recent decisions in **Khamisi Abderehemani v. Republic**, Criminal Appeal No. 21 of 2017 and **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 (both unreported), where the Court confronted a situation akin to the present scenario. While in **Khamisi Abderehemani** (supra) the statement of the offence in the charge sheet under which the appellant was tried for rape cited sections 130 (1) (2) (e) and 131 (1) instead of the applicable sections 130(1), (2) (b) and 131 (1) of the Code, in **Jamali Ally** (supra) the applicable provisions of sections 130 (1) (2) (e) and 131 (2) were not cited. In both decisions, the Court held that the non-citations or citations of inapplicable provisions on the charge sheets occasioned no injustice as the particulars of the offence sufficiently disclosed the charged offence and that the prosecution's evidence on record gave a detailed account of the incident to enable the appellant appreciate the case against him and defend himself effectively. The defects, therefore, were held to be remediable under the curative provisions of section 388 of the CPA.

In the same vein, we do not find any ostensible prejudice against the appellant that the victim's age was not mentioned in the particulars of the offence that he was a child aged under ten years. Given the nature of the offence charged, the victim's age was not a decisive factor on conviction but only a vital consideration in determining the appropriate penalty to be imposed upon conviction.

Based on the foregoing discussion, we find the complaint in the first issue as formulated above wanting in merit. It stands dismissed.

We now turn to the second issue on the variance between the charge and the evidence.

As indicated earlier, both parties are concurrent that there was a variance between the charge and the evidence on record as to the month in which the charged offence was allegedly committed and that this discrepancy was material and fatal to the prosecution case. The learned State Attorney added that the variance was particularly substantial because at the preliminary hearing stage the initial charge alleged that the second act of sodomy occurred on 18th October, 2008, but that date was subsequently changed to 22nd October, 2008 upon substitution of the charge sheet.

Indeed, it is on record that the evidence adduced by PW1, PW2 and PW3 did not link the appellant to the commission of the charged offence on **22nd October, 2008**, but to an act of sodomy committed on JM a month later, that is, **22nd November, 2008**. But, for us, as did the trial court and as affirmed by the first appellate court, it is significant that the evidence given by the three witnesses that the alleged act occurred on 22nd November, 2008 was consistent with the evidence proffered by the medical witness (PW4) that the victim was examined on that fateful day. Upon full reflection, we disagree with the parties that this variance was necessarily fatal to the prosecution case.

We think that in this case the variance arose because the charge wrongly stated 22nd October, 2008 as the date when the offence on the second count was committed instead of 22nd November, 2008. In our view, the test applicable by an appellate court when determining, at first, the existence of a defective charge, and secondly, its effect on an appellant's conviction, is whether the conviction based on the alleged defective charge occasioned a failure of justice or pronounced prejudice to the appellant. This test is in consonance with the curative provisions of section 388 of the CPA we referred to earlier. Besides, section 234 (3) of the CPA provides an additional cure to errors on the time stated on the charge, be it the actual

hour at which or the definite day on which or month in which the offence was allegedly committed. We find it imperative to reproduce the said provisions, whose import is that such errors cannot make a charge fatally defective or conviction a nullity:

> *"Variance between the charge and the evidence adduced in support of it* ***with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance*** *if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof."* [Emphasis added]

In **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007 (unreported), we had an occasion to consider the effect of a variance in dates. In that case, while the charge sheet reflected the date of the incident as **23rd April, 2002**, it was, on the other hand, adduced in evidence that the date was **23rd March, 2002**. Apart from agreeing with a submission made on behalf of the Republic that the error was most probably a slip of the pen, the Court held the said variance in dates as curable under section 234 (3) of the CPA. In the recent past, we had occasion to discuss the point in **Maneno Hamza v. Republic**, Criminal Appeal No. 338 of 2014 (unreported) where we took the same position. More or less the same position has been taken by

the Court of Appeal of Kenya when interpreting and applying similar provisions of the Criminal Procedure Code of Kenya – see, for instance, **Obedi Kilonzo Kevevo v. Republic** [2015] eKLR and **Joseph Kakei Kaswili v. Republic** [2017] eKLR.

Applying the above principle in **Damian Ruhele** (supra) and **Maneno Hamza** (supra) along with the persuasive cases of **Obedi Kilonzo Kevevo** (supra) and **Joseph Kakei Kaswili** (supra) to the instant appeal, we are satisfied that the error on the charge sheet was inoffensive; it neither prejudiced the appellant nor occasioned any injustice to him. Our view is particularly based on two factors: first, that the appellant did not raise any *alibi* or similar defence whose effect depended so much on the exactness of the date alleged on the charge as being the date when the offence occurred. And secondly, that the appellant fully focused his defence on what the prosecution witnesses alleged to have occurred on 22nd November, 2008 at the crime scene. We recall, to the prosecution's credit, that the appellant admitted that the victim visited his home on that day and stayed there for over forty-five minutes. Given these facts, we find no substance in the complaint in the second issue, which we hereby dismiss.

The question whether the *voire dire* test on PW1 was improperly conducted rendering PW1's evidence liable to be discounted needs not detain

us. We wish to remark that this issue was raised on the first appeal and that the learned appellate Judge dealt with it adequately in her judgment, shown at pages 64 and 65 of the record, thus:

> *"Let me point out that the typed proceedings have omitted some record and specifically the* ***voire dire*** *test as recorded by the trial court on 25/02/2010. I read the handwritten record and it is very detailed on this aspect. the questions and answers were recorded by the learned trial magistrate. In addition, the court recorded its finding on the voire dire that the child was found to know the truth and lies and he understood the nature of oath and the duty of speaking the truth. It is after that the trial court had the child sworn before he testified."*

We, on our part, find no cause to upset the above reasoning and finding by the learned appellate Judge. It occurs to us that the impugned proceedings on *voire dire* examination, as reflected at pages 11 and 12 of the record, clearly show that the learned trial Resident Magistrate duly conducted the test on PW1, a child witness of the tender age, by asking him detailed and sensible questions that drew virtuous answers upon which he established that he understood the nature of oath. The said witness was rightly allowed

to give a sworn testimonial account. The complaint in the third issue is, by the same token, unmerited.

Finally, we deal with the issue whether the prosecution established its case on the second count beyond reasonable doubt. In doing so, we will determine, in particular, the appellant's complaint that the prosecution case, as based upon the testimonies of PW1, PW2 and PW4, was contradictory and unreliable. The contention here is that while PW1 claimed that the alleged act occurred on the fateful day at noon, PW2 said in cross-examination that it happened at about 17:00 hours in the evening. It is further claimed that that PW4 adduced that she received the victim at 10:00 hours on 22nd November, 2008 when she had just started her clinic, which was impossible because it was two hours before the alleged offence had occurred.

At the forefront, we find it apt to observe that contradictions by any particular witness or among witnesses cannot be avoided in any particular case: see **Dickson Elia Nsamba Shapwata** (supra). In that case, this Court observed that invariably in all trials, normal contradictions and discrepancies occur in the testimonies of the witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence of the incident. Moreover, the Court stated that a material contradiction or

inconsistency is that which is not normal and not expected of a normal person, and that courts have to determine the category to which a contradiction, discrepancy or inconsistency could be characterized. In the premises, the Court held that minor contradictions, discrepancies or inconsistencies which do not affect the case for the prosecution, cannot be a ground upon which the evidence can be discounted and that they do not affect the credibility of a party's case.

We find it apt to refer with approval to the observation made by the High Court in **Evarist Kachembeho & Others v. Republic** [1978] LRT n.70 that:

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story."*

In the same vein, this Court observed in **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 (unreported) that due to the frailty of human memory and if the contradictions or discrepancies in issue are on details, the Court may overlook such contradictions or discrepancies.

Having examined the portions of the record referred to by the appellant, we have no hesitation to say that the complaint at hand is mostly a red herring. It is evident from the record that while PW1 pointed out at the

trial that the incident occurred on the fateful day at noon, the evidence given by both his father (PW2) and grandmother (PW3) concerned what happened thereafter. PW2 said that he found his son weak and foul-smelling on arriving back home in the evening. A little later, PW3's attention was drawn to the matter and subsequently JM revealed what the appellant did to him earlier that day and on a previous occasion. None of the two witnesses (PW2 and PW3) claimed that the alleged offence occurred in the evening at 17:00 hours. In fact, PW3 told the trial court that after she learnt of the incident, she took the victim to the police at 17:00 hours and subsequently to the hospital where he was examined by PW4.

However, we acknowledge that the record indicates PW4 to have said that the victim was brought to her at 10:00 hours on 22nd November, 2008, which is obviously a contradiction because, by PW1's own account, the alleged unnatural offence had not yet been committed on the victim. But, this, in our view, was a trifling contradiction attributable to an error in memory due to lapse of time. No one can expect a surgeon or any medical doctor who usually attends quite a number of patients whenever at work to cast his or her mind back to the exact time at which he or she attended a particular patient. Based on the evidence of the other three witnesses particularly PW3 who took JM to hospital, it is our considered opinion that the

victim was attended by PW4 in the evening. We think the discrepancy complained of does not deflect the fact that PW4 actually attended the victim on the fateful day after he had been sodomised. Thus, the ground contained in the last issue is similarly baseless and we dismiss it.

All said, we find no merit in the appeal, which we hereby dismiss in its entirety.

DATED at **DAR ES SALAAM** this 12th day of June, 2019

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL