**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: MKUYE, J.A., KWARIKO, J.A., And MAIGE, J.A.)**

**CRIMINAL APPEAL NO. 30 OF 2018**

**MAKENJI KAMURA ..... APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of Tanzania at Mwanza)**

**(Ebrahim, J.)**

**dated the 22nd day of December, 2017**
**in**
**(DC) Criminal Appeal No. 132 of 2017**

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## JUDGMENT OF THE COURT

26th November & 3rd December, 2021

**MAIGE, J.A.:**

At the District Court of Musoma ("the trial court"), the appellant **MAKENJI KAMURA,** was charged with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16, R.E., 2002; now R.E. 2019 ("the Penal Code"). The allegation was that, on 15th day of June, 2016 at Kwibara village within Musoma District in Mara Region, the appellant had carnal knowledge of PW3, a young boy of 5 years (name withheld) against the order of nature. Upon trial, the appellant was convicted and sentenced to 30 years imprisonment. His

first appeal to the High Court at Mwanza ("the first appellate court") proved futile and henceforth the instant appeal.

Before we consider the merit or otherwise of the appeal, a brief factual account portraying the background of the case may be pertinent. On the material date at around 10:00 am, PW3 was in the paddy fields scaring birds so that they could not destroy rice plants. The appellant was somewhere near grazing cows and goats. Suddenly, the appellant invaded PW3 and laid him on the ground. Thereafter, the appellant took the clothes of PW3 off and inserted his penis into his buttocks.

Fortunately, when this incident was taking place, Revocatus Vedastus (PW4) was in his farm nearby. He noticed something unusual happening at the scene of the crime. There was someone raising up and down around the bush. When he went there to see what was going on, he found the appellant and the victim there. They were both undressed. The appellant was on the top of the victim's buttocks. PW4 raised an alarm and some villagers, including Nyaganya Mafuru (PW5), gathered at the scene of the crime. The appellant was arrested and taken to the offices of the village authority and then to Mugango

Police Station. PW3 was thereafter rushed to Musoma Referral Hospital for check-up.

Dr. Regina Bernard Msonge (PW1) medically examined the victim and observed that, though he had no any injury, he felt painful when she touched his anus. She realized that, the victim had been carnally known against the order of nature. In her remarks appearing at the second page of PF3 (exhibit P1), PW1 concluded that, the victim had been sodomized "since there is tenderness per anus, also the boy has a lot of fearing".

In his testimony in defense, the appellant admitted presence at the scene of the crime on the material date. He equally admitted to have stayed with the victim for a while on the material date and time. He admitted further to have been arrested by the villagers after an alarm had been raised to the effect that, he had sodomized the victim. He admitted further to have been arrested and put into lockup for five days before being arraigned in Court. Nonetheless, he did not admit commission of the offence.

In his judgment, the trial magistrate was persuaded by the evidence of the victim (PW3) and the confessional statement by the appellant (exhibit P2) as corroborated by the evidence of PW1, PW4 , PW5 and the medical report in exhibit P1. He, therefore, held the appellant culpable of the offence. On appeal, the High Court discarded the evidence in exhibit P2 for offending the mandatory requirement of section 50(1) (a) and (b) of the Criminal Procedure Act, Cap. 20 R.E. 2019 ("the CPA"). That aside, it found the evidence of PW3 as corroborated by that of PW1, PW4 and the medical report in exhibit P1 sufficient to connect the appellant with the offence. It thus upheld the decision of the trial court. In the memorandum of appeal, the appellant has raised ten grounds which can be paraphrased as follows:-

1. *That, the trial was conducted without the appellant being afforded a right to be represented despite the offence being serious.*
2. *That the charge against him was illegally admitted after expiry of more than four months from the date of his arrest and dentation without a court permission.*
3. *That, the appellant was charged without the allegation against him being investigated into.*

4. *That, the principle of voire dire test conducted by the trial court was defective as did not put in record the actual response made by PW3 as per the requirement of the law.*
5. *That, the appellant was denied a right to cross examine the prosecution witnesses.*
6. *That the age of PW3 was not proved to the required standard.*
7. *That in the alternative to the 6th ground, the evidence of PW3 was doubtful and incredible.*
8. *That, the case against the appellant was cooked as the evidence of PW1 to the extent that no bruises and semen was found and that, the PW3 anus was dry, was contradictory to that of PW2, PW3, PW4, PW5 and PW6.*
9. *That, trial court wrongly believed the evidence of PW1 that worries, unhappiness and pain was a proof of penetration without considering that it might have been caused by other causes.*
10. *That, the High Court erred in not considering failure by the prosecution to call the leaders of the area such as 'VEO' or 'WEO' came to testify on effect as they knew if brought they should exonerate the appellant. (sic).*

When the appeal came up for hearing, the appellant appeared in person and was not represented. He adopted the grounds of appeal and asked the Court to let the Republic submit first subject to his right to rejoin where necessary.

On the other hand, the Respondent Republic enjoyed the services of Mr. Frank Nchanila and Ms. Agma Haule, both learned State Attorneys. Ms. Haule, who made the submissions addressed each and every ground of appeal and urged the Court to confirm the conviction and sentence and dismiss the appeal. The appellant was at the end afforded an opportunity to submit in rejoinder. He had nothing material to remark rather than asking for the mercy of the Court as he had already been in prison for quite a long time.

With the above exposition of the nature of the controversy, it is desirable to consider the merit or otherwise of the appeal, of course, without going beyond the notorious principle of law that, a second appellate court like this would only depart from the concurrent factual findings of the lower courts if it is satisfied that, there has been misapprehension of evidence, violation of some principles of law or miscarriage of justice. See for instance, **the Director of Public Prosecutions v. Jaffar Mfaume Kawaka,** [1981] TLR 149.

We shall for obvious reason, address grounds numbers 1, 2, 3, 4, 5 and 6 first because they raise pure points of law. Each of these

grounds shall be addressed separately save for the 4th and 7th grounds which shall be addressed together under the proposition that, the evidence against the PW3 was improperly admitted. Finally, we shall address the last three grounds under the proposition that, the case against the appellant was not proved beyond reasonable doubt.

The complaint in the first ground of appeal is that, the appellant was denied a right to be represented in the trial despite the charge against him being serious. In response, Ms. Haule submitted that, aside from those offences which attract capital punishment, right to representation is not automatic in other offences. The person who is in need of it, she clarified, has either to engage an advocate or apply for legal aid under the provisions of the Legal Aid Act, Cap. 21 R.E. 2019 ("the LAA)" . In her view therefore, the claim as to denial of a right to be represented is an afterthought and should be ignored.

With respect, we are in fully subscription with the learned State Attorney that, in cases like the instant one, the right to representation is not automatic. The person in need of such service has a duty to engage an advocate or apply for legal aid in terms of section 33(1) of the LAA in the event that he is unbale to hire an advocate. As the

appellant neither informed the trial court that he would wish to engage an advocate nor to apply for legal aid, he cannot be heard at this stage complaining that he was denied a right to be heard. The first ground of appeal is thus dismissed.

This now takes us to the second ground of appeal wherein the appellant is complaining that he was not arraigned to court within 24 hours from the date of arrest and detention as the law requires. In her submission, the learned State Attorney while in agreement with the appellant that under section 32(1) of the CPA, the appellant should have been brought to court within 24 hours from the date of his arrest and detention and that; it took more than four months for him to be taken to court, it is her submission that, the omission, much as it did not lead to failure of justice, is tolerable. In any event, she submitted, the appellant ought to have asked for police bail or applied to be produced to court.

This is not the first time we are dealing with an issue like this. We were confronted with an akin situation in **Jaffari Salum @Kikoti versus v. R,** Criminal Appeal No. 370 of 2017 (unreported),where, like in this case, the appellant faulted the judgment and proceedings of

the trial court on account that he was arraigned to the trial court after 39 days from the date of his arrest and detention contrary to section 32(1) of the CPA. We held that, the omission was a minor irregularity which could not vitiate the judgment and proceedings of the trial court. Guided by that authority, we dismiss the second ground of appeal.

In the third ground, the complaint is that, the appellant was charged without his case being investigated into. We fail to see any merit on this assertion. The fact that the allegation against the appellant was investigated into before the appellant being charged, was clearly stated in the memorandum of facts. The appellant did not deny about it. As that is not enough, there is on the record the testimony of No. 5543 D/CPL Awamu PW6, one of the policemen who were involved in the investigation. It is this witness who recorded the cautioned statement of the appellant during investigation process. In the circumstance, the complaint is devoid of any merit and it is dismissed.

Next for consideration is the complaint in the firth ground that, the appellant was not afforded a right to cross examine the witnesses. On this, the record speaks for itself. The evidence of the prosecution

witnesses is found at pages 10-17 of the record . As rightly submitted for the respondent, it is reflected in the respective pages that, the appellant was afforded an opportunity to cross examine each of the prosecution witnesses but opted not. More importantly, the record indicates that, when the appellant was being cross examined by the public prosecutor, he told the trial court that he did not cross examine the prosecution witnesses because he did forget. On further cross examination, he said, he was afraid to cross examine PW5 although he was telling what had happened. The ground is thus without merit and it is dismissed.

We move to the sixth ground as to the proof of the age of the victim. The appellant complains that the same was not proved beyond reasonable doubt. For the respondent, it was submitted in the first place that, whether the victim was a child of five years was not in dispute since it was admitted during preliminary hearing. In the alternative, it was submitted, the unopposed evidence of the doctor (PW1) was sufficient to prove the age of the victim.

We have examined the record and established that; in accordance with paragraph 3 of the facts of the case which was read and explained to the appellant during preliminary hearing and which was admitted by the appellant, the victim was described as a child of five years. The age of the child therefore, was an established fact which did not require proof.

Assuming, without deciding that, the age of the victim was in dispute, we agree with the learned State Attorney that, the evidence of PW1 was sufficient to prove the assertion. As we understand the law, age of a child can be proved by the victim, relatives, parents, medical practitioner or a birth certificate. It may as well be proved by inference of existing facts. [See, for instance, **Issaya Renatus versus v. R** Criminal Appeal No. 542 of 2015 and **Iddi s/o Amani v. R,** Criminal Appeal No. 184 of 2013 (both unreported)]. In this case, PW1, the doctor who examined the victim, testified that PW3 was a child of five years when he was produced to him for medical check-up on the material date. Such a piece of evidence was not challenged. In our considered view, the age of the victim was proved and, therefore, the 6th ground of appeal is dismissed.

We shall now address the 4th and 7th grounds which in essence fault the lower courts in placing reliance on the evidence of PW3 which was received without complying with the mandatory requirement of section 127(2) of the Evidence Act, Cap. 6, R.E., 2019. In her brief comments on this point, Ms. Haule admitted that, the respective provision was not substantially complied with as there is nothing in the record of appeal to the effect that, PW3 promised, before giving testimony that, he would tell the truth and not lies. Therefore, relying on the case of **Godfrey Wilson v. R**, Criminal Appeal No. 168 of 2016 (unreported), the learned State Attorney urged the Court to expunge the testimony of PW2 from the record. She submitted however that, the expungement of the said evidence aside, the remaining evidence is capable of proving the case beyond reasonable doubt.

We have considered the submission by the learned State Attorney in line with the testimony of PW3 on the record. We are in agreement with her that, the evidence of PW3 was admitted improperly. PW3 was during trial, a child five years. Admission of evidence of such a person is governed by the provision of section

127(2) of the Evidence Act, [Cap. 6, R.E. 2002; now R.E. 2019] as amended by Act No. 4 of 2016 which provides as follows: -

> *"(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies".*

From the above quoted provision, it is apparent that, giving a promise to tell the truth and not lies, is a precondition for admissibility and reliability of the evidence of a child of tender age who does not understand the nature of oath. As rightly submitted by the learned State Attorney, there is nothing on the record to the effect that PW1 promised to tell the truth or that he did not understand the nature of oath.

A mere remark by the trial magistrate like in this case that, he interviewed the child and he promised to tell the truth, is not by itself a proof of the compliance of the said precondition. The trial magistrate was obliged in the first place to inquire into and find out if the child understood the nature of oath. In the event that he found that he did not, he should have caused the child to promise to tell the truth and not lies and the promise should have been recorded in the proceedings.

There are a number of decisions supporting this position. One of such decisions is the case of **Godfrey Wilson v. R** (s*upra*). In particular, it was stated as follows: -

> *"Therefore, upon making the promise, such promise must be recorded before the evidence is taken".*

In the circumstance, we uphold the 4th and 7th grounds of appeal and expunge the evidence of PW3 from the record. After expunging the testimony of PW3, the question which we have to address is whether the remaining evidence is sufficient to sustain conviction against the appellant. We shall hereinafter address this issue in line with the last three grounds of appeal.

The offence with which the appellant was charged is unnatural offence. In accordance with the record, the fact that the appellant and the victim were known to each other appears not to be in dispute. Equally so, as between the appellant and PW4. They were all residing in the same village. The incident in question, it is common ground, happened during morning. In the circumstance, the issue of identity does not arise. The questions to be considered are two. **One**, whether the appellant was carnally known against the order of the nature on

the material date. **Two**, whether it was the appellant and no -body else who committed the offence. As it is the procedure, the burden of proof is on the prosecution. It was to prove the same beyond reasonable doubt. If any reasonable doubt was to arise, it is the law, it was to be applied at the benefit of the appellant.

Like rape, one of the essential ingredients of unnatural offence is penetration. Penetration can be proved by direct evidence as much as it can by circumstantial evidence. The best evidence in sexual offences , it is trite law, is that of the victim of the offence. [See, for instance, **Soleimani Makumba v. R** [2006] TLR 379)] In here, the evidence of the victim has been expunged. There is, if we can say, no direct evidence to prove penetration. Ms. Haule submitted however that, the evidence of PW4 if carefully considered with that of PW1 and the expert evidence in PF3 would circumstantially establish not only the element of penetration but connection of the appellant with the offence as well.

We have noted however from the record that, the documentary evidence in the PF3 (exhibit P1) was admitted without its contents being read out and explained to the appellant. That was obviously a fatal irregularity which vitiated the respective exhibit. This is in line

with the principle in **Bashiri John v. R**, Criminal Appeal No. 486 of 2016 (unreported). In the circumstance, we expunge exhibit P1 from the record.

We shall now proceed with the evidence of PW4. As we disclosed elsewhere in this judgment, this particular person, upon suspecting that something uncommon was going on at the scene of the crime, he went there and found both the appellant and PW3 naked. The appellant was on the buttocks of PW3 who was bitterly crying. In his defense evidence, the appellant admitted presence at the scene of the crime at the material day and time with the appellant. He further admitted being arrested by PW4 and other villagers in connection to the offence in question after an alarm had been raised. Besides, during cross examination, the appellant told the trial court that, he did not penetrate his penis into PW3's anus " except that was our play with him". More to the point, there is an oral account of PW1 to the effect that, when PW3 was produced to her for medical examination, was in serious pains whenever she touched his anus.

At this juncture, we find it important to observe that, the evidence of PW4 and PW1 was not challenged by way of cross examination or independent evidence. There is thus no reason why such evidence should not be believed. For, as held in **Goodluck Kyando v. R** [2006] TLR 363, every witness is entitled to credence and must be believed unless there are cogent and good reasons for not believing him. We therefore take it that the evidence of PW1 and PW4 was credible and reliable.

In our view, the fact that PW4 found the appellant being naked on the buttocks of a bitterly crying child and shortly thereafter PW4 came and found the two naked, would, if linked with undisputed evidence of PW1 that few hours after the victim was in serious pains when his anus was being touched, lead to an inference that PW3 was carnally known by the appellant against the order of the nature.

The complaint in the 8th ground of appeal that, the offence was not proved because of absence of bruises and semen in the anus of the victim, cannot shake the prosecution evidence. The reason being that, as held in **Daniel Nguru & Others v. R**, Criminal Appeal No. 178 of 2004 (unreported), penetration is not proved by presence of

semen or bruises on the body of the victim. Instead, as further held in **Hamis Masanja v. R,** Criminal Appeal No. 160 of 2011 (unreported), it is proved by entry of the male organ into the private parts of the victim however slight it may be . On this, the evidence of PW1 was very clear that, feeling painful by the victim when touched in his anus was an indication that he has been sodomized.

The complaint in the 9th ground of appeal that, the two lower courts relied on pains and fear as proof of penetration without establishing their cause is not founded on the record. The judgment of the High Court upholding the conviction of the trial court was clear and analytical on this point. It linked the pains and fear with the factual narration of PW4 at the scene of the crime and established without any reasonable doubt that, the source of the pains of the victim in his anus was the act of sodomy by the appellant.

There was also a complaint in the 10th ground of appeal that witnesses from the village authority were not called. However, we find this ground of appeal to have no merit. The allegation by the prosecution and the evidence on the record did not suggest presence of any of the village leaders at the scene of the crime before or after

the incident. In the circumstances, the evidence of the village leaders was immaterial.

In the final result and for the foregoing reasons, therefore, the appeal is without merit. It is, accordingly, dismissed.

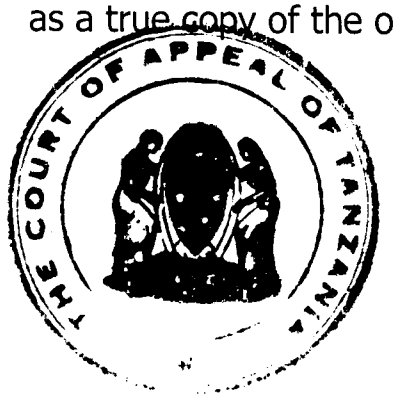
**DATED** at **MWANZA** this 2nd day of December, 2021.

R. K. MKUYE
**JUSTICE OF APPEAL**

M. A. KWARIKO
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

This Judgment delivered this 3rd day of December, 2021 in the presence of Appellant in person and Ms. Rehema H. Mbuya, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.




F. A. MTARANIA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**