**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[ARUSHA SUB-REGISTRY]**

**AT ARUSHA.**

**CRIMINAL APPEAL NO. 27 OF 2022**

(Originating from the Resident Magistrates' Court of Arusha,

Criminal Case No. 265 of 2020)

**CHRISTOPHER SABAYA MOLLEL ..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

15/02/2023 & 29/03/2023

**KAMUZORA, J.**

The Appellant herein preferred this appeal in the quest to have his conviction and sentence imposed by the Resident Magistrates' Court of Arusha (hereinafter the trial court), overturned. In the trial court, the Appellant stood charged for Unnatural Offence contrary to section 154(1) and (2)(a) of the Penal Code, Cap. 16 [R.E 2019] (hereinafter Cap. 16). After full trial, the trial magistrate convicted and sentenced him to serve life imprisonment.

The background facts of the case leading to this appeal can be discerned from the evidence adduced as follows: Glory Fanuel Mungas (PW1), the mother of the victim does the business of selling firewood. She accounted that on 03/10/2020, at 06: 00a.m the Appellant who is her

neighbour went at her residence to buy firewood. PW1 asked the Appellant if he knew Pastor Martin, whereas the Appellant responded affirmatively. She asked him to take firewood to the said pastor. She also sent E.F (the victim who is a boy aged twelve years to accompany him, so that the latter would return back with the money. They parted but when the victim returned back, he asked PW1 if the Appellant is a parent. The victim later narrated to PW1 that when they were on their way back from the pastor's house, the Appellant stopped the motorcycle on the road and ordered the victim to undress his short trouser. When the victim declined, the Appellant forcefully undressed him and laid the victim on the ground. The Appellant also undressed himself and inserted his penis in the victim's anus and had carnal knowledge of the victim against the order of nature. After that narration, PW1 went with the victim to the police station where she was issued with PF3 and sent the victim to Moivaro Dispensary where it was discovered that the victim was sodomised.

The Appellant refuted the allegation during his defence. After full trial, the trial magistrate was convinced that the prosecution had proved the charge against the Appellant beyond all reasonable doubts. The Appellant was convicted and sentenced to life imprisonment. Dissatisfied by both conviction and sentence, the Appellant has preferred this appeal on the following grounds verbatim:

1. *That, the trial court erred in law in convicting the Appellant on a charge which does not cite the proper provision of the offence charged;*
2. *That, the trial court erred in law in convicting the Appellant on the wrong provision of the law;*
3. *That, the trial court erred in law in sentencing the Appellant on a non-existent provision of the law;*
4. *That, the trial court erred in acting on a cautioned statement which was recorded without adherence to the law;*
5. *That, the trial court erred in recording the evidence of PW2, a child of tender years without adherence to section 127(2) of the Evidence Act, Cap. 6 [R.E 2019]; and*
6. *That, the trial court erred in shifting the burden of proof of the offence charged to the Appellant.*

At the hearing of the appeal, the Appellant was represented by Mr. Emmanuel Fredrick Kinabo, learned advocate while the Respondent Republic, was represented by Ms Riziki Mahanyu, learned State Attorney. Hearing of the appeal proceeded through filing written submissions.

Submitting in support of the 1st, 2nd and 3rd grounds of appeal combined, Mr. Kinabo averred that the Appellant was charged for Unnatural Offence contrary to section 154(1)(2)(a) of Cap. 16 but subsection 2 of that section does not have subdivisions. He pointed out that the Appellant was charged under a non-existent provision of the law and convicted under a wrong provision of the law. He referred page 10 of

the trial court judgment which shows that the Appellant was convicted under section 158(1) and (2)(a) of Cap 16. According to Mr. Kinabo, section 158 deals with incest by male, therefore it was irrelevant provision in convicting the Appellant. He maintained that since the Appellant was convicted on a wrong provision, it is as good as no conviction entered. The counsel for the Appellant added that the Appellant was sentenced based on a non-existent provision of the law as he was sentenced under section 154(1) and 154(2)(a) which provision does not exist in Cap. 16. He was of the view that the Appellant ought to have been sentenced under section 154(2) of Cap. 16.

The above anomalies according to Mr. Kinabo were fatal because improper citation which touch an ingredient of the offence charged renders the charge defective. He accounted that the age of the victim is an important factor in determining the sentence to be imposed. He relied on the Court of Appeal decision in **Charles Kakubo @ Kolin Vs. Republic**, Criminal Appeal No. 49 of 2018 (unreported).

The counsel for the applicant also faulted the charge sheet stating that it showed that the victim was 11 years old but in their testimonial accounts, PW1 stated that the victim was 13 years old. That, the victim during examination in chief stated that he was born in 2004, which entails that he was 17 years of age. According to Mr. Kinabo, the discrepancies

seriously prejudiced the Appellant especially in ascertaining the victim's age.

Submitting in support of the 5th ground of appeal, the learned advocate contended that according to the charge sheet as well as the evidence of PW1, the victim was a child of tender age and at the time he testified and the trial court treated him as such. That, it is unfortunate that before taking down his evidence, the trial court did not comply to the provisions of section 127(2) of the Evidence Act. He asserted that PW2 testified under oath but being a child of tender age, there was no indication whether he knew the nature and meaning of oath. That, the mere fact that the trial magistrate recorded that the witness knew the meaning of oath without further inquiry in the form of questioning him to ascertain whether he understands the meaning and nature of oath, in Mr. Kinabo's view, was in total contravention of section 127(2). To bolster his argument, he referred two decisions of the Court of Appeal: **Ramson Peter Ondile Vs. Republic**, Criminal Appeal No. 84 of 2021 and **Issa Salum Nambaluka Vs. Republic**, Criminal Appeal No. 272 of 2018 (both unreported). He insisted that since the evidence of PW2 was taken in contravention of the law, it ought to be expunged from the record.

In his submission, Mr. Kinabo also raised another additional ground challenging admission of the PF3, exhibit P1. He submitted that the same

was admitted unprocedurally because it was not read to the parties after being admitted in evidence. Relying on the case of **Bulungu Nzungu Vs. Republic**, Criminal Appeal No. 39 of 2018 (unreported), he prayed that exhibit P1 be expunged from the Court record.

Submitting in respect of the 4th ground of appeal, Mr. Kinabo contended that the standard form adopted in recording cautioned statement, exhibit P2 was not in conformity with the law. That, the form did not have an option where the Appellant would have signed if he wished not to record the statement which is his right under section 53(c)(1) of the Criminal Procedure Act, Cap. 20 [R.E 2019] (hereinafter the CPA). It was his further contention that PW4 did not inform the Appellant whether he had right not to record exhibit P2. He added that exhibit P2 lacks proper certification by the Appellant showing that he read the contents therein and understood them before signing as prescribed under section 53(3)(a)(i) and (ii) of the CPA.

The counsel for the Appellant further submitted that the Appellant testified that he was at Chekereni police post on 03/10/2020 from around 06:00pm until 04/10/2020 when he was sent to Usa River police station where he recorded the statement. That, this in his view, contradicts the evidence by PW4 who stated that he recorded the statement on 13/10/2020 at 19:00hrs to 20:00hrs. He referred section 50(1) of the CPA

arguing that the statement ought to have been recorded within four hours from the time the Appellant was arrested. He called upon this Court to expunge exhibit P2 from the Court record because there was no evidence that it was recorded within the prescribed time basing on the decision in the case of **Zabron Joseph Vs. Republic**, Criminal Appeal No. 447 of 2018 (unreported).

Expounding the 6th ground of appeal, the Appellant's counsel averred that it was the prosecution's duty to prove that the statement was recorded in compliance with the law unlike the appeal under consideration where the trial magistrate shifted the burden to the Appellant by stating that the Appellant did not contest when exhibit P2 was tendered and admitted in evidence. He maintained that the case against the Appellant was not proved to the hilt and he urged this Court to allow the appeal by quashing the conviction and setting aside the sentence imposed to the Appellant.

For the Respondent's side, the learned State Attorney at the outset supported the conviction and sentence imposed by the trial court. Responding to the 1st, 2nd and 3rd grounds of appeal, she admitted that in the offence was wrongly cited as Unnatural Offence contrary to section 154(1), (2)(a) of Cap. 16 instead of section 154(1)(a) and (2) of Cap. 16. However, she pointed out that it was mere typographical error. She

strenuously insisted that the particulars of the offence were very clear as they enabled the Appellant to fully understand the nature and seriousness of the offence that he was being tried for and he readily gave his defence. That, the Appellant was made aware of the date the offence was committed, the place where it was committed, the name of the victim and his age. Further, that the evidence of PW2 (the victim) was detailed on how the offence was committed to him, hence the particulars and the evidence adduced eliminated all prejudices against the Appellant. To back up her stance, she relied on the Court of Appeal decision in **Jamaly Ally @ Salim Vs. Republic**, Criminal Appeal No. 52 of 2017 (unreported) where the irregularities over non-citation and citation of inapplicable provision in the statement of the offence was considered curable under section 388 (1) of the CPA.

Regarding the 4th ground of appeal, it was Ms Riziki's contention that the allegation that the cautioned statement was recorded in contravention of the law, is an afterthought. She averred that when the said statement was tendered and admitted in evidence, the Appellant did neither object nor raised the alleged irregularities. To support her argument, she referred the Court to the case of **Nyerere Nyague Vs. Republic**, criminal Appeal No. 67 of 2010 (unreported).

In respect of the 5th ground, it was learned State Attorney's submission that the evidence of PW2 was recorded in compliance with section 127(2) of the Evidence Act because that section does not bar a child of tender age from testifying under oath. She added that the court was satisfied that PW2 possessed sufficient knowledge on the nature of oath thus, gave sworn evidence.

Responding to the 6th ground of appeal, Ms Riziki submitted that the prosecution gave sufficient evidence that proved the charge against the Appellant beyond all reasonable doubts. That, the evidence of PW2 was detailed on how the Appellant sodomised him and that evidence is the best evidence in sexual offences cases as held in the case of **Selemani Makumba Vs. Republic** [2006] TLR 380.

On the additional ground of appeal, the learned State Attorney conceded that the PF3, (exhibit P1) was not read out to the parties after it was admitted in evidence. She readily conceded to the prayer that the same should be expunged from record in considering the decision in the case of **Robinson Mwanjisi and 3 Others Vs. Republic** [2003] TLR 218. Ms Riziki however was of the view that despite expunging exhibit P1 from the record, still the evidence by PW3 that he examined PW2, found bruises in his anus concluding that he was sodomised, sufficiently covered

the contents in exhibit P1. In concluding, prayed for dismissal of the appeal for being devoid of merits.

I have examined the lower court record, considered the grounds of appeal and the rival arguments of both counsel for the parties. In determining this appeal, I wish to begin with the additional ground of appeal. Mr. Kinabo challenged admission of exhibit P1 since the same was not read out to the parties after being admitted in evidence. The learned State Attorney conceded and prayed that the same be expunged.

I entirely agree with both counsel that the PF3 which was tendered and admitted as exhibit P1, was unprocedurally admitted in evidence. The record shows that the PF3 was tendered by PW3 and the same was admitted as exhibit P1. After its admission, the contents were not read out to the parties as required under the law. The essence of reading documentary exhibits after being admitted into evidence was underscored in **Nkolozi Sawa and Another Vs. Republic**, Criminal Appeal No. 574 of 2016 (unreported) where it was held:

> *"In our considered view, the essence of reading the respective exhibits is to enable the accused to understand what is contained therein in relation to the charge against them so as to be in a position of making an informed and rational defence. Thus, the failure to read out the documentary exhibits was irregular as it denied the Appellants*

*an opportunity of knowing and understanding the contents of the said exhibits."*

Similarly, in this matter, given that the trial court omitted to read over the contents of the PF3 in court to enable the Appellant understand its nature of evidence and prepare a focused defence, it is obvious that it prejudiced him. Subscribing to the above decision, the PF3, Exhibit P1 is expunged from the court record. I therefore find merit in this ground but I agree with Ms. Riziki that the position is now clear that expunging the PF3 does not bar the court from considering the evidence of the doctor.

As regards to the 1st, 2nd and 3rd grounds of appeal, three issues were raised by the Appellant's counsel on the provision cited in the charge sheet, the provision used in convicting and sentencing the Appellant. The counsel for the Appellant faulted the trial court decision stating that the charge against the Appellant was defective for being preferred on a non-existent provision of the law. Perusal of the record clearly indicates that the Appellant was charged of Unnatural Offence contrary to section 154(1)(2)(a) of Cap. 16. I entirely agree with Mr. Kinabo that subsection 2 of section 154 does not have part (a) as shown in the charge sheet. For easy of reference, section 154 read:

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

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

*(b) has carnal knowledge of an animal; or*

*(c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.*

*(2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."*

It is clear from the above provision that subsection 2 of section 154 does not have parts. The question is whether by charging the Appellant under section 154(1)(2)(a) in the charge sheet instead of 154(1)(a) and (2) of Cap. 16 rendered the charge defective.

My answer in the above question is analogous to the submission by the learned State Attorney that it does not. The reason is that apart from adding part (a) which does not exist in the provision, the remained cited part of the provision, section 154(1)(2)(a) clearly creates the offence and sentence for unnatural offence. The charge sheet also clearly stipulates particulars of offence which in my view, enabled the Appellant to understand the nature and seriousness of the offence that faced him. That apart, the evidence by PW1, PW2, PW3 and PW4 gave detailed explanation on how the offence was committed and the Appellant cross examined them. The Appellant also gave his defence in relation to the offence he was charged with. Therefore, the particulars of the offence

eliminated all possible prejudices on the Appellant. The same position was reaffirmed by the Court of Appeal in the case of **Jamali Ally @ Salum** (supra), when faced with a similar scenario. The Court held:

> *"It is our finding that the particulars of the offence of rape facing the Appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices.* ***Hence, we are prepared to conclude that the irregularities over non-citations and citations of the inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA"*** (Emphasis added)

Subscribing to the above position of the law, the error in the charge sheet as correctly submitted by the learned State Attorney is one curable under section 388(1) of the CPA. The first issue is without merit. However, before I proceed on other issues raised on the 1st, 2nd and 3rd grounds on whether the Appellant was convicted and sentenced under the correct provision, I will first determine issues related to evidence to see if they form basis for conviction. This takes me to the 4th and 6th grounds of appeal.

On those two grounds, the Appellant challenges the cautioned statement for being recorded without complying legal requirement and the fact that in considering the said statement the trial court shifted the burden of proof to the Appellant. The Appellant's counsel insisted that the

cautioned statement of the Appellant was recorded in contravention of sections 50 and 53 of the CPA.

Going through the record, the charge sheet shows that the alleged offence was committed on 3rd October 2020. According to the evidence of the police officer (PW4), the Appellant was sent to Usariver police station from Chekereni police post on the same day the offence was committed, that is, 3rd October 2020 at about 06 to 07pm and he recorded his statement from 07 to 08pm. The statement itself, Exhibit P2 shows that it was recorded on 3rd October 2020 and the recording was completed at 08pm. The Appellant agreed that he was arrested on 3rd October and sent to Chekereni at 06pm. He however claimed that he stayed there until 4th October 2020 when he was transferred to Usariver police station and his statement recorded. The fact that the Appellant agreed that he was arrested on 3rd October 2020 support prosecution evidence that he was interrogated the same day. There is no other evidence supporting the Appellant's version of story that he was sent at Useriver on 04th October 2020. I therefore find no reason to disbelieve the prosecution evidence on the date and time the Appellant's statement was recorded. I therefore conclude that the prosecution evidence is satisfactory proving that the Appellant's statement was recorded within the prescribed time limit under the law.

It was however argued by the counsel for the Appellant that the prescribed form used in recording the statement did not have an option where the Appellant would have signed if he wished not to record the statement as required by section 53(c)(1) of the Criminal Procedure Act, Cap. 20 [R.E 2019] (hereinafter the CPA). I do not agree with the argument by the counsel for the Appellant because, the form (Exhibit P2) contain words *"hivyo basi haulazimishwi kusema neno lolote kuhusiana na tuhuma hizi isipokuwa kwa hiyari yako mwenyewe...."* Those words were clearly giving the Appellant right to state if he wished not to record statement. The accused's response would have been recorded anywhere in the statement sheet and signed by the Appellant. I therefore do not see how the form prevented the Appellant from excessing his right if he wished not to record the statement. Based on the above discussion, I also do not agree with the contention by Appellant that PW4 did not inform the Appellant whether he had right not to record statement.

On the argument that exhibit P2 lacks proper certification by the Appellant showing that he read the contents therein and understood them before signing as required by section 53(3)(a)(i) and (ii) of the CPA, I find the same baseless. It my observation is that exhibit P2 contain certification at the last page reading *"Mimi Christopher s/o Sabaya Mollel nathibitisha kuwa haya maelezo ndio malelezo yangu nimeyasoma/*

*nimesomewa na kuona kuwa ni sahihi".* After that certification, the Appellant signed the statement.

In my view, the statement met all legal requirement and that is why it was not objected during its tendering or raise any point claiming irregularity in recording the statement. When the Appellant was availed opportunity to cross examine PW4 regarding exhibit P2, did not cross examine the witness on the time and date the statement was recorded.

It is trite law that statement will be presumed to have been voluntarily made until objection is made to its admissibility by the defence. This was the holding of the Court of Appeal in the case of **Seleman Hassan Vs. Republic**, Criminal Appeal No. 364 of 2008 (unreported) and the case of **Ayubu Andimile @ Mwakipesile**, Criminal Appeal No. 503 of 2017 (unreported).

On the 5th ground of appeal the Appellant faults the procedures used in recording the evidence of PW2 who was a child of tender age. Section 127(4) of the Evidence Act defines who is a child of tender age as follows:

> *"For the purpose of sub-section (2) and (3), the expression 'child of tender age' means* ***a child whose apparent age is not more than fourteen years"*** (Emphasis added).

Although there is argument on the victim's age at the time of commission of offence, I will take a stance that at the time of giving his

evidence, PW2 was recorded to have 13 years of age, means a child of tender age within the meaning of the provision of the law. The court recorded that the victim knew the meaning of oath and proceeded on recording his evidence. This is captured at page 12 of the typed proceedings of the lower court which read: -

> *"PW2: E.F, 13 years, reside in Moivaro, a student at Shangarai, Christian,* ***know the meaning of oath swear*** *and state as follows..."* (Emphasis added).

Now, the question is whether by that record, the requirement under section 127 (2) of TEA was complied with. The said section 127(2) of the Evidence Act provides:

> *"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****."* (Emphasis added)

From the plain meaning of the above provision, it is apt to note that a child of tender age may either give evidence without taking oath or affirmation but upon promising to tell the truth and not lies. The position in the above provision was well adopted by the Court of Appeal in **Hamisi Issa Vs. Republic,** Criminal Appeal No. 274 of 2018 (unreported). The circumstance above applies where a child witness does not understand nature of oath. The Court of Appeal in **Wambura Kiginga Vs. Republic**,

Criminal Appeal No. 301 of 2018 (unreported), gave broader interpretation of section 127(2). It held:

> *"This Court has interpreted the section to mean that, a child of tender age, which means a child of an apparent age of not more than fourteen (14) years as provided under section 127(4) of the Evidence Act, may legally give evidence if one of the two conditions is fulfilled.* ***One, if before testifying the child swears or affirms; and two, if he or she promises to tell the truth and not lies in the course of giving evidence.*** *According to the position of this Court at the moment, if none of the two conditions is fulfilled and the evidence of the child is taken, such evidence is deemed to have no evidential value and it must be expunged from the record."*

From the holding in the above case, a child of tender age can be sworn to testify in court. But that is only when the court is satisfied that the child capable of understanding the meaning and nature of oath. In the case at hand, PW2 gave sworn evidence after the trial magistrate was satisfied that he understood the nature of oath.

It was argued by the counsel for the Appellant that the trial magistrate was wrong to just record that the witness knew the meaning of oath without further inquiry in the form of questioning him to ascertain whether he understood the meaning and nature of oath. To him that was in total contravention of section 127(2).

Broader interpretation of section 127 can be found in a number of decisions by the Court of Appeal of Tanzania. In the case referred by the Appellant, **Ramson Peter Ondile (supra)** the Court of Appeal referred its decision in the case of **Salum Nambaluka (supra)** where it was held:

> *"The provision enjoys the trial courts when dealing with children of tender age as witness, to still conduct test on such children to test their competence. It is unthinkable that section 127 (2) of the Evidence Act can be blindly applied without first testing a child witness if he does not understand the nature of an oath and if he is capable of comprehending questions put to him and also if he gives rational answers to the questions put to him"*

In Criminal Appeal No. 385 of 2018, **Seleman Moses Sotel @ White Vs. The Republic,** the Court of Appeal at page 8 of judgment quoted the proceedings of the lower court as follows: -

> *".... the following is what transpired before the said witness gave her evidence:*
> *"PW3 [F.S.H.] Resident of Mchinga Road, Islam,*
> *standard 3 student at Stadium Primary School, 10*
> *years, Makonde.*
> *Affirmed and state (sic)*
> *Court: The victim know (sic) the meaning of oath*
> *and she is competent to testify before this court."*
> From the above proceedings the Court held as follows: -

*"It is clear from the above excerpt that PW3 understood the nature of oath and thus the decision by the trial court to take her evidence on affirmation."*

At page 11 to 12 the court concluded as follows: -

*"In our considered view therefore, in the present case, the trial magistrate acted properly in taking the evidence of PW3 on affirmation after the witness had been found to understand the nature of oath. From the wording of s. 127 (2) of the Evidence Act, it cannot be said that her evidence was improperly taken. Obviously, the provision is silent on the procedure which a trial court should apply to decide whether a child witness should give evidence on oath or affirmation or upon a promise to tell the truth and on undertaking not to tell lies. Addressing that lacunae, the Court had this to say in the case of* ***Godfrey Wilson (supra).***

*"The question, however, would be on how to reach at*
*that stage. We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions which may not be exhaustive depending on the circumstances of the case as follows:*

*1. The age of the child.*

*2. The religion which the child professes and whether she/he understands the nature of oath.*

*3. Whether or not the child promises to tell the truth and not to tell lies."*

Referring the procedures adopted in **Godfrey Wilson (supra),** the court in **Seleman Moses Sotel (supra)** was satisfied that the evidence of the child of tender age was properly recorded under oath. The situation

in **Seleman Moses Sotel** is much relevant to our case at hand. The trial magistrate inquired from the witness and recorded the name, age, residence and religion and after being satisfied that the child witness understood the meaning of oath, proceeded on recording his evidence on oath. I am therefore of the settled mind that section 127(2) was complied with by the trial magistrate.

Having determined the propriety of the trial court proceedings, the question is whether after expunging exhibit P1, the remaining evidence can sustain the Appellant's conviction. As pointed out by the learned State Attorney, the contents of exhibit P1 were clearly explained by PW3, who examined the Appellant and found bruises on his anal part. He also realised that the Appellant's anus was penetrated by blunt object which suggested that he was sodomised.

The victim (PW2) gave a detailed account of the event. He narrated that on the material date, he was sent by his mother to accompany the Appellant to take firewood to pastor Martin. On their way back, he was ordered by the Appellant to undress his clothes but defied the order. The Appellant undressed him and inserted his penis in the victim's anus after lying him down. After satisfying his sexual desire, he took a piece of cloth from his motorcycle, rubbed the victim and rubbed his own penis. He thereafter ordered the victim to wear his clothes and warned him to keep

the secret abreast. When they reached home the Appellant gave him money so that the victim could not spill out the secret but the victim narrated everything to his mother, PW1 immediately upon his return.

The victim's evidence was corroborated by PW1, the mother. PW1 admitted have asked the victim to go with the Appellant to the pastor's house to take firewood. Upon his return, the victim immediately narrated on what begotten him and he mentioned the victim as the assaulter. There is also evidence by PW3 who examined the victim and concluded that he was sodomised. The Appellant was arrested on the same day and he confessed before PW4 for the offence and his confession was recorded. The same was admitted in court as exhibit P2.

The Appellant came with a general denial of the offence. In his defence, the Appellant raised a defence of alibi that on the material day from morning to evening he was with his relative one Godson Lomayani. Apart from failure to support his alibi that he was not at the scene on the time mentioned by prosecution side, this court is not much concerned with the weakness rather weight in prosecution evidence. This court is satisfied that the above prosecution evidence is water tight proving that the Appellant was at the scene on the date and time the offence was committed. The defence evidence did not raise any reasonable doubt which this court could consider as shaking the prosecution evidence.

Before I conclude this ground, I find it necessary to address the discrepancies in the age of the victim raised by the counsel for the Appellant. The counsel for the Appellant contended that the Appellant was prejudiced by the discrepancies in the age of the victim. He submitted that the charge referred the age of the victim as 11 years while in their testimonial accounts, PW1 stated that the victim was aged 13 years and PW2 testified that he was born in 2004 meaning that at the time he testified he was 17 years old.

I have revisited the trial court record. The charge sheet indicates the victim's age as twelve years old but numerically it was written 11 thus, I consider numerical number as typing error. The record also shows that while testifying, PW1 stated that his son was aged 13 years old. The victim's age in his particulars at the time of testifying was 13 years old, see the evidence of PW2. It is true that the typed proceedings show that the victim stated that he was born on 2004. But upon going through the hand written proceedings, I discovered that PW2 stated that he was born in 2009 and not 2004 thus, there was typing error. Counting from 2009 to 2021 when PW2 testified in court, his age was 13 years old. The charge sheet was drafted on 15/10/2020 when the victim was 12 years of age, as correctly depicted in the charge sheet. Basing on the foregoing, the

complaint that the victim's age referred in the charge sheet varied with the age in evidence is without prejudice misplaced.

Concluding ground 5, this court find that the evidence of the victim was properly recorded and it is water tight proving the unnatural offence against the Appellant. Being guided by the principle in of **Selemani Makumba Vs. Republic** (supra), this court find that the prosecution side proved the offence against the Appellant hence the trial court was correct to convict the Appellant for the same.

Having said so, let me now turn to the issue raised in grounds 2 and 3 that the trial court convicted and sentenced the Appellant based on wrong provisions of law. At page 10 of the typed judgment, while convicting the Appellant, the trial magistrate had this to say:

> *"Hence, for the reasons stated hereinabove* ***this Court convict the accused person herein for the offence of unnatural offence*** *contrary to section 158(1) and (2)(a) of the Penal Code, [Cap 16 R.E 2019]."*(Emphasis added)

According to Mr. Kinabo, the above provision which the trial magistrate relied upon to convict the Appellant is related to incest by males, therefore it has nothing to do with the offence the Appellant stood charged.

It is true that the Appellant was charged for Unnatural Offence found under section 154(1)(a) and the sentence is provided under subsection 2. The trial magistrate upon being satisfied that the prosecution side managed to prove the offence, convicted the Appellant based on section 158(1) and (2)(a) of Cap. 16 and sentenced him under section 154 (1) and (2)(a) of the Penal Code Cap. 16 R.E 2019. I have already resolved the issue related to citing paragraph (a) which is non existing provision under section in section 154 (2). I therefore do not intend to make repetition. I will directly go to the effect of citing 158(1) and (2)(a) of Cap. 16 in convicting the appellant.

After a thorough look into the proceedings and judgment of the trial court I am convinced to hold view that, citing section 158(1) and (2)(a) of Cap. 16, was a mere typographical error as the magistrate was clear that the Appellant was convicted for unnatural offence. It is clear that in the introductory part of judgment the trial magistrate cited the proper section to which the Appellant was charged with. At the last page of the judgment, while convicting, the trial magistrate referred the proper offence to which the Appellant was charged serve for the section used to convict. Instead of 154 it is recorded 158. This error in my view does not vitiate the conviction because from the bolded expression of the quoted part, the trial magistrate specifically and clearly stated that the Appellant

was convicted and sentence for Unnatural Offence, which in all aspects was the offence that the Appellant stood charged. Thus, citing section 158 instead of 154, appears to be typographical error which is curable under section 388(1) of the CPA.

Consequently, I find the appeal devoid of merits. It stands dismissed in its entirety. The Appellant's conviction and sentence by the trial court are hereby upheld.

**DATED** at **ARUSHA** this 29th Day of March, 2023


**D. C. KAMUZORA**

**JUDGE**