IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 50 OF 2023

(Originating from Criminal Case No. 21 of 2023 of Chemba District Court at Chemba)

MURISHIDI ABUBAKAR ITASO..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 15/02/2024

Date of Ruling: 28/02/2024

LONGOPA, J.:

The appellant one **Murishidi Abubakar Itaso**, is appealing against the conviction and sentence of the Chemba District Court in Criminal Case No. 21 of 2023 which sentenced the appellant to life imprisonment. This arose out of allegedly plea of guilty by the appellant to the charge of unnatural offence C/S 154(1) (a) of the Penal Code, Cap 16 R.E. 2022.

On 17/2/2023, the appellant was arraigned before the District Court of Chemba at Chemba for committing an unnatural offence against a victim of a three years' boy at Igunga Village within Chemba District. It is on

record that the appellant pleaded guilty to the charge and was convicted and sentenced thereof. However, upon being sentenced, the appellant decided to challenge both the conviction and sentence on three main grounds, as reproduced hereunder for easy of reference:

1. *That, the trial Court grossly erred in law and in facts by treating equivocal plea as that of unequivocal while the plea was ambiguous.*

2. *That, the trial court grossly erred in law and in facts when convicted and sentenced the appellant basing on defective charge for not indicating the sentencing provision. This is so because, the charge is predicated under section 154(1) (a) of the Penal Code Cap 16 R.E. 2022 which it was inconsistence with the requirement of the law as the law need both provisions which establishing the offence and the provision which creating punishment to be cited together as it is very crucial and there is no option to exclude one of them.*

3. *That, the trial court grossly erred in law and in facts when convicted and sentencing the appellant/accused person basing on procedural irregularities this is because when the prosecution read out the facts of the case the appellant was not asked if he admit all the facts or denies*

some of the facts or the said facts were correct the case at hand, the proceedings and Judgment of the trial Court did not show or indicate if such right was given to the appellant/accused person due to that, such failure of not observing the requirement of the law caused miscarriage of justice on party of the appellant.

The appellant prayed that this Honourable Court to allow his appeal, quash the conviction and set aside the sentence of life imprisonment thereafter order immediate release of the appellant from custody.

On 15/2/2024 when this appeal called for hearing, the appellant appeared in person while the respondent was represented by **Ms. Neema Taji** and **Ms. Prisca Kipagile**, both learned State Attorneys.

In support of the appeal, the appellant stated to have been arraigned in court, convicted, and sentenced in the same day. He argued that upon the charge being read to him by the prosecutor he was called to plea and he pleaded not guilty. The appellant asserted to have been convicted and sentenced without having pleaded guilty to the charge. The appellant adopted the grounds set out in the petition of appeal to form part of his submission in support of his appeal. He prayed for his release from custody as he is of the view that he was not correctly convicted and sentenced.

Ms. Prisca Kipagile, State Attorney on the other hand did not contest that the procedure used to convict and sentence the appellant was faulty. The learned State Attorney argued that the proceedings and judgment contain three major weaknesses. First, the facts were not explained to the appellant after the plea of guilty. There was no explanation on a language understood by the appellant and the appellant did not sign if he agreed to the facts. Second, the charge was defective for not including the sentencing provisions, that is, section 154(2) of the Penal of the Penal Code, Cap 16 R.E 2022. Third, the trial Magistrate did not convict the accused/appellant as per page 3 of the proceedings.

It was Ms. Kipagile's prayer that on account of these weaknesses, the proceedings and judgment be quashed and set aside. As the substance of evidence was not heard, this matter should be remitted to the District Court of Chemba for retrial as per provision of 388 of the Criminal Procedure Act, Cap 20 R.E. 2022. In a brief rejoinder, the appellant was not opposed to the case being remitted to the District Court of Chemba for retrial.

I have had an opportunity to peruse the record from the District Court of Chemba on this matter as well as the submissions by the parties to ascertain whether the appeal before me is meritorious. I am constrained to analyse the available evidence from the record to ably determine the issues raised in the grounds of appeal.

I shall commence the analysis the first ground of appeal that there was no an unequivocal plea by the appellant. To underscore this ground of appeal, it is pertinent to state from the outset that there are two main types of plea, namely plea of guilty and plea of not guilty. When an accused person pleads guilty to charge the procedure for dealing with such plea is different from the procedure when plea of not guilty is entered.

The plea of guilty is governed by Section 228 of the Criminal Procedure Code, Cap 20 R.E. 2022. It provides that:

> *228.-(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*
>
> *(2)* ***Where the accused person admits the truth of the charge, his admission shall be recorded*** *as nearly as possible in the words he uses and* ***the magistrate shall convict him and pass sentence upon or make an order against him****, unless there appears to be sufficient cause to the contrary.*

The record of the District Court of Chemba indicates that: First, the charge was read and explained to the accused person. Second, the accused person was invited to plea. Third, he pleaded guilty to the charge. Fourth, the trial magistrate recorded the admission in accused's own words.

Fifth, the magistrate convicted the accused and proceeded to sentence him. I shall reproduce the proceedings for easiness of reference:

IN THE DISTRICT COURT OF CHEMBA DISTRICT

AT CHEMBA

CRIMINAL CASE NO 21 OF 2023

REPUBLIC

VERSUS

MURISHID ABUBAKAR ITASO

PROCEEDINGS

STATEMENT OF OFFENCE: UNNATURAL OFFENCE,

contrary to section 154(1)(a) of the Penal Code Cap 16 [R.E 2022].

PARTICULARS OF THE OFFENCE*: MURISHI ABUBAKARI ITASO on 8th day of April 2023 at Igunga Village within Chamber District in Dodoma Region did unlawful have carnal knowledge of one MUSTAFA ALLY, a boy of three years against the order of nature.*

DATE: 17/04/2023

Corum: P.F. MAYUMBA-SRM

PP: SHIRIMA A/INSP

CC: MOCHO

Accd: PRESENT

***COURT**: Charge read over and explained to the accused person who pleaded thereto.*

***Acc**-It is true (Ni kweli)*

***Acc**-Ni kweli nilimlawiti Mustafa.*

Signed -P.F. Maumba -SRM

17/04/2023

SUMMARY OF FACTS

The accused is Murishi Abubakar Itaso 18 years of age, Mrangi, muslim and a peasant. The accused person residing at Igunga village at Chemba District in Dodoma Region.

That the accused person and the victim are residing in the same village and they are familiar to each other.

That on 8/4/2023 the accused person sodomised the victim one Mustafa Ally 3 years age. The accused person was arrested and taken to Chemba Police Station for interrogation. That during the interrogation the accused person admits to commit the offence. The accused person was then taken to the justice of peace and also admits to commit the offence.

That the accused person before this court pleaded guilt that he sodomised the victim.

In order to justify the same, I pray to produce PF 3, caution statement and extra judicial statement.

***Acc**- I have no objection.*

***Court**- The PF 3 for victim, caution statement and extra judicial statement are collectively admitted as an evidence against the accused person and marked as P1.*

Signed-P.F. MAYUMBA-SRM

17/04/2023

***Court**- Exhibits is read over the Court.*

Signed-P.F. MAYUMBA-SRM

17/04/2023

FINDINGS OF THE COURT

The accused person is brought before the Court and charged with the offence of having carnal knowledge against the order of nature to one Mustafa Ally a boy of three years. The accused person pleaded guilt for the offence charged. The prosecution side produced PF 3, wherefore, the medical doctor remarked that the victim was sodomised against the order of nature c/s 154(1) of the Penal Code CAP 16 R.E. 2022.

***I quote-** S.154(1) any person who have carnal knowledge of any person against the order of nature commits an offence and is liable to imprisonment for life or a term of not less than thirty years.*

The accused person admits to commit the offence during the interrogation at the Chemba Police Station also before the justice of peace. I find the accused person guilty and I convict him in terms of section 154(1) (a) of the Penal Code and order the accused person to serve life imprisonment.

PREVIOUS CONVICTION

PP/No previous conviction against the accused person. I pray for severe punishment against the accused person the same to be the lesson to the accused person.

Signed-P.F. MAYUMBA-SRM

17/04/2023

MITIGATION

Nil. The accused person remains silent.

SENTENCE

I order the accused (sic!) person to serve life imprisonment in terms of section 154(1)(a) of the Penal Code CAP 16 R.E. 2022.

Signed-P.F. MAYUMBA-SRM

17/04/2023

R/A fully explained.

Signed-P.F. MAYUMBA-SRM

17/04/2023.

Was the appellant's plea unequivocal? In my careful assessment of the record, the answer is in the affirmative. The reasons are two. First, the accused person pleaded guilty, and the trial magistrate recorded on accused own words as demonstrated in the proceedings at page 2. It is stated:

> ***Court-*** *Charge read over and explained to the accused person who pleaded thereto.*
> ***Acc-*** *It is true (Ni Kweli).*
> ***Acc-*** *Ni Kweli nilimlawiti Mustafa.*

This extract is what the appellant stated when he was called to enter plea. These words are clear from any ambiguities. The appellant knew exactly as to the offence he was answering to. He did not only state that it is true but he stated that it is true that he unlawfully carnally knew the victim against order of nature. This is in line with the decision in **Josephat James vs Republic** (Criminal Appeal 316 of 2010) [2012] TZCA 159 (1 October 2012), where the Court of Appeal stated that:

> *It is trite law that a plea of guilty involves an admission by an accused person of all of the necessary legal ingredients of the offence charged.*

Also, in the cited case of **Josephat James vs Republic** (Criminal Appeal 316 of 2010) [2012] TZCA 159 (1 October 2012), at pages 8-9, the Court of Appeal observed that:

> *We entirely subscribe to that view. In the instant case, the trial court was enjoined to seek an additional explanation from the appellant, not only what he considered was "correct' in the charge, but also what was it that he was admitting as the truth therein. In* ***Ramadhan Haima's*** *case (supra), the appellant after a charge of an unnatural offence c/s 154(1)(a) of the Penal Code was read to him admitted: "It is true that I did commit the unnatural offence, I did commit the offence, I did carnal knowledge to one Kiku s/o Lobuwack, boy of 10 years." On second appeal, the Court found out that the plea of guilty to the charge was unequivocal and was properly entered by the trial court.*

The trial court's record indicates that not only the appellant admitted that it is true but also went on to state that the truth is that he had carnal knowledge of one Mustafa against the order of nature. That means the trial court did not end only on relying on the admission that it is true, but it went further to record the nature of the truth which is ***"ni kweli nilimlawiti Mustafa"*** which means literally: it is true I had carnal knowledge of one Mustafa against order of nature. That response was clear

and sufficient for the trial court to ascertain that the plea entered was unequivocal and not otherwise.

Further, in the case of **Frank s/o Mlyuka vs Republic** (Criminal Appeal 404 of 2018) [2020] TZCA 1738 (20 August 2020), it was observed that where the plea is free from ambiguities, such plea shall be considered as unequivocal plea. The Court of Appeal observed that:

> *Our examination of the pleas which were entered by the appellant to the charges which were read over to him as well as his response to the facts of the case when they were narrated to him, assures us that he clearly understood the nature of the charge against him and that is why, his response was even more detailed than what was contained in the charge sheet. In line with what we stated in John Samwel @ Kabaka (supra), there was no way in which there could be raised a question of imperfectness, ambiguity or misapprehension.*

Second, the contents of the exhibits were admitted and read out before the Court of law. Those exhibits namely P1 collectively contains admission by the accused person to have committed the offence. The appellant appeared before a justice of peace on 13/4/2023 where he narrated willingly the admission of having carnal knowledge of the victim against the order of nature on material date. He said, among others: *"Mimi*

Mrishid Abubakari Itaso wa Kijiji cha Igunga Kata ya Goima siku ya tarehe 08/04/2023 majira ya saa 5:00 asubuhi ***nilimlawiti mtoto mwenye umri wa miaka miwili*** *na nusu jinsi yake me aitwaye Mustafa Ally.* *Mtoto huyu nilimkuta mtaani kwetu akiwa peke yake (analia) aliniona akaanza kunifuata mpaka kwenye geto.* ***Baada ya kufika geto ndipo nikamlawiti"*** which can be literally simply interpreted to mean "I had carnally known a child of two and half years. I found the child alone crying on the way. He followed me to home where I had carnal knowledge of him against the order of nature."

Similarly, in the Cautioned Statement signed on 08/04/2023 the appellant did admit that he had carnal knowledge of the victim against the order of nature. In his words stated that:

> *"Hivyo nikiwa nimebaki peke yangu na kuamua kutumia fursa ya kumshawishi mtoto aitwaye Mustafa S/O Ally wa miaka mitatu na kumtoa nyumbani kwao ambapo alikuwa nje na kumwambia twende dukani. Naye alikubali mtoto huyo nikaenda naye hadi katika chumba ninacholala nikaingia naye ndani na kumvua kaptura aliyokuwa amevaa na mimi nikavua suruali yangu niliyokuwa nimeivaa hadi kwenye magoti na kupiga magoti* ***kisha nikamuingiza mboo yangu kwenye mkundu wake na nikafanya naye mapenzi yaani 'nikamtomba' na kumkojolea shahawa.***"

The admission by the appellant contained in both the Extrajudicial Statement and Cautioned Statement is clear and free from any ambiguities on the elements constituting the unnatural offence. The appellant admitted having carnal knowledge of the victim against the order of nature of material date by inserting his penis into the victim's anus.

The ingredients of the unnatural offence were reiterated in the case of **Sospeter John vs Republic** (Criminal Appeal 237 of 2020) [2021] TZCA 329 (28 July 2021), pp.17 -18, the Court of Appeal stated that:

> *We wish to start with unnatural offence, the appellant was charged with two counts of unnatural offence contrary to section 154 (1) (a) of the Penal Code.* ***For such an offence to stand, there ought to be proof of penetration, however slight into the anus, with or without consent (see the case of Joel s/o Ngailo v. The Republic, Criminal Appeal No. 344 of 2017 (unreported)).*** *PW6 corroborated that evidence because after he had examined the girls' anuses, he found bruises and blood. He thus concluded that there was forceful penetration by sharp or blunt object in the girls' anuses. There is also on record the evidence of PW7 who established the girls' age to be below 10 years.*
>
> ***In totality, we are satisfied that the evidence brought before the trial court was enough to prove***

the essential ingredients of unnatural offence contrary to section 154 (1) (a) of the Penal Code.

Apart from the appellant own admission before the Justice of Peace in an extra judicial statement and before the Police officer in a Cautioned Statement that he carnally knew the victim against the order of nature, in PF3 the Medical doctor concluded that the anus of the victim was penetrated. In his words, the medical doctor stated that: *I have examined the above-named patient with the above complaint and establish that there is evidence of penetrated anus.*

It is categorically clear that the appellant admits without any flicker of doubts to have had carnal knowledge of the victim against the order of nature. The totality of three documentary evidence forming part of **Exhibit P 1** collectively was not objected by the appellant. It In the case of **Chande Zuber Ngayaga & Another vs Republic** (Criminal Appeal 258 of 2020) [2022] TZCA 122 (18 March 2022), at pages 13-14, the Court of Appeal stated that:

> *Being guided by the above authorities,* ***it is our considered view, and as rightly found by the trial court, that the appellants' statements provided overwhelming evidence of their participation in the commission of the offence.*** *In the said statements both appellants clearly admitted that they were the ones who*

transported the trophy on 20th January, 2018 for sale on a hired motorcycle. That, upon seeing the motor vehicle of the game reserve officers, they abandoned the trophy and the motorcycle and ran away. ***It is settled that an accused person who confesses to a crime is the best witness.***

It should be noted that the appellant did not object to the admission of three exhibits, namely PF 3, Cautioned statement and extra judicial statement. In essence, the contents of these exhibits cemented the admission of guilty of the appellant. The contents were read out in accordance with the legal requirements. This is what would be considered as fair trial as all necessary procedures were adhered to. In the case of **Joseph Leko vs Republic** (Criminal Appeal 124 of 2013) [2013] TZCA 327 (4 December 2013), the Court of Appeal instructively noted that:

The courts below are reminded that an accused person has to be treated fairly in all stages of the proceedings filed in court. He/she has a right to be shown all the exhibits which are sought to be relied upon in proof of the case against him/her and say whether or not he/she has any objection to their admissibility. In other words, trial courts have a legal and moral obligation of always conducting the trials before the courts fairly. This has always been the procedure prescribed by the law.

The appellant having opted not to object to the admission of the exhibits when availed opportunity to do so and the reading out of the contents of the admitted exhibits ensured that admission of the offence contained in those exhibits perfectly cementing the plea of guilty of the appellant.

The exhibits formed important part of the evidence in this case. Similarly, the contents of the documentary evidence were read out before the Court to appraise the facts of the case against the appellant. This is in line with wise guidance of the Court of Appeal in the case of **Erneo Kidilo & Another vs Republic** (Criminal Appeal 206 of 2017) [2019] TZCA 253 (21 August 2019), at pp.11-12, where the Court of Appeal stated that:

> *We do not agree with the learned Senior State Attorney for the respondent for suggesting that the appellants must be taken to have known the facts contained in exhibits P4 (Inventory Form), P5 (Trophy Valuation Certificate), and P6 and P7 (the appellants' confessional statements) which were not read out in court.* ***Contents of these exhibits carry detailed facts which affect ingredients of the counts preferred against these appellants.*** *The case of* ***LACK KILINGANI VS. R. (supra) is relevant to our proposition that where an accused person pleads guilty to an offence, the obligation to read out the facts contained in the tendered exhibits goes a long***

way to fully appraise the accused concerned all of facts that are locked in the exhibits. This appraisal in light of full knowledge of facts in exhibits will enable the accused person to either accept the facts therein as true, or even reject them and change his plea to NOT GUILTY.

In other words, an unequivocal plea of guilty cannot be sustained where contents of admitted exhibits were not read out to any person charged with an offence. (Emphasis added).

Having adhered to the requirements of availing opportunity to appellant to comment/object the admission of exhibits and reading the contents therein upon admission, **Exhibit P1** collectively is crucial evidence that cements the guilty of the appellant. I am of the settled view that the proceedings reveal compliance with the admission of the documentary evidence in this case as all the prerequisite conditions for such exhibits were adhered to.

I cannot agree with the learned State Attorney that the facts were not explained to the appellant. The record indicates that the charge was read over and explained to the appellant. Also, all the facts were narrated including the exhibits that sum up all the facts with respect to the offence. These exhibits were not objected by the appellant. The Extrajudicial and Cautioned Statements are in a language well understood by the appellant.

In my assessment of the facts and evidence available on record, it is my view that the first ground of appeal collapses for being devoid of merits.

The second ground of appeal is premised on absence of sentencing provision in the charge thus allegedly the charge was defective. The appellant was charged, convicted and sentenced to life imprisonment as per provision of section 154(1) (a) of the Penal Code. That section provides as follows:

> *154.-(1) Any person who (a) has carnal knowledge of any person 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.*

Regarding sentence in that provision under which the appellant was charged can be dissected into the following aspects: First, it provides a maximum sentence of life imprisonment. Second, the minimum sentence for the offence is thirty years. Third, the Court has discretion to impose appropriate sentence which is not less than thirty years imprisonment.

Was the appellant charged with a wrong provision or was the charge defective for not including the subsection 2 of section 154 of the Penal

Code, Cap 16 R.E. 2022? My answer to this is in the negative. In my considered view section 154(1)(a) of the Penal Code creates a complete offence of carnally knowing a person against the order of nature and it provides for sentence thereof. The sentence ranges from minimum of thirty years imprisonment to life imprisonment. As such, a person may be charged with an offence of carnally knowing someone against the order of nature without resorting to subsection 2 of the same section.

The provision of subsection 2 is there to accommodate enhancement of the sentence by limiting the discretion of the Court where the victim of the offence is a child below eighteen years of age. In case of that nature of the victim, the law makes it mandatory that sentence should be life imprisonment only. Indeed, if the Court sentences a convict to life imprisonment for unnatural offence committed against the child victim under section 154(1) (a), that sentence is in order and proper. I so find as that provision contains that penalty.

I am of a settled view that convicting and sentencing a person to life imprisonment under section 154(1) (a) of the Penal Code is an appropriate sentence as it is categorically provided for in that section. There was no error on the part of the trial court to convict the appellant and sentence him for life imprisonment as that sentence is provided for within the provision as the maximum sentence. It would have tasked my mind if there was no sentence of life imprisonment under section 154(1)(a) of the Penal Code and trial court having imposed such sentence to the appellant.

This court is enjoined to consider whether alleged defectiveness of the charge have caused miscarriage of justice to disregard the findings of the trial court. There is plethora of authorities that provide for effect of the defective charge. Miscarriage of justice is the main criteria. Once, a court is satisfied that there was no miscarriage of justice, any such alleged defects should be ignored. In the case of **Joseph Leko vs Republic** (Criminal Appeal 124 of 2013) [2013] TZCA 327 (4 December 2013), the Court of Appeal at pages 20-21, stated that:

> *We also note a defect in the charge sheet in that the appellant was charged under section 130(2) (b) which talks of commission of rape without consent. In this case the question of consent was immaterial as the victim of the offence (PW1) was aged 11 years hence she was under the age of 18 years. An offence committed to a woman falling in this category does not require consent of the victim. The appellant ought to have been charged under section 130 (2) (e) of the Penal Code. See the case of MUSA MWAIKUNDA V R [2006] T.L.R. 387. The learned judge on first appeal ought to have corrected the mistake made by the trial court.*
>
> *The defect in the charge sheet however, did not occasion any miscarriage of justice on the part of the appellant because when PW1 testified she mentioned her age to be 11 years and the appellant did not raise any question on this aspect. This omission on the part of the prosecution is*

curable under section 388(1) of the Criminal Procedure Act, [CAP 20 R.E.2002].

I subscribe fully to this decision of the Court of Appeal as it is a guidance that should be adhered to by this Court. There was nothing to cause miscarriage of justice in the circumstances of the instant case. The appellant fully understood the contents of the charge, that is why he answered with precision that it is true that he had carnal knowledge of the victim against the order of nature. The appellant left no ambiguities at all.

The other relevant authority is the in the case of **Joakim Mwasakasanga vs Daniel Kamali & Others** (Criminal Appeal No. 412 of 2020) [2023] TZCA 55 (24 February 2023), where the Court of Appeal stated as follows: -

Normally it is the accused who would raise the complaint of a defect in the charge, be it during trial or on appeal. Courts have dealt with such complaints in two ways depending on the circumstances of each case. One, by sustaining the complaint where they take the view that the accused will be prejudiced by the defect. See the case of ***Antidius Augustine v. Republic****, Criminal Appeal No. 89 of 2017 (unreported).* ***The other way is by treating the defect as curable and inconsequential where they are satisfied that it does not occasion a miscarriage of justice or prejudice the accused. The latter is a***

more contemporary position of the law, but always depending on the circumstances. *See the case of* ***Abubakari Msafiri v. Republic****, Criminal Appeal No. 378 of 2017 (unreported)* (**emphasis added**).

I cannot agree with the arguments by appellant and the learned State Attorney that there was weakness for not including the sentencing provision in the charge. The section applied to charge the appellant in this case is self-explanatory. It is creating an offence and provide for sentence. It provides for ingredients of the offence of having carnal knowledge of any person against the order of nature. Similarly, it provides for a sentence of imprisonment for life and in any case not less than thirty years imprisonment.

Indeed, section 154(1)(a) of the Penal Code is adequate in itself to sustain the conviction and sentence of the appellant as such sentence is legally correct and valid. It has not violated anything critical under the law. In the circumstances, the complaint by the appellant though supported by the prosecution is destitute of the truth. The second ground is dismissed for lack of merits.

Last complaint by the appellant that there were procedural irregularities that caused miscarriage of justice. The appellant is of the opinion that failure to give opportunity to the appellant to deny every fact after having been read out in court. This is supported by the learned State Attorney who argues that there was no conviction of the accused person.

I have had an opportunity to peruse the proceedings of the District Court of Chemba. I cannot agree with learned State Attorney. On page 3 of the proceedings on a subheading "Findings of the Court" the trial court stated that: "**I find the accused person guilt and I convict him in terms of section 154(1)(a) of the Penal Code...."**

In my settled view, this finding of the trial court does not lack clarity nor brings any ambiguities. It is straightforward that the trial Court did what the law requires as it convicted the appellant prior to sentencing him accordingly.

I should state that the proceedings and findings of the trial court may not be the most perfect record without any limitations. The proceedings might have lapses in various minor aspects. In my view such imperfections did not cause miscarriage of justice. The reasons are clear that all the facts were narrated, and the appellant was called upon to state whether he objected to admission of exhibits which summed up all those facts. The appellant did not object the admissibility of the exhibits which were collectively marked **Exhibit P1**.

The appellant was afforded opportunity to contest or otherwise on admissibility of exhibits constituting the facts of the case. The decision of the appellant not to object such admission of the exhibits paved a way for admission of the same in accordance with the legal requirements. It is

these exhibits that contains explicit admission by the appellant before justice of peace in extrajudicial statement dated 8/4/2023 and before the police in the cautioned statement dated 9/4/2023. The contents of the exhibit P1 was read in Court. Extrajudicial Statement and Cautioned Statement disclose the admission of the appellant to have committed the offence in clear terms. He admitted both before the justice of peace and before the police during interrogation that he had a carnal knowledge of the victim against the order of nature. Such admission left no doubt that the plea of guilty of the appellant was unequivocal. Also, the PF 3 which is expert opinion of a medical doctor indicates that the victim was carnally known against the order of nature.

In **Onesmo Alex Ngimba vs Republic** (Criminal Appeal 157 of 2019) [2022] TZCA 26 (16 February 2022) the Court stated that there cannot be an unequivocal plea on which a valid conviction may be founded unless these conditions are conjunctively met:-

> *"1. The appellant must be arraigned on a proper charge. That is to say' the offence, section and the particulars thereof must be properly framed and must explicitly disclose the offence known to law;*
>
> *2. The court must satisfy itself without any doubt and must be dear in its mind, that an accused fully comprehends what he is actually faced with, otherwise injustice may result.*

3. When the accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies each and every particular ingredient of the offence. This is in terms of section 228(1) of the CPA.

4. The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged.

5. The accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged and the same must be properly recorded and must be clear.

6. Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged."

I have no doubt in my mind that all these conditions were met in the instant case. The appellant was properly arraigned with a proper charge under Section 154(1) (a) of the Penal Code, Cap 16 R.E. 2022. The charge was read and explained to the accused person (appellant). The appellant pleaded guilty to the charge in an unequivocal manner by his own words that "it is true, I had a carnal knowledge of the victim against the order of nature." Also, the appellant was afforded opportunity to accept or challenge the ingredients of the offence as summed up in the **Exhibit P1** collectively

and he did not object. All the ingredients of the offence were clearly disclosed in the facts stated before the Court and admitted in full by the appellant.

It is a settled law in Tanzania that errors in the proceedings or decision which do not go to the root of the matter should be treated as curable and inconsequential to the findings if there is no miscarriage of justice. I have demonstrated that the plea of guilty was unequivocal and that charge was perfectly in order. This made the findings of the trial Court to be correct and legally acceptable.

I am aware that the Criminal Procedure Act, Cap 20 R.E. 2022 provides a guidance on the matter where on appeal or revision there is finding that irregularities exist in the proceedings or judgement. The criterion is whether there was a miscarriage of justice or not. The law states as follows:

> *388. Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity*

has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable.

At the end, I am of the settled opinion the third ground of appeal is destitute of merits. There is nothing of importance to warrant vitiating the findings of trial court on the matter were the accused person pleaded guilty unequivocally. There is no any solid reason to depart from the findings of the trial court to convict and sentence the appellant on his own plea of guilty.

Before I pen off the analysis of the appeal, it is important to reiterate that having found that the plea of the appellant was unequivocal the law prevents the convict(appellant) to appeal against his plea of guilty. Section 360(1) of the Criminal Procedure Act, Cap 20 R.E. 2022 states that:

360.-(1) An appeal shall not be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence.

The appellant in this case is not challenging on the extent or legality of the sentence. The conviction of the appellant is the main contention is this appeal. The plea of guilty is challenged for not being unequivocal, the charge being defective and the procedural irregularities which caused the miscarriage of justice leading to conviction of the appellant. Simply, he

challenges conviction and procedures leading to that conviction. He does not contest as to the stiffness of the sentence. I have analysed the whole of the grounds to set the record straight as per available evidence on record.

In totality of the events, this appeal lacks merits as the appellant is challenging his own plea of guilty which was in my view unequivocal plea. The appeal deserves only one conclusion which is dismissal on its entirety. Conviction and sentence of the trial court was based on an unequivocal plea of guilty of the appellant. I uphold both conviction and sentence of the appellant as entered by the District Court of Chemba. The appeal therefore should be dismissed. The appeal stand dismissed in its entirety for lack of merits.

It is so ordered.

DATED at **DODOMA** this 28th day of February 2024

E.E. LONGOPA
JUDGE
28/02/2024.