IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 19 OF 2018

(Originating from Criminal Case No. 01 of 2017 in the District Court of Karatu at Karatu by Hon. E.E Mbonamasabo, RM dated 13th day of December, 2017)

GODFREY SIMON..1ST APPELLANT

MASAI MOSHA...2ND APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

JUDGMENT ON APPEAL.

S.M. MAGHIMBI, J:

On the 13/12/2017, the two appellants were convicted at the District Court of Karatu at Karatu vide Criminal Case No. 01/2017. The appellants were initially charged with the offence of Unnatural Offence c/s 154(a) of the Penal Code, Cap. 16 R.E 2002 (The Penal Code) and on conviction, they were sentenced to serve an imprisonment for life. Aggrieved with both the judgment and sentence, on the 21/03/2018 the appellants filed an appeal before this Court raising three grounds of appeal. Subsequently on the 21/06/2018 when the parties appeared before me for the first time, Mr. Hamisi Mkindi, learned Counsel representing the appellants, prayed for leave of the court to add one ground of appeal. Therefore this appeal contains four grounds of appeal as follows:

1. That the trial magistrate grossly erred in law and fact for convicting and sentencing the appellant without ascertaining the aged of the accused and the victim
2. That the trial Magistrate erred in law ad fact and consequently arrived at the wrong conclusion that the offences charged were proved by prosecution beyond reasonable doubt against the appellant

3. That the trial court's judgment was not a judgment in law as it did not contain the points for determination and reasons for the decision
4. That the trial court erred in law and fact in convicting the Appellants based on weak and contradictory evidence.

Before this court, as I mentioned earlier, the appellants were represented by Mr. Hamisi Mkindi learned Advocate from the Legal and Human Rights Centre, while the respondent, the Republic, was represented by Ms. Tusaje Samwel, learned State Attorney.

Submitting on the first ground on ascertainment of the age of the appellants, Mr. Mkindi contended that the appellants are boys aged 16 and 17 years respectively. That Godfrey Simon the 1st appellant was born in the year 2000 and Masay Josiah, the 2nd appellant was born in the year 2002. He argued however, that in the charge sheet the age of the accused was recorded as follows; Godfrey Simon, tribe Iraq, age 19 years and for the second appellant it was recorded as aged 18 yrs. That during the preliminary hearing the facts of the case were read to the accused and the accused admitted their names and the place they have been arrested, and that they had been arraigned in the court, but they denied the rest of the facts including the age.

Mr. Mkindi submitted further that after the appellants had denied their age, which even by appearance they seem to be young persons, the court was duty bound to determine the age of the accused and it was to be one of the issues during the hearing of the case something which was never done. He argued that when the age of the accused is a determining factor in sentencing, the court is duty bound to analyse the age of the accused before passing a sentence. That it is crystal clear that when sentencing the accused, the trial court relied on the charge sheet which shows that the accused were aged 18 and 19 respectively. That it should however be noted that the trial court was misled by the prosecution by indicating different age of the accused persons in the charge sheet.

Mr. Mkindi submitted further that it is mandatory for the court to ascertain the age of the accused where accused seems to be a child. That in order for the court to ascertain the age, it may interview the accused or call in some relevant information or evidence

such as birth certificate or medical evidence. He supported his submissions by citing the case of Ismail **Ramadhan Mwembaju Vs. R, 1998 TLR 491**, at page 494, whereby the court held:

> *"in order to ascertain the age, the court may interview the accused, may seek clarification from the prosecution and may call in any relevant evidence including medical evidence. In the case at hand the lower court didn't make any such analysis. It possibly looked at the charge sheet and proceeded to pass the sentence, though also in their mitigation, the accused pleaded among other, young age."*

He argued that in the present appeal, the trial magistrate sentenced the appellant without ascertaining the age despite the fact that they disputed the age in the memorandum of facts. That the trial magistrate also failed to ascertain the age of the victim who was also the complainant in Criminal Case No. 01/2017 at Karatu District Court. That in the charge sheet, the age of the victim was indicated to be 9 years, however, during the trial and especially during voire dire, the victim who testified as PW3 stated his age to be 10 years. He hence argued that as per evidence, the age of the victim was 10 years and not 9 years and is fatal because it determined the sentence of the accused. That the accused persons were convicted of unnatural offence c/s 154(1)(a) of the Penal Code and subsection 2 of the Section 154 the sentenced of life imprisonment.

Mr. Mkindi submitted further that the victim claimed and proved before the court that he is ten years and not nine years so the sentence was highly excessive. He argued that before passing that sentence the trial magistrate was required to direct himself as to the age of the victim. He pointed out that the trial magistrate passed the sentence with reflection to Section 154(2) of the Penal Code and not 154(1)(a). That on page 54 of the typed judgment, the trial magistrate wrote that he was sentencing the appellants u/s 154(2) of the Penal Code, the provision of the law which talks of the age below ten years and not ten years and below. That if it could be proved that the victim was nine years, the sentence would have been correct but the victim is ten years and the

appellants are children. He hence prayed that the appeal is allowed because the trial magistrate failed to ascertain the age of the accused/appellants.

On the second ground of appeal that the trial magistrate erred in law and fact and consequently arrived at the wrong conclusion that the offence charged were proved by the prosecution beyond reasonable doubt; Mr. Mkindi submitted that the appellants were charged for committing unnatural offence c/s 154 (a) of the Penal Code. That the Penal Code does not have Section 154(a) which created the unnatural offence, hence the appellants were charged, convicted and sentenced on defective charge sheet for containing wrong as well as non-existing provisions of the law. That failure to site proper provision of the law is fatal as the trial magistrate was required to read the charge before admission and discovered the defect and reject it summarily. Mr. Mkindi argued that Criminal Case No. 01/2017 did not have a legal charge sheet and he supported his argument by citing the case of **R Vs. Titus Petro, 1998 TLR 395** whereby the Court, when dealing with a similar matter held that:

> *"as in this case, there is no legal charge; the whole proceeding was a traverse of justice."*

He further cited the case of **John Ikland @ Ayubu Vs. R, Criminal Appeal No. 196/2014**, whereby the Court of Appeal sitting at Iringa when dealing with the matter of defective charge sheet at page 7-8 had this to say:

> *"the above two scenarios, that is wrong citation of the Section under which conviction was based and omission to indicate under which statute para 14 (d) of the 1st Schedule and Sections 57(1) and 60(2) were cited from, suggest that the notice of appeal did not properly state the nature of conviction and sentence and that they constituted a serious defect"*

He then argued that failure to site proper provision of the law is a serious defect and prayed that the appeal is allowed on this ground as the charge sheet sited Section 154(a) but the magistrate sentenced the appellants u/s 154(2).

Mr. Mkindi submitted further that they are also concerned with the voire dire examination conducted to PW3 as it was not conducted to the standards of the law. He quoted the provision of Section 127(2) of the Evidence Act, Cap. 6 R.E 2002:

"Where in any criminal cause or matter any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received, though not given upon oath or affirmation, if in the opinion of the court, to be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth"

He then pointed out that in the typed proceedings at page 13, the voire dire reads:

VOIRE DIRE:

Question: What school do you stand

Answer: Njia Panda Primary School.

Question: AT what class

Answ: I am in standard IV

....

Witness: I promise to state the truth.

Mr. Mkindi submitted that this can hardly be described as voire dire conducted by the trial magistrate as the court failed to comply with the procedure laid down under Section 127(2) of the Evidence Act. He argued that the trial magistrate failed to record his opinion whether the child understands the nature of the oath and cited the case of **Dotto s/o Ikongo Vs. R, Criminal Appeal No. 06/2006,** (unreported) whereby the Court of Appeal sitting at Dodoma, stated at page 8:

"From this provision of the law it is unclear to us that when a child of tender age is involved in giving evidence, the presiding judge or magistrate is obliged to conduct an investigation in order to satisfy himself that the child is sufficiently intelligent to justify the reception of his evidence and that he understands the nature of an oath and the duty of speaking the truth. The findings and opinion of the trial judge or magistrate should be recorded in the proceedings. In this case the question is whether an investigation was conducted of the trial magistrate of PW1 before the evidence was received. On this we are with respect in agreement with Mr. Stolla, learned Counsel for the

appellant and Mr. Mwampoma, learned Sen. State Attorney for the respondent republic, that there was no such investigation conducted in terms of the law."

He submitted that in the cited case, the court continued to say the evidence of PW1, a child of tender age was improperly received and acted upon in convicting the appellant. He then prayed for the court to declare that the evidence of PW3 was not properly received because the trial magistrate failed to say if the child understands the nature of oath as provided u/s 127(2) of the Evidence Act.

Mr. Mkindi then moved to the argue on the PF3 that was admitted as EXP1. His argument was that the PF3 failed to prove the offence charged. That the PF3 showed that it contained the Doctors remarks which explained that there was no sperm in the anal area and that the anus has loosen its tightness. Further that the last column states that the victim "aliingiziwa blunt object". His argument was that a blunt object has so many meanings and wondered whether a penis is a blunt object. Further that when the doctor testified as PW4 he stated:

"On 28th Dec 2017 at about 0800 hrs I was on duty, one mother came with his young, they came from police station, the young men was derrick Jeremiah, he was about 9 years. That youngman was complaining to be sodomised. After admission we started to check his body, physical. We discovered at his anus there was some waste which was still got out and he had a red colours and the anus was not able. Then we had check up on his blood for HIV, the result was negative. Then I filled PF3 what I see and then to returned to police station."

Mr.Mkindi submitted that in the PF3, there is no information that the anus had some waste which was still getting out and that there is also no information of red colours which are new information not contained in exhibit P1. He hence argued that the trial magistrate failed to direct himself on that and it is in that context that prosecution failed to prove their case beyond reasonable doubt. He then cited the case of John Makolobela, Kulwa Makolobela and Eric Juma @ Tanganyika Vs. R 2002 TLR 296 and argued that a person is not guilty of a criminal offence because his defence is not believed, rather he is found guilty and convicted of a criminal offence because of the

strength of prosecution evidence against him which established his guilt beyond reasonable doubt.

On the third ground of appeal that the trial court judgment was not a judgment at all as it did not contain the points for determination or the reasons thereof, Mr. Mkindi submitted that the judgment of district court of Karatu delivered by E. E Mbonamasabo RM on 13/12/2017 does not have points for determination and reasons for the decision. That the judgment failed to comply with the mandatory provision of Section 312(1) of the CPA, as the necessity for the court to give reasons for the decision exists for many reasons, that includes the needs for the court to demonstrate their recognition of the fact that litigants and the accused persons are rational beings and have the right to be aggrieved. He cited the case of **Hamisi Rajabu Dibagula Vs. R, 2004 TLR 181** to support his argument.

On the fourth ground that the trial court erred in law and fact by convicting the appellants based on weak and contradictory evidence, Mr. Mkindi submitted that the evidence of PW1, PW2 and PW3 contradicted each other especially in the area where the accused was found after he had been sodomised. That it is in the proceedings at the evidence of PW1 is that on 27/12/2017, at about 1700 hrs she was at home and ordered her child to go to the shop but he was late to come. She heard a noise, when she went outside that child was crying having his trousers in his hands and battery. When she asked him he said Godfrey and Maasai put off his trouser then sodomised him at the same time. Mr. Mkindi submitted further that evidence of PW2 who is the father of the victim said that on 27/12/2016 at about 1700 hrs he was at home sleeping and was woken up by his wife who told him to listen to his child who was dying and started to interview and he said he was touched with Godi and Masai and they sodomised him. He also said when he continued to interview him he said Josephat also sodomised him on the other time. Mr. Mkindi submitted further that the evidence of PW3 at pg 14 was that on 27/12/2016 he was ordered by his mother to go the shop and on the way he met the appellants. His evidence was that he stood there at the matofailini area crying because he was feeling very painful and his mother came there and found him. He then argued that the question here is where did the mother find the

victim, is it at matofalini area as stated by the victim or at home as testified by PW1 and PW2.

Mr. Mkindi pointed out another contradiction of the evidence which is the time when the offence was committed. He submitted that in the charge sheet, it says the offence was committed at 1900 hrs. On the other hand when PW1 and PW2 adduced their evidence in court, they stated that the offence was committed at 1700 hrs and the victim, PW3 when adduced his evidence he stated that it was evening and no time was indicated. He argued that 1900 hrs is already night but 1700 there is still sunlight. He hence argued that the issue of time raised a question as to what time exactly this offence was committed and in criminal proceedings, the time of commission of offence is material.

Mr. Mkindi also submitted on the issue of one person called Josephat and questioned where his name came from. That the contradiction is also on the evidence of PW4 because there is a difference between the contents of PF3 and his sworn statement adduced as evidence in court. He submitted further that there is one important witness who was not called to testify which his evidence would have corroborated other evidence. He named the witness as his is Mzee Florian who was mentioned by the victim as the one who saw the victim after they have done the act. He argued that Mzee Florian was one of the key witness whose evidence was needed to corroborate the evidence of PW1, PW2 and PW3 and that failure to call him, the court was required to draw an adverse inference to the prosecution. He cited the case of **Azizi Abdallah Vs. R, 1991 TLR 71**, whereby the Court of Appeal held that:

> *"The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible, but only to confirm or support that which as evidence is sufficient and satisfactory and credible. The general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question are able to testify on material fact. If such witnesses are within reach but are not called without sufficient reasons being shown, the court may draw an inference adverse to the prosecution."*

He further cited the case of **Michael Noro & Juma Mniga Vs. R, Criminal Appeal No. 367/2014** (unreported) whereby the same principle was applied and argued that failure of prosecution to call Mzee Florian required the court to draw adverse inference to the prosecution.

Mr. Mkindi concluded by praying that this appeal is allowed and the court interfere with the sentence, he cited the case of Rashidi Kaniki Vs. R, 1993 TLR 258 hereby the court interfered with the sentence.

In her reply submissions, Ms. Samwel, supported both the conviction and sentences so passed by the trial court. She addressed the grounds of appeal severally starting by the first ground of appeal on the age of the victim to which her submission was that the age was ascertained by the trial court. That the charge sheet show that the offence was committed on the 27/12/2016 when the victim was nine years of age and that when he was called to testify it was in 04/07/2017 when he was 10 years old as seen on pg 13. That when called to testify, the victim stated the current age and not the age when the crime was committed and that when the victim testified as PW3, the appellants were present and they did not question on the age of the victims. She then cited the case of **Nyerere Nyague Vs. R, Criminal Appeal No. 67/2010** (unreported) on which the Court of Appeal held at page 5:

> *"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted the said matter and will be estopped from asking the trial court to disbelieve what the witness said."*

She then argued that as the appellants were present when PW3 was testifying, they were supposed to cross examine the witness on the age but they didn't. Further that the age of the victim stated in the charge sheet is corroborated by PW4, the doctor who examined the victim a day after the incident. In his evidence PW4 stated when he was examining the PW3 he was 9 years of age hence there was no need of scientific evidence to prove the age of the victim. She argued that as far as the age of accused person or appellant is concerned, the trial magistrate was satisfied that they were adults.

Ms. Samwel submitted further that it is true that when Preliminary Hearing was conducted both appellants admitted names and arrest and denied the rest of the facts, but when the 1st appellant was defending himself he said that he is 19 years of age and the 2nd appellant said to be 18 years of age. She submitted further that it means that they did admit the age stated in the charge sheet and there was no need for the trial court to conduct an inquiry or call for relevant information concerning the age of the appellants. She hence prayed that this ground is dismissed.

On the 2nd ground of appeal, Ms. Samwel submitted that it is true that the charge sheet was defective as there was an omission to site sub-section 1 of Section 154A of the Penal Code, but the omission was not fatal to prejudice the appellants because they understood the charge they were facing. She argued that the defect is curable u/s 388(1) of the CPA as the particulars of the offence were sufficient to enable the appellant to know the nature of the offence they were facing notwithstanding the omission to mention sub section 1. She submitted that the particulars disclosed the offence they were charged with and they pleaded to the charge, further that they did cross examine prosecution witnesses and they defended themselves hence they were aware of the charge they were facing. She cited the case of **Octavian Moris Vs R, Criminal Appeal No 254/2015** (unreported) where the Court of Appeal held at page 7:

> *"the particulars of the charge the appellant faced were clear on the nature of the offence he was facing. The mere fact that in the charge sheet there was omission to mention sub section e of Section 132 did not occasion any failure of justice to the appellant."*

She argued that the omission was not fatal and it did not occasion any injustice to the appellant as the prosecution had a strong case against the appellant.

On the issue of tender age of a child, Ms. Samwel submitted that Section 127(2) of the Evidence Act was amended by Section 25 of the written Law Misc Amendment (No. 2) Act No. 4/2016. The amendments are to the effect that a child of tender age may give evidence without making any oath or affirmation but shall promise the court to tell the truth and not to tell any lies. She then pointed out that at page 13 of the typed

proceedings, PW3 did promise to tell the truth and the trial magistrate recorded that. She argued that the trial court satisfied itself that PW3 possessed sufficient intelligence and understood the duty of speaking the trial and the court believed the demeanor and credibility of PW3 who was a victim and in sexual offences, the best evidence is that of a victim. She concluded that the prosecution proved the case beyond reasonable doubt and prayed for this ground to be dismissed.

On the third ground of appeal, Ms. Samwel's reply submission was that the judgment passed by the trial court was a judgment in law and it complied with Section 312(1) of the CPA. That at page 32 of the typed proceedings, the trial magistrate when determining the matter raised one issue and in answering the said issue he analyzed the evidence of prosecution and defence and when convicting the appellants he stated the reasons as seen on page 34 of the typed proceedings. That the law provides what is to be contained in the judgment and not the style of writing the judgment and prayed for this ground to be dismissed.

On the fourth ground of appeal, Ms. Samwel submitted that the evidence adduced against the appellant at the trial court was strong and as far as the year is concerned it is a typing error and it is clear from the evidence of PW3, even before the incidence he knew the appellants as when asked he said it is Godfrey and Maasai who sodomised him. She argued that there was no contradiction and prayed for this ground to be dismissed.

On the failure to call the material witness as submitted by Mr. Mkindi, Ms. Sawel argued that in sexual offences the best evidence comes from the victim and there is no number of witnesses required to prove a case. She then prayed that this appeal is dismissed.

In his rejoinder Mr. Mkindi reiterated what he had submitted on the first ground of appeal and added that the age of the victim need to be determined. He argued that someone can be born on October this year, next year does not mean that he has reached his birthday of one year and that is why the court insisted on the determination of the age of the victim. Further that as submitted by State Attorney that when testified in July he had reached the age of 10 needed to be proved, since this is a criminal case which has set the standard of proof and that is why the court insisted that if there is a

contradiction on the age then even scientific proof is needed. That neither him, State attorney or the trial magistrate knows the specific age of the appellant when the offence was committed. That if he was ten at the time he was testifying then the sentence could not be life imprisonment, it could have been lesser than that as provided u/s 154(1) of the Penal Code.

On the argument that the appellants were required to raise the issue of age, Mr. Mkindi urged that the argument should not be regarded because once the prosecution called a witness who testified differently from what had been stated then the court is required to direct itself on the difference and determine it.

On the second ground of appeal, Mr. Mkindi's rejoinder submission was that the omission to site the sub-section was fatal and that the cited case of Octavian Moris is distinguishable. In that case the court was discussing the omission of words and not a sub-section and argued that failure to cite a provision of the law is material. He submitted further that even if the child of tender age possess sufficient knowledge, the court need to record the questions and answers which were raised in order to confirm if the child possess sufficient knowledge. That a mere act of a trial magistrate writing I promise to state the truth does not mean that the witness has sufficient knowledge. He argued that in the cited case of Dotto Ikongo the court stated clearly why it is mandatory for the court to record the voire dire test. That the essence is to allow the higher court in appeal like this to satisfy itself if such questions sufficiently proved that the child had knowledge and if at all that voire test was conducted in the premises of the law.

On the last ground of appeal, Mr. Mkindi argued that since the evidence of PW4 is contradictory it raises doubts. Further that the place where the victim was found raises doubts and that if there was contradiction then the prosecution was bound to call the corroborating witness Mzee Florian whom the victim said he asked the appellants "nyie mnamfanyia nini mwenzenu". That failure to call him, the court must draw inference on prosecution case.

I have gone through the records of appeal, the parties submissions thereto and the grounds of appeal. Before me there are three main issues for determination, the first

one is that the charge sheet is defective; the second issue is on the age of the appellants and that of the victim in so far as sentencing is concerned and the third issue is whether or not the prosecution evidence adduced at the trial was sufficient to have warranted the conviction of the appellants.

Beginning with the first issue that the charge sheet is defective, Mr. Mkindi submitted that the appellants were charged for committing unnatural offence c/s 154 (a) of the Penal Code arguing that the Penal Code does not have Section 154(a) which created the unnatural offence, hence the appellants were charged, convicted and sentenced on defective charge sheet for containing wrong as well as non-existing provisions of the law. He hence argued that Criminal Case No. 01/2017 did not have a legal charge sheet and that failure to site proper provision of the law is a serious defect. He supported his argument by citing the case of **R Vs. Titus Petro, 1998 TLR 39** and the case of **John Ikland @ Ayubu Vs. R, Criminal Appeal No. 196/2014**.

In reply Ms. Samwel admitted that it is true that the charge sheet was defective as there was an omission to site sub-section 1 of Section 154A of the Penal Code. Her argument was that the omission was not fatal and is curable u/s 388(1) of the CPA because it did not prejudice the appellants as they understood the charge they were facing. That the particulars of the offence were sufficient to enable the appellant to know the nature of the offence they were facing notwithstanding the omission to mention sub section 1 and they pleaded to the charge, cross examined prosecution witnesses and they defended themselves hence they were aware of the charge they were facing. She cited the case of **Octavian Moris Vs R, Criminal Appeal No 254/2015** (unreported) to support her argument.

I have gone through the provisions of Section Penal Code, and indeed as argued by Mr. Mkindi, the Section providing for the offence is Section 154(1)(a) and not 154(a) of the Penal Code. However, Ms. Samwel raised a relevant question should the omission suffice to declare the charge defective to warrant the acquittal of the appellants? The answer is definitely NO. The Section 154 has two provisions, sub-sestion (1) and (2) whereas the subsection (1) provides for the offence and (2) provides for the sentence. The subsections (a)(b)and (c) of sub section (1) provides for the different ways the

offence may be committed. It is also pertinent to note that the sub section (2) does not have further sub section. Hence the sub Section (a) in the Section 154 is only available in sub section 1, which Section provides for the offence. The sub section matches the facts that were read over and pleaded to by the appellants hence the omission to mention the sub section (1) did not occasion any miscarriage of justice to the appellants. As held in the cited case of **Octavian Moris Vs R, (Supra), the** particulars of the charge the appellants were clear on the nature of the offence they were facing to which they pleaded to. The mere omission to cite the sub section (1) of Section 154 of the Penal Code did not occasion any miscarriage of justice to the appellants to warrant their acquittal.

The second issue for determination is the age of the appellants and that of the victim in so far as sentencing is concerned. In determining this issue, I shall not be detained by the age of the first appellant, Godfrey Simon because on the 11/10/2017 when he testified in defence as DW1, he told the court that he was 19 years of age. Since the offence is alleged to have been committed in December 2016, then it implies that he was either 19 years of age or if we are to subtract, for the sake of argument, one year from it, then he was 18 years of age. To the 1st appellant hence the age is not an issue.

As for the second appellant, Mr. Mkindi's submission was that during Preliminary Hearing the 2nd appellant disputed some facts including his age. That the court was duty bound to determine the age of the accused and argued that when the age of the accused is a determining factor in sentencing, the court is duty bound to analyse the age of the accused before passing a sentence. He cited the case of **Ramadhan Mwembaju Vs. R, 1998 TLR 491**, to support his argument. In her reply, Ms. Samwel admitted that when Preliminary Hearing was conducted both appellants admitted names and arrest and denied the rest of the facts. She however argued that when the 1st appellant was defending himself, he said that he is 19 years of age and the 2nd appellant said to be 18 years of age which means that they did admit the age stated in the charge sheet and there was no need for the trial court to conduct an inquiry or call for relevant information concerning the age of the appellants.

On my part, I am in agreement with the submission by Ms. Samwel that when the 2nd appellant was testifying on the 11/10/2017, he testified to be 18 years of age. The time he testified was less than a year when the alleged offence was conducted. As for the case of **Ramadhan Mwembaju Vs. R** (Supra), the circumstances are different because in that case, in his mitigation, the appellant pleaded his young age and it was an issue raised during trial. As for the case at hand, this issue never came during trial and even in his mitigation, the 2nd appellant's only mitigating factor was that he prays that the court doesn't pass a greater punishment. The issue cannot hence be raised at this point of appeal as it will deny the prosecution an opportunity to adduce evidence to that effect. That said, I find the ground as lacking merits and I hereby dismiss it.

As for the age of the victim Damian, it is undisputed by both Mr. Mkindi and Ms. Samwel that when the offence occurred in 2016 the victim was 9 years old. Mr. Mkindi's argument was that in the charge sheet, the age of the victim was indicated to be 9 years, however, during the trial and especially during voire dire, the victim who testified as PW3 stated his age to be 10 years. He hence argued that as per evidence, the age of the victim was 10 years and not 9 years and is fatal because it determined the sentence of the accused. On my part, I am surprised by the contradictory arguments raised by Mr.Mkindi as when he was defending his client the 2nd appellant, his argument was that since he testified to be 18 in 2017, then in 2016 he was 17. But now for the victim, he wants the age to be the one he was at the time he was testifying? Anyway, the issue here is what was the age of the victim at the time the offence was committed to him? The charge sheet shows that the victim was 9 years old and when he was testifying a year later, he said that his age was 10 years in which argued both ways, the victim was aged 9 years old when the offence was committed. Section 154(2) of the Penal Code provides:

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

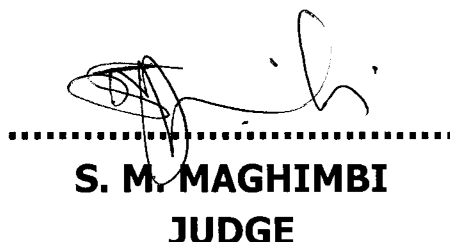
As per the law, since when the offence was committed to him the victim was 9 years, I find the sentence so passed by the trial court to be proper, should the next issue on

proof of the case be decided in favor of the respondent. This takes me to the issue on whether at the trial, the evidence adduced proved the charge beyond reasonable doubt. Beginning with the Voire Dire examination which Mr. Mkindi challenged, I am in agreement with the argument raised by Ms. Samwel Section 127(2) of the Evidence Act was amended by Section 25 of the written Law Misc Amendment (No. 2) Act No. 4/2016 allowing the child of tender age to give evidence without making any oath or affirmation. He is required to promise the court to tell the truth and not to tell any lies. As far as the records go, the victim who testified as PW3 did promise to tell the truth and not to tell lies. This was after the trial court was satisfied that the witness possessed sufficient intelligence and understood the duty of speaking the truth. Therrefore the evidence of the child was properly received.

I further find the argument of failure to call Mzee Florian as lacking merits. It is trite law that in sexual offences, the best witness is the victim of the offence. In the case at hand, after the witness PW3 promised the court to tell the truth and not to lie, the court believed the demeanor and credibility of PW3 who was a victim and in sexual offences, the best witness. Hence even in the absence of other evidence, I find that the testimony of the victim was sufficient to have warranted the conviction of the appellant. The mere variations in the time between the PW1 and PW2 did not in any way go to the root of the evidence adduced to have made the trial court raise a reasonable doubt against the prosecution.

Having made those findings, I see no reason to interfere with the findings of the trial court. I find the conviction well found and the sentence so passed proper. This appeal is hereby dismissed in its entirety. The judgment, conviction and sentence passed by the trial court are hereby upheld.

Dated at Arusha this 30th day of August, 2018.



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S. M. MAGHIMBI

JUDGE