IN THE HIGH COURT FOR ZANZIBAR
HELD AT VUGA
CRIMINAL APPEAL NO. 2 OF 2014
FROM ORIGINAL CRIMINAL CASE NO. 106 OF 2012

YUSSUF MOHAMMED YUSSUF ..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTOR ..... RESPONDENT.

Date of Last Order 13/03/2014
Date of Judgment 13/05/2014

JUDGMENT

MWAMPASHI J.

The appellant Yussuf Mohammed Yussuf was charged in the Regional Court at Vuga with three counts namely abduction c/s 130 (a), indecent assault c/s 131(1) (2) and unnatural offence c/s 150(a) all of the penal Act , 2004 (No 6/2004). He was acquitted on the first but was found guilty and convicted of the remaining two offences. The trail Court sentenced him to 14 years imprisonment for each of the two offences he was convicted with and sentences were ordered to run consecutively. This appeal is against both the conviction and sentence. For ease of reface the charge sheet as laid by the Prosecution against the appellant :-

HATI YA MASHTAKA

MAD/ PCR. 81/1212

MSHITAKIWA: Yussuf Mohammed Yussuf, mwanaume, Mtumzima, miaka 46, Mzanzibari wa Bet-el Ras, Unguja.

KOSA LA KWANZA: kutorosha msichana aliye chini ya wazazi Wake kinyume na kifungu 130(a) cha Kanuni ya Adhabu sheria No. 6/ 2004 ya Baraza la Wakilishi Zanizibar.

MAELEZO YA KOSA: Yussuf Mohammed Yussuf mnamo mwezi wa sita na mwezi saba saa zisizojulikana mwaka 2012 hapo skuli ya Rahaleo Wilaya ya Mjini Mkoa wa Mjini Magharibi Unguja bila ya halali Uhalali ulimchukuwa Fatma Abdulla Juma miaka 9 kutoka skuli ya Rahaleo Na kumpeleka nyumbani kwako Bet- Bet- El Ras bila ya idhini ya wazazi Wake.

KOSA LA PILI: Shabulio la aibu: Kinyume na kifungu 131(1) (2)sheria No 6/2004sheria za Zanziabr.

MAELEZO YA KOSA: Yussuf Mohammed Yussuf mnamo mwezi Wa sita na mwezi wa saba saa zisizojulikana Mwka 2012 hapo skuli ya Rahaleo Wilaya Wilaya ya Mjini Mkoa wa Mjini Magharibi Unguja bila ya uhalali ulimkashifu Fatma Adbdulla Juma miaka sita kwa kumchezea Maziwa na sehemu zake za siri akiwa ni Mtoto mdogo.

KOSA LA TATU: kumuingiliya mtoto wa kike kinyume na kifungu 150(a) sheria No 6/2004 sheira za Zanzibar.

MAELEZO YA KOSA: Yussuf Mohammed Yussuf mnamo mwezi sita Na mwezi wa saba saa zisizojulikana mwaka 2012 Hapo skuli ya Rahaleo Wilaya ya Mjini Magharibi Unguja bila ya halali Ulimwingilia Fatma Abdulla Juma miaka 9 Kinyume na maumbile na kumsababishia Maumivu makali sehemu za siri.

MADEMA POLISI:
6/9/2012

PP: SIGNED

The facts of the case against the appellant were as follows; The appellant had a tuition/ remedial class at Rahaleo of which PW3 Fatma Abdulla Juma (victim), PW4 Hamian Abubakar Issa and Dw2 Nafisa Yahya Husseni were among his pupils. The classes used to be conducted on every Fridays, Saturdays from 02.00 pm to 05.00pm. On 01/ 09/ 2012 PW3 attended the classes as usual . When she came back home she was seen by her mother Rauhia Muglis Othman (PW1) with peanuts, flied cassava chips and ubuyu in her hands. PW1 became suspicious wondering how come PW3 had those cookies while she had not given her any pocket money. PW1 decide to interrogate PW3 and was told that it was

the appellant who had given her the money. PW1 called the appellant who admitted that he gives money not only to PW3 but also to other pupils as motivation on their studies. To satisfy herself PW1 called and asked PW3's friends who denied and told her that it is only PW3 who is always given money by the appellant. PW1 reported her suspicions to her husband PW2 Abdalla Juma Zaidi and together they demanded explanations from PW3 as to why she is the only pupil who was being given money by the appellant. PW1 did not easily give the answer but burst into tears not until she was pressed and promised that she will not be punished when she told them that every day after classes when other pupils had left the appellant asks her to remain behind to clean the blackboard then he takes her to a dark room, undresses her, touches and sucks her breasts before he puts his fingers and penis into her anus. She also told them that the appellant had warned her to keep it as secret otherwise he was going to report her to her to parents that she does not know how to read. After hearing this from their daughter PW1 and PW2 reported the matter to the police and later took PW3 to the hospital where she was examined.

In her testimony PW3 who gave evidence on affirmation gave her testimony referring to two different instances or events, i.e about what did happen at Rahaleo where the remedial classes used to be conducted and on what happened at the appellant's house at Bet-El Ras where the whole class once went for extra classes.

Part of the evidence on the first, event which was in general and which to my understanding did not refer to any particulate date and which was on what did transpire at Rahaleo remedial class was as follows;

'When we finished tuition class Mr. Yussuf asked me to remain

and clean blackboard ,after finishing cleaning Mr. Yussuf took

my hand and take (sic) me to the dark room, the dark room is

at the left side of the house. At the dark room Mr. Yussuf

undressed me and doing (sic) bad things to me, took him (sic)

finger to my back side (PW3shows the finger to her anus), he

also sucks my breast, he also put his penis at my anus.

Mr Yussuf did this to me since 2011 and he done (sic) it

several times'.

As to what did happen at Bet El – Ras PW3 had these to tell the trial court;

'He also did the same time (sic) at Bet-El-Ras when I went there

with other pupils. At Bet-El-Ras Mr. Yussuf took me at his house

and did those bad things to me it was at his bedroom where he did it. We went Bet-El-Ras for studying it was Mr. Yussuf who asked us to go there. At Bet-El-Ras there was competition between us ad pupil of Rahaleo the competition was at Mr. Yussuf house….. We were watching letter A at the TV and at 4. 00 pm other pupils went out and we Nafisa and Hajra remain inside watching TV, then later Hajra and Nafisa went out and they left me alone inside watching TV, later Mr. Yussuf opened the door from his bed room, he took my hand and pull (sic) me at his room, when I was at hir room he undressed me and put his finger at my anus and sucked my breast then he put his penis at my anus and have intercourse with me through anus…. After doing bad things he was given (sic) me money, Tshs, 200 or 300 and other days he gave me 500 Tshs. …..I usually bought different things like cassava chips, ubuyu, peanuts and kachori by the money I

received from Mr. Yussuf …….At home sometimes I give those

things to my relatives. My mother and father saw me with cassava

chips, ubuyu and peanuts. After saw (sic) me with it they asked

me where did I get them. I never told them before on what Mr.

Yussuf did to me as I was afraid, Mr. Yussuf was (sic)

threatened me that he will tell my father that I do not know how

read. I know how to read. There was a day my father and mother

asked me what Mr. Yussuf did, and I told them that he did bad

things to me. After telling them they then took me to Madema

Police Station."

When asked in cross examination in respect of the Bet- El- Ras instance PW3 told the tried court among other things that Mr. Yusuf 's wife was at the kitchen cooking and that she is the one who prepared food for them.

The evidence from PW4 was also on affirmation. As on the Rahaleo occasion, which referred to a specific day but not specified her testimony was to the

effect that after classes Mr. Yussuf asked PW3 to remain the class and clean the blackboard. She and her friends proceeded home and did not wait for PW3. As for the Bet-El-Ras occasion she testified that they studied English through TV program and that she was with PW3 and other but at one time PW3 went missing She also told the trial court that during prayer times Mr. Yussuf and the boys went to pray but the girls remained behind. PW3 was there in the house. In cross examination PW4 stated that she saw Mr. Yussuf giving money to PW3 but that it was in secret. She also stated that when PW3 went missing she did not know her where about and that she (PW4) was there watching TV all the time even after Mr. Yussuf had returned from the mosque. She also told the trial court that she did not see PW3 entering anywhere. In re examination PW4 stated that after Mr. Yussuf had returned from prayer with other male pupils the studies continued.

Dr. Msafiri Marijani (PW5) is the medical doctor who examined PW3. In his testimony he told the trial court that on 03/09/2012 PW3 who was being suspected to have been carnally know against the order of nature for several months was brought to him for medical examination. His examination on PW3's genital organs revealed nothing abnormal let alone for the hymen which was stingily wide though intact. As for anal examination he observed that though there were no injuries there was hyperemia which is red colour around the anus reflecting that there had been recent injuries. His further examination showed

that PW3's spinster tone had been reduced which is not normal and which is the result of anal muscles being loose. His conclusion was therefore that PW3 had been sodomized. PW5 did also tell the trial court that PW3 was not sent to him on the day she was sodomized but according to the girl it was four days after. He tendered in court a PF3 filled by him as exhibit P1. In cross examination PW5 maintained that it was being suspected that PW3 was sodomized four days ago before she was examined by him. He also told the court that there are other objects which if penetrated into the anus results are similar to sodomy and in re-examination he explained that blunt object with similar size to penis may cause injuries to anus.

The only relevant evidence from PW6 the case investing officer was that after being assigned the case for investigation on 03/ 09/ 2012 she sent PW3 to the hospital for medical examination and visited the scenes of crimes at Rahaleo and Bet-El-Ras. At Rahaleo she found that there is a place set for and used as a remedial class in a house and that there was no office. She stressed that what made her visit the place was just for her to see where the remedial classes were used to be conducted and nothing else. At Bet-El-Ras PW6 visited a residential house in which the appellant resides and she inspected the room PW3 is said to have been sodomized.

In his defence evidence the appellant who had pleaded not guilty to all the charges from the first day the charges were read to him stood firm to his guns. He maintained that he did not commit the alleged offences against his pupil PW3 and in support of his defence he called DW2 Nafisa Yahya Hussein one of his pupil and a fried of PW3 and his wife DW3 Asha Said Salum. The appellant defenced himself by telling the trial court that the house at Rahaleo where he used to conduct the remedial classes has a hall which was partitioned into two parts. In that house there was neither a store nor a toilet. He further testified that after classes and before the pupils are allowed to go home any pupil could clean the black board and thereafter the premises used to be closed. The appellant went on telling the court that PW3 was one of his hard working pupils and that after classes PW3 used to leave in the company of other pupils including her friends Nafisa (DW2), Hajrat (PW4), Mohammed, Shemsa and sometimes she used to be picked up by her father (PW2).

The appellant did also testify that on the day it is alleged he abducted PW3 he shifted the class from Rahaleo to Bet-El Ras at his house because he was going to teach the pupils through video proprams. He maintained that all the parents had been informed of the shifting of the class and that all the pupils were at his living room except during lunch which was prepared by his wife DW3 and who was there all the time. After lunch he with the boys went to the mosque for prayers and left the girls including PW3 with his wife. He went on telling the

court that after prayers the classes continued until when the car came to pick them back to town. The appellant insisted that she never took PW3 to his bed room and never sodomized her. He lastly stated that it is not true that it is only PW3 who he used to give money as motivation but that he used to do so to all of his pupils and that was not done every day.

DW2 gave her testimony on affirmation telling the court that PW3 is her friend and that she used to attend the appellant's remedial classes at Rahaleo with her. She also testified that after classes and before leaving for home any of the pupils could clean the black board. No one was allowed to remain behind and that usually she went home in the company of PW3, Hamiani, Sukeda and Hajra. DW2 did further tell the court that the appellant used to give them including PW3 money and it was not done in secret. As on the day they went at Bet-El-Ras DW3 told the trial court that all the pupils were at the appellant's house living room learning until after lunch when the appellant and boys went to the mosque leaving her with other girls including PW3 at the living room. In cross examination DW3 maintained that at Bet-El-Ras she was with PW3 all the time and when asked by the trial court she stated that the appellant is her uncle.

The appellant's wife DW3 evidence was to the effect that on the day the appellant took his pupils to their house at Bet-El-Ras she was around all the time and that the studies were conducted at the living room.

The foregoing is the evidence tendered to support the charges against the appellant and the defence evidence given by the appellant. I have taken pain to reproduce the contents of the charge sheet and summarize the whole evidence not for nothing but because of the nature of the grounds raised in support of the appeal and also because this is a first appeal and that being the case this court has a duty and the right to re-evaluate the evidence and where necessary to have its own consideration and findings. In the case of ***Kasema Shindano @ Mashuyi vs. R***, Crim. Appeal No. 214/2006 (Unreported) the Court of Appeal had these to say;-

'The law, as we understand it, is that on a first appeal,

it is the appellant's legitimate right to have the entire

evidence re-evaluated by the appellate court. The appellant

is entitled to have that court's own consideration and views

of the entire evidence and its own decision thereon'.

Immediately after summarizing the evidence from both sides the trial court had a conclusion that from the evidence it was not in dispute that PW3 was indecently assaulted and sodomized several times. The trial court found that the evidence of PW3 and PW5 including the PF3 form (Exhb. P1) was unchallenged, credible

and truthful. The court therefore proceeded in singling three issues which to the court were the only disputed issues. The issues were as follows; Whether Fatma Abdalla Juma a girl aged 9 years old was abducted by the accused person Yussuf Mohammed Yussuf, Whether the accused person, Yussuf Mohammed Yussuf indecently assaulted Fatma Abdalla Juma and Whether the accused person Yussuf Mohammed Yussuf had carnal knowledge of Fatma Abdalla Juma against the order of nature.

It should be pointed out at this very stage, with respect, that it was wrong and a misdirection on the part of the trial magistrate to hastely conclude that it was not disputed that PW3 was indecently assaulted and sodomized at least for two reasons. One, it is not true that the allegations that PW3 was indecently assaulted and sodomized were not disputed. The allegations were strongly denied by the appellant during when the charges were read over to him and the denial was maintained throughout the trial and particularly in his defence. Two, it was not proper for the trial court to hastely hold that the evidence from PW3and PW5 was unchallenged and therefore that the witnesses were credible without first having properly analyzed and evaluated the evidence from those witnesses and from the whole evidence on record. In fact apart from the three singled out issues by the trial court the other important issues ought to have been as to whether or not PW3 was indecently assaulted and whether or not PW3 was carnally known against the order of nature. These were the issue to be dealt

with first and it was only after these issues are found in the affirmative that the issues whether or not it was the appellant who did indecently assault PW3 and who did carnally know her against the order of nature were to be determined.

The first issue among the tree issues singled by the trial court did not detain the court as the issue was simply found in the negative. The trial court found that the prosecution did not prove the first count on abduction because there was evidence from PW3 and from the appellant that PW3's parents and other parents knew about the Bet-El-Ras trip and some of the parents did in fact contribute to facilitate the trip.

As on the remaining two issues the trial court rightly found that the only relevant evidence supporting the two respective counts came from the victim i.e PW3. The court found PW3 as a credible and truthful witness and after warning itself on dangers of basing conviction on evidence from the victim alone without corroboration the court found the two issues in affirmative. The trial court also held that law in Zanzibar is now settled that the evidence of a child of tender years where it is credible is enough to support conviction without corroboration. The court cited S.49(1) (2) (3) (4) and (5) of the Children Act, 2011 (Act No. 6/2011) to cement the finding. The trial court therefore convicted the appellant on the two counts sentencing him to serve a period of 14 years in the Education Center on each of the counts and ordered that the sentences were to run

consecutively. This appeal as pointed out earlier is against the trial court conviction and sentence.

Nine grounds have been raised in support of the appeal in the following from:-

1. That the Honorable trial Regional Magistrate erred in law and in fact by convicting and sentencing the appellant based (sic) upon uncorroborated and weak evidence adduced by the prosecution
2. that the Honorable trial Regional Magistrate erred in law and in fact in failing to fully evaluated and consider the evidence adduced by the defense witnesses.
3. That the Honorable trial Regional Magistrate erred in law by assuming himself being a presiding officer (magistrate) of the children's Court while in fact he was not, hence making the entire proceedings a nullity.

ALTENATEVELY

That the Honorable trial Regional Magistrate erred in law in failure (sic) to properly warn himself on the danger of convicting the appellant on the danger

based (sic) upon uncorroborated testimony of a single witness who is of tender age.

4. That the Honorable trial Regional Magistrate erred in law and in fact in convicting and sentencing the appellant without first addressing the contradistinctions and inconsistencies of the evidences adduced by the prosecution witnesses.
5. That the Honorable trial Magistrate erred in law and in fact Ignoring the rules governing voire dire test of the witness of tender age.
6. That the Honorable trial Magistrate erred in law by imposing Sentence to the appellant in excess of his(trial magistrate) Jurisdiction.
7 That the Honorable trial Magistrate erred in law by denying the strong evidence of DW2, a relative of DW1 without advancing plausible and justifiable reasons for such denial.
8 That the Honorable trial Magistrate did erred in law and in fact by imposing to the appellant severe sentence without considering that the appellant is a first offender.

9 That the Honorable trial Magistrate did err in law by delivering judgment which falls short of ingredients, hence making the same a nullity.

At the hearing of this appeal the appellant as was before the trial court was represent by Mr. Rajab Abdalla learned advocated while the respondent (DPP) was represented by Mr. Khamis Juma learned State Attorney.

Mr. Rajab started by combining and arguing grounds 1, 2and 3 together. The complaints in those three grounds were that the prosecution evidence on which the trial court based the conviction was weak, uncorroborated, contradictory and that trial court did not properly evaluate and consider the defence evidence. It was submitted by Mr. Rajab that the trial court at page 55 of the typed copy of the proceedings rightly found that the only evidence on whether or not PW3 was indecently assaulted and sodomized by the appellant came from PW3, however the trial court erred in finding that PW3 was a credible and truthful witness. It was argued by him that PW3 was not a credible witness. He referred the court to the case of ***Jumanne Mwera vs. R,*** Cri. Appeal No. 186/2007 (Unreported) where the Court of Appeal among other things held that the credibility of any witness ought to be assessed not in isolation but on the basis of the totality of the other pieces of evidence on record. The court was also referred to the case of ***Maloda William and Mahagila Mrimi vs, R,*** Cri. Appeal No. 250/2006

(Unreported) where again the Court of Appeal held that the credibility of each witness in a case ought to be dispassionately assessed by testing it not only against the whole of his or her own evidence but more compellingly against the entire evidence on record. Mr Rajab submitted that the trial magistrate did not assess PW3's credibility on basis of her other piece of evidence and also on the basis of the evidence from other witnesses. He for instance pointed out that PW3 told the trial court that when they were at Bet-El-Ras the appellant pulled her to his bed room and carnally knew her against the order of nature but the evidence from PW4, DW1 and from other witnesses who were there show that nothing like that did happen. Mr. Rajab did also point out that while according to PW3 there is a dark room at Rahaleo remedial classes where the appellant used to take her and indecently assault and sodomize her, the evidence from PW6 the case investigating officer is that there is no such a room.

It was also argued by Mr. Rajab that the trial magistrate failed to properly analyze and consider the defence evidence and the whole evidence on record. He insisted that the magistrate did also fail to address the pointed out material contradictory evidence from the prosecution side and as a result he reached at a wrong conclusion that PW3 was a credible witness. Here the court was referred to the case of ***Mohamed Said Matula vs. R*** [1995] TLR. 3 where it was held among other things that any inconsistencies in evidence need to be addressed and resolved.

Mr. Rajab did also submit that the trial magistrate did not properly warn himself before conviction the appellant on uncorroborated evidence of PW3. He insisted that the magistrate did not point out the dangers of basing conviction on uncorroborated evidence of a single victim witness. To cement his argument he cited the case of ***Shiku Saleh vs. R*** [1987]TLR. 193.

As for the third ground it was argued by Mr. Rajab that the trial magistrate wrongly applied the Children's Act, 2011 and assumed the position of a presiding magistrate of the Children's court which is established under S. 18 of that Act while he was not such a magistrate. He further insisted that it was wrong for the trial magistrate to apply the provisions of the Act because there was no child of tender years who testified without being affirmed.

Mr. Rajab withdrew ground 5 and on ground 6 it was argued by him that according to S. 8 of the Criminal Procedure Act, 2004 the maximum custodial sentence the Regional Magistrate can impose is seven (7) years. That being the law, it was submitted by him, that in ordering the appellant to serve a period of 14 years of imprisonment on each of the two counts the trial magistrate exceeded his sentencing powers. It was suggested by him that the trial magistrate ought to have committed the appellant to the High Court under S. 12(1) of the Criminal Procedure Act, 2004 if he had reasons to believe that the

appellant was entitled to a stiffer sentence than he was empowered to impose. Mr. Rajab did therefore insist that the sentence imposed by the trail magistrate was illegal and that it has to be set aside. On the same breath it was Mr. Rajab's submission that it was wrong for the trial magistrate to convict the appellant on both two offences when the first offence of indecent assault is cognate to the offence of unnatural offence. He also pointed out that it was wrong for the trial magistrate to order that the sentences should run consecutively and not concurrently.

As on the seventh ground it was submitted by Mr. Rajab that it was an error on the part of the trail court to discredit DW2's evidence only because she and the appellant are relatives. He referred the court to S. 118 of the Evidence Decree, Cap 5 and argued that DW2 was a competent witness and that there is no law which prohibits relatives to give evidence. Here the court was referred to the case of ***Ayubu Hassan vs. R, Cri.*** Appeal No. 79/2009 (unreported) where the Court of Appeal insisted that the evidence of relatives must be considered as other evidence.

Mr. Rajab lastly submitted that it was wrong for the appellant to be sentenced to serve a maximum sentence while he was a first offender. He argued that the sentence is excessive, harsh and severe. He withdrew the last ground and

prayed that for the ground raised and argued by him the appeal be allowed by quashing the conviction and setting aside the sentence.

Mr. Khamis Juma the learned State Attorney for the respondent vehemently opposed the appeal. He started his submission by combining the 1st and the alternative ground to the 3rd ground which are on corroboration and credibility of PW3 and PW4. He argued that the issues of corroboration and credibility were properly dealt with by the trial magistrate. On corroboration his argument was that corroboration is not a matter of law but of practice. He referred the court to ***Maina vs. R***(1970)EA, 370 and ***Shozi Andrew vs R***[1987]TLR. 68 where the Court of Appeal insisted that a sworn evidence of a child of tender years does not need corroboration and can form basis of conviction. He also cited the case of ***Joseph Mapunda & Khamis Suleiman vs R***[2003]TLR. 368 where the High Court of Tanzania held that the criterion now on sexual offences is more on credibility of a victim if the court is satisfied that the victim is truthful. The other case cited by Mr. Khamis Juma is the Kenyan case of ***Mohamed vs R***[2005]2 KLR, 138 where it was held by the Court of Appeal that it is now settled that the court can no longer be restrained by the requirement of corroboration where the victim of sexual offence is a child of tender year if it is satisfied that the child is truthful. He also referred the court to S. 134 of the Evidence Decree, Cap 5 of the Laws of Zanzibar where it is provided that no particular number of witnesses shall in any case be required to prove any fact as it was also stressed in

Massoud Amlima vs R[1989] TLR. 35. He therefore ended by submitting that PW3 whose demeanor was observed by the trial court and was found to be credible and truthful his evidence needed no corroboration.

Grounds 2 and 7 were combined and argued together by Mr. Khamis Juma the learned State Attorney. He submitted that the complaint that the defence evidence was not taken into consideration by the trial court is baseless. He referred the court to pages 57 to 58 where the defence evidence was considered by trial court but was rightly found to have raised no reasonable doubt.

As for ground 4 it was submitted by Mr. Khamis Juma that it is not true that there were any material contradiction in the prosecution evidence. Here the court was referred to another Kenyan case of ***Mwangi vs R*** [2000] KLR, 472 where it was held that in any trial there are bound to be discrepancies and an appellate court in considering the discrepancies must be guided by the wording of S.382 of the Criminal Procedure Code i.e whether such discrepancies are so fundamental to cause prejudice to the appellant or they are inconsequential to the conviction and sentence. He pointed out that S. 382 of the Kenyan Criminal Procedure Code is pari materia to S. S. 394 of our Criminal Procedure Act, 2004.

It was Mr. Khamis Juma's submission on ground 3 of the appeal that it was not wrong for the trial court to apply S. 49 of the Children's Act and that in doing so

the trial magistrate did not assume the powers of the presiding magistrate of the Children's court. He argued that the trial magistrate was right in applying the said provisions because the relevant evidence in question was of a child witness. Mr. Khamis Juma conceded to the fact that S. 2 of the Children's Act defines a court as the court established under S. 18 which is the Children's Court. He however contended that that is a miss-drafting because the proper definition was supposed to be any criminal court of competent jurisdiction. Mr. Khamis Juma further asked the court to apply the definition of court as given under S. 4 of the Interpretation of Laws and General Provisions Act, 1984(Act No. 7/1984).

As on grounds 6 and 8 which are in regard to the sentence imposed on the appellant it was submitted by Mr. Khamis Juma that the trial court did not err in convicting the appellant to serve a period of 14 years of imprisonment for each of the two offences he was convicted of. He referred the court to S. 4(2) of the Criminal Procedure Act, 2004 under which the offence of unnatural offence under S. 150 of the Penal Act, 2004 is one of the offences the Regional Magistrate is empowered to try. He however conceded that since the offence under S. 131 of the Penal Act is not covered under S. 4(2) then the trial magistrate ought to have committed the appellant to the High Court for sentencing under S. 12 of the Criminal Procedure Act, 2004 and for this he prayed for the court to invoke its powers under S. 7 of the Criminal Procedure Act. The court was also referred to the case of ***Suleiman Makumba vs R***[2006]TLR, 379.

Mr. Khamis Juma's did lastly air his views on whether under the circumstances of this case particularly from the particulars given in the charge sheet it was proper for the trial court to find the appellant guilty to both two counts. To him the conviction was proper because indecent assault, under the circumstances of the case, is not cognate to unnatural offence. As for the order that the sentences have to run consecutively it was his argument that the trial court did not err because under S. 11(2) of the Criminal Procedure Act, 2004 the court has such powers. He therefore prayed for the appeal to be dismisses in its entirety.

In his rejoinder Mr. Rajab was quick to point out that under S. 11(3) of the Criminal Procedure Act, 2004 the trial magistrate had no power to impose a sentence of 28 years imprisonment in aggregate. He also contended that because the imposed sentence is illegal it will not be proper for his court to enhance or confirm it under S. 12 of the Criminal Procedure Act, 2004 as suggested by Mr. Khamis Juma. On this the case of ***R. vs Abdalla Suleiman*** [1983] TLR. 215 was cited by him.

Responding on the arguments made by Mr. Khamis Juma on ground 3 it was submitted by Mr. Rajab that the definition of court under the Interpretation of Laws and General Provisions Act is not applicable to the matter at hand. It was

insisted by him that the proper definition is that one given in the Children's Act and therefore that the trial court was not a Children's Court and ought to have not applied S. 49 of the Children's Act. As for the alleged contradictions in the prosecution case it was Mr.Rajab's argument that the trial court was supposed to consider the whole evidence on record and properly address the contradictions. He lastly contended that S. 4(2) of the Criminal Procedure Act, 2004 must be read together with S. 8 of the same law and he insisted that the trial magistrate had no power to impose 14 years imprisonment sentence on each offence the appellant was convicted of.

I would start with the complaint by Mr. Rajab that it was not proper for the trial court to find the appellant guilty of both two offences which though not specifically raised among the grounds of appeal it is a sound complaint. The other side did get an opportunity to comment on the issue. The argument by Mr. Rajab is that indecent assault is cognate to unnatural offence which to Mr. Khamis Juma is not the case and to him the trial court was right in finding the appellant guilty to both two offences as charged.

This issue has taxed my mind to a great deal. According to the particulars of the two offences as particularized in the charge sheet it is alleged on the second count in regard to indecent assault that in June and July 2012 at unknown time at Rahaleo Unguja the appellant did indecently assault PW3 by fondling and

touching her breasts and her private parts. As for the third count on unnatural offence it was alleged that on the same two months of June and July 2012 at the same place and again at unknown time the appellant did carnally knew PW3 against the order of nature causing her to sustain severe pains in her private parts. The first thing that came to my mind is that the proper Swahili word which the prosecution ought to have used in the particulars is ***baina*** (***between***) and not ***mnamo***. The word ***mnamo*** to my understanding does not mean between but it means on. This was however a minor shortcoming of the particulars of the two offences. The serious confusion was that from the particulars given it cannot be certain as to whether or not the unlawful acts which the appellant was being accused of doing on the second count were done by him on a different date and time to what were alleged to have done by him on the third count. From the particulars given on the two counts one could not tell for sure if the appellant did fondle and touch PW3's breasts and private parts before carnally knowing her against the order of nature and therefore that all the alleged unlawful acts in both two counts were done by her on the same date and time i.e in the same transaction or that they were done on different dates and time.

It was very important, under the circumstances of this case, where PP3's evidence on the dates the offences were committed against her was too general as she did not refer to any particular dated and due to the nature of the two offences in question, for the particulars to clearly show that the alleged unlawful

acts done on the second count were not done in the same transaction with what are being alleged to have been done on the third count. I am of this view because normally before an unnatural offence or even rape is committed, undressing, touching ones breasts or private parts before doing the actual act of unnatural offence or rape is a common thing. For that reason if the appellant before carnally knowing PW3 against the order of nature did first undress, touch and fondle PW3's breasts private parts he cannot if there is sufficient evidence to prove the third count of unnatural offence be found guilty of the second count which in essence and most of times may be comprised of the acts of undressing, touching and fondling breasts and private parts. He can only be found guilty of the second count if there is enough evidence to prove it and where there is no sufficient evidence to prove the third count. Under the circumstances of this case particularly from the alleged facts as alleged in the particulars of the charge sheet on the two counts in question, the appellant could only be found guilty of either of the two counts and not on both the counts. It was therefore wrong for the trial court to find the appellant guilty of both two counts while the particulars given in the charge sheet and the evidence adduced did not clearly show that the unlawful acts complained of in the two counts were not done in the same transaction.

Let me begin with grounds 6 and 8 of the appeal under which it is being complained by the appellant that the sentence of 14 years imprisonment on each

of the two offences the appellant was convicted is illegal because in law the sentencing powers of the trial magistrate in as far as custodial sentence is concerned is 7 years. It was also Mr. Rajab's contention that bearing in mind that the appellant was a first offender the sentence imposed on him is severe and excessive. On the other hand it was Mr. Khamis Juma's argument that as for the sentence on the third count i.e unnatural offence, the trial magistrate did not err in ordering the appellant to serve a period of 14 years imprisonment because he has such powers under S. 4(2) of the Criminal Procedure Act, 2004. He however conceded that since the offence of indecent assault is not covered under S. 4(2) of the Criminal Procedure Act, 2004 then the sentence imposed by the trial court on the second count was not proper and that the magistrate ought to have referred the matter to the High Court for sentencing under S. 12 of the Criminal Procedure Act, 2004.

First of all and with due respect to Mr Khamis Juma the learned state attorney it is not only that the offence of indecent assault under S. 131(1) and (2) of the Penal Act, 2004, is not one of the offences listed under S. 4(2) of the Criminal Procedure Act, 2004 and therefore that the trial magistrate had no power to impose an imprisonment sentence exceeding 7 years but in fact the trial magistrate had no jurisdiction to try the offence. According to the fifth column of the First Schedule the offence of indecent assault under S. 131 is not triable by the Regional Court but by the Subordinate Court. Either under S. 4 of the

Criminal Procedure Act, 2004, particularly under sub-section (1) of the section, the Regional Court is not one of the Subordinate Courts listed thereunder. S. 4 of the Criminal Procedure Act, 2004 is hereunder reproduced in extensor;

4(1) Subject to the other provisions of this Act and under Provisions of sub-section(2) of the section, any offence under the Penal Act may be tried by the High Court, or by any subordinate court by which such offence shown in the fifth colum of the First Schedule to be triable "Subordinate Court of the first, second or third class" shall be construed as being reference to a District Court whereas reference to "any Magistrate" shall be construed as being reference to a District Magistrate or a Primary Court Magistrate.

(2) The jurisdiction of a subordinate Court presided over by a Regional magistrate shall extend to and include the

trial of the offences falling under the following section of the Penal Act, namely, section 125, 132,150, 151, 160, 161, 256, 287, 324, 342(3), (4) and 343.

(3) Save in the case of minimum sentence as provided in any law for the time being in force for which trial is conducted before it, the Regional Court shall not have jurisdiction to impose a sentence of imprisonment exceeding seven years unless such court is vested with extended jurisdiction in accordance with the Magistrate's Court Act, 1985.

It can be clearly observed from the above reproduced sub-section (1) of section 4 of the Criminal Procedure Act, 2004 that the Regional Court is not the Subordinate Court referred to in that provision. The definition of a subordinate court as given under sub-section (1) does not cover or does not mention a Regional Court and the worst is that even the definition of "any magistrate" does

not recognize the Regional Magistrate. This goes contrary to S. 2 of the Criminal Procedure Act, 2004.

The Regional Magistrate is referred to under sub-section (2) of section 4 while under sub-section (1) neither the Regional Magistrate nor the Regional Court is mentioned. This creates a confusion and makes sub-section (1) of section 4 to be nothing but another undesirable results of copying and pasting. The drafters and the law makers once again forgot the need of taking into consideration the status of our court system when importing provisions of law from other jurisdiction to be part of our laws. It is obvious that the jurisdiction where the provision in question might have been imported from has a different court system to ours. The legal effect of S. 4(1) particularly the definitions of which court is 'a subordinate court' and to whom 'any magistrate' refers to as given there under and in consideration of the fifth column of the First Schedule is that the Regional Courts and our Regional magistrates have no jurisdiction to try the offence of indecent assault under S. 131 of the Penal Act, 2004. Under the fifth column of the First Schedule, offences under the Penal Act which are triable by the Regional Court are clearly listed and the offence under S. 131 of the Penal Act, 2004 is not one of them. The offence is triable by the subordinate court and as amply demonstrated above according to S. 4(1) of the Criminal Procedure Act, 2004 The Regional Court and Regional Court Magistrates are not the subordinate courts and any magistrate respectively. A call is hereby made for the concerned

authorities to do the needful and rectify this grave shortcoming as soon as possible but as the law stands today the trial court had no jurisdiction to try the second offence i.e indecent assault against the appellant. It is indeed ridiculous that the Regional Court can try many of the like offences like rape, gang rape, defilements of boys, etc but not indecent assault on women or girls under S. 131(1) of the Penal Act, 2004 but that is the law of the day.

Coming back to the issues whether or not the sentence imposed by the trial magistrate was legal or excessive it is clear that according to S. 8 of the Criminal Procedure Act, 2004 a maximum custodial sentence a Regional Magistrate is authorized to impose is that which does not exceed 7 years. It is only where a Regional Magistrate is conducting a trial wherein the offence in question attracts a minimum sentence which is above 7 years of imprisonment or where such a magistrate is vested with extended jurisdiction that he/she can impose a sentence of imprisonment exceeding 7 years. This is in accordance with S. 4(3) of the Criminal Procedure Act, 2004. The fact that the offence of natural offence under S. 150 of the Penal Act, 2004 is one of the offence the Regional Court is empowered to try under sub-section (2) of section 4 of the Criminal Procedure Act, 2004 does not mean that the Regional Magistrate's Court can impose a sentence of imprisonment exceeding 7 years as argued by Mr. Khamis Juma for the Respondent DPP. Sub-section (2) has to be read together with sub-section (3) of section 4. Under sub-section (3) the Regional Magistrate's Court is strictly

prohibited from imposing a sentence of imprisonment exceeding 7 years save in the case of minimum sentences and unless it is vested with extended jurisdiction. The trial magistrate did therefore err in law when he exceeded his sentencing powers by ordering the appellant to serve a period of 14 years of imprisonment on each of the two offences the appellant was convicted of while in law the maximum period he ought to have ordered is 7 years. As rightly argued by Mr. Rajab if the trial magistrate was of the view that the appellant was entitled to a greater punishment than he could in law inflict the proper course for him was to invoke S. 12 of the Criminal Procedure Act, 2004 and refer the appellant to the High Court for sentencing.

As for the complaint by the appellant on ground 3 that it was wrong for the trial magistrate to apply provisions of the Children's Act, 2011(Act No. 6/2011) because he was not sitting in the Children's Court established under the Children's Act, 2011, this court finds the ground of no any merit. The trial magistrate was entitled and there is no law prohibiting him to apply the said law. It should be borne in mind that the trial magistrate referred to S. 49 of the Children's Act, 2011 when evaluating the evidence given by PW3 who under that Act was a child. He cited the provision when discussing the issues of the relevance and corroboration in respect of the evidence given by a child witness. In doing so he did not assume the powers of the presiding magistrate of the Children's Court. S. 49 of the Children's Act, 2011 generally deals with evidence

of child witnesses in any criminal proceedings. It is not restricted to criminal proceedings before the Childen's Court only. What can only be pointed here by this court is that S. 49(1) of the Act was irrelevant in the case at hand because PW3 gave her evidence on affirmation. This sub-section covers situations where a child can be allowed to give evidence without taking an oath or making an affirmation.

The appellant's complaints on grounds 2 and 7 are that the defence evidence was not properly evaluated and considered by the trial court and that DW2's evidence was rejected only because he was related to the appellant. This court does not agree with Mr. Rajab that the defence evidence was totally ignored. The trial court considered the defence evidence but to my considered view the evidence was not properly evaluated and part of it was rejected on no good reasons. First of all the trial court did not consider the evidence given by DW3 at all. The evidence of DW3 was to the effect that on the day PW3 and other pupils went at the appellant's home and which is one of the days PW3 told the trial court the appellant pulled her in his bedroom and carnally knew her against the order of nature, she (DW3) was around all the time. Her evidence was to the effect that the appellant who is her husband could not have done such a thing while she was around. DW3's evidence had support of other evidence not only from the defence but also from the prosecution as it will be discussed when considering the issue of PW3's credibility.

The other problem relating to the complaint on how the trial magistrate treated the defence evidence is that the trial magistrate disregarded the evidence given by the appellant (DW1) and DW2 on wrong grounds. He did not believe DW3 only because the appellant is his uncle and therefore that they might have planned to tell lies to the court. This was wrong. If DW2 could lie in favour of her uncle the appellant, why could PW4 not lie in favour of her friend PW3? Also if relatives can plan to tell lies how come the trial magistrate believed what was testified by PW3's parents i.e PW1 and PW2? Could these, for reasons better known to themselves, not conspire with their daughter PW3 against the appellant? The point I want to stress here is that the trial magistrate erred in applying double standard in considering the evidence from both sides. There is no law which forbids family members from giving evidence. What matters is their competence and credibility. According to S. 118(1) of the Evidence Decree, Cap 5 of the Laws of Zanzibar all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions. Either, the Court of Appeal of Tanzania in the case of ***Paulo Tayari vs The Republic***, Cri. Appeal No. 216/1994(Unreported) had the following to say on the evidence given by relatives;

`We wish to say at the outset that it is, of course, not the law

that whenever relatives testify, to any event they should Not be believed unless there is also evidence of non-relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events must be borne in mind, the evidence of each of them must be considered on merit, as should also be the totality of the story told by them. The veracity of their story must be considered and gauged judiciously, just like the evidence of non-relatives".

To my considered view the trial magistrate did also err in discrediting the evidence given by the appellant and DW2 on their claim that it was not only PW3 who the appellant used to give money and the trial court did also err in concluding that the money given had no other reason but to win PW3 and sexually abuse her. First of all there was no evidence from the prosecution to support the allegations that the appellant used not to give money to any other pupils but to PW3 only. The fact that PW4 testified that the appellant never used to give money to her does not necessarily mean that no any other pupil was given money by the appellant. It was for the prosecution to call all the pupils and

it was only after all of them have denied the allegations that the appellant used to give them money that the trial court could have found the appellant not telling the truth. The appellant's duty was only to raise the doubt and in the circumstances of this case he did. There is a reasonable doubt that ether all or some of the pupils who were not called in evidence were also given money by their teacher the appellant. There is a doubt that it was not only PW3 who the appellant used to give money. On the same breath it cannot be concluded that the money the appellant gave to PW3 was not for motivation reasons as claimed by him and that it was aimed at winning PW3 where there is no evidence firstly where it is not clear that no any other pupil used to be given money by the appellant and secondly that every pupil or any of those who were given money were also sexually abused. Lastly on this same issue of money because given to PW3 this court does not agree with the trial magistrate that the appellant could not give money out to his pupils because he had no such money as even the parents were delaying in paying monthly tuition fees for their respective children. This again was a wrong reasoning. It should be borne in mind that most of the Tanzanians do not depend on only one financial means to make the ends meet. There was no evidence from the prosecution that the remedial classes used to be conducted by the appellant was the only financial means to him. In fact there is evidence that the class was his part time business. There is undisputed evidence from DW3 that the appellant used to be a teacher at High View and there was

also evidence from the appellant himself that he is also an artist and that he used to teach English language to other different people.

Finally on grounds 1, 4 and the alternative ground to ground 3 which are the crux of the matter. The grounds are on the complaints by the appellant that the prosecution evidence on which the conviction was based is contradictory, weak, uncorroborated and not credible. First of all this court agrees with the trial magistrate that in this case the only material evidence was that from the victim PW3. The successes of the prosecution case did totally depend on the credibility of PW3. Of course there was also evidence from PW5 the doctor who examined PW3 as well as his report exhb. P1. The trial court found PW3 a very credible and that her testimony did in fact and in law require no corroboration. The appellant's view is that that was not the case. It has been argued by Mr. Rajab for the appellant that PW3 was not that much credible and for that reason her testimony could not have formed the basis for the conviction. It is being complained that the trial magistrate in finding PW3 a credible witness did not consider the contradictions in PW3's own evidence and also in the whole prosecution evidence.

First of all it should be pointed out at this very stage that because PW3's evidence was received on affirmation her evidence did not require corroboration. The argument by Mr. Rajab that the evidence from PW3 needed corroboration

only because it came from a child witness is not tenable in law. S. 49(5) of the Children's Act, 2011 provides as follows;

> ***Notwithstanding the provision of this section, where in any Criminal Proceedings involving a sexual offence the only independent evidence is that of the child or victim of sexual offence, the court shall receive the evidence and may after assessing credibility of the child or victim of sexual offence, on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict for reasons to be recorded in the proceedings, if court is satisfied the child is telling nothing but the truth.***

In the case of ***Shozi Andrew vs R*** [1987] TLR 68 the Court of Appeal of Tanzania held among other things that a sworn evidence of a minor does not need corroboration. Again in the case of ***Robert Kivuma vs. R,*** Crim. Appeal No 48/2007 (Unreported) the Court had these to say in as far as corroboration in sexual offences is concerned;

'Where the victim of such offence is the sole witness, the law provides two alternative schemes namely; the court may convict if it is satisfied that the witness is telling nothing but the truth after it has warned itself about the dangers of doing so and the reason must be recorded. In case the trial court does not find it safe to ground a conviction on the evidence of the victim alone, then it shall look for corroboration".

As pointed out above the trial magistrate was satisfied that PW3 did tell nothing but the truth. The magistrate did also warn himself on dangers of basing conviction on such evidence. The crucial question here is whether PW3 was really a credible witness. Here it should be reminded that though it is a trial court which is in a better position to assess the credibility of witness, a court sitting in a first appeal can re-evaluate the evidence and it can even differ with the trial court where there are good reasons to do so. (***Kasema Sindano @ Mashuyi*** (Supra)).

It is the settled view of this court that in reaching at the conclusion that PW3 was a credible witness and therefore that the conviction can be based on her evidence the trial court, as also argued by Mr. Rajab, did not properly evaluate not only the evidence from PW3 but also from the whole evidence on record. The trial court did not test PW3's testimony with the required great care. Though a fact may be proved by the testimony of a single witness there is a need for testing with great care the evidence of such a single witness. In the case of ***Ahmed Omar vs. R,*** Cri. Appeal No. 154/2005 (Unreported) the Court of Appeal, among other things, held that;

> `***On the other hand the burden weighs heavily on any court considering the solitary evidence of a witness as enough/ sufficient to support conviction. Such evidence must be tested with greater care'.***

The trial court did also not assess the credibility of PW3 on the basis of the totality of the other pieces of evidence on record. In ***Jumanne Mwera*** (supra) as cited by Mr. Rajab, the Court of Appeal had these to say;

> ***'We take it to be settled law that issues of credibility of witnesses are best resolved by the trial court. But, we are***

also alive to trite law to the effect that the credibility of any witness in a case, ought to be assessed not in isolation but on the basis of the totality of the other evidence on record. This is because a lying witness can be an impressive witness in the witness box particularly when he or she does not contradict himself or herself'.

Again in the case of ***Maloda William and Mahagila Mlimi*** (supra) the Court insisted that;

'The credibility of each witness in a case ought to be dispassionately assessed by testing it not only against the whole of his or her own evidence but more compellingly against the entire evidence on record be it testimonial or documentary. It is unjudicial and unacceptable to pick out the evidence of a particular witness or witnesses and accept it as true without first testing its accuracy in the manner described above and use it as a yardstick

disbelieving the rest of the evidence'.

The trial court did not properly test the evidence of PW3 and in the settled view of this court PW3 was not credible and her evidence was therefore unsatisfactory in many aspects. ***One***, PW3 lied when she told the trial court that she was carnally known by the appellant at Bet-El-Ras. That she lied on this is also supported by the fact that it appear even the prosecution did not believe her otherwise there is no any good reason why the appellant was not charged with unnatural offence in regard to what PW3 alleged the appellant did to her at Bet-El-Ras and instead they charged him with the offence of abduction of a girl which could even not be proved to the satisfaction of the trial court. That PW3 did lie did not only came from the appellant and his two witnesses but also from PW4 whose evidence was to the effect that she was with PW3 all the time when they were there. Even her evidence that at one time PW3 went missing is of no assistance because there is no evidence that at the time PW3 went missing the appellant was also missing. The point I want to make here is that if PW3 lied on what she alleged did happen at Bet-El-Ras why and how could we believe her to have told the truth on what she alleged the appellant used to do to her at Rahaleo remedial classes? Can a credible and truthful person lie in one event and still be credible in another different event with no good reasons justifying why he

or she lied in the first event? The Trial magistrate ought to have considered PW3's credibility by properly testing her whole evidence.

Two PW3 lied on the existence of a dark room at the house the remedial classes used to be conducted at Rahaleo. PW3's testimony was that in the house the remedial classes used to be conducted there is a dark room where in the appellant used to take and indecently assault and carnally know her against the order of nature every day she attended the classes. Did she tell the truth on this? Is there such a room in the house or was it there at the material period of time? The evidence from the defence was that there is no such a room and that there used to be no such a room at any time. The appellant told the trial court that there was even neither a store nor a toilet over there. PW6 the investigating officer who visited the scene of crime did not find such a room. In her evidence she clearly told the trial court that there was no even an office over there. PW6 did not even bother to investigate and find out whether such a room used to exist at the material time or not. The evidence was therefore that there is no any dark room as claimed by PW3 which means that she did not tell truth and her credibility was therefore doubtful.

Very surprisingly the case investigating officer who undoubtedly did not know what she was supposed to investigate and find as an investigator and who did not know that she was a very important person/witness for the prosecution case

is recorded stating in examination in chief that "for me I just went to see where tuition was conducted and nothing else". An investigating officer in any case should know what are the elements which are necessary for the prosecution to prove the case and should know what kind of evidence is needed to prove the case. Likewise the office of the Director of Prosecution has the duty to guide and direct the investigating officers on what type and kind of evidence is necessary in each particular case. Shallow investigation of a case leads to shallow and weak evidence and the end result is nothing else but the acquittal.

Three, PW3 was a doubtful witness due to her conduct. PW3 told the trial court that the appellant started indecently assaulting her and carnally knowing he against the order of nature since 2012 but she never revealed it neither to her parents nor to any other person. The reason given by her as to why she did not tell anyone is that the appellant warned her and threatened he would tell her parents that she does not know how to read. This is not a strong reason to have been made by any truthful and obedient child and particularly to PW3 who in examination in chief she told the court that she knows how to read, meaning that to her the threat by the appellant was not a threat at all. Furthermore in cross examination PW3 told the court that she knew that what the appellant was doing to her was bad. The question here is how did she not reveal it to her parents or to any other person? In my view an obedient and truthful child whose evidence can be believed to be credible is not that child who cannot let the

alleged offences be committed against her or him for two years without complaining or letting it be known to anyone while she or he knows that that is an offence or bad thing.

The above pointed out shortcomings in PW3's evidence diminished PW3's credibility. The trial court fell into the error of finding her credible when it failed to take into account all the shortcomings as pointed above. The shortcomings, to me were fundamental and went not only to shake the credibility of PW3 as a witness but also to create reasonable doubts on whether PW3 was really indecently assaulted and carnally known against the order of nature and even if the alleged offences were really committed against her whether it was the appellant who did it. For the above given reasons and observations I, with due respect, differ with the trial court on its finding that PW3 was credible and that what she testified was nothing but the truth. PW3's credibility was so doubtful and no conviction could be safely grounded on her evidence alone.

In finding that PW3 was carnally known against the order of nature the trial court to same extent took consideration of the medical evidence from PW5 and on the PF3 form (Exhb P1) the evidence which was to the effect that the medical examinations done to PW3 showed that PW3 was carnally known against the order of nature. Unfortunately the evidence given by PW5 as well as her report had no relevancy to the case in question. According to the charge sheet PW3

was carnally known against the order of nature in June and July 2012. PW3 was taken to PW5 for medical examination on 3/09/2012, one month later. However the evidence from PW5 was that his examinations, findings and conclusion were based on information given to him that PW3 was carnally known against the order of nature four days before she was examined by him. In his evidence PW5 insisted that the signs observed or the results on his examination showed that PW5 was carnally known against the order of nature four days before the examination.

The fact that PW3 was medically examined a month after the dates the offence was alleged to have been committed against her and the fact that PW5's evidence suggested that PW3 was carnally known against the order of nature four days before he examined her on 03/09/2012 leaves no doubt at all that the evidence was not relevant to the case. His evidence did not suggest that PW3 was carnally known against the order of nature in June and July 2012 as it was being alleged in the charge sheet. From PW5's evidence, if PW3 had signs suggesting that she was carnally known against the order of nature, then that has nothing to do with the appellant because the case against him was that he did carnally know PW3 against the order of nature in June and July 2012 and not four days before PW3 was examined by PW5.

The problem with PW5's evidence and the PF3 form is that the findings and conclusions are not at variance with the particulars given in the charge sheet. PW5's evidence and the contents of the PF3 form do not match with the evidence given and the particulars given in the charge sheet.

The question is as to whether or not what was alleged in the charge sheet is what was proven by the evidence adduced by the prosecution. Did PW3 and PW5 give evidence which supported or proved the allegations that PW3 was indecently assaulted and carnally known against the order of nature in June and July, 2012? Were the contents of the PF3 form compatible with the particulars of the case read over and explained to the appellant in court? The obvious answer for the reasons amply given above is definitely no. It was very important for the Prosecution to produce clear evidence to prove that PW3 was indecently assaulted and carnally known against the order of nature in June and July 2012 as the charge sheet particularized and not otherwise. In ***Ryoba Mariba @ Mungare vs. R,*** Crim. Appeal No. 74/2003 (Unreported) and in ***Alfred Valentino vs R***, Crim. Appeal No. 92/2006 (Unreported) the Court of Appeal insisted that the evidence should be that is relevant and referring to the charged date. In the former case the Court held among other things that;

"***It was essential for the Republic which had charged***

Ryoba with raping one Sara Marwa on 20/10/2000

to lead evidence showing exactly that Sara was raped

on the day, a charge the accused was required to answer".

The other thing that has taxed my mind to a great deal in considering whether the allegations that the appellant did carnally know PW3 against the order of nature is the question of penetration. As in rape proof of penetration no matter how slight is essential. The question here is was there evidence to prove penetration either from PW3 or from any other piece of evidence be it real or circumstantial? Though it was alleged in the particulars of the charge that PW3 did sustain severe pains and injuries when the alleged offence was being committed to her there was no such evidence from her. All what she told the trial court was that the appellant used to put his penis at her anus and that he had intercourse with her when he put his penis in her anus. PW3 did not go further and tell the court what did she experience at least on the first time the appellant did so to her. There was therefore no good evidence to prove penetration and as abundantly demonstrated above the evidence from PW3 and his report (Exhb. P1) had no relevance to the charge the appellant faced which was to the effect

that the appellant did carnally know PW3 against the order of nature in June and July, 2012.

For all the above given reasons and observations it is settled view of this court that the Prosecution did not prove the charges against the appellant to the required standard i.e beyond any reasonable doubt. The trial court did therefore err in convicting the appellant. The appeal is therefore hereby allowed by quashing the conviction and setting aside the sentences passed by the trial court. The appellant be set free forthwith unless he is otherwise lawfully being held.

Sdg: Abraham Mwampashi, J.

Judge,

13/05/2014

The judgment has been delivered in court this 13/05/2014 in the presence of the appellant with his advocate Mr. Rajab Abdalla and in the presence of Mr. Khamis Juma assisted with Mr. Mohamed Salehe (SA) for the DPP (Respondent).

Sdg: Abraham Mwampashi, J.

Judge,

13/05/2014.

I CERTIFY THAT THIS IS TRUE COPY OF ORIGINAL

.....

DEPUTY HIGH COURT

ZANZIBAR

Mbs.....