IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KIMARO, J.A., MBAROUK, J.A., And MASSATI, J, A.)

CRIMINAL APPEAL NO. 56 OF 2005

NGUZA VIKINGS @ BABU SEYA
JOHNSON NGUZA @PAPII KOCHA
NGUZA MBANGU
FRANCIS NGUZA.....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mihayo, J.)

Dated the 27th day of January, 2005

In

Criminal Appeal No. 84 of 2004

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JUDGMENT OF THE COURT

3RD DECEMBER, 2009 & 11th FEBRUARY, 2010

KIMARO, J.A.:

This is a second appeal. All the appellants, the first being a father, and the second to fourth his children, were jointly charged in the Court of Resident Magistrate at Kisutu with ten counts of rape contrary to section

130 (2) (e) and 131 (A) (1) of the Penal Code as amended by sections 5 and 6 of the Sexual Offences (Special Provisions) Act, No. 4 of 1998. They were also jointly charged with eleven counts of unnatural offence contrary to section 154 (1) of the Penal Code as repealed and replaced by section 16 of the same law. The victims of the offence were ten children, who, in 2003, the time when the offences are alleged to have been committed were aged between six and ten years old. They were all pupils of standard one at Mashujaa Primary School, located at Sinza area in Kinondoni District. The trial court entered an omnibus conviction for all appellants in respect of all counts. A sentence of life imprisonment was imposed on each appellant. Each appellant was also ordered to pay a compensation of shillings two million to each of the complainants. On appeal to the High Court against the judgment and the sentence, the learned judge on first appeal said:

> *"The appellants were charged under section 131 (1) (3) of the Penal Code as amended by by SOSPA. I think the evidence as adduced fits the definition of gang rape contrary to*

Section 131A, under which the appellants were charged. I substitute the section under which the appellants should have been sentenced accordingly."

Still aggrieved by the decision of the High Court, the appellants filed a memorandum of appeal containing 19 grounds, but before the hearing, they abandoned grounds 1, 2,3,5,6,7,8,11,14,and 15 thus remaining with nine grounds which are:

"4. The learned High Court Judge erred in vindicating the procedure by the trial court to disallow and expunge from the record evidence of the police officers summoned by an order of the trial court which contradicted evidence of prosecution witnesses and to revisit, and vacate decisions already made in purported exercise of powers of revision which the trial court did not possess.

9. The learned High Court Judge erred in not finding that the non conducting of "voire dire" as by law required did not vitiate the proceedings.

10. The learned High Court Judge erred in not applying to the appellants the same standard of identification that was applied to the 5th accused in view of the fact that the 5th accused was well known to the victim witnesses.

12. The learned Judge of the High Court erred in finding that the accused persons and house No. 607 Sinza Palestine were properly identified as the persons who committed the crimes and the place in which the crimes were committed respectively.

13. The learned High Court Judge was in error in finding that the record of the proceedings in the trial court did contain a true and substantial reproduction of the witnesses' answers given during cross examination.

16. The learned Appellate Judge erred in law and in fact in confirming the trial Court's holding that the case for the prosecution in respect of each count had been proved beyond reasonable doubt.

17. The learned appellate Judge had erred in law and in fact in rejecting the defence case that all times material to the prosecution case there were people, other than the accused, at House No. 607, such that it was impossible for the accused to have committed the alleged offences without being seen by those other people.

18. The learned appellate Judge erred in law and in fact in upholding the trial Court's rejection of the defence of the 2nd, 3rd, 4th accused persons that they could not have been at house No. 607 at the times material to the prosecution case, without making any findings on credibility of several defence witnesses.

19. The learned appellate Judge erred in law in upholding the trial Court's failure and/or refusal to draw an adverse inference against the prosecution for their refusal to call material witnesses."

Before us Mr. Mabere Marando, learned counsel, appeared for the appellants, assisted by Mr.Hamidu Mbwezeleni, learned counsel. The Republic /Respondent was represented by Mr. Yustus Mulokozi, Principal State Attorney, assisted by Mr. Yohane Masara, Senior State Attorney. Before going on the grounds of appeal, a good starting point is to give a brief summary of the facts that prompted the filing of the charges against the appellants.

The evidence that was led in the trial court showed that in 2003 Aza Hussein (PW12), Rehema Mgweno(PW5), Alicia Longino(PW3), Agneta Sia (PW14), Isabella Angowile(PW9), Juliet Mbariki(PW8), Dei Jaffari(PW13),

Gift Kipwapwa(PW2), Yasinta Mbele(PW11) and Amina Shomari(PW5) were all standard one pupils at Mashujaa Primary school. One Candy David Mwaivaji (PW1) was a guardian of PW2 and was living with her. PW2 is a daughter of her sister in law and was seven years old then. PW1 was also living with a house girl called Sellina John.

On 8th October, 2003 at night, Candy noted that a foul smell was coming from PW2. She directed her to take bath but that did not remove the smell. On the next day, in the absence of PW2 who had already gone to school, PW1 asked Sellina why a foul smell was coming from PW2. Sellina informed Candy that she saw PW2 with shillings 200/- and upon inquiry on how she got the money, PW2 said she got the money from one Babu Sea @ Nguza, the musician. This made PW1 suspicious. When PW2 returned home from school, PW1 asked her why Babu Sea gave her money. According to PW1, PW2 was honest. She revealed to her how she met Babu Sea, the first appellant, who, by luring her with a soda and chewing gum; he took her to his room. He told her to close her eyes, tied her with a piece of black cloth over her eyes, undressed her, and after applying an ointment on her private parts, he had sex with her. He also told her to suck

his penis, which PW2 did. The 1st appellant threatened to take PW2 to the police or chop her ears if she revealed the sexual abuse to anyone. PW 2 also informed PW1 that she was not the only victim of the sexual acts by the appellants. She mentioned the rest of the victims to PW1. When PW1 examined PW2's private parts, she found them with fresh blood and pus oozing from there. PW2 was taken to hospital and she was diagnosed to be suffering from gonorrhoea and was treated.

Apart from reporting the incident to the police, PW1 with the assistance of Gift, traced the residences of the rest of the victims of the offences as mentioned by PW2. She informed their parents or guardians about the sex ordeal with the appellants. From the testimonies of the parents, guardians or relatives of the complainants, all the complainants admitted involvement in sexual acts with the appellants. These are Aisha Mrutu (PW4), mother of Alicia Longino(PW3); Hadija Omari(PW6), mother of Rehema Mgweno(PW5) and Congesta Audax(PW7),mother of Juliet Mbariki(PW8). Others are Mary Victory Chitumbi(PW10), mother of Isabella (PW9);Brigetha Kamenya (PW16), grandmother of Dei Jaffari(PW13); Hassan Gamaka(PW17), father of Aza Hassan(PW12); John Mbele(PW18)

father of Yasinta Mbele (PW11);Lilian Mbawala (PW19),guardian of Agneta Sia(PW14) and Amina Zuberi a relative of Amina Shomari (PW15). According to the witnesses all the complainants explained that the acts took place at house No.607 at Sinza which they said was the residence of the 1st appellant. What used to take place was that, the complainants were taken to the residence of the 1st appellant where they were told to undress. The appellants oiled their private parts and then had sex with them, both in the vagina and the anus. Some were placed on a mattress on the bed and others on a mattress on the floor. They were also told to suck the first appellant's penis and anus. The acts took place repeatedly between April and October 2003. All the victims were examined by Dr. Petronila Ngiloi, (PW20), a Specialist Paediatric. Her expert opinion was that Alicia (PW3), Gift Kipwapwa (PW2) and Amina Shomari (PW5) were sodomized, while Aza Hassan (PW12), Juliet Mbareki (PW8) ,Isabela Angomile(PW9) and Dei Jaffari(PW13) were raped. Agneta Sia (PW14) and Yasinta Mbele (PW11) were raped and sodomized. Out of the ten children who were subjected to the sexual abuse, it was only Rehema Mgweno who, according to the medical report, was found to have survived from the sexual abuse.

However, the evidence of Hadija Omari (PW6) the mother of PW5 was that her visual examination of PW5's private parts showed that her vagina was enlarged. On this evidence the appellants were arrested and charged as already indicated. In their defence, all appellants denied the commission of the offence and relied on the defence of alibi. Each appellant informed the trial court that given the nature of the activities they did for a living, all save the last appellant, being musicians and involved in practices daily, and at other times conducting performances outside Dar es Salaam, they could not have been at the "locus in quo" for the commission of the offences they were charged with. Moreover, the first appellant told the court that he was impotent. He said although he requested the prosecution to assist him in having his potency examined, he received a negative response. The fourth appellant was a student at Mbezi Secondary School and he said he used to attend classes.

The prosecution case rested mainly on the credibility of the witnesses and the identification of the appellants. The trial court believed the prosecution evidence and disbelieved the appellants' defence and they were all convicted, and each of the appellants was sentenced to life

imprisonment. As already stated the appellants lost their appeal in the High Court that is why they are before us now with this second appeal.

In arguing the appeal, Mr. Marando, learned counsel for the appellant started with ground nine of the appeal which faults the first appellate court for not holding that the proceedings of the trial court were vitiated for non compliance with the procedure for conducting "voire dire" examination on the child witnesses. He said although the learned Judge on first appeal faulted the procedure that was used by the trial court for being improper, yet he held that the proceedings were not vitiated. Citing the case of **Sunday Juma Vs R** Criminal Appeal No. 407 of 2007 (unreported) the learned counsel said the purpose for conducting "voire dire" and the procedure was fully explained in the case. One, is to ascertain whether the child witness possesses sufficient intelligence and understands the duty to speak the truth. Two, is to ascertain whether the child witness understands the nature of oath. Further submission by the learned counsel for the appellants was to the effect that the learned judge erred in law when he relied on section 127(2) of the Tanzania Evidence Act which was amended by the Sexual Offences (Special Provisions) Act to allow a conviction to be

based on uncorroborated evidence of a child witness. The learned counsel for the appellants relied on the case of **James Bandoma Vs R** CAT Criminal Appeal No.93 of 1999 (unreported) claiming that corroboration in this case was required. Citing the case of **Deemay Daati,Hawa Durbai and Nada Daati Vs R** CAT Criminal Appeal No.80 of 1994 (unreported) the Mr. Marando said that the "ratio decidendi" in the case is that the evidence of a child of tender years taken without conducting "voire dire" examination brings the evidence to the level of unsworn evidence and corroboration will be required, which in this case, was lacking. The Court was referred to the cases of **Mutunga Vs R** (2005) EA 325, and **Gabrieli Mahola Vs R** (1960) EA 169 which reiterated the same position. Mr. Marando also argued that the learned Judge on first appeal misdirected himself in thinking that the provisions of section 127(7) could be applied independently of section 127(2) of the Law of Evidence Act. Section 127(7), contended the learned counsel for the appellants, does not replace section 127(2). His opinion was that section 127(7) is only applicable where there has first been compliance with section 127(2). He said although section 127(2) is concerned with independent evidence of a child, it is not designed to

abandon compliance with section 127(2). Speaking comparatively between India and Tanzania by relying on Sarkar on Evidence, the learned counsel for the appellants said there is a difference between the two countries. Whereas in India it is a preliminary inquiry which is conducted hence making "voire dire" examination a matter of practice, in Tanzania it is a statutory requirement. He referred us to the case of **Sunday Juma Vs R** (supra), the latest one decided by the Court, and urged us to discount the evidence of the child witnesses taken without conducting "voire dire" examination properly.

Responding to this ground of appeal, Mr. Mulokozi learned Principal State Attorney for the respondent conceded that "voire dire "examination must be conducted properly to ascertain the capacity and competence of the child witness and that the questions asked and the answers must be on record. He said although in this case the questions and answers were not put on record, a finding was made by the trial magistrate that apart from PW3, the rest of the child witnesses did not know the meaning of oath. He also agreed that failure to conduct "voire dire "examination properly reduced the evidence of the child witness to the level of unsworn evidence.

He relied on the cases of **Herman Henjewele Vs R Criminal** Appeal No. Criminal Appeal No. 164 of 2005 (unreported). He said the effect of such failure does not justify discounting of the evidence. Rather, it lowers the value of the evidence and under such circumstances corroboration is required. He was of the opinion that the case of **Sunday Juma** (supra) was decided "per in curiam," and he urged us not to follow it. He said it would appear that the case of **Henjewele** (supra) was not brought to the attention of the Court.

On the use of section 127(7) of the Law of Evidence Act, the learned Principal State Attorney said it was used to assess the credibility of the witnesses and the reasons were recorded. He said in terms of the decision of the case of **Henjewele** (supra), the evidence of the child witnesses was treated as that of independent witnesses. Mr. Massalla, learned Senior State Attorney, added that despite the irregularity in conducting "voire dire" examination the decision of the trial court should be upheld.

On this ground of appeal there is no doubt that there was no compliance with the procedure for conducting "voire dire" examination. It was unfortunate that the error was committed by a magistrate of such a

high experience. The trial magistrate did not record the questions that were put to the witnesses and their answers. Instead, she only recorded what she found out of the child witnesses; that they knew the difference between the truth and lies but they did not know the meaning of oath. Out of the ten children, it was only one who knew the meaning of oath. Surely that was improper. In the cases of **Gabriel Maholi**(supra), **Sunday Juma**(supra) and **Henjewele** (supra) it was categorically stated by the Court that before receiving evidence of a witness of tender age, the trial court must ascertain that the child is possessed of sufficient intelligence to justify the reception of the evidence and whether the witness understands the duty of speaking the truth. This must be done by recording the question and answer session conducted on the child witness. It is only then the trial court should proceed to determine whether the evidence should be received on oath or without oath.

For the failure to comply with the procedure for conducting "voire dire" examination properly, the issue before us is what would be the effect of the omission? Fortunately this is an issue which need not detain us. As correctly pointed out by both the learned counsel for the appellants and the

learned Principal State Attorney, the position of the law is settled. The omission brings such evidence to a level of unsworn evidence of a child which requires corroboration. See the cases of **Kisiri Mwita s R** (1981)TLR 218, **Dhahiri Ally V R** (1989) TLR 27, **Deema Daati and two others V R** CAT Criminal appeal No.80 of 1994 and **Henjewela** (supra). In this respect the learned Judge on first appeal was right to say that non compliance with the procedure for conducting "voire dire'' does not vitiate the proceedings. In the case of **Sunday Juma** (supra) the Court after making a finding that the evidence of a child witness was taken without compliance with the procedure for conducting "voire dire" examination said:

> *"the test is meant to lay the basis of the Competence and credibility of the Evidence of the child so as to comply with Section 127(1)! of the Evidence Act. Failing in this test, therefore, is fatal.* ***The evidence of the child MOZA OMARI is hereby discounted." (Emphasis added)***

Mr. Marando requested the Court to follow the case of **Sunday Juma**

to allow this ground of appeal. On our part we agree with the learned Principal State Attorney for the respondent that the case was decided "per in curiam." The Court did not give the reasons for departing from the principle laid down in the previous cases and we have no reasons for departing from the already established principle. This ground of appeal therefore fails.

On whether there was corroboration to support the evidence of the child witnesses, it is a matter to be decided later in the course of this judgment. But at this juncture, we entirely agree with Mr. Marando that the provisions of section 127(7) do not override the provisions of section 127(2). All that the section does is to allow the court, in sexual offences, to assess the credibility of a child witness who is the only independent witness or a victim of crime, and convict without corroboration, if the court is satisfied that the child witness told nothing but the truth. The section reads:

> *"Notwithstanding the preceding provisions of this section where in criminal proceedings involving sexual offence the only independent*

evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence and may after assessing the credibility of the evidence of the child of tender years or, as the case may be of the victim of the sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, ***if for reasons to be recorded in the proceedings the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."*** *(Emphasis added).*

From the wording of the section, before the court relies on the evidence of the independent child witness to enter a conviction, it must be satisfied that the **child witness told nothing but the truth.** This means that, there must first be compliance with section 127(2) before involving section 127(7) of the Evidence Act; "Voire dire" examination must be conducted to ascertain whether the child possesses sufficient intelligence and understands the duty to speak the truth. If the child witness understands the duty to speak the truth, it is only then its evidence can be relied on for

conviction without any corroboration otherwise the position of the law remains the same, that is to say that unsworn evidence of a child witness requires corroboration. OSDORN`S CONCISE LAW DICTIONARY 7th Ed. P.95 defines.

> *"corroboration as independent evidence which implicates a person accused of a crime by connecting him with it; evidence which confirms in some material particular not only that the crime has been committed but also that the accused committed it".*

For grounds 16, 17 and 19 the learned counsel for the appellants argued them together. The grounds are concerned with failure by the learned Judge to make a finding to the effect that the trial court ought to have made a finding in respect of each count, erred in rejecting the defence of alibi raised by the appellants and failure to draw adverse inference against the prosecution for refusal to call material witnesses. The learned counsel for the appellants argued vigorously that the learned Judge on first appeal erred for not holding that the trial court ought to have made a finding in respect of each count on whether it was proved or not.

The learned Principal State Attorney did not make any response on this ground. With great respect to the learned counsel for the appellant, our view on this ground is that, it was not raised as a specific ground of appeal in the High Court. The first appellate Judge cannot be faulted for not making a decision on a matter which was not specifically brought before him. The petition of appeal filed in the High Court at pages 579 to 601 of the record of appeal has 25 grounds of appeal but none of them challenged the trial magistrate for failure to say whether or not each count was proved and that a conviction ought to have been entered in respect of each count. However, we agree with the learned counsel for the appellant that it was wrong for the trial court to enter an omnibus conviction in respect of all the counts. The trial court ought to have scrutinized each count and the evidence adduced in support of each count as well as the defence of each appellant, and then make a finding on whether or not each count was or was not proved. The omission however was not fatal. It was a misdirection which is curable under section 388 of the Criminal Procedure Act, CAP 20 R.E.2002. We will come to this aspect later when discussing ground 18.

On grounds No. 17 and 19 the learned counsel for the appellants attacked the learned Judge on first appeal for failure to make a finding that the trial magistrate was biased and did not accord the defence of the appellants the weight it deserved. The trial magistrate was particularly attacked for the style adopted in writing the judgment. The judgment, Mr. Marando said, makes undeserving remarks on the defence witnesses, hence suggesting that the trial magistrate was biased and had formed her own opinion about the case. Instead of making her decision by analysing the evidence on record, she decided the case basing it on her own opinion. The learned counsel for the appellants submitted extensively about the defence of alibi relied upon by the appellants to say that there was no possibility for them to have committed the offences at house No.607. For the first appellant, the learned counsel said he was not living in the house and at all material times the house was occupied by people; namely his mother one Elombee and a house girl. The first to third appellants were also musicians. In 2003 the first appellant was in Achigo Band. On Mondays to Fridays when they were not in bands, they did rehearsals at house NO.607. The second and third appellants were in FM

Academia and they did their rehearsals at a place called Chetemba and they did several performances outside Dar es Salaam including Arusha, Mwanza , Dodoma and Moshi. The fourth appellant was a secondary school student at Mbezi Secondary School and he would be attending classes. Remarking on the notes made by the trial magistrate on the judgment giving her opinion on the evidence of the defence, the learned counsel for the appellants lamented that the trial magistrate seemed to have ignored the defence of the appellants and the several witnesses they summoned to support their case, and had already formed her own opinion about the case. He said for instance at page 542 of the record of appeal it is recorded that:

> *"The second accused person testified having recorded album with Judith Wambura in August or September 2003 at unknown dates."*
>
> *Then the trial magistrate made the following remarks:*

"Court: So what? Relevance to the charges?" *Mr.* Marando said similar undeserving remarks are repeated in the judgment in respect of the defence witnesses but nothing was said in respect of the prosecution witnesses. The duty of the trial court, said Mr. Marando, was to evaluate the defence evidence and then say why the witnesses were discredited.

The learned counsel for the appellants also submitted at length about the prosecution witnesses, claiming that, the trial court made an improper and discriminative evaluation of the evidence. As he traversed through the prosecution evidence, the learned counsel said the evidence adduced by the child witnesses did not prove that the offences were committed by the appellants and the child witnesses appear to have been couched on what to tell the court. Remarking on the evidence that was led by Aza Hassan (PW5), the learned counsel said PW5 testified that the fifth accused who was jointly charged with the appellants but was acquitted, said that the fifth accused was her English teacher, a matter which was denied by the fifth accused. The evidence of PW5, added Mr. Marando, does not show how the appellants were connected with the commission of the offences and no specific dates for the commission of the offences are indicated, hence counts 1 and 2 were not proved, much as the medical report by Dr. Petronila Ngiloi,(PW20) said that Asha was sexually abused. He further said that the two counts did not specify who the victims of the offences were, and it was wrong for the trial court to assume that the victim of the offence was Aza Hassan. Mr. Marando said the trial Principal Resident

Magistrate did not accord the defence evidence the same treatment.

The learned counsel for the appellants also said that, there was an omission by the prosecution to summon material witnesses who could have corroborated the evidence of the child witnesses that they were seen going to house No.607. Such witnesses included one Mangi, an owner of a container operated as a shop in front of House No. 607, neighbours, one Zizel mentioned by PW2 to have introduced her to the 1st appellant and one Cheupe, a student at Mashujaa Primary School who was said to have abducted the victims of the crime and taken them to house No.607 on the instructions of the appellants.

On his part the learned Principal State Attorney was very brief. He said there was no discrimination in the assessment of the evidence that was led during the trial. Regarding the remarks made by the trial magistrate on the judgment, the learned State Attorney said she took what she considered important for purposes of assessing the demeanour of the witnesses. His opinion was that even if there are irregularities in composing the judgment, they are curable under section 388 of the Criminal Procedure Act.

The two grounds of appeal need not detain us. The learned Judge on first appeal correctly observed that the trial Principal Resident Magistrate dwelt too much on the contradiction in the defence case, but a conviction in criminal cases is never based on the contradictions in the defence case but rather on the evidence adduced by the prosecution witnesses. In other words the burden of proof in criminal cases lies on the prosecution evidence and not on the defence and the standard is beyond reasonable doubt. Discrepancies and contradictions in defence evidence may only assist the court in assessing the whole evidence to ascertain whether the prosecution discharged the burden of proof but weaknesses in the defence case cannot be the basis for the conviction of the accused. There is a line of authorities on this point. See for instance the case of **Samwel Silanga vR** (1993) T.L.R 149.

As for the judgment, section 312 of the Criminal Procedure Act, CAP 20 R.E.2002 gives a guidance on the contents of a judgment. In terms of the said provision, the writing of a judgment is a style, and it is a personal experience. What is important is that the judgment must contain points for determination, the decision of the court and the reasons for the

decision. Once that is complied with, any additions to the judgment is a cosmetic although at times, may be adverse to the parties. For this reason we emphasise the importance of avoiding making remarks in the judgment which do not reflect impartiality. In this case, we agree with the learned counsel for the appellants that the remarks made by the trial magistrate were unwarranted under the circumstances, more so because they were one sided. But as the learned Principal State Attorney said, the defect is curable under section 388 of the Criminal Procedure Act.

Regarding the failure by the prosecution to summon important witnesses to corroborate the evidence of the child witnesses, we must say that this ground lacks merit because the question of which witness should be summoned to prove the prosecution case rests on the prosecution. Moreover, it is not the number of witnesses which matters but rather it is the credibility of the testimony which is important and that is why section 143 of the Evidence Act CAP 6 R.E. 2002 disregards the number of witnesses required to prove a certain issue. We said earlier on that in the course of analysing the evidence to see if each of the counts was or was not proved, we will discuss whether there was corroborative evidence to

support the conviction of the appellants.

As for ground 18, the learned Judge on first appeal was faulted for not holding that the defence of the 2nd, 3rd, and 4th appellants was not properly assessed and their defence was rejected without giving any reasons. In support of this ground, Mr. Marando said the defence evidence was not evaluated and the reasons for the rejection of the evidence were not given. He said even if the defence of alibi was not particularised or that the appellants told lies, still, the prosecution had the duty of proving the charges beyond reasonable doubt. Relying on the case of **Philemon Yahana Sanga Vs R** CAT Criminal Appeal No.90 of 2000 (unreported) and Sarkar on Criminal Procedure on the contents of the judgment, the learned counsel for the appellants said that the judgment should always be based on the evidence adduced and not on the personal opinion of the magistrate. He requested the Court to evaluate the defence evidence and treat it fairly.

On ground 13, the learned counsel for the appellant said the 1st appellant brought witnesses from Achigo Band and they gave a timetable for their rehearsals that they were conducted from Mondays to Thursdays but that evidence was ignored. He prayed to the Court to give the defence

evidence the weight that was required. On the evidence of PW20, the learned counsel for the appellants said her expert opinion was that, PW5 was a virgin and such evidence should have given the appellants the benefit of doubt. He said although they do not have anything adverse to explain why the charges were preferred against the appellants, it was worthy considering whether there was no foul play in charging the appellants and whether the offences were proved. He said in accordance with the evidence of PW2 when she was examined at Mwananyamala Hospital, she was found to have contacted a venereal disease but the PF3 form was not tendered in court as evidence to prove this fact and even PW20 who examined her on 22/10/2003 said she had no venereal diseases. The learned counsel added that the doctor's evidence was only important to prove whether or not there was rape or sodomy but not the person who committed the offences. He was of the opinion that if the appellants committed the offences they deserve being condemned; otherwise they should all be set free. On his part, Mr. Mbwezeleni learned counsel agreed with his colleague and added that the side comments on the judgment gave a wrong impression and should not have been made at all. He was of

the opinion that the case was framed up.

Responding to the submissions by the learned counsel for the appellants, Mr. Mulokozi, learned Principal State Attorney said the incidents took place repeatedly and both courts were satisfied with the assessment of the evidence and that if the trial court was satisfied with one side, there was no need for trusting the other side. He said the defence of alibi was properly rejected, because particulars were not supplied as required by the provisions of the law. On the suggestion by Mr. Marando that the evidence was cooked up, the learned Principal State Attorney said that lacks support and should not be considered. Regarding the evidence of Farida, who was said to be the girlfriend of the 1st appellant, Mr. Mulokozi said she should not be trusted. He said PW1, PW4, PW6, PW7, PW10, PW16, PW17, PW18, PW19 and the investigator were independent witnesses relied upon by the trial court to convict the appellants. He added that the evidence of the doctor was to the effect that the children were sexually abused and the trial court was justified to disregard the defence of alibi and convict the appellants. His opinion was that the case was an exceptional one, and the court looked at all the circumstances before arriving at its decision and in

so doing, there was no shifting of the burden of proof. He prayed that the appeal be dismissed.

In a brief reply, the learned counsel for the appellants said it was wrong for the trial court to reject the defence of alibi even if no particulars were supplied to the prosecution. He noted that the particulars of the fourth appellant were given in the charge sheet and they should have been used by the prosecution to ascertain the true position. He repeated his earlier submission that house no. 607 was a centre of business activities and it was impossible for the complainants to go into the house and be raped without being noticed. On the remarks by the learned Principal State Attorney that after the trial court had believed the prosecution evidence they had no reason to look at the other side, the learned counsel for the appellants said that was not the position of the law. The duty of the trial court was to assess the evidence for both sides and then make a decision and give reasons for believing one side and disbelieving the other. According to Mr. Marando the prosecution was requested to assist in taking the first appellant to hospital for examination of his potency in order to ascertain whether he was functioning but the request was turned down.

As for the evidence of the doctor, the learned counsel for the appellants said it was important to prove the “actus reus” but not the person who committed the offence. Mr. Mbwezeleni added that the appellants showed various discrepancies in the prosecution case hence giving the appellants the benefit of doubt and so the appeal should be allowed and appellants be set free.

Earlier on, we said that it was mandatory for the trial court to have made a finding in respect of each count and not to enter an omnibus conviction. It is now an opportune time for us to deal with the matter and in so doing; we believe that the rest of the grounds of appeal will be answered. As already indicated in this judgment , the learned Judge on first appeal made a finding that the evidence that was adduced proved the commission of the offence of gang rape contrary to section 131A of the Penal Code as amended by SOSPA. The leaned Judge on first appeal however, did not say anything about the unnatural offences. As Mr. Marando, learned counsel for the appellants was asked to address us on the matter, he categorically stated that the law does not provide for the offence of gang sodomy, and so if the prosecution wanted to charge the

appellants with the unnatural offences, they should have brought separate charges of unnatural offence in respect of each of the appellant and not to charge them jointly. We agree with Mr. Marando that the law does not provide for the offence of gang sodomy and the appellants should have been charged separately for each of the unnatural offences alleged to have been committed by each of the appellant. But as already stated the learned judge on first appeal said the evidence proved gang rape. Our considered opinion is that it was wrong to charge the appellants jointly with the offence of unnatural offences because the law does not provide for gang sodomy. Each appellate should have been charged separately for the unnatural offences. We allow the appeal by all the appellants on the unnatural offences, set aside the convictions and order their acquittal.

Coming to the offences of rape, the first count is in respect of Aza Hussein (PW12). All the appellants are alleged to have committed the offence against her on 11th October, 2003 at house No. 607 at Sinza B. In her testimony PW12 said that it was all the appellants who raped her and she was raped during school days. However, the testimony of F 4468 PC Samwel (PW23) was to the effect that on 11th October, 2003 a Saturday, he

arrested the 1st appellant. The rest of the appellants were arrested on 12th October, 2003 by C. 9744 Dt. Corp. Jordan (PW 24). According to the evidence of the doctor (PW20) and the PF3 form (exhibit P4), PW 12 was sexually abused. Given the discrepancy in the prosecution evidence on the date of the commission of the offence, a Saturday which the Court takes judicial notice under section 59(1) (a) of the Law of Evidence Act CAP 6 R.E.2002 that Saturdays, are non working days, while PW12 said the offences were committed on working days, we find that the first count was not proved. The appellants are accordingly acquitted.

Rehema Mgweno (PW5) is the victim of the third count, alleged to have been committed by all the appellants between September and October, 2003. According to PW5 she was raped by the 1st appellant and he also ordered her to suck his penis. Hadija Omari (PW6), the mother of PW5 did a visual examination of PW5's vagina and she said it was enlarged. But PW20, a medical specialist said as she examined PW5 she saw no signs of sexual abuse. With such a discrepancy in the prosecution evidence, all the appellants are given a benefit of doubt and they are all acquitted.

In the fifth count the victim is Alicia Longino (PW3). The offence is

alleged to have been committed by all the appellants at unknown day of October, 2003. Her testimony which was taken on oath was to the effect that she was raped several times by all the appellants. However the medical examination by PW20 revealed that there were no signs of being raped but the was sodomized; For the reasons we have indicated, all the unnatural offences were dismissed. The fifth count is equally dismissed and all the appellants acquitted.

The 7th count is in respect of Isabela Angonile(PW9), also alleged to have has been raped by all the appellants at unknown time during the month of September, 2003. PW9 testified that Yasinta Mbele told her the name of the 1st appellant and that he dishes out money. In the company of Gift, Alisia, Aza, Dei, Amina and Shemsa and Yasinta Mbele PW9 went to the residence of the first appellant at house No.607. According to the witness, all the appellants were there. The first appellant covered her face with a black cloth and after he oiled her private parts, he had sex with her. After the sexual act, the first appellant washed her and then ordered her to suck his penis which had wounds and she did it although she felt nauseated. PW9 said she felt pains but she did not reveal the information

to her mother because the appellant threatened to kill her. On that day she was given shillings 300/=. As she gave evidence she was able to identify the first and second appellants by their names. The rest of the appellants she identified them by appearances. According to the witness the sexual acts were repeated several times and at times even the rest of the appellants had sex with her. The witness said at times she cried for help because of the pain she suffered, but the first appellant increased the voice of the radio so that their voices would not be heard. She recalled an incident when, because of pain, they cried asking for help and one woman entered the room of the 1st appellant and she found them underneath the bed hiding. The witness said as the 1st appellant heard a knock on the door, he got dressed. When the woman entered the room, they continued crying, and she canned them and told them to refrain from that bad habit. The medical examination by Petronila Ngiloi(PW20) a specialist paediatric revealed that PW9 had a torn hymen, and old perennial bruises an indication that she was sexually abused by a blunt object. The PF3 form was admitted in court as exhibit P6.

All the appellants denied the commission of the offence and raised

the defence of alibi. The first to third appellants claimed that what they did for a living did not allow them to be at the “locus in quo” to commit the offence. Furthermore, the first appellant said he was impotent hence incapable of committing the alleged offence. As for the fourth appellant he said he was a secondary school student who would be attending classes at the time the offence was alleged to have been committed.

The issue before us is whether the evidence on record proved the commission of the offence. As already indicated, PW9 was a child of seven years and she testified without oath. Moreover “voire dire” examination was not properly conducted . As the omission brings the evidence to the level of unsworn evidence, and her evidence was taken without oath, without ascertaining her capacity to testify, corroboration was required. See the case of **Henjewele** (supra). From the evidence on record there is no doubt at all that PW9 was raped. She testified to that effect, and there was medical evidence by PW20, that PW9 was sexually abused. PW9 said it was the appellants who raped her. The only issue is whether there is corroborative evidence to prove that it was the appellants who raped her. The offence is alleged to have been committed at house No 607

Sinza. Mr. Marando contended that there was no way in which the offence could have been committed there without other people noticing, because the house had other occupants, namely the mother of the 1st appellant and a house girl. In addition, Mr. Marando said in front of the house there was a shop and the owner would see the children as they went into the house but he was not summoned as a witness. Even other material witness like Zizel and Cheupe were not summoned. We have already commented on the witnesses the prosecution have to call and we need not make a repetition of what we have said. Suffice it to say that, on record, there was evidence to show that the children could have gained access into the house without being noticed. The observations made at the "locus in quo" through the assistance of PW13, showed that there was an entrance into the house which would be used by the children to gain access into house No 607 without being noticed.

Now what was the corroborative evidence on record? That was the description of the room of the 1st appellant. PW9 said there was a mattress on the bed and another on the wall and that some of the children were put on the bed and others on a mattress on the floor. We said at the

beginning of this judgment the victims of the offences of rape were ten female children, all pupils of Mashujaa Primary school and their evidence on the description of the room of the first appellant was similar. A bed with a mattress and another mattress on the wall which would, during the time of having sex with the children was put on the ground.

No.C 9744 Dt. Corp Jordan (PW24) who arrested the 2nd to 4th appellants said in his evidence that:

> *"Those children led us to the house of Nguza near a school at Sinza a primary school near a shop/ container. The children victims showed me the room where the alleged rape took place. The room was to the right it had a bed with a mattress, and the mattress leaded(sic!)on the wall where clothes were hanged. The children victims had said that the sex was done on* ***a bed and on the mattress on the floor. (Emphasis added)***

The witness also testified of having seen a variety of male trousers and shirts. He also saw a table. When the trial magistrate visited the scene of crime, (reflected at page 170 of the record of appeal), Dei Jaffari (PW13) also a victim of the sexual abuse led her to the scene of crime from the

Mashujaa Primary School showing how the victims left the school and went to house No. 607. The trial magistrate recorded thus:

> *"She led us on how their short trip to the house of the first accused looked like. From the near toilet to the behind the container/ shop, to small entrance (not gated) entering the door through a sitting room, straight would lead to the other exit (door with a grill. Before exit door, we were led by her to the left and then to the door in front on right and the last room. In the room she* ***showed us the bed with a mattress where the sex is alleged to take place and where the other mattress would be placed for sex too***. ***She showed us the radio***. *However, she said she forgot the toilet. (However, we noted a toilet with showers in the same room which is self contained). I noted the wardrobe where clothes are hanged almost the whole wall. A small container/shop is in front of the first accused's house (Telephone) However, the container/shop which Dei showed us as where they* would get the sweets and soda is at a distance but was *shielding the house of the first accused*

"Dei showed us how they would came(sic!) from the school compound, enter the first accused's house without passing the front of the container. (Emphasis added).

The provisions under which the appellants are charged strictly forbids any sexual intercourse with a female below the age of 18 years. The objective is to protect the children who are not yet matured to make right decisions for their lives.

The first appellant claimed that he had problems with his potency and for that matter he could not have committed the offence. He said that the prosecution refused to assist him in having his potency examined by the doctor to confirm whether he was or was not capable of committing the offence of rape. In our considered opinion the prosecution had no obligation to do that. We say so because in terms of the provisions of section 114 (1)of the Law of Evidence Act, CAP 6 R.E 2002 the question of the potency of the 1st appellant was within his own knowledge and the burden of proof was on him to prove that his penis was not functioning. The section reads:

"Where a person is accused of any offence,

the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged, and the burden of proving any fact especially within the knowledge of such person is upon him.

Provided that such burden shall be deemed to be discharged If the court is satisfied by the evidence given by the prosecution, whether on cross examination or otherwise, that such circumstances or facts exist.

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence, creates a reasonable doubt as to the guilt of the accused person in that respect."

Section 114 (2) (b) of the Evidence Act is also relevant. It does not impose on the prosecution, the burden of proving that the 1st Appellant was not impotent. The evidence from PW9 was that she had sex with the 1st appellant. The doctor who examined PW9 confirmed that she was sexually abused by a blunt object. Under such circumstances penetration is not an issue. The medical report supports that there was penetration. The question as to whether the 1st appellant's penis was functioning or not was

one within his knowledge. Under section 114(1) of the Evidence Act the burden was on him to prove that he was impotent. He has not done so. The case does not fall within any of the proviso given in the said section. Under the circumstances we find that the offence of rape in count 7 was proved in respect of the 1st appellant.

As for the rest of the appellants although PW9 said the offence was committed several times, the particulars of the offence do support her. The particulars show that the offence committed on an **unknown day of September 2003.** The testimony of PW9 was that it was the 1st appellant who raped her on the first day she was taken to his residence by Yasinta Mbele. Even if there were rehearsals taking place at house No. 607 there was nothing to prevent the 1st appellant from the commission of the offence. According to the evidence, the incident took place for few hours after 11 am or between 10 am and 11 am. Moreover, there is no reason why all the children would have told lies against him. He admitted that he had no grudges with any of them.

Another small important matter to be cleared was the evidence by PW9 that the 1st appellant tied her with a black cloth. The defence of the 1st appellant was that if the witness had her face tied up, she could not have

known that it was the 1st appellant who committed the offence on her. We are satisfied that PW9 knew that it was the 1st appellant who raped her because after the sexual abuse he washed her and then ordered her to suck his penis. This piece of evidence removes any doubt on PW9 that she did not know who raped her. We thus find that the offence was proved against the 1st appellant and we confirm his conviction in that respect. As for the rest of the appellants there is no evidence to link them with the commission of the offence. The charge against them is dismissed and they are acquitted.

The complainant in the 10th count is Juliet Mbareki (PW8). The offence is alleged to have been committed at unknown time between September and October. The evidence of the witness was that the 1st and 2nd appellants whom she identified by names as Babu Sayer/Sea and Papii Kocha had sex with her. She also made a dock identification of the 3rd and 4th appellants that they also had sex with her but could not recall their names. She said it was Yasinta Mbele and certain boys who abducted and held her by her waist and took PW8 and her friends to house No. 607. She said the sexual abuse was repeated three times. She also said that the

sexual abuse took place on a mattress with the 1st appellant while his children had sex with her on a mattress on the floor. Conjesta Audax (PW7) mother of PW8 said she made visual examination of the vagina of her daughter and she found it enlarged and was discharging some dirty and had a foul smell. On the other hand the medical examination by PW20 was that Juliet Mbariki was sexually abused. The PF3 form was admitted in court as exhibit P4 and the medical opinion of the doctor was that PW8 was sexually abused.

The line of the defence of the 1st appellant has already been discussed in count seven. The rest of the appellants also relied on the defence of alibi. The witness said the offence was committed about three times, one time after school that is after 11 am and at other times during break time which started at 10 am to 11am. The position of the 1st appellant is clear and we have fully analysed his defence. He was in house No. 607. Given the evidence on record there was nothing which would have prevented the 1st appellant from the commission of the offence. We have analysed his defence in detail as we discussed count seven. Regarding the 2nd appellant his defence of alibi does not rule out the possibility of the

commission of the offence. We say so because as we have indicated, the offence took about one hour only and on a few occasions. This means that even if the 2nd appellant had performances outside Dar es Salaam, there were times he was in Dar es Salaam. According to his defence he was outside Dar es Salaam periodically but not always. In any event, we do not see any reason for PW8 to fabricate evidence against him. She was a small child who did not have the capacity to know the danger which lay ahead of her for her involvement in the sexual acts. She did not know that the sexual acts could have ruined her life completely.

We have shown above that there was corroborative evidence. In this respect we are satisfied that the offence was proved against the 1st and the 2nd appellant and they were properly convicted with this count. As for the rest of the appellants, the evidence against them is doubtful because the complainant only made dock identification of them. The question we ask is if PW8 was able to mention the names of the 1st and 2nd appellants why not the rest of the appellants? The 3rd and 4th appellants are given benefit of doubt on this offence and they are acquitted.

In count 12 the complainant is Dei Jaffari(PW13). The offence was

alleged to have been committed against her during unknown time between September and October, 2003. In her testimony she said she was raped by the 1st appellant. The doctor confirmed that she was raped. The PF3 form was admitted in evidence as exhibit P9. This is the witness who showed the trial magistrate how they used to go to the house of the 1st appellant from the school and how they gained access to the house. As indicated in count seven she also gave a description of the room of the 1st appellant which as we have shown is corroborative evidence on who committed the offence. From the analysis of the defence of the 1st appellant, in count 7 we are satisfied that this offence was equally proved beyond doubt in respect of the 1st appellant.

The 14th count is in respect of Gift Kipapwa (PW12). We need not waste our time on this count because the evidence of the doctor (PW20) was that the witness was sodomized. As already stated we dismissed all the unnatural offences because the appellants were wrongly charged with gang sodomy as the law does not provide for such offences. Since there is no sufficient evidence to prove the offence of rape it is dismissed and all appellants are acquitted.

Yasinta Mbele (PW11) is the complainant in count 18. The offence is alleged to have been committed on unknown date between April and 8th October, 2003. The testimony of this witness was that one day as she was going to school and had decided to seek for the company of Juliet (PW8), her classmate; she met the 1st appellant at the school compound. The 1st appellant lived in the neighbourhood. He called her and asked for her name and she revealed it to him. PW11 also asked for the 1st appellant's name and he informed her that he was Nguza. On that same day as she was walking home after class, in the company of her friends; Gift, Juliet, Alisia, Isabel and Aza, they passed at the 1st appellant's house. The 1st appellant who was with his children caught her and took her with her friends to his room. The 1st appellant tied her face with a black cloth and had sex with her on a mattress on the floor after oiling her private parts. The others were put on the bed. According to the witness Pappi Nguza, 2nd appellant, did have sex with her too. In return to the sexual abuse she was given shillings 200/=. Giving a description of the room, PW11 said apart from the bed and the two mattresses, there was also a wardrobe. This witness who was a link to the whole incident of the sexual abuse admitted that he

was instructed by the 1st appellant to take her friends to him and he informed them that they would be given money by the 1st appellant. She said she suffered pain because of the sexual abuse but she did not tell anyone because the 1st appellant threatened to cut her mouth and take her to the police if she informed anyone about the sexual abuse. She denied having kidnapped any of her friends to take them to the 1st appellant. She said all of them went there on their own volition. The report of the doctor who examined her said that PW11 had a torn hymen and old healed perennial, anal sphincter lax. The medical opinion was that she was sexually abused in the vagina and anus by a blunt weapon. The PF3 form was tendered and admitted in evidence as exhibit P10.

The defence of the 1st appellant is as was given in the seventh count which we discussed in detail. On the same reasons we find that this offence was proved. Regarding the 2nd appellant his position is as discussed in count 10. He was outside Dar es Salaam occasionally and not always and there was nothing which could have prevented him from the commission of the offence. Moreover, no reason has been given to show that the witness had any reasons for fabricating evidence against him. We

are equally satisfied that the offence was proved beyond doubt in respect of the 1st and 2nd appellants.

Next is count 20. According to the particulars of the offence in the charge sheet as per the record of appeal at page 8 the victim of the offence in count 20 is S d/o K. The judgment of the trial court at page 524 shows that the complainant referred to as S/K in count 20 is Amina Shomary (PW15). But we ask whether S/K can be an acronym of Amina Shomary. For what we understand to be protective purposes, the names of the complainants are given by their acronyms in all the counts and for this reason we disagree with Mr. Marando that the names of the complainants in counts 1 and 2 was not given. For instance in count 7, the complainant is A/L. At the time she gave evidence, it was shown that her name is Alisia Longino. Similarly in count 12 D/J is Dei Jafari and in count 14 G/K is Gift Kapwapa. Given the sequence of acronyms in the other counts we fail to see the link between Amina Shomary and the acronym S/K. It is common knowledge that a charge sheet can be amended to reflect correct particulars. See section 234 of the Criminal Procedure Act. The record of appeal does not show that there was any time the charge sheet was

amended to give a correct acronym of Amina Shomary. The trial Principal Resident Magistrate should not have taken for granted that S/K was the acronym for Amina Shomary, because it does not follow the sequence used for the rest of the complainants in this case. For this reason, we dismiss the charge because of variance between the evidence and the particulars of the charge.

The last count no.22 is for Agneta Sia (PW14) whose acronym in the charge sheet is A/W. Let us say straight away that for this count we need not waste time dwelling on it because at the time PW14 gave evidence she could not identify any of the appellants, notwithstanding the fact that she mentioned Babu Sayer/Sea and Pappi Kocha as the persons who had sex with her. She was recorded in her evidence saying:

> *"One day after school we were taken by the first accused Babu Sayer/Sea and took us to his house. I was with Shamsa, Alicia, Tabia, and taken into the room of Babu Sayer /Sea. He told us to suck his (first accused) pennies , oiled our private parts, and put his pennies in the private parts in front and behind. He told us to lick his breasts. He*

and Pappi Kocha, had sex with me. ***I don't know Babu Sayer/Sea or Pappi Kocha. I can't show Babu Sayer or Pappi Kocha. There is no Ba****bu* ***Sayer /Sea in this room."*** *(Emphasis added).*

Since PW14 was not able to identify any of the appellants she said raped her, it was improper for the appellants to be convicted with that offence.

In the process of evaluating the evidence that was on record in respect of each count, we analysed the defence evidence particularly that of the 1st and 2nd appellants and we are satisfied that they were involved in the commission of the offences we have indicated. In this regard, their defence of alibi was properly rejected. We have also shown that there was corroborative evidence to the commission of the offences by the 1st and 2nd appellants and that was the description of the room in house No.607 where the offences took place. From the visit that was made by the trial Principal Resident Magistrate when led by Dei Jafari(PW13) it became apparent that the children could go into the house without using the main entrance hence being unnoticed by outsiders. The increased volume of voice of the radio while the sexual acts were taking place was another corroborative evidence

to hide what was taking place in the room. There was also evidence on record by the complainants that at a certain time Farida Abdu (DW 10) the girlfriend of the 1st appellant found the victims of the offences in the room of the 1st appellant hiding under the bed. It was their evidence that when the 1st appellant heard a knock on the door he got dressed and informed the victims to hide underneath the bed. Because the children shouted for help they were discovered and canned. This evidence shows that there was a possibility of the sexual acts taking place without the other occupants of the house knowing what was going on.

Given the analysis of the evidence made in respect of the various counts of the offences of rape , we are satisfied that grounds 13 and 18 partly succeed to the extent that there was no proper evaluation of the evidence in respect of some of the counts . The appeal therefore, partly succeeds and fails as follows, the 1st appellant is guilty of the offence of rape in counts 7 and 12 contrary to sections 130(2)(e)and 131A 1 of the Penal Code as repealed and replaced by sections 5 and 7 of the SOSPA. In respect of counts 10 and 18 the 1st and 2nd appellants are guilty of the offence of gang rape contrary to section 131A of the Penal Code. Counts 1,

3, 5, 14, 20 and 22 are all dismissed in respect of all the appellants. Counts 7 and 12 are also dismissed in respect of the 2nd to 4th appellants and count 10 and 18 are dismissed in respect of the 3rd and 4th appellants. Eventually, the convictions against the 3rd and 4th appellants are quashed and the sentence and orders of compensation are set aside. They are set free unless withheld for any other reason. As for the 1st and 2nd appellants, the order for compensation is sustained only in respect of the counts they have been convicted with and it is quashed and set aside in respect of the rest of the counts they have been acquitted. It is accordingly ordered.

DATED at DAR ES SALAAM this 3rd day of February, 2010.

N.P. KIMARO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original

N.N. CHUSI
DEPUTY REGISTRAR