IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 601 OF 2021

JUMANNE MZANJE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from decision of the Resident Magistrate's Court of Dodoma, at Dodoma)

(Mpelembwa, J.)

dated the 03rd day of September, 2021

in

SRM EXT. J. Criminal Appeal No. 23 of 2021

JUDGMENT OF THE COURT

04th December, 2023 & 2nd January,2024

LILA, JA:

In Criminal Case No. 86 of 2020, the District Court of Bahi convicted the appellant of the offence of rape contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code and sentenced him to serve thirty (30) years imprisonment. He was aggrieved and preferred an appeal to the High Court. The High Court transferred the appeal to the Resident Magistrates' Court of Dodoma to be heard and determined by a Resident Magistrate with Extended Jurisdiction. Thereat, it was registered as Criminal Appeal No. 23 of 2021. The appeal was unsuccessful hence this appeal challenging that decision which upheld the appellant's conviction and sentence.

The accusation by the prosecution as reflected in the charge was that; on 19th September, 2020 at Muhanza Street, Lamaiti Village within Bahi District in Dodoma Region, the appellant had carnal knowledge of a girl aged 15 years who shall, in this judgment, be referred to as XY to disguise her identity.

Following the appellant's denial to the charge, the prosecution paraded six (6) witnesses to prove the charge one of them was PW2 who was referred to as 'THE VICTIM'. As the appeal raises among other issues whether PW2, that is 'THE VICTIM', is the very girl (XY) referred in the charge which issue we shall determine later, we shall, in the meantime maintain the name 'THE VICTIM' in narrating the background facts leading to this appeal. It was 'THE VICTIM's testimony that on the fateful day she was in the forest at Lamaiti fetching firewood whence Jumanne (the appellant) who she knew his place, appeared saying he was looking for a goat and she replied that she did not see it. The appellant further probed her if her sister was at home as he had an issue to arrange with her but she told him that she was not there. Then the appellant told her that *'nawe huwa nakutamani'* literally meaning he envied her but she told him that she was not interested. She further said, as she was carrying firewood on her head at that time, the appellant fell her down, undressed her and raped her. Elaborating the whole ordeal, she said the appellant inserted his penis into her vagina causing her to sustain injuries and she noted white fluids in her vagina which she called sperms. Her call for help could not assist as no

one responded. She returned home and reported the matter to her mother. They then went to the appellant's home but they could not find him. But, later on, the went to their home and denied the accusation which act prompted them to report the matter to the Village Chairman leading to the appellant's arrest. That the next day they reported the matter to the police station and, later, her mother took her to hospital.

According to the PF3 (exhibit PE1), the doctor one Daniel Shukrani Mbwila (PW1), examined one Salome Shauri Magumbila who went to hospital with her grandmother. He told the trial court that he noticed sperms which was an indication that she was raped but there were no blood or bruises. He concluded that there was penetration but VDRS was normal and he posted his findings on exhibit PE1.

PW3, Edina Magumbila (PW3), a mother of eight children, XY inclusive as her last born, told the trial court that on 19/9/2020 at 17:00, XY went back home from fetching firewood in the bush crying and upon inquiring her, she told her that she was raped by one Jumanne in the bush. That they went to the appellant's residence but did not find him and that it was later on when he personally visited them and unsuccessfully tried to negotiate settlement alleging that it was simply the devil who had captured him. She concluded her testimony that they reported the matter to the street chairman. The appellant was arrested

and slept at the Ward Executive Officer's (WEO) office and was later on taken to police station. That they later went to the police station to report the matter.

While at the police station, the appellant's cautioned statement (exhibit PE2) was recorded on 21/9/2020 by G 8568 DC Safari (PW4) who said he informed the appellant all his rights before recording the statement in which the appellant confessed raping the XY on 19/9/2020.

Jamila Mkabala (PW5), a justice of the peace and a magistrate at Bahi Primary Court, recorded the appellant's extra-judicial statement (exhibit PE3) in which she said he admitted committing the offence of rape.

To prove that XY was a standard five pupil at Lamaiti Primary School, Ramadhani Kipaya (PW6), a Head-Teacher of that school, testified proving so and he tendered as exhibit her Development Progress Card (exhibit PE4).

The appellant (DW1), the sole defence witness, had it, in his affirmed defence, that on 19/9/2020 he was at home making bricks when a person with a bicycle appeared and told him that his uncle had met a motorcycle accident. That when he asked to use the bicycle to go and see his uncle, his hands were tied with ropes and was taken to the police station while being told that he would know the reason of being arrested while at the police station. That he stayed at the police station until 21/9/2020 when the investigator asked him to sign three papers and was later, on 22/9/2020, taken to court facing the charged offence.

The trial court, at the conclusion of the trial, was satisfied that the prosecution had proved the charge consequent upon which it convicted and sentenced him as explained above.

The Resident magistrate with Extended Jurisdiction whom the appeal was transferred for hearing on first appeal, too found the charge established relying on the evidence by 'THE VICTIM', the doctor's report (exhibit PE1) which although it did not show injuries, the learned magistrate found it not to be an ingredient of the offence of rape citing the case of **Daffa Mbwana Kedi,** Criminal Appeal No. 65 of 2017 (unreported) and the confessional statement by the appellant (exhibit PE 2). Relying on the Court' decisions in the cases of **Selemani Makumba vs Republic**, Criminal Appeal No. 94 of 199 and **Godi Kasenegala vs Republic**, Criminal Appeal No. 10 of 2008 (both unreported) which underscored the principle that best evidence in sexual offences comes from the victim, the learned magistrate was moved by the testimony of 'THE VICTIM' that she was penetrated by the appellant, a person she knew well. The magistrate further held that 'THE VICTIM' was forthcoming that the appellant inserted his male organ into her female organ causing her feel pain which facts established penetration and that by naming the appellant to PW3 as the ravisher instantly, she was reliable as was held in the case of **Marwa Wangiti vs Republic** [2002] TLR 39. The learned first appellate magistrate further held that the evidence by 'THE VICTIM' that she was penetrated coupled with the

medical examination findings as posted in the PF3 (exhibit PE1) sufficiently established penetration in terms of section 130(4) of the Penal Code citing as an authority the case of **Daffa Mbwana Kedi vs Republic** (supra). For these reasons the learned magistrate found the appellant's appeal had no merit and dismissed it. The appellant was aggrieved and accessed this Court fronting five (5) grounds of complaint that: -

1. *That the lower court and the 1st appellate court erred in law to determine the case while the charge was defective on the ground that the age indicated in the charge sheet differ from the age indicated in the preliminary hearing.*
2. *That both the lower court and the first appellate court erred in law to determine the case basing on procedural irregularities.*
3. *That both the lower court and the 1st appellate court erred in law and fact to determine the case and impose a sentence of 30 years without considering the requirement of section 131(2)(a) of the Penal Code, [Cap 16 R. E. 2019] as the appellant when charged was of 18 years according to the defence evidence and the preliminary hearing.*
4. *That the learned trial Magistrate erred in law and fact for attaching weight to unreliable evidence hence reached to erroneous decision.*
5. *That, both the lower court and the 1st appellate court erred in law to find the appellant guilty with the offence charged while the prosecution failed to prove the case beyond reasonable doubts.*

Before us representing the appellant was Mr. Leonard Mwanamongo Haule, learned advocate, whereas the respondent Republic was represented by Ms. Catherine Gwaltu, learned Senior State Attorney.

First to take the floor to argue the appeal was Mr. Haule who informed the Court that he had planned to argue grounds 1 and 3 conjointly as one complaint that the sentence imposed was illegal and grounds 2, 4, and 5 together under one headline that the charge was not proved beyond reasonable doubt.

Arguing in respect of grounds 1 and 3, it was Mr. Haule's contention that the personal particulars of the appellant in the charge, the proceedings of the preliminary hearing, memorandum of undisputed facts and the defence evidence show that the appellant was 18 years old when he was arraigned in court and was a first offender, hence could not, on conviction, in terms of section 131(2)(a) of the Penal Code, be incarcerated in prison to serve thirty years imprisonment instead of being ordered to suffer strokes of the cane. Under that provision, he insisted, the appellant could be ordered to suffer corporal punishment only. He therefore argued that a custodial sentence of thirty years imprisonment meted out is illegal. He, however, proposed that if that is accepted by the Court then he should be set free because he has already served an illegal sentence in prison for over two years.

Regarding grounds 2, 4 and 5, Mr. Haule forcefully argued that the evidence as a whole, did not prove one of the essential ingredients of the of

rape that there was penetration. Attacking the testimony of the doctor (PW1), Mr. Haule contended that had he noticed penetration when he medically examined XY, then he would have posted so in exhibit P1 instead of waiting until when he appeared in court to testify which rendered his testimony an afterthought. It was his argument that exhibit PE1 simply showed that there was no injury to the cervix or anus or sperm quite different from what he told the court that he noted sperms signifying that there was penetration.

Arguing in another angle, Mr. Haule asserted that the victim (XY) shown in the charge did not testify. It was his firm view that the one who testified and indicated in the record as 'THE VICTIM' or PW2 is not the victim shown in the charge (XY) as there was no reason to hide her name during trial as such practice is done in the judgment only. To him 'THE VICTIM' was a completely different person and unknown. As the true victim did not testify then there was no one who proved penetration. And, as penetration is a crucial element in proving rape cases, absence of such evidence adversely affected the prosecution case, he insisted. It was his further argument that if taken that 'THE VICTIM' meant the victim shown on the charge (XY), then there was variance between the charge and evidence which compelled the prosecution to amend the charge which was not done. He cited the case of **Mabula Limbe vs Republic**, Criminal Appeal No. 563 of 2015 (unreported) to support his assertion.

Another attack by Mr. Haule was directed to the Extra-Judicial Statement (exhibit PE3). His attack was two-limbed. He first argued that, if taken to have been properly recorded, the statements therein do no suggest any penetration. He referred to statements such as *'niiilala nae', 'kiukweli nilikua nataka kumwingilia,' 'tulivyoanza hilo tendo la ndoa akanisukuma na kusema bila hela sitaki', 'mimi sikuwa nimemaliza,' 'mtoto mwenyewe alisema tayari ameshalala na Mesha siku hiyo hiyo halafu na mimi nataka bila hela akanisukuma kabla sijamaliza kile kitendo cha kumwingilia. Alisema anataka apewe mimba na mtu mmoja sio na watu wengi maana yake kwa kuwa nimekataa kumpa hela tuachane* literally meaning*; "I slept with her, truly, I wanted to penetrate her, when we started to consummate she pushed me away saying without money she was not ready to deal with me, I was yet to finish it up, the young girl said she had slept with one Mesha on the same day and I also wanted to have sex with her without money and she pushed me away before I completed penetrating her, she said she wanted to be impregnated by one person not many people and as I had refused to give her money then our relationship should end up".* With these words, he contended, the act of penetrating the victim was yet to happen and cited to us the case of **Richard Sichone vs Republic**, Criminal Appeal No. 71 of 2019 (unreported) to cement his argument.

The second limb was that the manner the extra-judicial statement was taken, did not accord to all the Chief Justice's Guidelines as it only complied with

guidelines number 1, 2 and 3 only. To him, that was fatal and exhibit PE3 should be disregarded.

Ms. Gwaltu, in arguing the appeal, was just opposed to the conviction only. She had no issue with the invalidity of the sentence as argued by Mr. Haule to whose submission she fully associated with and agreed with him that he deserves being discharged as he had served an unlawful custodial sentence for over two years.

In resisting the appeal against conviction, she contended that the testimony by PW2, who was the only victim indicated in the charge and the only one who testified as the one ravished in this case although her name was not disclosed but referred to as 'THE VICTIM', proved being penetrated. She was firm that 'THE VICTIM' meant the one referred in the charge (XY). As for the cited case of **Mabula Limbe vs Republic** (supra), it was her view that it is distinguishable as in such case there were differences in the victim's names while in the present case there was only one victim according to the charge.

Regarding evidence proving penetration, Ms. Gwaltu argued that, PW2's evidence was sufficient it being from the victim of the offence and was reliable as she named the appellant to be her ravisher at the earliest opportunity to PW3. That her evidence was corroborated by findings posted by the doctor (PW1) in exhibit P1 who indicated that there were gametes which meant sperms in the victim's genital parts.

Ms. Gwaltu couid not let Mr. Haule's attack on the Extra-Judicial statement (exhibit PE3) go unchallenged. As for it not being a confession, she argued that the words that '*nilikuwa sijamaliza*' that is '*I was yet to finish it up*' connoted that the appellant had penetrated the victim although he was yet to quinch his sexual desire. She insisted that, in law, penetration however slight, is sufficient penetration referring to the case of **Tabu Sita vs Republic**, Criminal Appeal No. 297 of 2019 (unreported). For the second limb, she took the Court to page 48 which was exhibit PE3 and tried to relate it with the Chief Justice's Guidelines as listed down at pages 16 and 17 of the copy of the Court's decision in the case of **Tabu Sita vs Republic** (supra) in which she said, Guideline (iv) is complied with in paragraph 5 of the extra-judicial statement, Guideline No. (v) and (vi) are complied with in paragraphs 5 and 8 of the exhibit PE3. In her view, all the Guidelines were abided to by PW5 in recording exhibit PE3.

Rejoining, Mr Haule, first, reiterated his earlier submissions. He then insisted that 'THE VICTIM' who testified as PW2 is an unknown person. He also argued that PW1 is not reliable because he did not post noticing sperms in the PF3 (exhibit PE1) as he claimed when testifying. As for the victim's evidence, he urged the Court not to take the same as gospel truth but should be examined properly by the Court. He, lastly, maintained his stance on the invalidity of the extra-judicial statement (exhibit PE3) for want of compliance with all the Chief Justice's guidelines.

In view of the arguments by Mr. Haule that the true victim of the incident (XY) did not testify, we find this to be a crucial issue calling for our determination before embarking on the determination of other grounds of appeal. Mr. Haule and Ms Gwaltu differed on who 'THE VICTIM' was. The record is vivid that PW2 was referred to as 'THE VICTIM'. Mr. Haule contended that such witness is an unknown person and did not refer to the victim referred to in the charge and if she is the one, then there was variance between the charge and evidence in respect of the name of the victim of rape, while Ms. Gwaltu maintained that she was the one and no variance existed. We think Mr. Haule's contention has no merit. As was rightly argued by Ms. Gwaltu there was no mention of any other victim throughout the proceedings and judgments of both the trial court an even the first appellate court. Both courts entertained no doubt on who was the victim in the instant case other than Salome Shauri @ Magumbila. We entirely agree with her. The charge indicated that the victim was 15 years and rape was committed at Muhanza street in Lamaiti village on 19/9/2020 and PW2 who testified as 'THE VICTIM' explained that she was 15 years on 7/10/2020 and a student at Lamaiti. PW3 who said was the biological mother of the XY gave similar evidence. That meant PW3 was referring to PW2 or 'THE VICTIM'. Like the learned State Attorney, we are of the firm view that by writing PW2 as 'THE VICTIM', the trial magistrate referred to no other person other than the victim named in the charge, that is XY. For this reason, the cited case of **Mabula**

Limbe vs Republic (supra) in which there was variation regarding the owner of pig stolen between the particulars of the charge and the evidence which suggested that there were two incidents of theft, has no relevance here. Similarly, the need for amendment did not arise rendering the cited case of **Mabuia Limbe vs Republic** (supra) inapplicable. That said, we hold that the arguments by Mr. Haule that the victim did not testify and there was variance requiring an amendment of the charge are unmerited and we dismiss them.

Next, we shall consider the complaint that the wording in the extra-judicial statement (exhibit P3), as recited above, could not be interpreted to connote penetration. Both learned brains are in agreement that penetration is an essential ingredient in establishing rape and, indeed, it is so in terms of section 130(4) which states that:

> *"For the purpose of proving the offence of rape-*
> *(a) Penetration however slight is sufficient to constitute the* ***sexual intercourse*** *necessary to the offence; and*
> *(b) Evidence of resistance such as physical is not necessary to prove that* ***sexual intercourse*** *took place without consent..."* (Emphasis provided).

The Court has occasionally considered various terminologies and phrases employed by witnesses in court in addressing penetration or having sexual intercourse and the Court explicitly found it that upbringings and cultural restrictions have occasionally forced witnesses not to state directly what penetration means. The Court, for instance, in the case of **Hassani Bakari @**

Mamajicho vs Republic, Criminal Appeal No. 103 of 2012 (unreported) when considering the import of section 130(4) of the Penal Code observed that: -

> *"The catch words here are **sexual intercourse and penetration**. The words are defined **in Longman Dictionary of Contemporary Engiish** as meaning-*
> *"The bodily act between animals or people in which the **male sex organ enters the female**" (Emphasis provided).*
> *The **male sex organ** means the penis and the **female sex** organ means the vagina. It is therefore common knowledge that when people speak of **sexual intercourse,** they mean the penetration of the penis of a male into the vagina of a female. It is now and then read in court records that trial courts just make reference to such words as **sexual intercourse** or **male/female organs** or simply to have **sex,** and the like. Whenever such words are used or a witness in open court simply refers to such words, in our considered view, they are or should be taken to mean the penis penetrating the vagina. There are circumstances, and they are not few, that witnesses or even the court would avoid using such direct words as penis or vagina and the like, for obvious reasons including but not restricted to that person's cultural background; upbringing; religious feelings; the audience listening; the age of the person, and the like. These "restrictions" are understandable, given the circumstances of each case. Our considered view is that, so long as the court, the adverse party or*

any intended audience grasps the meaning of what is meant then, it is sufficient to mean or understand it to be the penetration of the vagina by the penis. We believe, that is why even section 130 of the Penal Code does not use directly the words of or phrases such as penetration of a vagina by a penis. Our culturai backgrounds and upbringing need to be observed and respected in matters of this kind."

We fully subscribe to the above and without hesitation hold that the words recited above particularly phrases that *'nililala nae', 'tulivyoanza hiio tendo la ndoa akanisukuma na kusema bila hela sitaki', 'mimi sikuwa nimemaliza,' '...akanisukuma kabla sijamaiiza kile kitendo cha kumwingilia...'* they referred to nothing but having sexual intercourse with and hence established penetration.

Recording of the extra-judicial statement (exhibit PE3) was also faulted by Mr. Haule contending that it did not comply with the Chief Justice's Guidelines number (iv), (v) and (vi). The case of **Tabu Sita vs Republic** (supra) which outlined and extensively discussed the said Guidelines was cited to us to bolster the assertion. The three Guidelines allegedly not complied required this information be reflected in the extra-judicial statement: -

"(iv) Whether any person by threat or promise or violence has persuaded him to give the statement;

(v) Whether he really wishes to make the statement on his own will; and

(vi) That, if he makes a statement, the same may be used as evidence against him."

Ms. Gwaltu resisted the argument stating that such Guidelines were complied with in paragraphs 5 and 8 of the extra-judicial statement. We have examined the said Guidelines and the referred paragraphs of the extra-judicial statement and realized, indeed, that there was compliance. In those paragraphs, the learned justice of the piece (PW5) indicated the questions posed to the appellant and his responses thus: -

"5. Mshtakiwa amejulishwa yupo mbele ya mlinzi wa amani na ameulizwa kama anataka kutoa maelezo. NITATOA MAELEZO

8(a) mshtakiwa amejulishwa kuwa y uhuru na yuko huru kutoa maelezo, anajibu hivi; NITAYATOA TU

(b) Mshtakiwa amejulishwakuwa kama atatoa maelezo yake yataandikwa na yatatumiwa baadae wakati shauri litakapokuwa linasikilizwa. Mshatakiwa anajibu: SINA KIPINGAMIZI."

We think, closely examined, the above reveals full compliance with the complained Guidelines. We would, however, wish to insist here that, in testing compliance with Guidelines or Rules, parties have to look at the contents and substance rather than expecting verbatim expressions of the guidelines. This complaint therefore fails.

Linked with the above is an attack directed to the Doctor (PW1) who examined the victim that he was unreliable because he stated in court matters which were not posted in exhibit PE1 that he noticed sperms and there was penetration. We have examined exhibit PE1 and found, as rightly argued by Ms. Gwaltu, that PW1 posted that he noticed 'gametes' which refers to sperms as he told the trial court. That finding justified his claim, in court, that the victim was penetrated. The complaint is baseless and is hereby dismissed.

Having made our findings on the above complaints, we lastly have to consider the major issue whether the prosecution proved that the victim was raped and that it was the appellant who raped her.

The record bears out that the appellant's conviction in the present case was founded on the evidence of PW1, PW2 and the exhibit PE3. Both courts bellow regarded the two witnesses as star witnesses and we have held that the exhibit PE3 was validly recorded. Neither of the two courts below doubted the two witnesses meaning that they were unanimous that they were truthful and credible witnesses. Trite principle of law is that where there are concurrent findings of facts by the lower courts, an appellate court, in a second appeal, should not disturb them unless it is clearly shown that there has been a misapprehension of the substance of evidence, a miscarriage of justice or violation of some principle of law, or there are obvious errors on the face of the record, or misdirections or non-directions on the evidence, nature and quality

of the evidence, resulting in unfair conviction – [See, among others, the cases of and **Patrick Abel v. Republic,** Criminal Appeal No. 55 of 2014, CAT (unreported) and **Amratlal Damodar Maltazez and Another t/a Zanzibar Silk Store v. H. Jariwalla t/a Zanzibar Hotel** (1980) T.L.R. 31]

We have, with sober minds, examined the evidence on record. PW2 was unequivocal that the appellant met her in the bush while looking for firewood and the appellant looking for a goat, grabbed her, fell her down and raped her by penetrating his penis into her vagina causing her suffer pains. To exhibit her reliability, she instantly reported the matter to PW3, her mother and other steps were taken including being taken to hospital where she was examined by PW1. Her evidence was consistent, truthful, credible and strong. PW1 supported PW2's evidence that he noticed sperms in her genital parts signifying being penetrated. Consistent with the Court's holding in the case of **Selemani Makumba v. Republic** (supra), that true evidence of rape has to come from the victim, as properly submitted by Ms. Gwaltu, the prosecution evidence established beyond certainty that PW2 was raped and the appellant is the person who molested her as was charged and we agree with her that the two courts bellow correctly held so. The evidence is not only consistent but also coherent. We therefore see no justification to interfere with the findings of the lower courts. This complaint also fails.

We now turn to consider the first ground of complaint that the two courts below erred in law to impose a sentence of thirty (30) years imprisonment without considering that the appellant, when he was charged, was 18 years old, was a first offender and the requirement of section 131(2)(a) of the Penal Code and he deserved, upon conviction, to be sentenced to only suffer strokes of the can. This ground of appeal is merited and, luckily, both sides agree with that. Indeed, the personal particulars of the appellant as were presented by the prosecution when he was first arraigned in court and his own defence evidence established that he was 18 years old. In terms of section 131(2) (a), (b), (c) of the Penal Code he could not be sentenced to serve a prison term. For easy of reference the cited provision provides: -

> "Notwithstanding the provisions of any law, where the offence is committed by **a boy who is of the age of eighteen years or less**, he shall-
>
> *(a) **if a first offender, be sentenced to corporal punishment only;***
>
> *(b) if a second time offender, be sentence to imprisonment for a term of twelve months with corporal punishment;*
>
> *(c) if a third time and recidivist offender, he shall be sentenced to five years with corporal punishment.*" (Emphasis added)

In the light of this provision, the sentence of 30 years imprisonment meted against the appellant was therefore illegal. The more so, like both learned counsel, we find it just to set the appellant free after considering that he has served an illegal custodial sentence for over two years.

For the foregoing reasons, the appeal against conviction fails. The appeal against sentence succeeds and we quash and set it aside. For a reason stated above, we order his immediate release from prison.

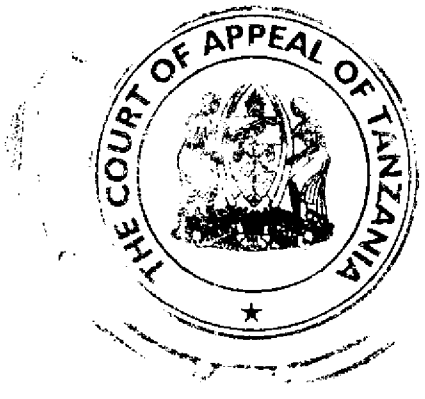
DATED at **DAR ES SALAAM** this 21st day of December, 2023.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of January, 2024 in the presence of the Appellant in person, unrepresented and Ms. Faudhiat Mashina, learned State Attorney for the Respondent/Republic via video link from High Court Dodoma is hereby certified as a true copy of the original.



R.W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL