**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(BUKOBA DISTRICT REGISTRY)**

**AT BUKOBA**

**CRIMINAL APPEAL NO. 93 OF 2020**

*(Originating from Criminal Case No. 211 of 2019 of District Court of Ngara at Ngara)*

**TWALIB MUSSA---------- APPELLANT**

**VERSUS**

**REPUBLIC---------- RESPONDENT**

**JUDGEMENT**

**Date of Last Order: 12/05/2022**

**Date of Judgment: 24/06/2022**

**A. E. Mwipopo, J.**

Twalib Mussa, appellant herein, filed the present appeal against the decision of Ngara District Court in Criminal Case No. 211 of 2019. The appellant was charged and convicted by the District Court for the offence of Rape contrary to section 130(1), (2) (e) and section 131(1) of the Penal Code, Cap. 16, R.E. 2002. It was alleged that on 20th November, 2019, at Murugina Village, within Ngara District in Kagera Region the appellant did unlawfully have carnal knowledge of one A.E. (the name of the victim is withheld for the purpose of protecting her), a girl aged 9 years old. The prosecution called a total of 5

witnesses and tendered five exhibits to prove its case. The trial court did find the appellant with a case to answer and informed the appellant about his rights to defend himself and to call other witnesses in his defense, but the accused decided to remain mute. The prosecutor prayed for the trial Court to proceed to deliver its judgment. The trial Court proceeded to convict the appellant for the offence charged and after mitigation the Court sentenced him to serve life imprisonment.

The appellant was not satisfied with the decision of the District Court and filed the present appeal against the said decision. In his petition of appeal, the appellant raised a total of five (5) grounds of appeal as provided hereunder:-

1. *That, the trial Magistrate grossly erred in law and fact for convicting the appellant contrary to section 231 (3) of the Criminal Procedure Act, Cap. 20, R.E. 2002.*

2. *That, the trial Court and prosecution side did not comment for the failure of the accused to give evidence contrary to the law.*

3. *That, the evidence by PW3 (victim) was wrongly given or taken by making an oath contrary to mandatory provision of section 127 (2) of the evidence Act as amended by Act No. 4 of 2016.*

4. *That, the evidence by PW3 (victim) which was taken or given by an*

*oath implies her evidence was brotherly taken hence bad in law.*

5. *That, the said exhibit PV – PF3 was improperly tendered and received without reading it to the appellant which is contrary to the law.*

The appellant, who appeared in person, prayed for all grounds of appeal which are found in the Petition of Appeal to be considered by the court and the court to allow his appeal.

In response, the respondent, who was represented by Mr. Juma Mahona and Mr. Amani Kirua, State Attorneys, was against the appeal. Mr. Amani Kirua submitted on the 1st ground of appeal that the ground has no merits as the law provides for the prosecutor to give comment where the accused person decide to stay mute. In this case the appellant decide not to defend himself after he was given the chance to do so. The prosecutions' comment was given that the trial court to proceed to deliver Judgment.

On the second ground of appeal, the Counsel said that the prosecution provided their comment after the appellant decided not to defend himself when he was given the chance to do so. Thus, the second ground of appeal has no merits.

On the appellant's 3rd ground of appeal, the counsel said the law provides under section 127 (2) of the Evidence Act that the child of tender ages is allowed

to testify if she promise the court to say the truth and not to lie. The same was done by the trial court. Thus, there was no need to take oath of this witness of tender age. The same position was stated by the Court of Appeal who explained the requirement under section 127 (2) of the evidence Act in the case of **Ally Ngozi v. Republic**, Criminal Appeal No. 216 of 2018, Court of Appeal of Tanzania at Dar Es Salaam, (unreported), at page 18. Thus, the 3rd and 4th grounds of appeal have no merits.

On the last ground of appeal, he said that the proceedings shows at page 12 of the proceedings that it was PW5 who testified and tendered the PF3 which was admitted as Exhibit PV. The proceedings shows at page 13 that the Exhibit – PV was read over to the appellant. Thus it is not true that the Exhibit PV was not read over to him.

In his rejoinder, the appellant retaliated his earlier prayer that the Court has to consider his grounds of appeals and discharge him.

From the submissions, the Court will consider the grounds of appeal found in the petition of appeal as it was the appellant's prayer. The 1st and 2nd grounds of the appeal will be determined together as they are related. The appellant alleged on these two grounds that that his conviction was contrary to section 231 (3) of the Criminal Procedure Act, Cap. 20, R.E. 2002, which provides for the Court to draw adverse inference against the accused person who elects to

remain silent and the prosecution shall be permitted to comment on the failure of the accused person to give evidence. The said section provides as follows, I quote:-

> *"231 (3) Where the accused, after he has been informed in terms of subsection (1) elects to remain silent the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be permitted to comment on the failure by the accused to give evidence."*

The appellant is saying the trial Court erred to convict him without drawing adverse inference and the prosecution failed to comment after he choose to remain silent. In response, the counsel for the respondent said that the appellant decide not to defend himself after he was given the chance to do so. He added that the prosecutions' comment was given that the trial court to proceed to deliver Judgment.

The proceedings shows in page 14 the trial Court delivering ruling, after the prosecution closed its case, where the appellant was found with a case to answer. In page 15 of the typed proceedings the trial Court informed the appellant of the offence he is facing and his right of defense by testify himself and or to call other defense witnesses and exhibits according to section 231 (1) of the Criminal Procedure Act. The appellant answer was that he opt to remain silent. The law under section 231 (3) of the Criminal Procedure Act provides that

the court shall be entitled to draw an adverse inference against the appellant and the court as well as the prosecution shall be permitted to comment on the failure by the appellant to give evidence. The record show that the prosecution prayed for the Court to pronounce judgment. Thus, it is clear that the prosecution did not comment on the appellant decision not to defend himself and the Court did not draw adverse inference. The Court proceeded to deliver judgment.

Looking at the said law, it was optional for the prosecution and the Court to comment on the said appellant decision not to defend himself. The section provides that the prosecution and the Court are permitted to comment on the appellant's decision. As the comments are made after permission, it means the prosecution and court have option to comment on appellant decision not to defend himself. What was mandatory is for the Court to draw adverse inference for the act of the appellant. However, the said omission by the trial court is not material irregularity to the case at hand. The reason is that the omission did not prejudice appellant. The appellant opted not to defend himself by his own choice. The trial Court properly informed the appellant on his right to defense. This Court was of similar position when it was confronted with the same issue in the case of **Ramadhani Iddi @ Mnyampaa vs. Republic**, Criminal Appeal No. 53 of 2020, High Court at Arusha, (unreported), where at page 5 the Court held that:-

*"The mere fact that the court as well as the prosecution, never drew an adverse inference against him or even comment on the failure by the accused to give evidence, in my view, is not a material irregularity. He waived his right to defend."*

From above discussion, I find the omission is not fatal and is saved by section 388 (1) of the Criminal Procedure Act. Thus, the 1st and 2nd grounds of appeal have no merits.

In the 3rd and 4th grounds of appeal appellant alleges that the evidence of PW3 (victim) who is the child of tender age was wrongly given contrary to section 127 (2) of the Evidence Act as amended by Act No. 4 of 2016 and the witness evidence was taken under oath which implies that the evidence was brotherly taken hence bad in law. The counsel for the respondent said in his reply that under section 127 (2) of the Evidence Act the child of tender ages is allowed to testify if she promise the court to say the truth and not to lie. The same was done by the trial court, thus, there was no need to take oath of this witness of tender age.

The evidence in record shows in page 7 of the typed proceedings that PW3 testified on 06th January, 2020. The Court recorded testimony of PW3, who was aged 9 years at that time, after she promised to speak the truth and not to tell lies. This was done in accordance with section 127 (2) of the Evidence Act, Cap. 6, R.E. 2019, which provides as follows:-

*"127(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

The above cited section which was introduced by Act No. 4 of 2016 allows a child of tender age to give evidence without taking oath on condition that he/she promises to tell the truth and not to tell lies. In the case of **Msiba Leonard Mchere Kumwaga vs. Republic**, Criminal Appeal No. 550 of 2015, Court of Appeal of Tanzania at Mwanza ,(unreported), the Court held at page 9 that:-

*"Currently, a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies."*

The same position was stated by the Court of Appeal when discussing section 127 (2) of the evidence Act in the case of **Ally Ngozi vs. Republic, (supra)**, were it held that, I quote:-

*"What can be discerned from above cited provision as amended, provides for two conditions. One, it allow the child of tender age to give evidence without oath or affirmation. Two, before giving evidence, such child is mandatorily required to promise to tell the truth to the Court and not to tell lies."*

Thus, the trial Court properly followed the procedure by recording the evidence of PW3 after she promised to tell the truth and not to tell lies. For that

reason I find the 3rd and 4th grounds of appeal to be devoid of merits.

In the 5th ground of appeal the appellant said that exhibit PV (PF3) was improperly tendered and received without reading it to the appellant which is contrary to the law. The prosecution responded by saying that it is not true as the said the PF3 was tendered by PW5 and it was admitted as Exhibit PV. The said Exhibit PV was read over to the appellant.

The proceedings shows at page 12 that PW5, a Clinical Officer who examined PW3, testified and tendered PF3 which was admitted as Exhibit PV after the appellant said he has no objection. The proceedings at page 13 shows that the Exhibit PV was read over to the Court. Thus, the evidence available in record proves that the Exhibit PV was tendered and admitted according to the law and it was read over to the Court after it was admitted. Thus, this ground also has no merits.

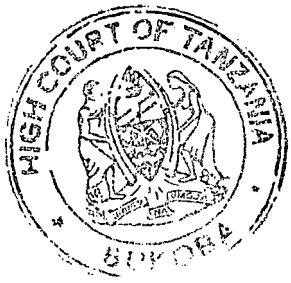
Therefore, all five grounds of appeal found in the petition of appeal are devoid of merits and I find the appeal has no merits. Consequently, the appeal is dismissed and the decision of the trial Court is upheld. It is so ordered.

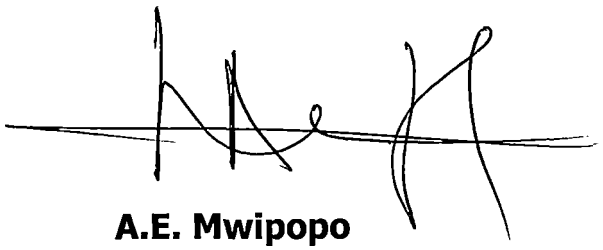

**A.E. Mwipopo**

**Judge**

**24/06/2022**

**Court:** Judgment was delivered today in the presence of the appellant and the counsel for the respondent.



**A.E. Mwipopo**

**Judge**

**24/06/2022**