THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT MUSOMA

CRIMINAL APPEAL No. 112 OF 2021

(Arising from the District Court of Bunda at Bunda in Criminal Case No. 17 of 2020)

JOHN ROBERT ..... **APPELLANT**

Versus

THE REPUBLIC ..... **RESPONDENT**

JUDGMENT

03.04.2023 & 13.04.2023
Mtulya, J.:

The appellant, John Robert, was prosecuted and found guilty of rape contrary to section 130 (1), (2) (e) and 131 (1) of the **Penal Code [Cap. 16 R.E 2019]** (the Code) at the **District Court of Bunda at Bunda** (the district court) in **Criminal Case No. 17 of 2020** (the case). Following the sentence against the appellant, the district court had sentenced him to serve thirty (30) years imprisonment.

The findings and sentence of the district court aggrieved the appellant hence filed **Criminal Appeal No. 112 of 2021** (the appeal) in this court complaining of seven (7) faults allegedly

committed by the district court and prayed this court to quash the conviction and sentence imposed against him.

The reasons of appeal briefly show that: first, medical officer who examined the victim and prepared P.1 was not summoned to testify; second, the district court relied on hearsay evidence and declined the defence evidence on payment of wages; third, the victim was not summoned to testify in the district court; fourth, the accused person did not know how to write and read cautioned statement; fifth, no DNA expert was called to testify on sperms; sixth, the best evidence of the victim of alleged rape was not produced in the district court; and finally, the district court heavily relied on the evidence of PW2 which had several doubts and ureliable.

The appellant was called in this court on 4th April 2023 through teleconference communications to elaborate his reasons of appeal, but had informed this court that the reasons are self-explanatory and the respondent was supposed to reply them and will accordingly rejoin the replies. The respondent on his part had marshalled Mr. Felix Mshama, learned State Attorney to protest the reasons of appeal.

According to Mr. Mshama, the appeal was brought in this court without good reasons hence the decision of the district court may be up-held. In his opinion, the first reason of appeal has no merit as the law in section 240 (3) of the **Criminal Procedure Act [Cap. 20 R.E. 2019]** (the Act) permits expert exhibits to be tendered by any expert witness on the subject as it was done by expert clinical officer, Masalu Mayeji (PW5). On the reason of calling PW5 instead of medical practitioner who examined the victim and prepared P.1, Mr. Mshama submitted that the reasons are displayed at page 19 of the proceedings of the district court that the medical practitioner who examined the victim was transferred to another duty station.

Regarding consideration of hearsay evidence and decline of defence testimony on delay of payment of wages, Mr. Mshama submitted that the prosecution had brought at the district court eye witness Sumai Mawazo (PW2) who witnessed the appellant committing the crime of rape against the victim. With the third reason of appeal, Mr. Mshama submitted that the victim was summoned and appeared in the district court, but could not testified as she was uneducated on sign language as is displayed by language expert Mr. Juma Ginari (PW1) at page 8 of the proceedings of the district court.

According to Mr. Mshama, the expert had testified that the victim cannot hear and speak sign language and the district court noted and appreciated the point hence ordered other witnesses to testify as displayed at page 9 of the proceedings of the district court. In his opinion, Mr. Mshana thinks that the practice is allowed by the Court of Appeal (the Court) in the decision of **Issa Ramadhani v. Republic**, Criminal Appeal No. 409 of 2015.

Mr. Mshama contended further that the appellant had confessed twice to different authorities on the commission of the crime against the victim: first, he had orally confessed before private person called Mashiku Katemagire, who was summoned to testify in the district court as prosecution witness number three (PW3); and second to the police officer F. 7595 DCsgnt Reornerd of Kibara Bunda, who was marshalled by the prosecution as witness number four (PW4). According to Mr. Mshama, ground number four of the appeal has no merit as the appellant admitted the offence of rape and registered reason of devil's influence, which does not relate to reading or writing cautioned statement.

With the complaint on DNA expert and examination results of sperms, Mr. Mshama submitted that it is not a legal requirement in rape cases and in any case expert opinion does not override oral testimony of PW2 who had witnessed the offence being committed by the appellant against the victim. In order to make his point understood, Mr. Mshama had moved this court to read the authority of the Court in **Mawazo Anyandwile Mwaikaja v. DPP**, Criminal Appeal No. 455 of 2017.

Regarding the sixth reason of appeal, Mr. Mshama stated that in the present case, there is a large bundle of evidences from PW2, PW3 and PW4 which points a finger to the appellant to have committed the offence, and that in the circumstances of the present case, the victim could not be able to testify as she was dumb and deaf with language barrier. In his opinion, that is allowed in the case of **Siaba Mswaki v. Republic**, Criminal Appeal No. 401 of 2019.

According to Mr. Mshama, the prosecution brought PW2 in the district court to testify on what he had seen and testified all that had occurred against the victim committed by the appellant. In his opinion, PW2 was reliable and credible witness that cannot

be faulted by mere words of the appellant that the evidence of PW2 was in doubt.

Rejoining the submission of Mr. Mshama, the appellant conceded the submission on the first ground of appeal, but protested all other materials registered by Mr. Mshama. In his submission, the appellant contended that: first, he was not witnessed by any person committing the crime of rape against the victim; second, the victim was not summoned in the district court to testify; third, Mr. Mshama does not say the truth on the fourth ground; fourth, the Republic did not call the appellant at the hospital to have his sperms examined; fifth, the victim was not interrogated and recorded her statement; and finally, PW2 is not credible witness as he testified lies before the district court.

I have perused the present record and found that the appellant was arraigned at the district court on 16th March to reply a charge of rape against a girl child aged fourteen (14) years old (the victim) allegedly committed on 14th January 2020 at Kenkombyo Village within Bunda District in Mara Region, contrary to section 130 (1), (2) (e) and 131 (1) of the Code. When the charge was read against him, he entered a plea of not guilty. Following the denial, the prosecution had decided to

summon a total of five witnesses to establish its case as per standard requiring in proving criminal cases. I will briefly highlight the materials produced by both parties during the hearing of the case in the district court for purposes of appreciation of the matter.

PW1 had testified in brief that the victim is dumb and deaf who cannot speak or hear and further she cannot understand sign language hence cannot express or testify in court of law. PW1 opined other persons who had witnessed the crime to be summoned and testify for the prosecution. Following the advice, the prosecution had marshalled PW2 who briefly testified to have seen the appellant raping the victim on 14th January 2020 in morning hours and immediately informed PW3, who went at the crime scene, arrested the appellant and took him to the village offices for further steps.

PW3 was called to testify on what transpired on the fateful day. In his testimony he stated that the victim did not attend any school and on 14th January 2020, he was informed of rape instance by PW2, who had witnessed the appellant raping the victim. According to PW3, he went to the scene of the crime and found the appellant, and upon interrogation, he confessed to

have raped the victim, but claimed that it was triggered by the devil's activities. PW3 testified further that the appellant attempted to escape from the scene of the crime, but was arrested with assistance of Kenkombyo villagers, and took him to Kenkombyo Village Executive Officer and finally brought him at Kibara Police Station.

PW4 was summoned in the case to tender and read cautioned statement of the appellant and prayed so in the district court and the statement was admitted as exhibit P.1 and was read loud in court. According to PW4, the statement in exhibit P.1 was freely extracted from the appellant without any use of force. Exhibit P.1 shows that the appellant confessed to have raped the victim, but he was influenced by the devil's power.

The prosecution finally marshalled PW5 as an expert witness to produce and explain on Police Form No. 3 (PF.3), following transfer of clinical officer, Paolo Kidande, who had examined and prepared report of the victim. The record at page 17 of the typed proceedings shows that Paolo Kidande was transferred from Kasahunga Health Centre in Bunda District to Njombe Region. In his testimony PW5, had produced the

statement and was admitted as exhibit P.2, which was read loud before the district court. P.2 displays that the victim had suffered sexual assault of rape species.

Replying the allegation levelled against him, the appellant testified that the case was fabricated against him because of quarrels between him and his boss originated from a claim of unpaid eleven (11) months' salary. According to him, he had been keeping cattles for a year without any pay, and when started complaining his wages, the boss initiated criminal proceedings against him in rape case. However, the appellant testified that he does not know the name of his boss and did not take any steps to report the complaint of wages to any persons or authorities.

After registration of all relevant materials, the district court finally concluded at page 4 of its judgment delivered on 25th February 2021 that: *the prosecution side proved its case beyond reasonable doubt*. The reasoning of the district court is displayed at page 3 of the judgment that:

> *...in present case the victim was unable to give her evidence...but the evidence of PW2, as she stated that she witnessed with her naked eyes that the*

accused was naked and the victim was raised her feet having sexual intercourse. This evidence is satisfactory to prove that the accused did rape the victim as it is direct evidence as required by section 62 of the Evidence Act. In addition, the accused himself admitted to commit the offence when arrested by PW3 immediately at the scene of crime...lastly, PF.3 that is exhibit P.2, indicated that the victim was found with male sperms into her genital parts.

On consideration and analysis of defence evidence, the district court thought at the bottom of page 3 of the judgment that:

The defence evidence of the accused that he was falsely prosecuted after claiming for his wages does not hold water simply because, firstly, he does not know even a person who hired him; secondly, no any other person who came to testify [on the complaint of wages]; and further, the accused did not cross examine [all prosecution witnesses] on that matter of claim of wages.

I have scanned the proceedings of the district court, perused judgment of the same and submissions of the parties in the present appeal, and found that in the totality of the evidences produced on the record, the district court was right in convicting the appellant. In my considered opinion, the present appeal was brought in this court without good reasons. I will explain:

The record shows that the alleged rape incident occurred on 14th January 2022, at around 09:00 hours and in the same morning, PW2 witnessed the incident and immediately reported to PW3. Record shows further that the appellant confessed orally before PW3 that it was devil's work which had caused the incident. PW3 had testified further that in cooperation with other villagers, they arrested the appellant who had tempted to escape from the crime scene and brought him to Kenkombyo Village Authority and later took him to Kibara Police Station. On the same day, the appellant had confessed before the police officer that he had committed the offence of rape against the victim, and was recorded in exhibit P.1.

Regarding the reason of committing the indicated offence, the appellant had repeated the same cause, and orally stated

before PW3, that: *ni shetani tu aliyeniingilia*. According to the record, the victim was examined at Kasahunga Health Centre and found to have suffered sexual assault of rape type and PF.3 was admitted as exhibit P.2 to justify the prosecution's allegation of sexual offence of rape species.

I am aware the appellant had brought in this court seven grounds of appeal complaining on several issues resolved by the district court. During the appeal proceedings in this court, the appellant had conceded the first submission of Mr. Mshama that expert opinion and may be produced by any other expert on the subject. I have read the record and found PW5 is a medical doctor holding Bachelor Degree from Muhimbili University of Health Sciences. During his testimony, PW5 had admitted P.2, which was drafted by another Medical Doctor Paolo Kidande, who was transferred to another duty station in Njombe Region.

The law in section 240 (3) of the Act was enacted to summon expert witness to interpret technical exhibits brought before courts of law in support of the complained crimes. That has been the interpretation and practice of courts in our jurisdiction since 1980 as it was resolved in the precedent of **Agnes Doris Liundi v. Republic** [1980] TLR 46. The practice has

been followed without reservations in a bunch of precedents of the Court of Appeal and this court (see: **Edward Nzabuga v. Republic,** Criminal Appeal No. 136 of 2008; **Marwa Daniel @ Omary Daniel @ Omi v. Republic,** Criminal Appeal Case No. 136 of 2021; and **Joseph Morumbe @ Nyambureth v. Republic,** Criminal Appeal No. 23 of 2002).

In any case, Police Form No. 3 or medical reports in sexual offences do not prove cases against accused persons, but are registered to assist court in showing unconsented sexual intercourse in alleged sexual ofences. In considering the same, courts of law are not bound by medical reports, if there are good reasons to do so (see: **Selemani Makumba v. Republic** [2006] TLR 376 and **Agnes Doris Liundi v. Republic** (supra); and **Joseph Morumbe @ Nyambureth v. Republic** (supra). In any case, expert evidence cannot override eye witness who was present and witnessed the event (see: **Mawazo Anyandwile Mwaikaja v. DPP** (supra). In the present appeal, the appellant and Mr. Mshama are right in their submissions regarding the first ground of appeal.

In the present appeal, the record shows that the district court had resolved the case based on three (3) matters as they

are reflected at page 3 of the judgment, namely: first, eye witness PW2; second, exhibit P.2; and finally, confession of the accused to two different persons, PW3 and PW4. I therefore agree with Mr. Mshama that the prosecution had brought at the district court direct evidence of eye witness PW2, and not hearsay materials.

Regarding consideration of the defence case, the judgment of the district court at page 3 shows that the materials brought by the appellant were considered and examined, but found to have no any merit for three reasons, namely: first, the appellant had failed to mention his employer, who is complained of fabricating a case against him; second, the appellant had declined to call any witness to corroborate his complaint on the wage; and finally, the appellant had declined to cross-examine prosecution witnesses on the subject.

In rape cases, there is a well-established practice of this court and the Court that the best evidence is that of the victim. The practice has been supported in dozens of precedents of the cited courts (see: **Selemani Makumba v. Republic** (supra); **Mawazo Anyonyile Makwaja v. Director of Public Prosecutions,** Criminal Appeal No. 455 of 2017; **Bashiri John v. The Republic,**

Criminal Appeal No. 486 of 2016; **Abdallah Kondo v. Republic,** Criminal Appeal No. 322 of 2015; **Tatizo Juma v. Republic,** Criminal Appeal No. 10 of 2013; **Yohana Msigwa v. Republic** [1990] TLR 148 **Abasi Ramadhani v. Republic** (1969) HCD 226).

However, the thinking was qualified in the decision of the Court in **Mohamedi Saidi v. Republic,** Criminal Appeal No. 145 of 2017, which had resolved that *the words of victims of sexual offences cannot be taken as gospel truth, but their testimonies should pass the test of truthfulness.* The qualification received support of the same Court and this court in **Alex Rwebugiza v. The Republic,** Criminal Appeal No. 85 of 2020; **Marwa Daniel @ Omary Daniel @ Omi v. Republic,** Criminal Appeal Case No. 136 of 2021; and **Joseph Morumbe @ Nyambureth v. Republic** (supra).

The rule on the best evidence in rape cases has been receiving further qualifications in situations where the victim cannot be found, speak, hear or has expired. In the precedent of **Issa Ramadhani v. Republic** (supra), the Court, at page 3 of the judgment had resolved that:

> *This is not the first time that a court has arrived at a conviction without the testimony of the victim of the crime. We have held in a number of*

cases that conviction can be sustained independent of the evidence of the victim. See for example, ***Abdallah Elias v. the Republic,*** *Criminal Appeal No. 115 of 2009,* ***Haji Omary v. the Republic,*** *Criminal Appeal No. 307 of 2009 and* ***Fuku Lusamila v. the Republic,*** *Criminal Appeal No. 12 of 2014, to mention but a few.*

In the precedent of **Haji Omary v. Republic** (supra), the Court has produced criterion to be invited when such circumstances arise, and thought that reasons of on failure to testify must be displayed on record. The Court then observed that:

The law recognizes that there are instances where charges may be proved without victims of crimes testifying in court... Though we agree that ideally the reason for the non-taking of the testimony of the victim should have been entered on record. However, such failure neither weakened the case for the prosecution nor resulted in a failure of justice.

In the present appeal, the victim could not communicate either in her vernacular Sukuma or Swahili language and efforts

were initiated to call expert on sign language, PW1, but all efforts proved futile. In such circumstances, the appellant could not claim the victim was not marshalled in the district court while page 8 of proceedings conducted on 19th May 2020 displays it all and PW1 had conversations with the victim on sign language unsuccessfully.

The appellant, in the instant case, had entered confession to two different persons, PW3 and PW4, at the scene of the crime and Kibara Police Station, respectively. He further identified who prompted him to commit the crime of rape, devil. He is quoted in exhibit P.2 and PW3's testimony that it was the devil's action that had persuaded him to commit the offence. In such circumstances of the present case, and considering the totality of evidence on record, and noting the need of justice and protection of dumb and deaf persons, the district court was right in convicting and sentencing the appellant. I am aware the appellant claimed that he is illiterate without writing and reading knowledges. However, exhibit P.1 was read before him at the police station and signed the same to accept its contents and it was read again loud in the district court as reflected at page 13 of the proceedings of the district court.

Again, when PW2 had completed producing his evidence, the appellant had nothing to cross-examine her. When PW3 was registering his evidence, the appellant cross-examined her on issues related to escaping and beatings at the crime scene, but was silent on issues of alleged rape against him.

Similarly, when PW4 was tendering P.1, the appellant just complained on his illiteracy and truthfulness of the exhibit P.1. I learned some faults on the record, but in consideration of totality of the evidence on the same, I consider the faults as minor and do not go into the root of the matter and justice to the parties, that: *whether the appellant had committed the offence of rape against the victim.*

In the present appeal, the record is silent on DNA test. The appellant complains that he was not summoned at Kasahunga Health Centre to have his sperms examined and compared to those found in the victim's private parts. Mr. Mshama on the other hand thinks that is not necessary and, in any case, there is no any law that compels the respondent to do examination. Further, Mr. Mshama contended that expert opinion on DNA test cannot override oral testimony of eye witness PW2 who had

witnessed the appellant committing the offence against the victim.

In order to make his point understood, Mr. Mshama had moved this court to read the authority of the Court in **Mawazo Anyandwile Mwaikaja v. DPP** (supra). I have consulted page 20 and 21 of the indicated precedent, and found the following paragraph in relation to the present case:

> *As amply demonstrated, the appellant confessed before the hamlet members after he was arrested by PW2 upon an information by PW1 (the victim) that he raped the victim. PW2 testified on what he was told by the victim and also that* ***the appellant confessed committing the offence.*** *We reiterate that number of witnesses is immaterial and* ***PW2 sufficiently explained what transpired after the appellant was arrested.*** *As no ground for doubting what PW2, a hamlet chairman, has been raised by the appellant, like the learned Senior State Attorney,* ***we find no any need for another person to have been called to testify on the point****... The need for DNA profiling to corroborate rape*

offence forms the crux of the complaint by the appellant. ***Much as we agree that it is not a legal requirement, we think there is a wrong thinking that expert opinion evidence overrides oral account of the incident.*** *To wash out that myth, the Court in* ***Edward Nzabuga v. Republic,*** *Criminal Appeal No 136 of 2008, quoted with approval the observation of the High Court Judge in that case when it went for the first appeal. We also subscribe ourselves to that observation. Oral evidence by PW1, PW2 and PW3 supported with the PF3 (exhibit P1), in our view, sufficiently proved that the victim was penetrated and the appellant to be the ravisher.*

(Emphasis supplied)

The reasoning in declining the DNA profiling to corroborate rape offence is found in the same Court in the precedent of **Juma Mahamudu v. Republic,** Criminal Appeal No 47 of 2013, where it was stated that:

Even if we are holding that a DNA test may reveal better results than other form of examination conducted to a raped lady, the

present law does not lay down conditions for DNA in proof of rape cases. Not only that the Country (Tanzania) may not possess sufficient DNA test facilities, but we are convinced that the procedures provided under section 240 (3) of Cap. 20 suffice to establish and provide correct results in examining the victim relating to such offence, the appellant is charged with.

The thinking of our superior court was well received and appreciated by the same Court in multiple decisions and this court has been following the course without any reservations (see: **Aman Ally @ Joka v. Republic,** Criminal Appeal No.353 of 2019 (CAT); **Christopher Kandidius @ Albino v. Republic,** Criminal Appeal No. 394 of 2015 (CAT); **Kennedy Mauve @ Majaliwa v. Republic,** Criminal Appeal No. 160 of 2020(HCT); and **Frank Onesmo v. Republic,** Criminal Appeal No. 147 0f 2019(HCT). The present appeal is bound to follow the course. The claim of the appellant to have his sperms' DNA profiled has no merit.

In the instant appeal, the record shows that the materials brought in the district court by PW2, PW3, PW4 and PW5 show that the appellant committed the offence of rape against the

victim. Again, the circumstances of the present case show that the victim was unable to testify as it is indicated in the record and the practice has already received the support of the decision of the Court in **Siaba Mswaki v. Republic** (supra). I have had an opportunity to peruse page 10 and 11 of the indicated precedent and found the statement of our superior court which shows that:

> *we agree with the appellant that the victim was not called as a witness to testify before the trial court. However, we wish to state at the very outset the settled position of law that, in criminal cases the burden of proof lies on the prosecution and it never shifts – see:* ***Tafifu Hassan @ Gumbe v. Republic,*** *Criminal Appeal No. 436 of 2017. This means that it is upon the prosecution to call material witnesses to prove a case beyond reasonable doubt and in exercising this noble task, they are not limited in terms of number of witnesses whom they should call. Section 143 of the* ***Law of Evidence Act,*** *Cap. 6 R.E. 2019 provides in clear terms that there is no particular number of witnesses that is required in proving a case. What is important is the credibility of a*

witness and weight of evidence. In the case of ***Bakari Hamis Ling'ambe v. Republic,*** *Criminal Appeal No. 161 of 2014...It is also settled position that* ***conviction can be grounded on account of the evidence of an eye witness without calling a victim to testify*** *– see:* ***Mbaraka Ramadhani @ Katundu v. Republic,*** *Criminal Appeal No. 185 of 2018.*

(Emphasis supplied).

Displaying the scenario in the case, the Court had described the instance as:

...it is undisputed fact that the victim was not called to testify as a witness and the reason as stated by Ms. Makundi, which we accept, is that he was prevented by his mental illness. At page 6 of the record of appeal, PW1 testified that he saw the appellant pushing the victim who is insane to the bush. At page 7 of the record of appeal, PW2 stated that the victim is a matured person but mentally ill. The state of mind of the victim was also stated by his father, PW3 at page 7 of the record of appeal that 'my neighbor had

carnal knowledge with my son who is mentally ill'. The medical doctor who examined the victim discovered that the victim was having mental problem. As stated by Ms. Makundi, we have perused the record of appeal and we could not find anywhere the appellant cross-examining prosecution witnesses concerning their testimonies regarding the victim's mental condition.

Similarly, in the present appeal, the record shows that the victim was unable to hear and speak any language for easy communications and conversations in the district court. The record shows further that the victim did not attend any school to facilitate communications in sign language. The record is also silent on the appellant cross-examining PW1 and PW3 on the indicated language challenges. During the hearing of the case, the prosecution had brought eye witness PW2 to testify what had transpired and accordingly testified to have seen the appellant to have sexual intercourse with the victim. In my considered opinion, PW2 is reliable and credible witness that cannot be faulted by mere words of the appellant on her credibility and reliability. In criminal cases, what is important is

the credibility and reliability of a witness in one hand and weight of evidence produced by such witness on the other. PW2 is credible and had passed the test of truthfulness as per decision in **Mohamedi Saidi v. Republic** (supra).

I have also considered all the materials produced by the prosecution witnesses in the case at district court, and think, as I said earlier in this judgment, have proved the case against the appellant to the standard required in criminal cases. Regarding the complaint on the consideration of the defence case, all is stated at page 3 and 4 in the judgment of the district court that:

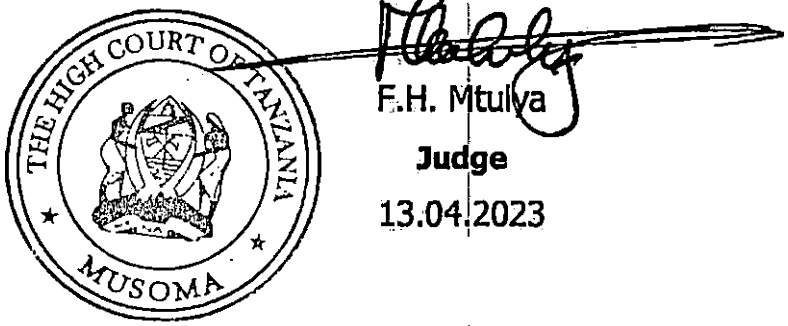
> *The defence evidence of the accused that he was falsely prosecuted after claiming for his wages does not hold water simply because, firstly, he does not know even a person who hired him; secondly, no any other person who came to testify [on the complaint]; and further, the accused did not cross examine [all prosecution witnesses] on that matter of claim of wages.*

Having this quotation in the judgment of the district court, the appellant cannot claim his defence on the complaint of

wages against his boss was not considered. In the final analysis, I think, the present appeal was brought in this court without good reasons to dispute the judgment of the district court. I have therefore decided to uphold the judgment of the district court in its entirety. This appeal is dismissed for lack of merit.

It is so ordered.

Right of appeal explained.

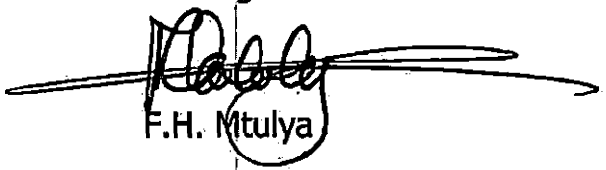


F.H. Mtulya

Judge

13.04.2023

This judgment was delivered in Chambers under the Seal of this court in the presence of **Mr. Felix Mshama,** learned State Attorney for the Republic and in the presence of the appellant, **Mr. John Robert,** through teleconference placed at this court, Musoma Prison and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.



F.H. Mtulya

Judge

13.04.2023