IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 11 OF 2021

(Arising from Criminal Case No. 176 of 2020 of Kasulu District Court Before I.D. Batenzi, RM)

DIRECTOR OF PUBLIC PROSECUTION..... APPELLANT

VERSUS

MALIGILE S/O MAINGU.....RESPONDENT

JUDGMENT

1st June & 02nd July, 2021

A. MATUMA, J.

The respondent herein Maligile s/o Maingu a TPDF Soldier at Mtabila Camp within Kigoma Region stood charged in the District Court of Kasulu for Rape Contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019. It was alleged that he had carnal knowledge of a victim girl aged 15 years old who shall be referred in this judgment as PW1. The offence is allegedly committed on the 16th day of July, 2020 during morning hours at Hwazi street within Kasulu District in Kigoma Region.

The brief facts on the matter is that the victim girl PW1 worked at the homestead of the respondent as a house maid. The respondent had his wife namely Jackline Emmanuel and a seven years old child namely Elizabeth Maligile Maingu. On the night before the incident date, the couple (the respondent and his wife) fell into a quarrel and or fight which necessitated the respondent's wife to leave the home that night leaving behind her husband now the respondent, the child and the victim PW1.

It is alleged that early in the morning the respondent got out of his room and entered the room of the victim who used to sleep with the infant daughter of the respondent. Thereat he forced PW1 (the victim) to drink beer (Balimi) until she became unconscious by reason of intoxication. He then raped her brutally to the extent that PW1 sustained PV bleeding, severe pains, PV tear, vagina tear and bruises on the labia minora.

After a full trial the trial court (I.D. Batenzi – RM) was in fact satisfied that PW1 was sexually assaulted, penetrated into her vagina and seriously injured as per evidence on record that she was even admitted in hospital for some days due to her deteriorated condition she had that day. The learned trial magistrate was however in doubt whether it could be established with certainty that the penetration into PW1's vagina was by **penis** because by the time of such penetration she was unconscious and

could not seen that it was actually the **respondent's penis** which was penetrated into her vagina. He also rejected the defence of the respondent that he was not at the crime scene at the time alleged and that the case was fabricated against him due to the grudges with his wife.

In other words, the learned trial magistrate was satisfied that the respondent was guilty of what befallen the victim (PW1) but that the same did not amount to rape for lack of evidence to establish exactly that it was the penis which was penetrated into the said PW1's vagina as nobody saw as such, and the victim herself was unconscious by reason of intoxication as herein below quoted;

> *'To me having revisited the evidence on record, I have seen that the prosecution did not tender any evidence to suggest, leave alone the question of showing that the victim was penetrated by penis. Since the offence is alleged to have been committed at the time* ***the victim was unaware of what was happening, it is obvious the victim could not have seen,*** *as it is the case,* ***what penetrated her****'.*

In that respect the trial magistrate was of the view that the prosecution managed to prove the offence of grievous harm only as against the accused person but did not proceed to convict him as such because the same was not a charged offence nor kindred minor one, to the charged

offence of rape. See page 14 of the impugned judgment as quoted herein below;

> *'The facts, in the other hand, establish the offence of grievous harm contrary to section 225 of the Penal Code. However, in terms of section 304 of the CPA, which list the kindred offences to the offence of rape contrary to section 130 of the Penal Code, the offence of grievous harm is not among the kindred offences to the offence of rape* ***which I could have, in alternative, held the accused liable for conviction'.***

It is in the circumstances of such reasoning of the trial court, the respondent was acquitted of the offence. The prosecution became aggrieved of the said acquittal hence this appeal with two ground of appeal namely;

i. *That the trial magistrate erred in law and facts for acquitting the respondent on the ground that prosecution side failed to prove penetration without taking into consideration the evidence of PW1, PW3 and exhibit P1.*

ii. *That the trial magistrate erred in law and in fact in deciding that the prosecution side failed to prove the case against the respondent beyond reasonable doubts.*

At the hearing of this appeal, the appellant/Republic was represented by Mr. Raymond Kimbe learned State Attorney while the respondent was

present in person and had the service of Mr. Abdulkher Ahmad and Mr. Eliuta Kivyiro learned advocates.

Mr. Raymond Kimbe learned State Attorney argued the two grounds together to the effect that; with the evidence of PW1, PW3 and the PF3 exhibit P1, the learned trial magistrate erred in law to acquit the respondent allegedly that there was no evidence of penetration.

He further submitted on the evidence on record in regard to penetration reiterating the evidence of the victim PW1 on how the respondent entered into her bedroom, awakened her, forced her to drink the pombe slapping her three times, how she was intoxicated and lost awareness, how she found herself penetrated into her vagina, how she was bleeding, how her underpants, gown and kitenge were sustained with blood, how she sustained pains and the evidence of the doctor who examined her and established that the victim PW1's vagina had clotted blood, bruises, lacerations between the inner and outer space of the vagina. The learned state attorney argued that all these are indicators of penetration.

He further submitted that in regard to who was perpetrator to the crime no doubt, was the respondent. He argued that in the homestead where the crime was committed, there were only three people; the victim PW1, the respondent, and a child aged seven years old. That the act of the

respondent to forcefully intoxicate the victim had no any other explanation rather than intent to fulfil the commission of the rape in question. The learned State Attorney cited the case of ***Selemani Makumba versus Republic*** *[2006] TLR 379* to the effect that true evidence of rape comes from the victim herself.

He further cemented his arguments on the consistence of the victim to have named the respondent to her parents, to police and to the court, and that the crime was immediately reported to police and the victim taken to hospital on the same day. He winded his submission by drawing my attention that it is on record that prior to the crime, the respondent had attempted to rape the victim PW1. He thus prayed for this appeal to be allowed, the acquittal of the respondent by the subordinate court be vacated and substituted with a conviction and sentence accordingly.

Mr. Abdulkher Ahmad learned advocate responding on the appellant's submission argued that the evidence of PW1, PW3 and the PF3 exhibit P1 did not prove penetration. The learned advocate made his submission in line with the reasonings in the trial court's judgment to the effect that since the victim was intoxicated and deep asleep, she could not know what was going on against her until when she woke up out of pains in her vagina.

He faulted the evidence of PW3 Mr. Alphonce Gabriel Lutumo (Assistant Medical doctor) to have failed to establish the causative of the lacerations he observed during his examination of PW1's vagina. He finalized his arguments by submitting that the offence of rape cannot stand in the absence of proof of penetration. Then Mr. Eliuta Kivyiro took over to join force with fellow advocate and submitted that in this case the issue is not penetration generally but **what was the object** used in such penetration. That the law recognizes penetration of a penis only into the vagina for the purposes of the offence of rape. That according to the evidence on record, the victim PW1 got intoxicated and thus could not testify to the effect that the respondent inserted his penis into her vagina. He was of a further argument that blunt object cannot necessarily mean a penis. The learned advocate forcefully argued that there should have been positive evidence from the victim that what penetrated her was **a penis** and not anything else.

He further argued that the case of Selemani Makumba cannot be taken to mean the evidence of the victim of rape be taken as a gospel of truth. Rather, the rules of evidence relating to credibility of a witness must be adhered. He cited section 127 (6) of the Evidence Act, Cap. 6 R.E. 2019

and the case of ***Mohamed Said versus Republic,*** *Criminal appeal No. 145 of 2017 (CAT).*

Mr. Kivyiro further faulted the evidence of the victim PW1 that the respondent had attempted to rape her, and that when she gained conscious she found the respondent sitting beside her on the bed because she did not testify as such during her examination in chief but during cross examination. To him, such shaken the credibility of PW1.

He finally called this court to draw adverse inference against the prosecutions for failure to call in evidence one Jackline Emmanuel as a potential witness who assisted the victim for the first time. On this argument he cited the case of ***Azizi Abdallah versus Republic, [1991] TLR 71.*** He finally called this court to maintain the judgment of the District Court and dismiss this appeal.

Mr. Kimbe learned State Attorney in rejoinder reiterated what he had earlier on submitted and added that the fact that the victim was intoxicated cannot negate the rape and that circumstantial evidence on record proved that the respondent raped the victim after the intoxication.

On the issue of credibility, the learned State Attorney submitted that the victim was credible. She did not state some issues in the examination in

chief because she was not asked questions in that regard but when she was asked as such during cross examination, she replied accordingly.

About calling Jackline as a material witness for the prosecution, the learned State Attorney protested that she was not material witness at all and that the said Jackline was the respondent's wife who in law was not a compellable witness.

Having heard the parties as herein above and gone through the records of the trial court at hand, I find out that there is no dispute that indeed the victim PW1 was sexually assaulted to the extend that she suffered pains, bruises and lacerations into her vagina, she also sustained vagina bleeding. This is due to the undisputed evidence of the victim herself that after she was forcefully intoxicated, she fell into a deep sleep and could not know what was going on against her. But when she gained conscious, awakened she felt severe pains into her vagina, her underpants down stained with blood, and could not even wake up as she failed to raise up from the bed until when the respondent's wife one Jackline arrived and picked her to hospital after passing through the police.

This evidence was corroborated with that of PW3 the assistant medical officer who clearly testified that the victim was brought to him on a wheel chair. He examined her vagina and found clotted blood in the vagina and

thighs. He stitched the victim and admitted her into the hospital for one week. This witness further observed bruises on Labia minora, tear on labia minora and established that the tear was due to forced penetration. Refer the victim's PF3 exhibit P1.

In fact, this was also the findings of the trial court which observed that the victim was grievously harmed and the respondent did not dispute the fact that she suffered such sexual assaults at his own home on the material crime date. He only fended himself that at the alleged material time he was not at home but at his work on duty.

The question of credibility does not therefore arise as purportedly by the learned advocates for the respondent. This is obvious, for the reason that the findings of the trial court to the effect that the victim indeed was sexually assaulted to the extent which the trial magistrate referred to as a grievous harm was not challenged nor the respondent cross appealed against such findings.

Even if I had to consider the credibility of the victim PW1, my finding is that she was credible enough and very reliable. Her explanations and evidence that she was sexually assaulted to the extent as herein above stated was corroborated by independent witnesses such as PW3 the assistant medical officer as demonstrated herein above and PW4 WP 9163

D/C Eva who attended PW1 in the first instance at the Police Gender desk. She observed how the victim suffered from pains in both the vagina and stomach, blood oozing, and collected the victim's clothes which had stained with blood.

She also visited the crime scene and inspected the bedroom where the offence was committed and found clothes of the victim on the ground including the underpants and took them as exhibits.

But again, the victim was very clear in her evidence that having been intoxicated and fell asleep she did not know what was going on against her until when she gained her senses only to find herself sexually assaulted. This implies that she had nothing to lie or else she could have purported to have witnessed all what was being done by the respondent against her. It is from this very evidence the respondent's advocates relies to argue that since the victim was intoxicated, she was unable to see the actual penetration. That means, they are actually in agreement that the victim was intoxicated at the time of the crime. If so, why then should we not believe her as to how she got intoxicated and what she sustained thereafter. It is legally unsound to use the evidence of the victim of sexual offence in favour of the perpetrator and at the same time use the same

very evidence against her while such evidence are incriminating against the perpetrator.

The trial court concluded that the prosecution case was not proved beyond reasonable doubt merely because it was in doubt whether it was **a penis** and that it was that of the respondent which was used to penetrate into the victim's vagina to constitute the offence of rape since penetration of a penis into the vagina is an essential ingredient in a rape case. In that respect therefore, the issues for determination are;

i. *Whether the established penetration into the victim's vagina was done by the respondent.*

ii. *Whether such penetration was of the penis of the appellant and not anything else.*

Starting with the first issue above, there is no doubt that all what was befallen to the victim, it was the respondent behind it. That is very clear on the evidence on record. PW1 explained how she was peacefully asleep that day, how the respondent entered into her room and forced her to drink beer while slapping her until when she became drunk and lost consciousness. She could not know what was going on against her and when she gained conscious, she found herself severely sexually assaulted as explained above. Despite the fact that she was unconscious, what

befallen her was a continuation of a crime which started by the respondent for a forced intoxication. The respondent was thus duty bound to give reasonable explanation as to why he intoxicated the victim, to whom did he handle the victim after he had intoxicated her and on what state of healthy she was. That would not be shifting the burden of proof because, it was the respondent who forcefully intoxicated the victim to make her incapable of defending herself and witness anything to be done against her with her sober mind. As the respondent did not offer any explanation to that effect, his acts and the consequences that befallen the victim are inculpatory facts which are incompatible with the innocence of the respondent. He is thus liable to what befallen the victim just as it would be in other incidences under the doctrine of recent possession or last person to be seen with the deceased alive.

In the instant matter it was the respondent a last person to be seen with the victim safe and healthy. It is him who forcefully intoxicated the victim as I have earlier on said to make her temporarily unsound mind, for her to fail protecting herself from any harm. She thereafter suffered all those harms while she was at the state of a forced intoxication. In that respect, it was the respondent to explain who grievously harmed the victim as it was put by the trial magistrate which is in fact grievous sexual abuse

amounting to rape. In the absence of the respondent's explanation, and inferring into the doctrine of the last person to be seen, it is the respondent responsible for the crimes committed at the time he was with the victim under the state of intoxication.

In fact, this was a finding of the trial court that it was the respondent responsible with the crime as I have quoted herein above to the extent that the trial court thought even to convict him of the offence of grievous harm, only that it was not a kindred offence to rape. The respondent has not challenged such finding not only by cross appeal but even in his submission against the appeal.

Not only that but also the trial court rejected his defence that he was not on the crime scene at that time and that this case was fabricated against him;

> *'...The accused defence of alibi is accordingly denied.*
>
> *On the defence that, these charges are fabricated by the accused wife due to the animosity caused by the accused's wife's allegation of infidelity, I am of the opinion not to agree to this version of defence. I regard it as an afterthought. The accused has not indicated anywhere, either by cross examination, before his defence that he had such defence...*

I am not persuaded to see that, the accused defence has merit to the extent of casting doubts over the already established prosecution case'.

This denial of the accused's defence has not been challenged as well. There is no cross appeal in that respect nor there was any argument against it at the hearing of this appeal. The conclusion therefore is that it was the appellant who committed the offence against the victim PW1 by sexually assaulting her as herein above demonstrated.

The next question or issue is thus whether the inflicted penetration assaults by the respondent against the victim into her vagina was by penis and not anything else to constitute the sexual assaults as Rape. The central problem is on this issue. The minds and understandings of the learned advocates and that of the trial magistrate is that the intoxicated victim although there is sufficient evidence of penetration cannot establish that the penetration was by penis. As such rape cannot stand for lack of evidence that it was the penis which was used to penetrate the vagina of the victim.

This is misconception, and such construction of the facts cannot legally stand. This is because in rape cases penetration need not necessarily be proved by the victim herself although the best evidence is always expected from her. Penetration in rape cases can be equally proved and

or established by a third party such as the doctor through medical examination, a parent or any other people through physical examination. In the case of ***Salu Sosana v. Republic,*** Criminal Appeal No. 31 of 2003 for instance which was quoted in the case of ***Mussa Ally Onyango,*** Criminal Appeal No. 75 of 2016, the Court of Appeal of Tanzania held that rape can be established even if there is no medical evidence provided that **there is other evidence pointing to the fact that it was committed.**

In that respect all what matters is the availability of evidence generally in the circumstances of each case, to establish the fact that what was committed was nothing other than rape. That can be established even if there is no evidence of the victim herself by reason of incompetence to testify such as minority of the age, people of unsound mind or even those who are raped and by reason of such rape or any other factors becomes mentally disturbed to the extent of losing their ability to express themselves thoroughly. Purporting to construe that only the victim can prove that she was penetrated **by a penis into her vagina** would bring absurdity in the law because people who are disadvantageous as I have named them herein above would follow victims of rape without legal redress by reason that they cannot tell exactly that what penetrated them

was a penis. Take an example of a child of one or two years, even that of five years, can they speak with certainty that they saw a penis penetrating into their vagina? Certainly not. Some cannot even know what is a penis. For them it would be sufficient to give general evidence suggesting the rape to have been committed against them. Such evidence would only need corroboration to convict.

That is why in the case of ***Hassani Bakari @ Mamajicho v. The Republic***, *Criminal Appeal No. 103 of 2012,* the Court of Appeal at Mtwara held that it is not always necessary for a witness to use the word '***penis penetrating the vagina***'. It would be sufficient if the evidence given would generally be understood by the court and the adverse party to mean that it was a penetration of the vagina by penis. Such holding is at page 10 of the said decision and I quote;

> *'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'.*

In the instant case, the evidence generally on record and exhibits are understood to mean that the penetration of PW1's vagina was by penis of the respondent. It is in fact on record that at one time the respondent attempted to rape the victim. How it failed, it is untold. But at least, an

inference can be justifiably drawn that as the first attempt failed, the respondent decided to forcefully intoxicate the victim this time to ensure that he does not fail again. He did, and finally executed his evil mind by raping PW1. The respondent's advocates complained that PW1 did not state in her examination in chief that the respondent had attempted to rape her until when she was being cross examined. This complaint is without any merit. The evidence given during cross examination carries the same weight as that given during examination in chief. That is why a person cross examining a witness must be cautious, or else he might remind the witness of a very essential evidence against himself. And if that happens it is not the witness to lame. All what matters is whether the witness is believable. In this case I believe PW1 that at one time was nearly to be raped by the respondent. That fact is therefore taken against the respondent to corroborate the prosecution case.

In the case of ***Matendole Nchanga @ Awilo versus The Republic, Criminal appeal No. 108 of 2010 CAT*** at Tabora (unreported) for instance, the Court accepted the evidence of the victim and that of a person who found the accused on flagrante delicto as sufficient evidence to prove penetration. The victim in that case had merely testified that the accused kicked her legs and she fell down. Thereat, the accused held her

neck and removed her underwear and started to sex her. she did not say she saw the penis penetrating her vagina.

Also, another witness in her support, merely found the accused on top of the victim having sexual intercourse. She did not also state that she so the penis of the accused penetrating the vagina of the victim. Yet the Court of Appeal accepted the evidence of the two witnesses as being sufficient evidence to prove penetration for the purposes of rape. So, it is not a question of seeing the penis penetrating the vagina but that what was done was nothing rather than sexual intercourse. That is why penetration however slight is enough for the purposes of establishing the offence of rape. It is the circumstances under which the offence was committed that matters.

Under the circumstances of this case it cannot successfully be argued that the act of the respondent to forcefully intoxicate the victim PW1 on bed, removal of her dresses including the under pants, sexually assaulting the victim to the extent of causing bruises, bleedings and lacerations in the vagina did not amount to rape. What was it then? Only the respondent could tell because he was the only one with her and had forcefully intoxicated her. In the absence of his explanation as I have repeated

herein above several times, there can't be any other conclusion than that he raped the victim.

We should not set bad precedents for rapists to intoxicate victims of sexual offences for taking cover against the proof of penetration of the vagina by penis despite the fact that the records would show exactly that all what was committed was rape.

One most important factor to be born in our mind is that whenever penetration is to be proved, it is not necessary that the victim says she saw the penis penetrating her vagina at the time of rape. It would depend to the style used by the rapist as he might use such a style hindering the victim to a direct view of the penetration. For example, in most rape cases, it has been victims thrown down upwards, the rapist lies on top of them. Under the circumstances, the victim cannot see the penis penetrating her due to the fact that her vagina and the penis of the rapist would be very far from her viewing and her body and that of the rapist would be covering the two sexual organs. Under the circumstances, rape can still be sufficiently and has always been proved without necessarily the victims testifying to have seen penis penetrating them. Other evidence to penetration such as pains, bruises, lacerations, swelling vagina e.t.c would be sufficient to prove penetration and the

circumstances under which the penetration was made would be sufficient to establish that it was a penetration by the penis, hence rape.

In the instant case, I have no doubt that the penetration of PW1's vagina was by penis and the penis is that of the respondent herein. Otherwise, it was open to the respondent to offer his explanation on how and by what object he penetrated the victim's vagina, provided that it was him the last person to be with the victim being safe and healthy, intoxicated her to lose her awareness and later, the victim found her under the state of being penetrated to the extent herein above stated.

His explanation would have entitled the court to determine its genuinely and decide accordingly. As he has chosen to make a general denial not only to have committed the crime but also to have even been on the crime scene at the time, he cannot dispute the prosecution evidence that the penetration at issue was by the penis which amounted to rape.

The learned advocates for the respondent argued that one Jackline Emmanuel was not called as a material witness for the prosecution and thus adverse inference is called for. I am far to purchase their arguments. Rather I agree with Mr. Raymondi Kimbe learned State Attorney that the said Jackline was the wife of the respondent and thus competent but not compellable witness.

Even though the said Jackline was not on the locus in quo. She was only phoned by PW2 Constancia Raphael and informed of the incidence. She went at the crime scene and took the victim to police and later to hospital. Her evidence was thus covered by the victim herself and PW4 the police officer who accompanied the said Jackline to take the victim to hospital.

But again, it is on record at page 3 of the proceedings that the said Jackline Emmanuel was one of the two sureties who stood for bail of the respondent at the trial court. In the circumstances, the two Jackline and the respondent had still good relation and or love to the extent that she committed herself to a bail bond of Tshs 1,500,000/=. Such a person could not be a potential witness to the prosecution even if she would have been a compellable witness.

Having reasoned as herein above, I am inclined to agree with the appellant that the trial District Court erred to acquit the respondent on the ground that the prosecution case was not proved beyond reasonable doubt by reason of lack of the evidence of penetration of the vaginal by the penis. I therefore quash such findings of the trial court and in its place substitute with the findings that the prosecution case was proved beyond any reasonable doubts against the respondent. I thus find the respondent Maligile Maingu guilty of rape contrary to section 130 (1) and

(2) (e) and 131 (1) of the penal code, Cap. 16 R.E. 2019. I accordingly convict him of the offence under the herein above provisions. It is so ordered.

A. Matuma

Judge

02/07/2021

S E N T E N C E

Having convicted the respondent of the offence of Rape, the parties submitted for and against a stiff sentence. It was the argument of the respondent's advocate Mr. Abdulkher Ahmad that the respondent is the first offender, a soldier in the defence force thus needed for National security, a father of one child namely Elizabeth who is depending on him. The learned advocate prayed the court to consider as well that prior to the crime the respondent had gone for a pombe drinking and thus was drunk at the time of the commission of the offence. He finally pleaded the period of one month the respondent was in remand custody pending judgment.

On the other hand, the appellant called for severe punishment to the respondent so that it serves a lesson not only to the respondent but also to the general public.

Under section 131 (1) of the penal code supra, the provision of which provides for a sentence against a person convicted of rape to be life imprisonment and in any other case to imprisonment of not less than thirty years with corporal punishment, and with a fine. In addition, thereto, the convict is liable to be ordered to pay compensation of an amount to be determined by the court, to the victim of the offence for the injuries sustained.

A sentence of thirty years imprisonment would therefore be a minimum sentence regardless the strength of the mitigating factors.

In the circumstances, I do hereby sentence the convict Maligile Maingu to the minimum sentence of thirty years jail term. He is hereby sentenced to suffer imprisonment for thirty years.

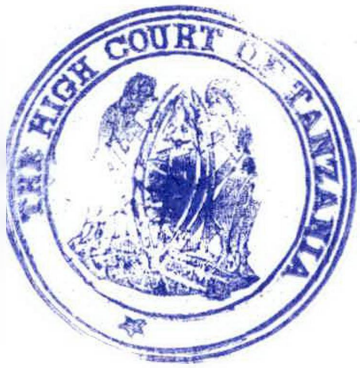
In addition to the custodial sentence, I order him to pay compensation to the victim PW1 an amount of money to the tune of **Tshs 5,000,000/=** for the injuries she sustained to the extent of being stitched in her vagina and admitted in the hospital for the brutal rape she faced after having been subjected to a forced intoxication and physical assault (slapping), taking into consideration that the convict is a soldier of the Tanzania People's Defence Force who was expected at all times to use his skills for

protecting the nation for the safety of the nation and peaceful life of the citizens.

The compensation ordered herein shall be immediately recovered from attachment and sell of any of his movable or immovable property, his shares at any institution or business or from his pension contributions, whichever easier. The Director of Public Prosecutions is hereby directed to assist the poor victim to recover the herein compensation as ordered herein.

Right of appeal to the Court of Appeal of Tanzania subject to the relevant laws governing appeals thereto such as the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and the Court of Appeal Rules, 2009 as amended is hereby explained.

It is so ordered.



Sgd: A. Matuma

Judge

02/07/2021