IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISRTY

AT MOSHI

CRIMINAL APPEAL No. 14 OF 2019

(C/F Criminal Case No. 109 of 2017 District Court of Hai at Bomang'ombe)

THE REPUBLIC ..... APPELLANT

VERSUS

GODSON GABRIEL TEMBER ..... 1ST RESPONDENT

NOEL FABIAN TESHA ..... 2ND RESPONDENT

7th & 25th June, 2021

JUDGMENT

MKAPA, J.

In the District Court of Hai at Bomang'ombe (trial court) in **Criminal Case No. 109 of 2017** the respondents were arraigned with the offence of gang rape c/s 131A (1) of the Penal Code, Cap 16 [R.E. 2002]. As per the charge sheet it was alleged that on the 1st of May 2017 at 17:00 hours at Kingereka Bomang'ombe area within Hai District Kilimanjaro Region, the respondents did unlawful have carnal knowledge of a girl whom I shall conveniently be referring her as the victim or **AB**. The trial magistrate acquitted the respondents because of a confusion alleged to have been occasioned by the use of the term *"unlawful canal knowledge"* as stated in the charge sheet Vis a' Vis the term "*sexual intercourse*" as stated in the charged section. Aggrieved, the appellant preferred this appeal challenging the decision of the trial court on the following grounds;

1. That, the trial magistrate erred in law and fact in failing to give reasons for the decision.

2. That, the trial magistrate erred in law and fact in failing to find the similarity between the term sexual intercourse and carnal knowledge.

When the appeal was called for hearing, the respondents did not enter appearance despite proper service being effected. The appellant prayed for exparte hearing by way of written submissions. Having being satisfied that the respondents were properly served the court ordered the appeal to proceed *ex-parte*. Ms. Lilian Kowero, learned State Attorney appeared and represented the appellant/Republic. She submitted on the 1st ground that the trial magistrate did not give reasons for the decision made as required under section 312 (1) of CPA which provides that;

> *"312.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."*

To support her contention, Ms. Kowero referred the court to the decision in the case of **George Mingwe V R** (1984) TLR 10 where the court held;

> *"a judgment which does not confirm with provisions of section 312 (1) of CPA is not a judgment in law and will certainly run the risk of being quashed. It has been said now and then that the judgment to be a judgment must contain point or points of determination, the decision thereon and the reasons for that decision."*

From the above authority it was the appellant's view that the trial magistrate did not adhere to the above guiding principle. She prayed for the trial magistrate's decision to be quashed.

Supporting the 2nd ground, Ms. Kowero averred that the phrase carnal knowledge and sexual intercourse carries the same meaning. She made reference to **Black's Law Dictionary**, which defines carnal knowledge as *"the act of man in having sexual intercourse with a woman."* Comparable definition was elaborated in the case of **Alexander Likoye V R** (2005) KLR where the court defined carnal knowledge to mean;

> *"carnal knowledge is defined as sexual intercourse, especially with an underage female"*

It was Ms. Kowero's further submission that, the prosecution evidence clearly established how the respondents took turns to rape **AB** while she cried for help. That PW2 (victim's mother) was the first to respond to the call and witnessed the 2nd respondent fleeing from the crime scene. Ms Kowero averred further that, the victim did sufficiently identify the respondents who later returned to the victim's home and plea for mercy. PW2's evidence was corroborated by PW4 victim's brother and PW7 the doctor who confirmed the victim to have been penetrated by a blunt object and was found with a bruised genitalia and spermatozoa mixed with blood. Finally, Ms. Kowero prayed for the Court to evaluate the whole evidence quash the trial court's decision, convict and sentence both respondents with gang rape offence c/s 131 (1) of the Penal Code, Cap 16 [R.E. 2019] (Penal Code).

Having carefully examined the record of proceedings and judgment of the trial Court the question for consideration is whether the appeal has merit.

It is worth noting that this being the first appeal, the Court is entitled to re-evaluate the evidence and come up with its own conclusions as was held in the case of **Deemay Daati & 2 Others V R** [2005] TLR 132, that "*the 1st appellate court is entitled to look at the evidence as a whole and make its own findings of fact especially where there is misdirection and non-direction on the evidence.*"

From the evidence on record, I am in agreement with the learned State Attorney the fact that the decision arrived at by the learned trial magistrate is wanting. The relevant part of the trial magistrate's judgment is reproduced hereunder;

> *"However when passing through the provision of section 132 (1) and (2) of the Penal Code Cap 16 R.E. 2002 there is nothing like carnal knowledge as well*
>
> *shown in the charge sheet herein as far as gange (sic) rape offences is concern.*
>
> *I said so as from the filed charge sheet when passing through the particulars of the offence it has been alleged that the two accused on 1st day of May, 2017 at about 17:00 hrs at Kingereka Bomang'ombe area within Hai District did unlawfully have carnal knowledge to victim.* ***My question is did the accused have sexual intercourse to the victim or did they have carnal knowledge to the victim?***
>
> *There is confusion on that and for the said defect as well seen in the charge sheet no any court that can convict on it.*
>
> *That mean prosecution has failed to discharge their duty of proving this matter. There are doubts as explained above, and for such situation I don't see any need of discussing and elaborate more the evidence that has been tendered." (Emphasis supplied).*

It is clear from a reading of the aforementioned excerpt that the trial magistrate grossly erred in failing to determine the appeal on merit for failure to draw similarities between the two legal terms to wit; carnal knowledge and sexual intercourse when the trial magistrate asked;

" *my question is did the accused have sexual intercourse to the victim or did they have carnal knowledge*..... ***I don't see any need of discussing and elaborate more the evidence that had been tendered***."

The trial Magistrate however did not elaborate on how the alleged confusion did actually prejudice either of the party.

I do appreciate the submission made by the learned State Attorney while referring to the definition of the phrase "*carnal knowledge*" as defined by **Black's Law Dictionary, 8th Edition,** at page 226 meaning;

> *"Sexual Intercourse especially with underage female, sometimes shortened to knowledge"*

It is sufficiently clear from the aforementioned definition that the phrase "*carnal knowledge*" and "*sexual intercourse*" are synonymous. I am therefore of the considered opinion that the use of the two terms interchangeably did not vitiate the whole proceedings. Thus the trial magistrate ought to have properly analyse and evaluate the evidence adduced in court. Additionally, had the trial magistrate considered the omission fatal she ought to have ordered amendment to the charge sheet from the beginning prior to proceeding with a full trial. Failure by the trial magistrate to determine the matter on merit tantamount to miscarriage of justice as the evidence on record irresistibly link the respondents with the offence. In her testimony at page 13 of the trial Court's typed proceedings **AB** narrated how on the date of the occurrence of the incident she was sent to a shop by her mother to buy some soap when

the 1st respondent suddenly appeared from the corner and asked her to follow him to one Farida who was at a nearby restaurant. However, when she was wondering on the where about of Farida the 1st respondent lured her to the 2nd respondent's room and forcefully grabbed and entered her into the room while covering her mouth. He undressed her and the trio took turn to rape her. She scream for help and his brother PW4 who was working at the garage nearby rushed to the crime scene and found **AB** naked while the respondents were still present at the crime scene but fled immediately before being apprehended.

The above piece of evidence was corroborated by PW7, medical doctor who examined AB and prepared a report to the effect that, AB's vagina was found with spermatozoa mixed with blood a proof that she was penetrated by a blunt object. Thus penetration was proven. Also PW2, **AB's** mother testified how she had witnessed the respondents fleeing from the crime scene when she was the first to respond to the **AB's** call for help. PW2 further testified how the 2nd respondent approached her and PW5 (**AB's** father) seeking for mercy that's when he was arrested.

I have to admit that, the evidence of the prosecution witnesses was consistent at all stages thus irresistibly link the respondents with the offence. More so, the appellant managed to prove the offence at the required standard to the effect that **AB** was penetrated by the respondents. (gang rape)

Elaborating on what amounts to penetration, the Court of Appeal in **Omary Kijuu V Republic**, **Criminal Appeal No. 39 of 2005, CAT-Dodoma** (Unreported) held;

"Thus, the doctor's observation coupled with PW2's evidence on how those bruises came there, that is, they were caused by a male organ, amounted to penetration and capable of proving the offence of rape..."

In their defence, although the respondents denied to have carnally known **AB**, the latter sufficiently identified them as they were even seen fleeing the crime scene. Also the 1st respondent was arrested while at the victim's premises praying for mercy a fact which he neither cross examined upon nor denied.

For the reasons discussed, I found the respondents guilt of the offence of gang rape c/s 131 A (1) of the Penal Code and sentenced to serve life imprisonment as per section 131 A (2) of the Penal Code. Since the verdict has been reached in their absentia, they will start to serve the sentence once they are apprehended. Consequently, the appeal is allowed and the trial court's decision is hereby quashed and set aside.

It is so ordered.

Dated and delivered at Moshi this 25th day of June, 2021

S.B. MKAPA
JUDGE
25/06/2021