

IN THE HIGH COURT OF TANZANIA

(IN THE MWANZA SUB-REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 1 OF 2023

(Originating from Criminal Case No. 5 of 2022 in the District Court of Mbogwe at Mbogwe)

MALIGI PAGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 15/05/2023

Date of Judgment: 29/05/2023

Kamana, J:

On 9th November, 2022, Maligi Pagi, the appellant, was convicted and sentenced to life imprisonment by the District Court of Mbogwe at Mbogwe on his plea of guilty to the offence of gang rape contrary to section 131A(1) and (2) of the Penal Code, Cap. 16 [RE.2022]. Particulars of the offence as per the charge sheet had it that on 3rd November, 2022 at 2000hrs at Shinyanga 'A' within Mbogwe District in Geita Region, the appellant and other persons had carnal knowledge of the victim AA (name withheld to conceal her identity) without her consent.

Upon reflection, the appellant appealed against the conviction and sentence on the following grounds:

1. That the trial court erred grossly erred in law and fact by entertaining the charge sheet.
2. That the trial court erred in law and fact by according weight to Exhibit PE1 (cautioned statement, extra-judicial statement and PF3).
3. That the trial court erred in law and fact by entertaining the equivocal plea of guilty from the appellant.
4. That the trial court erred in law and fact by relying on the admitted facts of the accused which do not prove the offence of gang rape.

When the appeal was called on for a hearing, the appellant had the services of Mr. Paul Kaunda, learned Counsel. The respondent was represented by Ms. Sabina Chogogwe, learned State Attorney. The appeal was argued for and against viva voce.

Arguing in support of the appeal, Mr. Kaunda prefaced by abandoning the second and fourth grounds. Regarding the first and the third grounds, the learned Counsel contended that it was wrong for the offence of rape to be predicated under section 131A (1) and (2) of the Penal Code, Cap. 16 without citing section 130 of the Code. He reasoned that the offence of gang rape is an aggravated offence of rape and hence as a matter of principle, it is compulsory to prove the offence of

rape before embarking to prove the offence of gang rape. In that case, he opined that his client pleaded guilty to the defective charge sheet. Buttressing his views, Mr. Kaunda cited the case of **Michael Adrian Chaki v. Republic**, Criminal Appeal No. 399 of 2019; and **Imani Charles Chimango v. Republic**, Criminal Appeal No. 382 of 2016. He summed up by imploring this Court to quash the lower court's decision and release the appellant.

Responding, Ms. Chogogwe, learned State Attorney conceded to the first ground of the appeal. She submitted that since section 130 of the Penal Code was not cited, the plea of guilty was equivocal. That being the case, she argued that it was not proper for the trial court to convict the appellant. She further contended that even the facts of the offence did not cite section 130 of the Code. The learned State Attorney beseeched this Court to nullify the proceedings and quash the conviction and set aside the sentence. However, the learned Counsel parted ways with her counterpart by urging this Court to remit the case file to the trial Court for the same to be heard on its merits.

Mr. Kaunda rejoined by registering his disagreement as to the way forward concerning the appeal at hand. He argued that a retrial will be used by the Prosecution to fill the gaps. He contended that the

Prosecution was under the obligation to draw a proper charge sheet. He concluded by averring that the retrial will prejudice his client.

Having heard both parties, I concur with the reasoning of the legal minds before me. I do so as I am of the understanding that for an offence of gang rape or any form of rape, the offence of rape must be proved. When the charge sheet does not cite section 130 of the Penal Code, it goes without saying that the offence of gang rape cannot stand on its own. For ease of reference, I think it is relevant to reproduce section 131A (1) and (2) of the Penal Code as follows:

'(1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape.

(2) Subject to provision of subsection (3), every person who is convicted to gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape.'

Reading of section 131A (1) and (2) reveals that the said section does not provide for the offence of rape. What is provided under the section is a mode of rape which is gang rape and its penalty. In the

case of **Imani Charles Chimango v. Republic** (Supra), the Court of Appeal stated:

'From the above provisions, there is no doubt at all that the offence of "gang rape" is an aggravated specie of the offence of rape. The phrase "Where the offence of rape is committed" appearing at the very beginning of sub-section (1) of section 131A pre-suppose that in gang rape, the prosecution must also prove that offence of rape in any of its various descriptions under section 130 has been committed.'

Fortified by that position, I hold that the appellant was charged, convicted and sentenced on the equivocal plea of guilty as the charge sheet was defective. Consequently, invoking revisional powers of this Court, I nullify the proceedings of the trial Court, quash the conviction and set aside the sentence.

As to the way forward, I concur with the reasoning of Ms. Chogogwe that the matter be remitted to the trial Court for retrial. I take that recourse on account that the matter was not heard in a full trial. In that case, there are no gaps to be filled by the Prosecution as no witness testified.

The accused should remain in custody pending the retrial. Order accordingly.

Right to Appeal Explained.

DATED at **MWANZA** this 29th day of May, 2023.



KS KAMANA

JUDGE