

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(DODOMA DISTRICT REGISTRY)
AT DODOMA**

DC. CRIMINAL APPEAL NO. 29 OF 2022

(Originating from District Court of Kondoa in Criminal Case No. 73/2021)

ATHUMANI ABDALLAH.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

27/7/2022 & 28/09/2022

KAGOMBA, J

The appellant, Athumani Abdallah, was convicted by the District Court of Kondoa ("trial Court") on the two counts; namely, rape contrary to section 130(1), (2)(e) and 131 (1) of the Penal Code Cap 16 R.E 2019 and impregnating school girl contrary to section 60A (3) of the Education Act, Cap 353 as amended by the Written laws (Miscellaneous Amendment) Act No. 2 of 2016. Upon conviction, the appellant was sentenced to imprisonment for thirty (30) years on each count.

It is against the said conviction and sentence the appellant has filed this appeal, with three grounds essentially arguing that the prosecution side failed to prove the case against him beyond reasonable doubt.

Briefly, it was alleged before the trial Court that on diverse dates between March 2021, to October, 2021 at Cheku B village, within Chemba District in Dodoma Region, the appellant had sexual intercourse with one

Laila Abdi Hassan, a girl of 14 years of age. Despite the appellant maintaining a plea of not guilty and defending himself along that line, the trial Court relied upon the testimony of PW1 (the victim), PW2 Zuhura Adam, PW5 Dr. Grayson Victor and PW6 H.7403 Detective Leberius, among others, to find him guilty for both counts, and proceeded to sentence him, as it did.

During hearing of the appeal, the appellant was represented by Mr. Cosmas Mataba, learned advocate, while the respondent was represented by Ms. Judith Mwakyusa, learned Senior State Attorney.

For the first count of rape, Mr. Mataba argued that it was not proved because the prosecution evidence didn't prove all the ingredients of the offence. He said that the victim's testimony that the appellant took out "*condom lake na kuniingiza mimi sehemu za siri*" was ambiguous and fell short of disclosing if she was actually raped.

He also challenged the prosecution evidence for not showing exactly when it was revealed that the victim was pregnant. He argued that the evidence of PW2 Zuhura Adam, the victim's mother, was embedded with contradictions as she told the trial Court that it was on 23rd October, but later she said she discovered that the victim was pregnant some days back.

Additionally, Mr. Mataba challenged the prosecution evidence for failure to prove the age of the victim, arguing that the girl merely stated her age without any proof. He cited the case of **Solomon Mazala vs The Republic**, Criminal Appeal No. 136 of 2012, Court of Appeal of Tanzania, at Dodoma, to cement his contention.

On the count of impregnating a school girl, Mr. Mataba argued that there was no any proof that the victim was a student, save for contradicting testimonies adduced. He elaborated that in the first place the victim testified that she was a standard VII student but later said she had completed standard VII, then she said she was a form one (1) student. He found further contradictions in the testimonies of PW3 Prisca Jacob Malambo, a teacher, who testified that the victim was her student from 2015 to 2021 when she completed standard VII, but didn't adduce any proof to that effect.

Mr. Mataba argued further that the evidence as to whether it was the appellant who impregnated the victim was also contradictory. He said that while the victim testified that she had never had sexual intercourse with any person other than the appellant, PW3 Prisca Jacob Malambo, being the victim's teacher, testified that the victim confessed to her that she had sexual relationship with another person. Mr. Mataba argued that, under such circumstances, the trial Court should have ordered a DNA test for proof. He also punched on the evidence of PW5 Grayson Victor, a doctor arguing that he did not testify to the extent of his medical knowledge.

Basing on the above submissions, Mr. Mataba prayed the Court to allow the appeal, quash the conviction against the appellant, set aside the sentence thereof and set free the appellant.

Ms. Mwakyusa, on her part, supported the appeal. She argued that the prosecution failed to prove the age of the victim as the date of birth of the victim was not stated during trial. She also argued that there were doubts as to whether the appellant impregnated the victim since there was no any

proof such as DNA, as it was contended by the learned advocate for the appellant. After such a reply, she rested her case honourably, leaving the Court with a duty to determine whether the case against the appellant was proved beyond reasonable doubts.

Now, in the light of the submissions made by both Mr. Mataba for the appellant and Ms. Mwakyusa for the respondent, and after thorough perusal of the trial proceedings and judgment, this Court is inclined to agree with the learned counsels that, in deed, the prosecution case was not proved beyond reasonable doubt. I shall explain below.

To prove the offence of rape under to S. 130 (1), (2)(e) of the Penal Code where the victim is less than eighteen years old, proof of age is mandatory. The Court of Appeal of Tanzania in the cited case of **Solomon Mazala** clearly observed that the provision of S. 130(2)(e) of the Penal Code requires presence of tangible proof that the age of victim was under eighteen years at the time of the commission of the alleged offence. This proof is necessary because, once the age is established to be below eighteen years, it negates consent of the victim, if any.

It is trite law that decision of the Court must be grounded on evidence properly adduced during trial otherwise it will not a decision at all. Therefore, the trial Court erred in convicting the accused with the offence of raping a victim of supposedly fourteen years of age, basing on unproved fact that the victim was under eighteen years of age.

In addition to the foregoing, the prosecution had to prove if there was penetration, which in this case was not. As pointed out by Mr. Mataba, the victim's evidence was not certain that there was penetration. It was liable for misinterpretation, the words "*kondomu lake na kuniingizia mimi*" essentially may not mean the same as penetration of the appellant's sexual organ into the victim's sexual organ. Condom is not synonymous with penis. In a very recent decision of the Court of Appeal in **Masanyiwa Msolwa vs Republic** (Criminal Appeal 280 of 2018) [2022] TZCA 456 (21 July 2022) available at www.Tanzlii.org, it was stated in this respect thus;

*"Admittedly, for the offence of rape of any kind to be established, the prosecution or whoever is seeking the trial court to believe his or her version of facts on trial, **must positively prove that a sexual organ of a male human being penetrated that of a female victim of the sexual offence..**" [Emphasis added].*

Without a candid proof of penetration as clearly explained in the above cited authority, the charge of rape must fail. The case is also among numerous authorities for the legal position that, if the victim is below 18 years, as it appears to be in this case, the age of the victim must be proved too. As already stated, these two key ingredients of statutory rape, namely; penetration and victim's age, were not sufficiently proved.

Turning to the second count, I am of a firm mind that the offence of impregnating a school girl was also not proved. There is no evidence which linked the appellant with the pregnancy of the victim. As rightly submitted by counsels for both sides, the case was yawning for a DNA test to prove

the appellant's fatherhood. Besides, as rightly contended by Mr. Mataba, there was no sufficient proof that the victim was a school girl.

Based on the above analysis, I find that the case against the appellant was not proved beyond reasonable doubts. As such, the issue set for determination in this appeal is answered in the negative. For that reason, the appeal is allowed. The conviction and sentence, are respectively, quashed and set aside. The appellant should be released from custody forthwith unless otherwise lawfully held. It is so ordered.

Dated at Dodoma this 28th day of September, 2022.



ABDI S. KAGOMBA

JUDGE