

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

(DC) CRIMINAL APPEAL NO.60 OF 2022

(Original Criminal Case No. 36 of 2021 of the District Court of Kondoa at Kondoa)

JOSEPH GASPERY.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

09/11/2022 & 11/11/2022

MASAJU, J.

The Appellant, Joseph Gaspery, was charged, tried and convicted of the offence of **rape** contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code [Cap. 16 Revised Edition 2019] in the District Court of Kondoa. Upon conclusion of the trial, he was sentenced to serve a life imprisonment and pay the victim compensation to the tune of Tsh.500,000/=. Aggrieved by such findings, conviction and sentence the Appellant sought the appeal before this Court. His Petition of Appeal comprises eight (8) grounds of appeal wherein he essentially alleges

that the prosecution case against him before the trial Court was not proved beyond all reasonable doubt.

When the appeal was called on for hearing on the 9th day of November, 2022 the Appellant appeared in person and prayed to adopt his Petition of Appeal so that it forms his submissions in support of the appeal before the Court. He submitted that he did not commit the crime, but he was framed up by PW1 his former wife and mother of the victim of crime so that she could enhance adulterous relations with her former husband. He prayed the Court to allow the appeal. The Respondent Republic was represented by Mr. Salumu Matibu, the learned State Attorney who did not contest the appeal.

The Respondent Republic stated that there was no proof of rape due to apparent contradictions on the medical report (PF3, Exhibit P1) and unreliable evidence adduced by the victim's mother. That, although an interpreter was involved since the victim was not able to speak Swahili language the procedure for his engagement was not followed. The Respondent Republic further reasoned that the involvement of two

social welfare officers during the trial eliminated the aspect of privacy which is crucial in sexual offences.

The Respondent Republic also stated that there was contradiction in the apparent age of the victim as between the testimony of PW2, the victim, and her mother, PW1. Similarly, PW2's evidence contradicted her mother's evidence as regards to what actually happened (they saw) at the crime scene. The Respondent Republic basically submitted that the prosecution case before the trial court fell short of truth and credibility consequently creating doubt. At last, the Respondent Republic prayed the Court to allow the appeal, quash the conviction and set aside the sentence thereof.

In rejoinder, the Appellant appreciated the submissions made by the learned State Attorney for the Respondent Republic and maintained his prayer that the Court be pleased to allow the appeal.

The Court appreciates the parties' submissions that the prosecution case before the trial court was not proved beyond reasonable doubt. Section 130 (4) (a) of the Penal Code [Cap.16]

requires proof of penetration as a key ingredient in rape cases. Reverting to the present case, the admitted PF3 ('Exhibit P1') does not clearly disclose whether or not the victim was sexually penetrated. The same is coupled with ambiguity as the doctor (PW4) observed no any injury, no discharge, no hymen, 1cm widened vaginal, a venereal disease however he remarked that there is evidence of penetration. While testifying, PW4 stated that the victim vaginal was wide 1cm, her hymen was absent, she had bacteria in the urine that she tested negative on HIV and other sexually transmitted diseases thus prescribed her medicine for infections. PW4 did not in her testimony come out clear (speak of) on the proof of penetration.

In effect, this discrepancy weakens the prosecution case because it creates doubt on whether the victim was truly raped. Her evidence does not reflect the medical examination conducted on her.

Also, the record of proceedings of the trial court on the 18th day of August, 2021 reads thus;

"PW2

Catherine Xavier, 9 yrs promises to speak the truth

Court

Witness is able and capable of testifying."

The procedure was against the requirement of section 127 (2) of the Evidence Act [Cap 6 RE 2019] because nowhere the record of proceedings reveals the witness (PW2) on her own so promising in a direct speech.

The trial courts observation, that "*witness is able and capable of testifying*" is not related to the requirement of the promise given under section 127 (2) of the Evidence Act, [Cap 6 RE 2019]

The evidence by PW2 is hereby expunged from the record of the trial court.

Additionally, there was contradiction in the evidence of the prosecution. That, at the police station PW1 stated that she found the Appellant inserting his penis into the victim's vagina. During trial PW1 stated that she found the victim holding her pant and the Appellant was in bed naked trying to put on his clothes. Whilst, the victim (PW1),

testified that PW2 found the Appellant in the act of sexual intercourse with the victim of crime. This contradiction is material as it casts doubt on the actus reus (commission) of the offence by the Appellant taking into account PW1 and PW2 were both eyewitnesses.

Moreso, as rightly submitted by the Respondent Republic there were contradictions on the exact age of the victim of crime (PW2) since the victim herself testified that she was 9 years of age, her mother (PW1) testified that the victim was 6 years old and the PF3 notes that the victim was 6 years old. Nevertheless, there was neither a birth certificate, affidavit of proof of age nor a clinic card tendered by the prosecution to prove the exact age of the victim it being an essential requirement in statutory rape and so as to clear the contradiction.

From the totality of the afore observations, the Court finds that the trial court erred in relying on the prosecution evidence which is insufficient, contradictory and doubtful in convicting the Appellant. The trial court ought to have examined the prosecution case to the required standard i.e proof beyond reasonable doubt.

That said, the Court is of the considered position that the prosecution failed to prove their case beyond reasonable doubt in the trial court. The appeal is hereby allowed accordingly. The conviction and sentence meted by the trial court are against the Appellant are hereby quashed and set aside respectively. The Appellant shall be released from prison forthwith unless otherwise held for another lawful cause.



GEORGE. M. MASAJU

JUDGE

11/11/2022