IN THE HIGH COURT OF TANZANIA
AT MTWARA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO 42 OF 2007

Original Masasi D/Court Cr. Case No.192/2005 Before:M.O. Lilibe, PDM

AIDANO KAMTUNDUKA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

14/7/2008 & 29/7/2008

Rweyemamu J.,

Judgment

In Mtwara District Court (DC) Cr. Case 63/2006, the appellant **Aidano Kamtunduka** was arraigned on a charge with two counts; rape c/s 130 (12)(e) & 131 (1) as amended by the Sexual Offences Special Provisions Act 4/98 (SOSPA) in the first count, and causing grievous harm c/s 225 both of the Penal code. The particulars had indicated that on **23/11/2005**, the appellant raped and caused grievous harm to Thecla d/o Hamis (Pw[1]). He was convicted and given concurrent prison sentences of 30 years and 12 months respectively. Dissatisfied he appealed that decision which I hasten to state, was not supported by the republic/respondent on appeal.

Let me first revisit the evidence at trial upon which the impugned decision was based. The facts were brief composed of the evidence of the complainant **Pw[1]**, her son **Pw[2]**, the Village Executive Officer (VEO) **Pw[3]**, a member of the militia who arrested the appellant **Pw[4]**, and a doctor who examined the complainant - **Pw[5]**.

Pw[1] deposed that at about 12.00 hrs, (mid day) of 23/11/2005 (mid day), she at home sleeping when the appellant went in and carnally knew her without her consent. He ejaculated three times and in the course of the rape, he cut her with a knife on the thigh to prevent her from shouting. He dashed out thereafter and she was then able to raise alarm, neighbours came and she told them what had happened. They assisted her to arrest the accused and took him to the police station. She went to hospital and was given a PF 3 admitted as P Exhibit 1. In response to a question by the appellant in cross examination, she disclosed that her husband was away at the time.

The rest of the prosecution evidence went as follows; Pw[2] the son, testified that on 23/12/2005 he returned home and his mother told him that she had been raped by the appellant. He advised her that they should report to VEO which they did. The VEO Pw[3] deposed that on 23/1/2005 (it is not clear at what time since the

record says *"at around"* then is silent) Pw[1] reported to her that *"she had been raped by the now accused"*. She ordered a militia to arrest the appellant and take him to the Police.

The appellant was arrested by Pw[4] a member of the militia who testified that on 23/**11**/2005 around 15.30 hrs he was ordered to arrest the appellant *"who was suspected for rape"* he arrested him and handed him to the police. The complainant was ultimately taken to the police then hospital. A doctor testified as Pw[5] and tendered a PF 3 which where he had opined that *"victim was interrupted by a blunt object around her private parts like male organ"!!* He went on to testify that he saw bruises and wounds on the Pw[1].

In defense the appellant denied any involvement in the matter. His evidence was brief *"I deny the charge as I did not commit the offence charged. I only wonder how I was charged in this court. I know nothing about the case"*. He admitted under cross examination that he had no grudges with the complainant but stressed that *"the case is just cooked"*

He repeated his protestation on appeal and submitted that Pw[1] lied; that no exhibit was found on him; that there was no evidence that he committed the offence - no neighbors came to testify that the offence took place, -save complainant's own son;

I have noted a discrepancy on dates of the events as told by the witnesses, Pw[1] and Pw[2], and Pw[3], but the same may be due to illiteracy of the witnesses. The CAT cautions that *"in case of illiterate witnesses, it is not fair or desirable to tie them down too closely to estimates of time..."*.**Shihobe Seni & Ano V.R** (1992) T.L.R. 330. I would therefore make no issue of those discrepancies. Still, based on matters pointed out above, I find that the DC wrongly found the complainant credible. As hers was the only evidence connecting the appellant with the offence, I find the case against the appellant not to have been proved on the required standard, quash his conviction and sentence.

Before concluding, I find myself inclined to make the following observation: I have noted from a number of criminal appeals which I have handled involving ordinary and statutory rape cases, that the same are poorly and casually investigated, if not, the weakness lie with their prosecution. The evidence in these cases is usually scanty, mainly composed of almost only the testimony of the victim. Absence of investigators testimony, now characterize most of these cases.

It appears to me that there is a wrong assumption that, it suffices for the victim to testify that she was raped by the appellant. That is a wrong stance. It has to be remembered that the

amendments brought in by SOSPA regarding receipt of the victim's evidence without need for corroboration in sexual offence cases, did not do away with the general rule of law and practice that conviction can be found on the evidence of a single witness but only if the court is fully satisfied that the witness is telling the truth.

In order for SOSPA to achieve its intended objectives through court action; investigators have to obtain information through witnesses which would help paint a clear picture to the court regarding; commission of the offence, surrounding circumstances before and after the event; and prosecutors have to carefully lead and solicit relevant information from such witnesses as is usually done in other serious cases involving serious penal consequences, and investigators have to testify to ensure links in the prosecution are clearly set out.

That said, I order the appellant's immediate release unless otherwise lawfully held.

R.M. Rweyemamu
Judge
28/7/2008

THE HIGH COURT OF TANZANIA