IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CRIMINAL APPEAL NO. 180 OF 2007

ISRAEL ABRAHAM ... . APPELLANT

- Versus -

THE REPUBLIC ... ... RESPONDENT

(Appeal from the decision of the District Court of Arusha)

(D. S. MLAY – PDM

Dated the 13th day of June , 2007

In

Criminal Case No. 754 of 2006

11th & 12th December, 2008

JUDGMENT

Before Mmilla, B.M. J.:

Israel Abrahamu was charged in the District Court of Arusha of two offences; armed robbery c/s 287A and attempted rape c/s 132(1) and (2) both of the Penal Code Cap 16 of the Revised Edition, 2002. However, the trial court acquitted him of the second count of attempted rape but substituted the offence of sexual assault on a woman probably c/s 135 of the Penal code. He was sentenced to serve a term of 30 years' imprisonment in respect of the first count on top of which he was to receive 12

strokes of the cane, and a term of 4 years' imprisonment in respect of the substituted charge of sexual assault on a woman. The sentences were ordered to run concurrently. The appeal is against conviction and sentence. The appellant is appearing in person while the respondent Republic is being represented by Ms Silayo, learned state attorney.

Going by the evidence of the complainant one Agness Leonard who testified as PW1, the appellant, a person she had known before because he was living at Sokoni One area which is neighbouring Sinoni area from where she was living, caught her on the morning of 2.7.2006 on her way to church for her Sunday prayers and dragged her into a maize farm at which he allegedly robbed her of certain properties at a knife point. They included cash shs.9, 850/=, a golden wedding ring, ear rings, a bible, and a handbag. It was similarly related by the complainant that the appellant attempted to rape her. but that in view of the alarm she had raised which attracted the attention of two persons including PW2 Joshua Kiliko Leiser paved way foe her rescued. He ran away on seeing those two persons come. The matter was reported to their fellow villagers and ultimately to the police. In that she had known the appellant, the villagers traced and

arrested him. He was subsequently handed over to the police who charged him accordingly.

The appellant's memorandum of appeal has raised three grounds, firstly that he was not properly identified by the complainant; secondly that the trial court grounded conviction on the weakness of his defence and lastly that the evidence of the prosecution witnesses was contradictory.

In his oral submission before this court, the appellant argued that the prosecution did not prove the case against him beyond reasonable doubt. He repeated that the prosecution evidence was contradictory, thus unreliable. He drew this court's attention on the point that while the complainant said he was armed with a knife, the other witness said that he was not armed.

In the first place, I am in agreement with learned state attorney Ms Silayo that the appellant's allegation that he was not properly identified is without merit. The evidence of the complainant was amply clear that she knew him before that day as they were living in the same ward. Her evidence was

corroborated by that of PW2 who said that he had known the appellant before that day, and that he clearly saw the appellant at the scene of crime. Even, the incident took place in broad day light, such that it removed the possibility of mistaken identity. In this court's view, the trial court magistrate correctly found that the appellant was properly identified by PW1 and PW2.

The trial court heard that the complainant was dragged into a maize farm from wherein she was robbed her belongings before he sexually assaulted her. To an extent, her evidence on this was corroborated by that of PW2. This witness testified that he found the complainant and the appellant in the maize farm, and that the complainant was lying down and the appellant on top of her. He also said that on seeing he and his colleague come, the appellant rose, picked the complainant's hand bag and ran away. They attempted a chase him, but they failed to apprehend him. Of course he did not talk of the weeding ring, the earrings, and the bible on account that those items were grabbed before he arrived at the scene of crime.

It is a fact however, that while the complainant said the appellant threatened her with a knife, PW2 testified that the

appellant was not armed. It is possible that PW2 did not see any weapon because the appellant ran away on seeing him come. However, the trial court found that the complainant was a credible witness and believed her evidence.

Having carefully examined the complainant's evidence, I share the trial court's views. I take it, as did that court, that she was robbed at knife point therefore that it was indeed an offence falling under the provisions of section 287A of the Penal Code. In the circumstances, the trial court properly found that offence was proven beyond reasonable doubt as I also hold.

As already pointed out, the trial court acquitted the appellant on the second count of attempted rape but substituted thereof the offence of sexual assault on a woman. The evidence in that regard was that after dragging her to the maize farm, he fell her down and raised her skirt and a piece of kitenge to the level of her chest after which he removed his victim's underwear before loosening his trouser and held his penis ready to execute his intention, but that he was interrupted by PW2 and his colleague. The prosecutrix evidence on this point was corroborated by that of PW2 who said that on arrival at the

scene, he found the appellant lying on top of the complainant. He added however, that the appellant ran away on seeing him come.

The issue that follows is whether or not the evidence supported the offence sexual assault. In this court's view, the evidence stated above constitutes sexual assault in terms of section 135 (1) of the Penal Code which provides that:-

> "(1) Any person who, with the intention to cause any sexual annoyance to any person utters any word or sound, makes any gesture or exhibits any word or object intending that such word or object shall be heard, or the gesture or object shall be seen, by that other person commits an offence of sexual assault and is liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding three hundred thousand shillings or to both the fine and imprisonment."

In the premises, the trial court's decision to substitute the offence of sexual assault for attempted rape was properly

reached at, so was the sentence of four years' imprisonment which it imposed. I uphold that finding. In the circumstances, the appeal lacks merits and is dismissed.

(Sgd)
Mmilla, B. M.
Judge

12.12.2008

Date: 12th December, 2008

Coram: B. M. K. Mmilla, J.

For the Appellant: Present.

For the Respondent: Ms. Swai, State Attorney.

B/c: Shilla.

Court: Judgment delivered this 12th day of December, 2008 in the presence of Ms. Swai, learned state attorney for the Republic and the appellant in person.

AT ARUSHA.

(Sgd)
Mmilla, B.M.
Judge
12/12/2008

I certify that this is a true copy of the original.

G. H. HERBERT

Ag. DISTRICT REGISTRAR

ARUSHA

BMM/jn.