IN THE HIGH COURT OF TANZANIA

AT IRINGA

APPELLATE JURISDICTION

(Iringa Registry)

(DC) CRIMINAL APPEAL NO. 9 OF 2012

(Originating from Criminal Case No. 405 of 2006
of the District Court of Iringa District
at Iringa.
Before S.W. Mwalusamba – R.M.)

ATILIO S/O KITINE ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

2/4/2014 & 16/5/2014

REASONS FOR THE JUDGEMENT

MADAM SHANGALI, J.

On 26th July, 2006 the appellant ATILIO KITINE was arraigned and charged before Iringa District Court with the offence of Rape contrary to Section 130 (1) and 131 (1) of the Penal Code as amended by Sections 5 and 6 of the Sexual Offences Special Provisions Act No. 4 of 1998.

At the end of the trial the appellant was convicted and sentenced to serve thirty (30) years imprisonment. Dissatisfied with that decision the appellant has filed this appeal to challenge the conviction and sentence.

On 2/4/2014 when this appeal was set for hearing, the appellant appeared in person while the respondent/Republic was represented by Ms. Nichombe, learned State Attorney. In the course of hearing the appeal the appellant had nothing to say and on further inquiry from the Prison Officer who was guarding the appellant, I discovered that the appellant had serious hearing problems, almost a deaf. The Prison Officer informed the court that the Iringa Prison Authority has been facing a lot of problems to communicate with him. After a short discussion with the learned State Attorney, I decided to proceed with the hearing of the appeal basing on the grounds of appeal filed by the appellant.

In his petition of appeal, the appellant raised about five grounds of appeal which may conveniently be condensed to only one ground namely, whether the prosecution side managed to prove its case beyond reasonable doubt. In her ample submission, Ms. Nichombe learned State Attorney supported the appeal on the main ground that there was no sufficient prosecution evidence to base conviction against the appellant.

Upon hearing the submission made by the learned State Attorney and having critically examined the record of proceedings of the trial District Court, together with full digestion of the complaints raised by the appellant in his petition of appeal, I immediately allowed the appeal, quashed conviction against the appellant and set aside the sentence of thirty (30) years imprisonment imposed against him. Consequently I also ordered for the appellant immediate release from prison unless held on another separate lawful reason. I also reserved my reasons for such immediate order, which I am now ready to pronounce.

The first crucial issue in this appeal is the procedure employed by the trial District Court to conduct the case having discovered that the accused/appellant is deaf or half deaf person.

The record of the proceedings indicate that on 6/12/2006 when the case was called for preliminary hearing the accused/appellant was absent. The prosecution side informed the trial District Court that the appellant had jumped bail and thus prayed for a Warrant of Arrest. Later on it was discovered that the appellant who is half deaf was within the court premises waiting for his case. He did not hear when his case was called because he is deaf. The Warrant of Arrest was cancelled and the case proceeded.

Preliminary hearing was duly conducted and hearing adjourned to 11/1/2007.

On 11/1/2007 the trial District Court started to record the prosecution evidence (PW.1) but suddenly and suo motu the trial Magistrate observed that the appellant is deaf and there and then the appellant's brother namely Abas Kitine was quickly called in and sworn to act as an interpreter of the appellant. It is not clear how the appellant managed to understand and follow up the court proceedings from the date when the charge was read over and explained to him on 27/7/2006 and during preliminary hearing. Secondly it is not clear how the trial Magistrate discovered that Abas Kitine, the brother of the appellant was an expert in deaf-mute communication language. In addition the record of proceedings is not clear on how the interpretation was conducted especially on the defence level.

In her unsworn testimony, PW.1 a child aged 12 years claimed that on the date of incident the appellant called her and gave her T.Shs.50/=. Then the appellant took her to the bush and raped her. That after the act the appellant ordered her (PW.1) to remain behind in the bush so that he may have leave first to distract the attention of the people. In that regard, the testimony of PW.1 indicate that there was ample language communication between her and the appellant. That

evidence is highly suspicious taking into consideration the fact that the appellant is deaf. Even the evidence of PW.4, who claimed that she inspected her grand daughter and found her with sperms all over her underpants and vagina must be treated with caution because PW.2, the medical doctor stated clearly and filled in the PF.3 (*Exhibit P.1*) that he found bruises around the PW.1's genital region caused by a blunt object. The issue of sperms spread all over PW.1's underpants and vagina was concocted by PW.4 alone.

Ms. Nichombe, learned State Attorney pointed out that another serious shortcoming in the conduct of this case is the fact that the trial Magistrate failed to properly consider the defence case. She pointed out that in his Judgement the trial Magistrate analysed and evaluated only the prosecution evidence and disregarded the defence evidence. The learned State Attorney referred this court to the case of **Hussein and another Vs. Republic** (1986) TLR 166 where it was held that it is a serious misdirection on the part of a trial Magistrate to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence. I entirely concur with the learned State Attorney.

Another interesting matter in this case is the fact that the case was tried by three different Magistrates on different occasions without giving any reason for the trial exchanges.