



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO. 25 OF 2017**

**PIUS SIKENGA WANJALA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the judgement and sentence of Hon. W. K. Chepseba- CM.,***

***dated 15<sup>th</sup> February, 2017 but delivered by Hon. C.A.S. Mutai, P.M., in the C.M'S***

***Court at Bungoma, in Criminal Case No.738 of 2016, Republic vs Pius Sikinga Wanjala)***

**JUDGEMENT**

The appellant has appealed against his conviction and sentence of 10 years imprisonment in respect of the offence of attempted rape contrary to section 4 of the Sexual Offence Act No. 3 of 2006.

In this court the appellant raised three (3) grounds of appeal in his petition of appeal, which he calls a memorandum of appeal.

In ground 1 the appellant has faulted the trial magistrate both in law and fact for convicting him of attempted rape upon evidence that could not sustain the charge. In this regard, the evidence of JNO (Pw 1) was that on 9<sup>th</sup> March 2016 at 11.42 pm she was asleep in her house with her five children. She heard a bang on the door and it opened. At that time a person held her blouse. She lit her phone torch and recognized the appellant whom she knew before. A struggle ensued and her daughter N (Pw 3) who was with her in the house screamed.

As a result, RNO (Pw 2) went to her rescue. Pw 1 held the appellant's khaki cap (exhibit Pexh 2) and pink/red shirt (exhibit Pexh 3) as the appellant attempted to run away. Pw 2 met her mother in law (Pw 2) at the door. The appellant knocked her down and escaped.

Pw 1 continued to testify that the next day she went to hospital; where she was given a P3 form exhibit P3. She also identified her treatment book exhibit P5. She also testified that she knew the appellant before and later she led police to arrest the appellant. Pw 1 further testified that the appellant tried to pin her to the bed. In the process of being the appellant trying to pin her to the bed Pw 1 sustained an injury to the head and leg. Pw 1 further testified that she had no land dispute with the appellant and had no grudge with her.

Finally, Pw 1 testified in re-examination that the appellant did not find her with a boda boda rider.

The evidence of Pw 1 is supported by that of RNO (Pw 2); who went to the scene of crime in answer to the screams of Pw 1 and Pw 3. Pw 2 found the appellant standing at the door step struggling with Pw 1. Pw 2 also screamed and a neighbour went to their rescue. The appellant then ran away leaving behind his clothes exhibits 2, 3, and 4. Pw 3 further testified there was moon light and that she knew the appellant before this incident.

The evidence of Pw 1 was also supported by her daughter SW (Pw 3); who similarly recognized the appellant at the scene of crime during that night.

Elias Adoka Omudang (Pw 6) is the clinical officer who examined Pw 1 at Bungoma district hospital on 18<sup>th</sup> March 2016. His findings were as follows. Pw 1 was aged 37 years. She had been treated at Kimaeti health center under OP No. xxx/xxx. She had changed her clothes. She alleged that someone tried to rape her but she screamed and neighbours came to her rescue.

She was injured in the right hip joint and a bruise on the right knee joint. Her other parts of the body were normal. Pw 6 completed the P3 form and produced it as exhibit 5. According to Pw 6, Pw 1 was aged 32 years old and not 37 years. It was the police who had written that she was aged 37 years.

The appellant testified on oath denying the offence. He testified that on 2/3/2016, he found the complainant making love with a boda boda rider. He then told her that it was shameful and that he was going to report to her husband. The next day the complainant called her and agreed to finish that matter; but later the complainant told him that she will fix him.

The appellant continued to testify that on 16/3/2016 as he was at his home taking supper police men from Kimaeti police station went to his home and arrested him without telling him the offence he had committed. He was later charged in court. He testified that his relations with the witnesses were not good. There was a land dispute with them and the complainant's daughter (Pw 3) was told what her mother her to tell the court. On the material day he was not at home.

As a first appeal court I am required to re-evaluate the entire evidence afresh and make my own independent finding while bearing in mind that I did not see and hear the witnesses testify. I must also consider the submissions of both parties.

I have re-evaluated the entire evidence and the submissions of the parties.

I find that the evidence of the complainant (Pw 1) was credible that she was injured in the leg and the head. The examining clinical officer (Pw 6) found injuries in her right hip joint and a bruise on the knee joint. Furthermore, I find as credible her evidence that she recognized the appellant as a person she had known before this incident through her phone torch light. Her evidence of recognition was corroborated by her daughter (Pw 3) and her mother in law (Pw 2).

There is further corroboration of the evidence of the complainant in the recovery of the clothes of the appellant namely the striped shirt (exhibit 1) and the khaki cap (exhibit 2), which he left behind as he escaped from the scene of crime.

The defence of the appellant was that of an alibi and that the case against was fabricated.

I find that the appellant was positively recognized at the scene of crime by Pw 1, Pw 2 and Pw 3. I further find that the appellant had taken further steps in his attempt to rape the complainant. These steps were that the appellant held her blouse and was pushing her to her bed. His attempt to rape the complainant was frustrated by the resistance of the complainant and the screams of her daughter. In view of this I find as persuasive the observation of this court (Asika Makhandia, J) in Abraham Otieno v Republic, Kisii High Court Criminal Appeal No. 53 of 2009, (2011) e-KLR, in which that court observed that the intention of rape must be manifested for instance by word of mouth or the conduct of the culprit. And that the intention must be to rape the victim but was stopped in tracks and in the nick of time.

I find that there is ample evidence which proved beyond reasonable doubt that the appellant was properly convicted of attempted rape.

In the circumstances, I find no merit in ground 1 which I hereby dismiss.

In ground 2 the appellant has faulted the trial court in convicting him on the prosecution evidence which was contradictory. I have perused the prosecution evidence and I find that there are no such contradictions. I therefore dismiss this ground of appeal for lacking in merit.

In ground 3 the appellant has faulted the trial magistrate for being biased. In this regard, I find that the judgement of the trial court is based on the evidence tendered before it and is not biased. The appellant has not proved by way of evidence that that court was biased. I find as persuasive the Supreme Court decision in Hon. Lady Justice Kalpana Rawal v Judicial Service Commission & Another, Case No 11 of 2016, in which that court observed that in a claim for actual bias it must be proved that the decision maker approached the issues with a closed mind or had prejudged the matter and could not be swayed by the evidence in the case at hand.

I therefore find no merit in ground 3 which I hereby dismiss.

The appellant has also challenged his sentence of ten years imprisonment. I find that the sentence of ten years imprisonment was merited and his appeal is hereby dismissed.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI VIDE VIDEO CONFERENCE THIS 25<sup>TH</sup> DAY OF JANUARY 2022.**

**J M BWONWONGA**

**JUDGE**

**In the presence of:-**

Mr. Kinyua: Court Assistant

The appellant in person

Ms Mukangu for the Respondent