



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO 65 OF 2019

PETER KIPKOECH TOROITICH..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement and sentence of Hon. J.L. Tamar, PM, dated 23/10/2019 in the Principal Magistrate's Court at Eldama Ravine, in Criminal Case No. S.O. 47 of 2018, Republic v Peter Kipkoech Toroitich)

JUDGMENT

1. The appellant was convicted of attempted rape contrary to section 4 of the Sexual Offences Act No 3 of 2006 and was sentenced to ten (10) years imprisonment.
2. The appellant has raised four grounds in his amended petition to this court.
3. In ground 1 the appellant has faulted the trial court both in law and fact in convicting him on a charge of attempted rape without supporting evidence.
4. The evidence of the complainant (Pw1) RJR (her initials) was that on 26/12/2018 at about 1.00 pm she was at the home of Major Sigilai, where she had gone to prepare food for the initiates. She cooked there until 10.00 pm. She then left and approached the appellant who had a motor cycle stationed around the home of Sigilai. She told the appellant to take her to her mother's home to pick her daughter and thereafter proceed to her home. She had known the appellant before as they were together in primary school.
5. Pw 1 continued to testify that instead of taking her to Morigwo, the appellant took her to Narasha forest. She asked him why he was taking her to the forest. The appellant shouted at her telling her to keep quiet. Pw 1 realized she was in danger. Upon reaching the swampy area, Pw 1 stepped down and fell down. The appellant switched off the motor cycle. The appellant strangled her with a piece of stick, which was produced as exhibit 1. He also slapped her very hard.
6. The ground was muddy as it had rained. She asked him why he wanted to kill her. The appellant told her that it was going to take two minutes. That is when she realized that the appellant wanted to have sex with her. The appellant also bit her on the face. The complainant then told him that if that is what he wanted he should stop beating her. The appellant then opened his zip and removed his penis. The appellant then told her to remove her trousers; which were put in evidence as exhibit 2. The complainant also had a white top exhibit 3 and a blue jumper exhibit 4.
7. Pw 1 further testified that the appellant had a cap exhibit 5; which he left at the scene and his motor cycle side mirror, exhibit 6.
8. The complainant tightly held his erect penis and squeezed it hard. The appellant cried and she squeezed it more hard for ten minutes. The appellant then put on his motor cycle and left.
9. Thereafter the complainant left and went to her home arriving in the morning. She reported the incident to her husband namely CKC (Pw 3). Pw 3 testified that his wife arrived home and complained that the appellant took her to Narasha forest and attempted to rape her. She had injuries on her face and her clothes were full of mud.
10. Pw 3 continued to testify that in the morning the appellant and his sister Maria went to her home and pleaded that he be forgiven. The appellant accompanied them to the police station, where he was arrested.
11. The complainant was medically examined by Timothy Make Chesang (Pw 2), a clinical officer then stationed at Eldama Ravine hospital. The findings of Pw 2 were as follows. She had a human bite on both sides of her face. There was tenderness on the front side of her neck. There was also tenderness on her left side of the head. Pw 2 concluded that a blunt weapon was used as well as a human bite. He treated her

with tetanus vaccine and anti-biotics. He then produced his report as exhibit 8. He also produced the treatment card as exhibit 7.

12. Finally, the prosecution called No. 112194 PC Patrick Mwangi (Pw 4), who was the investigating officer. In addition to producing the foregoing exhibits, Pw 4 supported the evidence of the prosecution witnesses.

13. The appellant made an unsworn statement denying the charge. He stated that he was a farmer and also a boda boda rider. He further stated that on the material date he was at Nile bar in Kabunyony. Pw 1 arrived there and asked him to buy her alcohol. The appellant then gave her a one thousand shillings note (shs. 1,000). Pw 1 then bought the alcohol but refused to return the change. They then fought with the complainant biting him. He also bit the complainant. The following day she went to see the appellant at her house. They then turned against him with her husband. He finally stated that he was charged with an offence which he had no knowledge of.

14. This is a first appeal. As a first appeal court I have re-assessed the entire evidence as required of a first appeal court.

15. I have also considered the authorities cited by the appellant. The first authority being Charles Nega v Republic (2016) e-KLR, in which this court (Mrima, J) observed that in a case of attempted rape, the evidence produced must go beyond the preparatory stages and must go right to the door step of possible commission of the offence. I find that in the instant case the actions of the appellant, had gone past the preparatory stages and was on the verge of raping the complainant. I further find that the appellant was stopped from raping the complainant by the latter squeezing the penis of the appellant so hard that he felt pain and started crying.

16. Furthermore, the appellant also cited Bukenya & others v Uganda (1972) EA 549, in which the Court of Appeal held that the prosecution must make available all witnesses to establish the truth, failing which the court is entitled to draw an adverse inference. In this regard the appellant submitted that Sigilai in whose home the appellant had gone to cook should have been called to testify. He further submitted that the prosecution should also have called the sister of the appellant who accompanied the appellant to the home of the complainant. I find that there is merit in this submission but the absence of their potential evidence does not go to the root of the case in view of the credible and ample evidence of the prosecution. I therefore dismiss the submission of the appellant in that regard.

17. Furthermore, the appellant also submitted that the trial court did not specify the section under which he was convicted and sentenced. This he submits is fatal to the conviction and sentence. I find that the appellant was convicted of attempted rape which is an offence under section 4 of the Sexual Offences Act No. 3 of 2006. I find that although this was not specified by the trial court in its judgement, it is a harmless or curable error in terms of section 382 of the Criminal Procedure Code. I therefore dismiss this submission.

18. In the premises, I find that the appellant's appeal fails and is hereby dismissed in its entirety.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KABARNET THIS 29TH DAY OF SEPTEMBER 2021.

J M BWONWONGA

JUDGE

In the presence of:

Mr. Kemboi and Mr. Sitienei, Court Assistants.

Appellant present in person.

Mr. Mong'are for the Respondent.