REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 18 OF 2019

RODGERS WAWIRE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.42 of 2019 of the

Chief Magistrate's Court at Busia by Hon. S. O Temu–Principal Magistrate)

JUDGMENT

1. **Rodgers Wawire,** the appellant herein, was convicted for the offence of attempted rape contrary to section 4 of the Sexual Offences Act No.3 of 2006.

2. The particulars were that on the 15th March 2019 in Busia Township Location, of Busia County, unlawfully caused his penis to penetrate the vagina of **SNO** without her consent.

3. The appellant was sentenced to serve five years' imprisonment. He now appeals against both conviction and sentence.

4. The appellant raised seven grounds of appeal which can be summarised as follows:

a) The learned trial magistrate violated his constitutional rights to fair trial.

b) The learned trial magistrate erred in law and in fact relied on contradictory evidence to convict him.

c) The learned trial magistrate erred in law and in fact by failing to rely on the medical evidence.

d) The learned trial magistrate erred in law and in fact by disregarding the defence evidence.

5. The appeal was opposed by the state through Mr. Gacharia, learned counsel who contended that there was sufficient evidence on which to convict.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972]**

EA 32.

7. One of the issues that the appellant's counsel raised during submissions was whether the trial court can convict on another charge after acquitting on the substantive and the alternative charge. Section 179 of the Criminal Procedure Code provides:

> **(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**
>
> **(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.**

An offence is deemed to be a lesser offence due to the lower punishment prescribed.

8. The penalty for rape is provided for under section 3 (3) of the Sexual Offences Act as follows:

> **A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.**

Whereas the penalty for attempted rape is provided for under section 4 of the Act as follows:

> **Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.**

In my opinion attempted rape though has a lower starting penalty, the maximum is the same as that of rape. The learned trial magistrate could not therefore convict on a charge that was not preferred. This was prejudicial to the appellant.

9. The appellant alleged in his grounds of appeal that his Constitutional right to fair trial was breached. This is not borne out by the evidence on record. The fact that a court has not agreed with the evidence adduced by an accused cannot be interpreted to mean that his right to fair trial was breached. This ground lacks basis and the same is dismissed.

10. SNO (PW1) testified that when the appellant was ferrying her home on his boda-boda motorcycle he raped her. He initially entered a forest and when she enquired what was wrong, he claimed to have lost his way but went back to the road. When they reached an area where there were some bushes, he stopped and said he wanted to urinate.

11. After the appellant had urinated he called her so that they could proceed. Instead of resuming their journey, he got hold of her by the hair and started to pull it. He told her that he wanted to sex with her but she declined. He threatened her with death. She submitted for they were in the forest alone after he had threatened to kill her. He undressed her and raped her.

12. He inserted his penis into her vagina and when he had finished, she left him on the ground, took her clothes and ran away. The accused caught with her when she was asking some two women to assist her.

13. At this point of her narration, a red flag ought to have been raised. Help had come but from her narration she did not pursue the help instead when the appellant pulled her to board the motor cycle she apparently did not protest. Was there rape? The most reasonable reaction was to protest loudly since she was no longer alone. She did not do so.

14. When being cross examined by the appellant she claimed he had a small knife in his pocket. The unanswered question is how she knew of it yet in her evidence she never talked about the presence of any weapon.

15. Metrine Auma (PW2) is the clinical officer who examined the complainant on16th March 2019. Her evidence was that she was dragged to the ground and slapped before she was being raped. This contradicted her version in court. In the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**(Madan, Miller and Potter JJA) held:

> **The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.**

The complainant did not paint a picture of herself as a reliable witness.

16. The medical evidence adduced by PW2 confirms the doubts I had entertained. There was no evidence of rape. The genitalia had no signs of forced entry. It is common knowledge that even in consensual sex, if a woman is not adequately prepared, there would evidence of inflammation. Nothing of the sort was seen and no spermatozoa were seen in spite of the complainant stating that the appellant had unprotected sex with her.

17. It was not justified for the clinical officer to conclude that there was evidence of attempted rape due to the alleged bruises she observed on her elbows and her knees. In any case, the finding of the bruises contradicted her evidence on how the alleged rape occurred.

18. The offence of attempted rape is an inchoate offence. An attempt to commit a crime is defined in the **Oxford Concise Law Dictionary (2nd Edition)** as:

> **Any act that is more than merely preparatory to the intended commission of a crime; this act is itself a crime.**

For an offence to be construed to be an attempt, it must pass the “but for” test. In the instant case, the complainant did not testify that the appellant was interrupted by anybody or by anything. There was therefore no attempt to rape.

19. The appellant testified that the complainant refused to pay him for the services. This defence was plausible for he testified that when he was arrested, she called him and asked him to go for his money.

20. From the foregoing analysis of the evidence on record, I find that there was no evidence on which to convict the appellant for the offence he was charged with or for the offence of attempted rape. I therefore quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and **SIGNED** at **BUSIA this 23rd Day** of January**, 2020**

KIARIE WAWERU KIARIE

JUDGE