



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 43 OF 2019

LAURENCE KISAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(From the original conviction and sentence in S.O.A case No.138 of 2018 of the
Chief Magistrate's Court at Busia by Hon. S.O Temu-Principal Magistrate)*

JUDGMENT

1. **Laurence Kisaka**, the appellant herein, was convicted of 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 25th day of November 2018 at [particulars withheld] village, Butula sub County within Busia County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of MA without her consent.
3. The appellant was sentenced to serve five years imprisonment. He has appealed against both conviction and sentence.
4. The appellant was represented by the firm of D. K Nabulindo & Company Advocates. He raised the following grounds of appeal:
 - a) That the learned trial magistrate erred in law and in fact by disregarding gross violations of Article 50 of the Constitution.
 - b) That the learned trial magistrate erred in law and in fact by convicting the appellant on the basis of insufficient evidence.
 - c) That there is new and compelling evidence that could change the direction of this case.
 - d) That the learned trial magistrate erred in law and in fact by not considering his mitigation.
 - e) That the sentence was harsh in the circumstances.

5. The appeal was opposed by the state through Mr. Mayaba, learned counsel who contended that the prosecution proved its case to the required standards.

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. My perusal of the record, does not reveal any instance when the appellant was denied a fair hearing as provided for under Article 50 of the Constitution of Kenya. This ground is therefore baseless.

8. The complainant in her evidence in court said the incident was on 28th November 2018. The charge states that the incident was on 25th November 2018. PW2, PW3 & PW4 in their evidence said the incident took place on 25th November 2018. Indeed she was examined at the hospital on 27th November 2018. The complainant's variance on the date is not fatal and is curable under section 382 of the Criminal Procedure Code.

9. An attempted offence is established when the acts of an accused person have gone beyond mere preparation. 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 therefore, I will endeavour to find whether the offence of attempted rape was established.

10. Maximilla Adhiambo (PW1) testified that prior to the incident complained of in this case, she had quarreled with a child of the appellant. When she reported the matter, the appellant refused to talk with her family members presumably over the incident.

11. On 28th November 2018 PW1 testified that she was going home at about 7 p.m. The appellant approached her from behind and knocked her down. He informed her that he was going to kill her. He had a knife. A struggle ensued while he held her throat. Two women went to the scene and intervened. She said that he informed her that he was going to teach her after quarrelling with his child. She interpreted his actions as an attempt to rape her.

12. Monica Auma Wangia (PW2) testified that when she was attracted to the scene by some screams, she found the appellant struggling with the complainant while he had a knife in his possession.

13. Silvia Auma (PW3) was one of the people who was attracted to the scene by the screams. When she reached where the appellant and the complainant were, she heard the appellant asking the complainant to tell the truth.

14. The evidence at the disposal of the learned trial magistrate did not at all prove the offence of attempted rape. This must have been a deliberate twist of facts by the complainant. The evidence of Silvia Auma (PW3) gave a clear picture that whatever the appellant was doing was not an attempt to rape. The two had a disagreement over a quarrel between the complainant and the appellant's children.

15. The conviction was not based on evidence. I accordingly quash the same and set aside the sentence and set the appellant free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 24th Day of March, 2020

KIARIE WAWERU KIARIE

JUDGE