



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO.18 OF 2016

NDUNDI MWAMBIRE KOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Sexual Offences Case No. 7 of 2014 of the

Chief Magistrate's Court at Malindi – L.N. Wandia, RM)

JUDGEMENT

1. Ndundi Mwambire Koi, the Appellant, appeals to this court against his conviction and sentence for attempted rape contrary to Section 4 of the Sexual Offences Act No. 3 of 2006 (S.O.A.). It was alleged that on 2nd February, 2014 at Golf Club area in Malindi District within Kilifi County the Appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of R.M.K. without her consent. At the conclusion of the trial he was found guilty and sentenced to ten years imprisonment.

2. In amended grounds of appeal filed on 11th October, 2018 the Appellant faulted the trial court for not affording him a chance to mitigate thus denying him a fair hearing. Further, that the sentence imposed on him was contrary to Section 4 of the S.O.A. Additionally, the Appellant contends his conviction was against the weight of the evidence adduced and his defence was never considered.

3. This being a first appeal the Appellant is entitled to a fresh analysis of the evidence in order for this court to come out with its own independent decision. In doing so, this court should be mindful of the fact that it never saw or heard the witnesses testify and does not have the advantage that the trial court had.

4. In his submissions, the Appellant stressed that he was not given a chance to mitigate before being sentenced and that the sentence of ten years imposed on him was harsh as the S.O.A at Section 4 provides imprisonment for five years as the minimum sentence for attempted rape.

5. As for the evidence adduced, the Appellant asserts his identification by the alleged victim was unreliable as she only stated he was the one after he was escorted to her by the people who had arrested him. He supported his submission on this point by citing the decision in **Mbae v Republic, Criminal Appeal No. 32 of 2004**.

6. The Respondent opposed the appeal stating that the prosecution had established that an attempted offence of rape was committed and the culprit was the Appellant. According to the Respondent, the Appellant cannot claim that he was not identified as the offence was committed during broad daylight and the complainant had sufficient time to identify her attackers. The decision in the case of **Michael Nganga Kinyanjui v Republic [2014] eKLR** was cited in support of the assertion that the Appellant was indeed identified. In the cited case, the Court of Appeal in concurring with both the trial court and the first appellate court that the appellant had been sufficiently identified held that:

“We are satisfied from the concurrent finding of fact that the complainant had sufficient opportunity, aided by the afternoon daylight, to positively identify the appellant. The appellant had shortly before the attack passed the complainant. One of the appellant’s confederates got hold of the complainant and as they struggled the appellant hit the complainant with a pistol, snatched his mobile phone and fled. Wanyonyi who, all along, was watching the attack from a 6 meter distance confirmed...”

7. Three witnesses testified for the prosecution. The complainant, R.M.K., testified as PW1 and told the trial court that on 2nd February, 2014 at about 10.30 a.m. she was from her place at [particulars withheld] going to wash clothes at [particulars withheld] where her boss lived. She was using a short-cut by the shores of the Ocean. On reaching the Golf Club the Appellant emerged with another man. They held

her and removed her clothes leaving her naked. She screamed as they kicked her. People responded to her alarm and the Appellant and the man he was with took off with her clothes. The people who had gone to her rescue gave chase and managed to arrest the Appellant in the forest but the other man managed to escape.

8. Cross-examined by the Appellant, the complainant told the court that her attackers had emerged from the forest grabbed her and pulled her into the forest. She started to scream as they removed her clothes. Those who went to her rescue found her naked.

9. PW2 Albert Kalume Kazungu, a fish monger, was on the material day going for fish at Eden Rock area. He was riding a bicycle and on reaching a thicket near the Golf Club he found the complainant naked and screaming for help. He enquired from her what the problem was and she told him that two men had gotten hold of her and pushed her to the forest wanting to rape her. He requested for a towel from Malindi Golf Club which the complainant used to cover herself. Other people had joined him. They entered the forest to search for the attackers.

10. About 300 metres into the forest they found the Appellant looking trapped. He was holding a lessso in his hands. They stopped him and asked him about the lessso. He said it belonged to his woman who refused to cooperate when they got to the forest and she screamed so he ran away. They took him to where the complainant was and she identified him and stated that he was with another man who had run away. They asked the Appellant to take them to the scene of crime and he cooperated and took them about 100 metres from the road where the complainant's clothes and a male trouser were recovered. The Appellant and the complainant were escorted to the police station by officers of a private security company who had come to the scene.

11. PW3 Corporal Mohamed Bakata investigated the matter. He produced the clothes as exhibits in the case.

12. When the Appellant was placed on his defence and Section 211 of the Criminal Procedure Code complied with, he opted, as he was constitutionally entitled, to keep quiet. He also indicated that he was not calling any witness.

13. The issue to be determined in this appeal is whether the prosecution established beyond reasonable doubt that there was an attempt to rape the complainant, and if so, whether that attempt was sufficiently linked to the Appellant.

14. In summary, the unchallenged evidence that was adduced established that the Appellant and another person forcefully dragged the complainant who was a stranger to them and stripped her naked. When they were undressing her they uttered words in Kiswahili that "hii siku ya leo tutamalizana na wewe kama sijui" meaning that they were going to deal with her that day. When the Appellant was arrested he told those who arrested him, who included PW2, that the complainant was his woman but had refused to cooperate.

15. The Appellant was found with the complainant's lessso and he led those who arrested him to where her clothes were.

16. Everything points to the fact that the Appellant intended to have a sexual encounter with the complainant. The intended sexual encounter, as admitted by the Appellant himself at the time of his arrest, was not consensual. That is what is called attempted rape.

17. In **Abraham Otieno v Republic [2011] eKLR; Kisii H.C. Criminal Appeal No. 53 of 2009**, Asike-Makhandia, J (as he then was) defined the ingredients of attempted rape as follows:

For an offence of attempted rape to be deemed to have been committed under the section, the prosecution must prove that the culprit acted in such manner that there was no doubt at all as to what his intention was. The intention must be to rape. It must be shown that he was about to rape the victim but was stopped in tracks and or in the nick of time. The intention to rape must be manifest. Such intention can be manifested for instance by word of mouth or conduct of the culprit. If the culprit proclaims his intention to rape and directs his efforts towards the goal for instance, by holding the victim or pushing her to the ground, undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but does not go the whole hog because of *factus interveniens*, that would be good evidence of attempted rape. Alternatively, if the culprit without expressing his intentions verbally gets hold of the victim, fondles her, removes her clothes including her pants and also undresses himself in preparation thereof but for one reason or another something happens which compels him to stop, again that would be good evidence of attempted rape."

18. In this case the Appellant while with another man grabbed and pulled the complainant, who was not their acquaintance, into a forest. They then removed her clothes including her pants and told her they would deal with her that day. What other intention can be read from their acts? The only conclusion is that they wanted to have carnal knowledge of her without her consent.

19. Identification of the Appellant was not in doubt at all as he was arrested with the complainant's lessso. He also led those who arrested him to the scene of the attempted rape where the complainant's clothes were recovered. The complainant also identified the Appellant when he was taken to where she was immediately after his arrest. The Appellant himself told PW2 that the complainant was his woman but she was refusing to cooperate. The Appellant's claim that he was not properly identified is therefore without merit.

20. There is no basis for the Appellant's claim that his defence was never considered. Since he did not offer any evidence, his defence could only be gleaned from the replies to the questions he put to the prosecution witnesses during cross-examination. The trial magistrate carefully analyzed the evidence of each prosecution witness including what they stated in cross-examination before reaching her decision. The trial magistrate cannot therefore be accused of failing to consider the Appellant's defence.

21. I therefore agree with the finding by the trial court that the Appellant attempted to rape the complainant. His conviction is therefore sustained.

22. On the appeal on sentence, I find that the Appellant is indeed correct that the trial magistrate did not give him an opportunity to mitigate. His sentence of ten years imprisonment is found inside the judgement delivered on 24th July, 2015. It is fused with the judgement and is therefore part and parcel of the judgement.

23. In the Criminal Procedure Bench Book published by the Kenyan Judiciary in 2018 it is stated at page 137 that:

“103. Mitigation enables the offender to submit evidence that may reduce the severity of the sentence... the court may inquire into the facts relied upon by the offender in mitigation.

104. The court should explain to the offender his or her right to make a statement or submit evidence in mitigation.”

24. It is therefore crucial that a convicted person should be availed the opportunity to mitigate before sentence is passed. It is only through mitigation that the court can learn of the circumstances of the offender before it.

25. The trial magistrate therefore erred in failing to accord the Appellant a chance to mitigate.

26. What should I do now? Ideally, the Appellant ought to be sent to the trial court to present his mitigation followed by resentencing. There is no mitigation on record upon which this court can consider the appropriate sentence for the Appellant. The prosecution was never given an opportunity to state if the Appellant had any previous convictions.

27. I, however, find that remanding this matter to the trial court for resentencing is not necessary in the circumstances of this case. Section 4 of the S.O.A. provides the minimum sentence for attempted rape as five years. The sentence may be enhanced to life imprisonment. In awarding a sentence higher than the minimum it is important for the trial court to state the reasons. In the Appellant's case no reasons were stated as to why he was sentenced to ten years imprisonment instead of the minimum sentence of five years.

28. In the circumstances I allow the appeal on sentence and set aside the imprisonment of ten years. The same shall be substituted with a prison sentence of five years. The appeal succeeds in that regard only.

Dated, signed and delivered at Malindi this 19th day of December, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT