REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 66 OF 2014

JOHN ODUOR MAYOBE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. H. Wandere PM in Mumias Cr. Case No. 847 of 2013 delivered on 30.05.2014

J U D G M E N T

Introduction

1. The appellant herein John Oduor Mayobe was convicted and sentenced for ten (10) years for the offence of attempted raped contrary to section 4 of the Sexual offences Act No. 3 of 2006.

2. The particulars of the said offence were that on the 17th day of September, 2013 at [particulars withheld] Village, Khalaba Sub-location of Matungu District within Kakamega County he unlawfully and intentionally intended to cause his penis to penetrate the virgina of J M O without her consent.

3. There was also an alternative charge, that of committing an indecent act with an adult contrary to section 11(a) of the Sexual Offences Act Number 3 of 2006 though the trial court did not make a finding on the same

The appeal

4. Appellant who was aggrieved by the said conviction and sentence on the main charge filed his own appeal on the following homemade grounds:-

(1) That I did not plead guilty to the above appended charge.

(2) That the trial magistrate erred both in law and fact in convicting me based on the evidence that was not only malicious but was uncorroborated, discredited, inconsistent and lacked probative value

(3) That the trial court made the decision based on anticipations and personal opinions that is not warranted for in law

(4) That there was no exhibit produced in court to confirm the allegations

(5) That it was only the family members who testified thereby making the trial process unsafe.

(6) That the investigating officer relied on the evidence of only family members which could have been a premeditated plan to fix him

(7) That the trial court did not consider my defence which was sufficient enough to exonerate me from any wrong doing

(8) That the trial court did not consider that we had grudges with this family hence this case

(9) That more grounds will be adduced when I get the lower court proceedings.

The appellant prays that his appeal be allowed conviction quashed and sentence set aside so that he is set at liberty.

5. The appeal was canvassed both orally and by written submissions. In his written submissions the appellant claimed that the prosecution's evidence was stage managed to incriminate him and that the prosecution witnesses MAY have colluded to implicate him with this crime. He added that the trial court did not consider that there was no evidence from other quarters apart from his family.[Emphasis mine]

6. He added that the evidence by the investigating officer was not proved and he also raised issue with the delay in reporting the crime by PW1. He maintained that this was a systematic scheme to incriminate him with the crime that never was. He submitted that he is innocent.

7. In a short rejoinder Mr. Ng'etich for the prosecution opposed the appeal. He submitted that the appellant was properly identified by PW1 to PW4 who recognized him. He added that the evidence of the prosecution was corroborated leaving no doubt that appellant committed the crime. He also stated that there was no need for medical evidence because of the nature of the offence which did not require such evidence. He also relied on the record and judgment of the learned trial court in opposing the appeal.

8. This being a first appeal it is the duty of this court to analyse the evidence on record, re-evaluate it and come up with its own conclusion bearing in mind the fact that it neither saw nor heard the witnesses at the time of trial to assess their demeanor as they testified. See **Okeno – vs –Republic[1972]E.A 32**

The Prosecution Case

9. The prosecution called five (5) witnesses among them two minors. The prosecution case was that the complainant on the 17.09.2013 at about 9 pm was heading to the main house from the kitchen when she was suddenly held by the waist. She felt someone grabbing her breast and he private parts. In the struggle she fell down on her back and the attacker fell on top of her. She started screaming and two of her children came to her rescue. The two children saw her and even saw the appellant on top of her. Her blouse and skirt were torn by the appellant. She stated in her evidence that the attacker wanted to rape her.

10. She testified she had already identified the appellant when he held her by the waist as she turned with her spot light on. Her children who were at the scene, namely PW2 and PW3 also saw the appellant with the help of the light from their mother's torch. One of the children ran to a neighbour's (PW4) house and called him. PW4 came and since we had a torch was able to see the appellant. PW1 testified that she reported the matter to the police at Harambee Police Station the next day. PW1's testimony was corroborated by her two children PW2 and PW3 and also that of PW4. The appellant gave a brief sworn testimony in which he denied the offence and asserted that this case was a frame-up to settle land related issues he denied being at home on the material evening. He also stated that if the complainant's allegations were true then there would be no reason why other family members and neighbours could not come to her rescue when she screamed. He also claimed he was not properly identified.

Analysis and Determination

11. All the witnesses save for PW5 saw the accused at the scene struggling with PW1. All of them testified that they knew the appellant very well. He was known to each one of them, first as member of the family and as a neighbour. The matter was investigated by PW5 No. 57074 from Harambee police patrol base where he received the complaint on the 18.9.2013. He went to the complainant's home after receiving the report and saw the scene. He observed that the scene was disturbed, he recorded witness's statements and also learnt that the appellant was a brother of the husband of the complainant. He produced the complainant's torn skirt and blouse which were marked as PEX1 and 2 respectively.

12. Having heard the rival submissions by the prosecution and the appellant and having reread the judgment by the trial magistrate, the following are the pertinent issues for determination;-

(1) Whether there was need to produce exhibits to confirm the allegations.

(2) Whether the evidence was malicious, uncorroborated discredited, inconsistent and lacked probative value.

(3) Whether the appellant was properly and positively identified/Recognized.

13. As regards the first issue herein the trial court properly explained that this was a case of attempted rape. The court at page 4 of its judgment stated that "**that act was not completed therefore medical evidence could not have been availed. Secondly, no under garments could have been produced before court because this accused person was found in the act of tearing the blouse and skirt of the complainant and he had not reached the undergarment of the complainant for them to be exhibited**." I do agree with the findings of the trial court as regards the evidence and/or the exhibits produced. This was an attempted rape. It was sufficient that the complainant's outer garments were produced.

14. The appellant intended to do the act but was found before he could overpower the complainant. He managed to tear the complainants skirt and blouse which acts showed the intention that he had. He knew very well that the complainant's husband was not present and took advantage of the situation. Fortunately he was caught red handed. I therefore find that the ground that there was no exhibit produced in court to confirm the allegation cannot stand.

15. On the second issue I do find that the evidence adduced by the prosecution was consistent. The same was well corroborated by the prosecution witnesses PW1, PW2, PW3 and PW4. There was no malice that could be read from the evidence by the said witnesses. Even the appellant's suggestion that there was a land dispute between him and complainant's husband is doubtful in my view and does not cast any doubt in the mind of this court as to what happened on the material night.

16. The said witnesses found the appellant in the act and they were able to see him. He was somebody they knew and therefore recognized him and properly identified him with the help of the torches that were lit. It court be said that since the witnesses were from one family their evidence cannot be relied on by the courts. As already stated herein above the evidence in this case was consistent and the appellant was not able to challenge it in any way. It remains therefore that grounds 2,3,5,6 and 8 of appeal cannot stand.

17. For the above reasons I find that the appeal lacks merit. The trial court relied on straight forward evidence by the prosecution. The appellant who alleged malice did not prove the same. Suffice it to say that PW2 and PW3 could not have held a grudge against the appellant since they were minors. The appellant tried to say that both PW2 and PW3 were coached in their evidence, but considering the totality of the prosecution case, the appellant's insinuations are baseless.

Conclusion

18. This court upholds the trial courts findings and the appeal herein is dismissed. Right of appeal to the Court of Appeal from today.

Orders accordingly,

Judgment delivered, dated and signed in open court at Kakamega this 30th day of May, 2017

RUTH N. SITATI

JUDGE

In the presence of;

……Present in person…….....for Appellant

……Miss Kibet…….....for State

……Polycap Mukabwa…….....…Court Assistant