REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 49 OF 2013

SIMON MWITI.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

JUDGMENT.

The Appellant Simon Mwiti was charged with attempted rape contrary to section 4 of the Sexual Offences Act No. 3 of 2006 (SOA). The particulars of the offence were that on 1/1/2012 at Tunyai Location, Tharaka-Nithi County, attempted to rape one R M. without her consent.

The Appellant was tried, convicted of the offence and sentenced to 5 years imprisonment.

The Appellant was aggrieved by the said conviction and sentence and therefore filed this appeal. The grounds of appeal are as follows:

a. **The Learned Magistrate erred in law and facts in convicting the appellant on insufficient and contradictory evidence;**

b. **The Learned Magistrate erred in law and facts in failing to believe the evidence of the appellant;**

c. **The Learned Magistrate erred in law and in facts in failing to find that both the appellant and the complainant were lovers and that the appellant was assaulted by the husband of the complainant;**

d. **That the Learned Magistrate erred in law and in facts in sentencing the appellant excessively.**

This being the first appellate court, I have subjected the evidence adduced before the trial court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision of **Okeno Vrs. Republic 1972 EA 32**.

The facts of the prosecution case were that, PW1 R M was on 1/1/12, asleep at around 11PM when she heard her cow coughing and went outside to check with her torch. She found nothing unusual with the cow and decided to go back to her house and as she approached the door, a person abruptly held her from the shoulders whereupon she shone her torch and recognized the intruder (the appellant) who was a "boda boda" rider (motor cycle). She asked the intruder what he wanted and the intruder forced her to enter inside the house so that he could tell her what he wanted. The appellant then ordered her to strip off her clothes but she refused. The appellant who was armed with a panga threatened to cut her if she dared to scream. The appellant then removed his trouser and pants and ordered PW1 to go into bed. As they slept, PW1 heard her husband calling her while outside the house and she screamed and her husband pushed the door which opened and he entered inside. A struggle ensued between the appellant and PW1's husband but the appellant overpowered PW1's husband who had a deformed leg and fled. One M arrived at the scene whereupon the appellant fled leaving behind his personal effects namely; clothes, identity card, wallet, phone and house keys all of which were identified by PW1 in court and produced as exhibit. The following day i.e. 2/1/12, they proceeded to Tunyai Administration Police camp and reported the matter. They were then instructed to go back home and call elders but the accused refused to attend the meeting whereupon they reported the matter at Chiakariga patrol base.

PW2, A M who was PW1's husband corroborated PW1's evidence by testifying that on 1/1/12 at around 11PM, he arrived home and found his door open. He pushed the same and shone a torch at the appellant whom he found at the door and his wife (PW1) screamed as he struggled with the appellant. The appellant overpowered him since he had a deformed leg and he ran away leaving behind his personal effects which included on ID card, panga, wallet, trouser phone and house keys. The following day, he took the items to the police station whereupon the appellant was arrested. He further testified that he knew the appellant as a "boda boda" operator and that after the appellant had escaped one M who was his brother arrived at the scene.

PW3 PC Johnson Kirgot, a police officer based at Chikariga Patrol base testified that on 12/1/12, he was at the station when PW1 reported that there was a person who wanted to rape her. He booked the report, took witness statements and thereafter the appellant was arrested by one PC Nguu and PC Mbugua. He further testified that he was given personal effects belonging to the appellant.

In his sworn testimony the appellant denied the offence and stated that a grudge started between him and PW2 when he bought a motor cycle before PW2. He said that one C he had drunk local brew he had drunk local brew with PW1 and PW2 then alleged they had been staying together and that he chased him with a panga. In cross examination on how his clothes came to be in PW1's house, he claimed that he used to live with PW1 before she got married and that she used to wash his clothes.

DW2 Jacob Mwanthi a "boda boda" (motor cycle) rider told the court that on dates he could not recall, he used to find PW1 at the Appellants house washing clothes and he heard the appellant complain that his clothes and money were stolen.

The appeal was opposed. It was contended by Mr. Kariuki, counsel for the State, that the prosecution had adduced sufficient evidence to sustain a conviction and that the Appellant's defence did not cast any doubt on the prosecution's case. The Learned Counsel further contended that the sentence meted on the appellant was very lenient because under section 4 of the Sexual Offences Act, it can be enhanced to life imprisonment. On this basis, he urged the court to dismiss the appeal.

Mr. Kimathi, counsel for the appellant on the other hand opted to argue the 4 grounds of appeal as one. It was his contention that the learned trial magistrate convicted the appellant on insufficient and contradictory evidence and that the complainant's evidence was not corroborated by any other evidence.

I have carefully considered this appeal and the submissions by both counsel.

Whether there was sufficient evidence to found a conviction. No doubt, PW1 was alone when the incident occurred as is common in such offences. The assailants will ordinarily take advantage of the victim when alone. PW1 narrated what happened before her husband (PW2) arrived home. PW2 said that on

arrival at his house at about 11 pm he found the door to his house open, and that the appellant was near the door where a struggle ensued before the appellant managed to escape leaving behind his clothes and other items. PW1 and 2's evidence is consistent as to the circumstances prevailing when PW2 arrived home. Apart from claiming that he was framed the appellant did not deny whether or not he was at PW1 and 2's house at the said time. PW1 recognized him and so did PW2. He is a person known to them and they used torches. He had even talked to PW1 ordering her to strip. In fact the appellant does not deny that he was known to PW1. I am satisfied that PW1 and 2 identified the appellant as the person who paid PW1 a visit at such ungodly hour i.e. 11.00 pm. At first the appellant alleged that he has been framed because he bought a motor cycle before PW2 did, meaning that PW2 was jealous of him. However, the appellant kept building and changing his case. Later in cross examination he claimed that his clothes were found at PW1 and 2's house because PW1 used to wash his clothes. Incidentally this was the first time he was making this claim. Nowhere in the prosecution evidence did the appellant allege that PW1 was his lover or that she had taken his clothes to wash. Then came DW2 the appellant's witness. DW2 contradicted the appellants evidence when he said that he had seen PW1 several times at appellant's house washing his clothes and that the appellant had complained that his keys and money had gone missing. The defence evidence is at such variance that it is totally unbelievable. PW1 could not have taken the clothes to wash for the appellant and in the same breadth steal them as alleged by DW2. Another reason why the defence is glaringly unbelievable is because apart from the appellant's clothes being found in the complainants house, the keys, wallet and phone were also found in PW1s house. The phone wallet and keys could not have been there for washing. The presence of applicants keys, phone, shoes, panga, wallet, voters card, ID card in PW1's house goes to strengthen PW1's evidence that the appellant fled from PW1's house upon PW2's arrival behind the personal effects. I am satisfied beyond any doubt that it is the appellant who entered PW1's house on the material night and forced her to strip and he had taken out his clothes in readiness of raping PW1. The appellants defence is an afterthought unbelievable and I dismiss it as untrue.

On the question of corroboration, there is really no requirement that there has to be corroboration in sexual offences. In the case of **Mukungu V. Republic (2002) EA 483** the court of appeal expressed the view that the requirement for corroboration in sexual offences affecting adult women and girls was unconstitutional to the extent that the requirement was against them qua women or girls. It is sufficient that the trial court gives the reasons for believing the complainants evidence.

Whether the defence was considered; the trial court did consider the appellant's defence extensively and found that it was untenable. The court said:-

"**It is to be noted that items found in the complainants house were not only the accused clothes but included his shoes, wallet with voters card and ID card. These items were clearly left behind by the accused as he fled the scene on hearing the complainant's husband returning home."**

Like the trial court, I do find that the defence was not convincing and is unbelievable having taken into consideration all the evidence on record in its totality.

Whether the offence of attempted rape was proved section 4 of the SOA 3 of 2006 provides as follows:

"4. 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."

PW1 vividly explained that she had been ordered to strip and that the appellant too had undressed and as they got to the bed PW2 called from outside. Having believed PW1's version of what occurred that night, the appellant's intention must have been one, to take part in a sexual act with PW1. On the totality of the evidence I am satisfied that the charge was proved beyond any doubt and I find the conviction by the trial court to be safe and I hereby confirm it. The end is that the appeal is dismissed in its entirety.

DATED AT MERU THIS 24TH DAY OF APRIL, 2015.

R. P. V. WENDOH

JUDGE.

Mr. Mulochi for State

Mwenda Court Assistant

Mr. Wamache holding brief for Mr. Kimathi for Appellant.