REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL NO.52 OF 2014

(Appeal from the Judgment of Hon. L. Gicheha in Malindi CM Cr. Case No.819 of 2012)

WILSON NDUME JIRA *alias* BUSH.....APPELLANT

VRS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with attempted rape contrary to section 4 of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that the appellant on the 26th day of November, 2012 in Malindi District within Kilifi County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of E K without her consent.

He was convicted and sentenced to serve eight (8) years imprisonment. The grounds of appeal are that the case was not proved beyond reasonable doubt, the ingredients of the charge were not proved, that the burden of proof was shifted and that the sentence is excessive. Mr. Shujaa, counsel for the appellant, submitted that the prosecution was expected to prove that the appellant had the intention of causing penetration and that the overt act was sufficiently proximate to the intended offence: All what was alleged was that the appellant pushed the complainant down and fell on her. It was at 6.45 p.m and on the road. Appellant had not attempted to remove his clothes and was arrested at that stage. The appellant did not even talk to the complainant. A stranger and one George arrived at the scene but were not called to testify. The burden of proof was shifted. Appellant testified that he met the complainant in the forest with her boyfriend and she thought the appellant would notify her husband. There was no intention to rape the complainant. Further, appellant was a first offender and yet the minimum sentence of five years was not imposed yet there were no aggravating circumstances.

Mr. Nyongesa, prosecution counsel, opposed the appeal. Counsel contends that it is not mandatory to prove that the appellant removed his trouser or that of the complainant. The only inference one could conclude was that there was intention to rape the complainant. Those witnesses who were not called could not have changed the evidence already on record and that the burden of proof was not shifted.

The record of the trial court shows that PW1 was the complainant. She testified that on 26/11/2012 at 6.45 p.m she was with H heading home. There was a stranger walking next to them. They saw the appellant walking towards them. He told the stranger to give him one woman. He pushed H towards the stranger and held PW1's hand. The appellant started pulling pw1's hand towards the forest. H went and started pulling her. She fell and the appellant fell on her thighs. A neighbour called George went there and all of them including appellant started walking towards home. The appellant then escaped as they were discussing the issue. It is her evidence that she suspected the appellant's intention because he told the stranger to give him one of the ladies. PW1 is a 22 year old student. The matter was then reported to the police and she was issued with a P3 form.

PW2, H N was with PW1. They had escorted their friend A and were walking back home along Mtangani road. A young man was walking behind them. The appellant appeared from the opposite direction and told the young man to give him one woman.The appellant pushed PW2 towards the young man and started pulling pulling PW1. PW1 fell on the ground and the appellant fell on her. The two were facing each other. She screamed as she thought the appellant would rape PW1. George went to the scene and all of them started going home including the appellant. The matter was later reported to the

police.

PW3, Ibrahim is a Clinical Officer. He examined PW1 on 3/12/2012 and filled her P3 form. PW1 had injuries on both wrist and left knee. He classified her injuries as harm. **PW4, PC John Muthiya** was based at the Malindi Police Station. He took over the case from the investigating officer, Corporal Susan Kibaoni who had been transferred. By that time the appellant had already been charged.

The main issue for determination is whether the appellant attempted to rape PW1. The evidence of PW1 and PW2 is that they all knew the appellant very well. They even know he has a nickname, alias Bush. The appellant saw two ladies he knew and told the stranger why he was not giving him one woman. This was at 6.45 p.m and along Mtangani road. This is not a tarmacked road but it is a murram road used by members of the public. The stranger made no attempt to hold PW2 and it appears he simply walked on. After the incident all the parties started walking towards him. There was no attempt to remove PW1's clothes or even the appellant made no attempt to remove his clothes.

The incident can be given different interpretation. According to PW1, she suspected that the appellant's intention was to rape her as he told the stranger to give him one of the ladies. According to PW2, she thought the appellant would rape PW1. The trial court concluded that by knocking PW1 down, the appellant's intention was to rape PW1.

It is clear that the parties knew each other very well. Could the appellant rape PW1 while knowing that PW2 was there. The stranger did not hold PW2 and it appears PW2 went to hold the complainant. It is PW2's evidence that she was also pulling PW1. At the moment of pulling by PW2 and the appellant, PW1 fell and the appellant fell on her. Definitely PW2 was also there screaming. The appellant is not a stranger to them. No attempt to remove clothes was made. The incident happened on a road. The evidence does not show how long it took.

Given the circumstances of the case, one cannot conclude beyond reasonable doubt that there was intention to rape PW1. It could be possible that the appellant was simply making jokes with people he knew. By saying give me one of the ladies he could have just been joking. He just said that loudly. PW2 did not fall when the appellant pushed her towards the stranger. The appellant's evidence in defence was that he found PW1 in the forest with her boyfriend and they though he would report them. I do not think that evidence raised any doubt on the prosecution case.

I do find that the totality of the prosecution case did not prove the case beyond reasonable doubt. There was no attempt to have sex with PW1. I believe the incident only took a short time. Although one cannot conclude with finality another pe4rson's intention, it is possible to make a definite conclusion when all the facts taken together lead to that definite conclusion. It is doubtful that the appellant would have raped PW1 at 6.45 p.m on the road while PW2 was there screaming. PW2 is not a minor. She testified that she completed class 8 in 2011.

In the end, I do find that the case was not proved beyond reasonable doubt. The appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 29th day of July, 2015.

SAID J. CHITEMBWE

JUDGE