REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO.13 OF 2015

ABDIRAHAMAN DARACHA GUYO.....APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in Criminal Case No.482of 2014 of the Principal Magistrate's Court at Marsabit by Boaz M.Ombewa – Ag.Principal Magistrate)

JUDGMENT

The Appellant, **ABDIRAHAMAN DARACHA GUYO**, was charged with an offence of attempted rape contrary to section 4 of the Sexual Offences Act of 2006.

The particulars of the offence were that on the 1st June 2014 at [Particulars Withheld] in Marsabit County, the appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **E D,** without her consent.

The Appellant was found guilty of the offence and sentenced to serve 10 years imprisonment. He now appeals against both conviction and sentence.

The Appellant was represented by Mr.Biwott, the learned counsel who relied on three grounds of the ten the Appellant had filed in person with the memorandum of appeal on 18th August 2014. He relied on the following grounds:

1. That the learned magistrate erred in law and in fact in failing to establish that the charges (sic) levelled against the Appellant herein was never proved beyond reasonable doubt.

2.That the learned magistrate erred in law and in fact in convicting the Appellant without of a medical doctor or any medical report whatsoever.

3.That the learned magistrate erred in law and in fact in failing to establish that the witnesses gave conflicting evidences (sic) that did not warrant any conviction.

The state opposed the appeal through Mr. Mwangangi, the learned counsel.

Briefly the facts of this case are that while the complainant was going home from church, she met the Appellant who started to seduce albeit in a crude manner. She was in company of a cousin aged five years. When she ignored his advances, he pursued her, held and knocked her down and attempted to rape her. When she raised an alarm, he fled.

The Appellant contended that he was framed up in this offence due to an existing grudge with the complainant's cousin.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and 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 VRS. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

The medical evidence adduced was attacked from two fronts. In his oral submission, Mr. Biwott contended that no basis of the production of the P3 form by another person other than the maker was laid. Mr. Mwangangi on the other hand argued that the provisions of section 33 and 50 of the Evidence Act were complied with.

Mr. Biwott raised issue with the evidence of the doctor who produced the P3 form of the complainant. He felt that it was wrong for the doctor to produce it as he was not the one who examined the complainant.

Dr. Imbusi Mark (PW4) produced the P3 form of the complainant on behalf of a colleague. It was produced under s.33 and s.77 of the Evidence Act. **PW4** said that he worked with the maker of the document and that he could identify his handwriting. It was quite proper for **PW4** to produce the P3 form. In any case the Appellant informed the court that he had no objection to **Dr. Imbusi** testifying on behalf of **Dr.Sereti.** Nothing therefore turns on this ground.

I will address the 1st and the 4th grounds together for they raise issues of sufficiency of evidence and its quality. Mr. Biwott invited me to make a finding that there was contradiction in the evidence of the complainant and that of **Kabala Jarso (PW2).**

With respect, I do not find any contradiction in the evidence of these two witnesses. They both testified that at the time of the complained of incident, they had parted ways. **PW2** was attracted back by the distress cry of the complaint.

The complainant testified that she found the Appellant seated. After she had passed him,he started following her and asked her to wait for him but she declined. He asked for her name and declared that he loved her. He held her pushed and knocked her down. He removed her headscarf and placed it in her mouth. He held her by the neck and lowered his pair of trousers and her pants. When he wanted to rape her both her and her cousin screamed. When he saw people going there, he escaped. These are the screams that attracted **PW2.**This witness said that she saw the Appellant running towards an open field.

The P3 form **(exhibit 2)** indicated that the complainant's tee-shirt and dress had dust and that she had bruises on the neck that was swollen.

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, the acts of the Appellant went beyond mere preparation. Were it not for the screams of the complainant and her cousin, he would have raped her.

I am satisfied that the evidence on record was sufficient to found a conviction on. Consequently I find that the appeal lacks merit and the same is dismissed. I therefore uphold the conviction and the sentence meted out by the trial court.

DATED at Marsabit this 24th day of November 2015

KIARIE WAWERU KIARIE

JUDGE