



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 146 OF 2006

BENEDICT MUTISYA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 793 of 2003 by

Hon. Richard Odenyo - S.R.M. on 3/11/2006)

J U D G M E N T

1. The appellant was charged with the offence of attempted rape contrary to Section 141 of the Penal Code. Particulars of the offence thereof being that on the 4th day of July 2003 at **[particulars withheld]** village, Nzawa sub location in Mwingi District within Eastern Province, attempted to have carnal knowledge of **J M M** without her consent.

In the alternative he was charged with indecent assault on a female contrary to Section 144(1) of the Penal Code.

Particulars of the offence thereof being that on the 4th day of July, 2003 at **[particulars withheld]** village, Nzawa sub location in Mwingi District within Eastern Province, unlawfully and indecently assaulted **J M M** by touching her private parts.

2. He was tried, convicted on the main count and sentenced to serve 5 years imprisonment. Being aggrieved by the conviction and sentence he now appeals on grounds that:

- i. The learned trial magistrate erred in law and fact in holding that the charge against the appellant had been proven beyond reasonable doubt.
- ii. That the learned trial magistrate erred in law and fact in failing to sufficiently consider the defence testimony or at all which raised serious doubts on the credibility of the prosecution evidence.
- iii. That the learned trial magistrate erred in law and fact in granting a sentence which is manifestly excessive in the circumstances and based on irrelevant and extraneous factors.

3. It was the submission of counsel for the appellant, **Mrs. Wambua** that the prosecution's evidence was contradictory; failure of the complainant to seek refuge in a nearby home cast doubt to her story; The alleged events having happened in broad daylight people at several homesteads would have witnessed the event; evidence of torn clothes and injuries sustained having not been

- produced was evidence of no offence having been committed; and that the defence of the appellant raised doubts.
4. Learned state counsel **Mr. Mwangi** opposed the appeal. He stated that the complainant positively identified the appellant as the person who held her hand, pinned her on the ground and removed her clothes. Further he stated the evidence of the complainant was corroborated by that of PW2 who was in the vicinity. PW2 who was a neighbour to the appellant recognized him. He urged the court to find that the trial court was right in making a finding that the defence was a mere denial.
 5. Briefly, the prosecution's case was that PW1, **J M M** was herding her cows when the appellant who was also herding his cows at the same place knocked her down, struggled to remove her clothes. He inserted his hands in her skirt. When she struggled back he covered her mouth with her hands. PW2, **Muli Munywoki** saw the appellant chasing after PW1, he knocked her down and lay on her. PW1 then left crying. PW3 arrested the appellant.
 6. In his defence the appellant denied having committed the offence in issue. It was his evidence that he saw two (2) cows and a donkey having strayed onto his farm. He went to drive them out. He saw the complainant at a distant driving a donkey which carried water. When he asked why she let animals stray onto his farm, she insulted him and came up with false allegations. She said there was a land dispute between him and PW1's family.
 7. Further, he stated that the complainant's paternal uncle sued him in civil case No.171/1994. On the 27th July 2007 he went to complain to the Assistant Chief that the complainant's father was defaming him. The chief notified him that the matter had been reported to the police. On 1/8/2003 he went to see the OCS Migwani police station. He was released on bond. Thereafter he was arrested. He denied having touched the complainant. It was his defence that the complainant had a criminal case No. 47/2004 against him yet she did not raise the allegations raised in the instant case.
 8. The appellant called two (2) witnesses. DW2 his wife said the complainant told her that the accused had not done anything to her. DW3, **R M M** a neighbour saw the appellant and the complainant at a distance talking in loud tones. She however did not see how they parted.
 9. This being the first appellate court, it is my duty to re-evaluate the evidence adduced before the trial court and come up with my own conclusions and findings bearing in mind that I neither saw nor heard witnesses who testified (*See Okeno -vs- Republic 1972 E.A 32*).
 10. An evaluation of evidence adduced clearly shows that when the complainant encountered the appellant while coming from the river, she had gone to fetch water from the river and she was also grazing cows. According to her, the cows 'got mixed' with those of the appellant. The appellant on the other hand argued that he was on the farm spraying his crop with pesticide when he saw two (2) cows with a donkey stray onto his farm. He had gone to remove the cows from his farm when he saw the complainant. When she reached some 30 metres away from him he asked her why she let animals stray to his farm and she denied the allegations. The complainant however said that the appellant held her hands and declared that he would teach her a lesson.
 11. It is evident that the act of the animals straying on the farm/or "getting mixed" up with animals whichever was true angered the appellant. In his defence the appellant established that there had been a long outstanding disagreement between their families. This was as a result of a land related issue. The appellant states that the complainant insulted him when he asked about the animals. Although the appellant does not say what happened after the alleged insult, the complainant filled in the events that followed thereafter, the appellant threw down the stick he had and chased after her, caught up with her, kicked her and she fell down. They struggled. He wanted to remove her clothes. He inserted his hands into her skirt as they struggled. A person, one **Muli** went by.
 12. The question to be posed at this stage is whether the appellant did have an intention of raping the complainant but there was some interruption that deterred him from actualizing his action of violating her sexual autonomy. PW2, **Muli** had this to say:

“...it was Mutisya who was ahead of M M. After a short while the latter caught up with the former. I could see Munywoki touching M M. The latter was resisting being touched. I saw the said Munywoki run after M M. He chased her into the shamba. I was watching the events from about 40 metres away. Then Munywoki fell M. I heard M telling Munywoki not to sleep on

her. That Munywoki had slept on her cloth. Then M left that place crying saying that she would report the incident when she reaches home...”.

The unfolding events as stated by the eye-witness suggests that the Appellant assaulted the complainant. A person chasing after another who falls and the aggressor falls on him/her lying on the other's cloth cannot be deemed to be sexually harassing her. From the evidence adduced it cannot be said with certainty that the appellant attempted to rape the complainant.

13. In the premises I find the appeal having merit. It is allowed. The conviction is quashed and the sentence set aside.

14. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 25TH day of MARCH, 2014.

L.N. MUTENDE

JUDGE