



215/2014

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 115 OF 2009**

**JACKSON MUTHAMA MATOTYA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 21 of 2009 by Hon. F.M. Nyakundi, PM on 4/6/2009)*

**JUDGMENT**

1. The appellant was charged with the offence of attempted rape contrary to **section 4(1)** of the **Sexual offences Act, 2006**. Particulars of the charge were that on the **21<sup>st</sup> October, 2008** at around 11.00 am at **Kako sub-location** in **Makueni District** within **Eastern Province**, he unlawfully attempted to have carnal knowledge of **M M M** without her consent. In the alternative he faced a charge of indecent assault of a female contrary to section **11(1)** of the **Sexual Offences Act 2006**. Particulars of the offence being that on the **21<sup>st</sup> day of October, 2008**, at **Kako sub-location** in **Makueni District** within **Eastern Province**, he unlawfully indecently assaulted **M M M** by touching her private parts.
2. He was tried and convicted on the main count and sentenced to serve **15 years** imprisonment. Being aggrieved by the conviction and sentence he preferred the instant appeal on grounds that:
  - i. The learned trial magistrate erred in law and fact when she convicted the appellant of an offence which was not proved beyond reasonable doubt.
  - ii. The learned trial magistrate erred in law in finding that the accused person was guilty of the offence charged of attempted raped.
  - iii. The learned trial magistrate erred in law and fact when she convicted the appellant without any corroborating evidence.
  - iv. The learned trial magistrate erred in law and fact when she dismissed the appellant's defence that the charge was a frame up due to a land dispute.
  - v. The trial magistrate erred in law and fact when she shifted the burden of proof to the appellant to explain his innocence.
  - vi. That the learned trial magistrate erred in law and fact when she convicted the appellant on a defective charge.
  - vii. The learned trial magistrate erred in law and fact when she entertained charges that were in violation of the appellant's constitutional rights.

viii. That the learned Magistrate grossly erred in law and fact in imposing an illegal and excessive sentence on the appellant.

3. The appeal was canvassed by way of written submissions. The facts of the case were that on the **21<sup>st</sup> October, 2008**, PW1, **M M M** was ploughing on the farm using oxen when the appellant went and also started directing the animals. He made them stray into the neighbour's farm. The complainant managed to control them. He then proposed to tell her something after her mother who was present moved out of the vicinity. Her elderly mother moved a distance away then he told her that he intended to sleep with her. Being offended by his remarks she threatened to report the matter to the clan. She took the plough and as she turned the appellant climbed her back and held her breasts intending to make her fall down. She told him that she did not want his business. But he insisted that he would sleep with her. They encountered her mother. Being offended by what the appellant had done she released the animals. She left the appellant with her mother.
4. On the way home as she tethered animals in the bushes she encountered the appellant carrying a stick. She attempted to make a call to seek assistance but he grabbed her, bit her on the mouth and strangled her as she screamed. He made her fall down, got on top of her and squeezed himself between her legs. She struggled with him and kept her legs together. Neighbours responded to her screams. The appellant on seeing them pushed her away and threatened to kill her that night if she refused to accept him.
5. PW2, **J N M** a neighbour to both the appellants and complainant heard screams. She rushed to the scene only to find the appellant holding the complainant's neck biting her on the mouth. He lay on top of her on the ground and on seeing her he ran away. The complainant had sustained injuries.
6. PW3, **P M** confirmed in material particulars what was stated by PW2. The matter was reported to the police. PW4, **No. 73107 Corporal Agnes Ikube** investigated the case. PW5, **Winfred Mwendu Wambua** a clinical officer at **Makueni District Hospital** examined the complainant. She looked dirty, she was dusty all over, had worn a cream blouse that was dirty and with blood stain on the front left side which was dry. She had scratch marks under the chin and lower lip, lateral side to the right hip was lacerated. Marks having been inflicted by teeth. The investigations carried out by PW4 culminated into the appellant being arrested and charged.
7. When put on his defence the appellee alluded to events of **20<sup>th</sup> October, 2008**. It was his evidence that he worked until 1.00pm on his farm. He then went to graze cattle until evening. Later on the **5<sup>th</sup> January, 2009**, he encountered three (3) men, **Mwanzia Kiema, Mwanja Ngwili** and **Mumo Muthoka** who assaulted him alleging that they had been given money to kill him. He found himself at the Assistant Chief's Office and the police station. He was taken to hospital, treated, and released on bond. Thereafter he was charged in court.
8. **DW2, Mutisya Mulinge** a witness called by the appellant said that he arbitrated upon a dispute over land between the complainant and the appellant. He later learned the complainant had uprooted sisal plants from the boundary. It was alleged the two (2) fought. After the appellant's arrest he found him naked at The Chief's office.
9. The appeal was canvassed by way of written submissions.

As a first appellate court I am mandated to subject the evidence adduced in the Lower Court to fresh and exhaustive evaluation so as to reach my own conclusions bearing in mind that I neither saw nor heard witnesses who testified.

10. The appellant was charged with the offence of attempted rape. Contrary to **Section 4(1)** of the **Sexual Offences Act**, which provides thus;

***“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.”***

11. To be guilty of the offence stated the person must attempt to commit an act which causes penetration with his or her genital organs. According to particulars of the offence the appellant was said to have attempted to have carnal knowledge of the complainant without her consent. The evidence presented by the prosecution was that the appellant had harassed the complainant at about 11.00am where he declared his intention to sleep with her. According to PW2 and PW3 they heard screams at 2.00pm. They found the appellant assaulting the complainant. According to them the appellant had wrestled the complainant who was on the ground and he was on top of her. The complainant had sustained injuries on her chin and lower lip. The complainant said the appellant attempted to squeeze himself between her legs but she kept the legs together.

12. In her finding the trial magistrate stated thus:-

***“I am satisfied that the prosecution has proved that the accused person herein accosted PW1 on 21/10/2008, and after a drawn out confrontation finally felled her at her home and attempted to rape her; which act was interrupted by the arrival of PW2 and PW3 and other neighbours”***

13. The learned trial magistrate formed the opinion having considered the facts presented. What she failed to consider was the fact that for the offence to have been committed there must have been an attempt to cause penetration with the genital organ. ***“Genital organs” is defined by Section 2 of the Sexual Offences Act, 2006 to include the whole or part of male or female genital organs...”***. The appellant being a male, his sexual organs would include the testes and the penis. At no point was it suggested that the appellant tried to remove the complainant’s *clothings*. It has also not been said that he attempted to remove his own clothes that covered his genital organs.

14. What was established was the fact that there had been a disagreement between the appellant and the complainant at 11.00am when they eventually met, the complainant stated thus:-

***“I asked if he had not stopped that business. I picked my phone and made a call. The phone disconnected, as the person I was calling disconnected the phone. I was trying to ask the names of police officers the accused accosted me and wanted to take the phone. He hit me. He heard me calling the shopkeeper at the market if he had the numbers of the AP Officers. I hid the phone to the back. He grabbed me and bit me on the mouth hard. I screamed loudly but he got hold of throat and strangled me...”***

The evidence clearly shows that the appellant assaulted the complainant and occasioned her some harm as established by medical evidence. She suffered harm. For the offence alleged to have been proved the intention of the appellant of having sexual intercourse with the complaint must have been proved. This was however not the case. There was indeed a struggle between the two but there was no proof of attempted rape. It is also important to note that right from the outset, the complaint the complainant made to the police was of assault according to PW4. This should have been the charge the police should have preferred against the appellant.

15. There is an alternative charge of indecent assault of a female contrary to **Section 11(1) of the Sexual Offences Act, 2006**. It is stated that the appellant committed the offence by touching the private parts of the complainant. Looking at the marginal note, the offence is in respect of a person committing an indecent act with a child or adult, but the subsection alluded to specifically refers to an indecent act with a child. A perusal of the particulars of the offence are also not specific as to what private parts the prosecution had in mind. In the circumstances, the charge could not have seen the light of the day.

16. It has been stated that the defence of the appellant that he was framed was dismissed erroneously. In his defence the appellant did not state that he had a land dispute with the complainant, (*however, he introduced the issue in cross-examination*). However, He called DW2 who stated that he had arbitrated over a land dispute between the two (2). He gave hearsay evidence that there had been a fight between the two and the accused was framed up. The court should have disregarded the evidence of the witness that was in admissible.

17. With regard to the issue of violation of the appellant's rights, the charge sheet indicates he was arrested on the **5/1/2009** and arraigned before court on the **23/3/2009**. It is indicated he was in custody. This would mean that his rights may have been violated. In his testimony he said he was assaulted by people he named. He called upon this court to interpret the constitution. It is the law that a person arrested having been accused of committing an offence must be produced in court within 24 hours. The law on the issue is settled, if any constitutional right of an accused is contravened, the remedy lies not in an acquittal but an action in civil suit for damages. ( see ***Julius Kamau Mbugua versus Republic Criminal Appeal No. 50 of 2008*** where the court stated thus:-

***“The breach of a right to personal liberty of a suspect by police perse is merely a breach of a civil right and Section 72(b) expressly provides that such breach is compensable by damages”.***

18. Having however evaluated the evidence adduced in the Lower Court in totality and having taken into consideration the law, I find that the prosecution did not prove the case as required by the law. The appeal has merit. Accordingly, I allow it; the conviction imposed is quashed and sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at MACHAKOS this 25<sup>TH</sup> day of MARCH, 2014.**

**L.N. MUTENDE**

**JUDGE**