REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 21 OF 2012

JOHN TUMBU TUIKONG …..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(*Appeal arising from the decision of Hon. M. N. Gicheru , CM in Kitale Chief Magistrate's Court in Criminal Case No. 188 of 2011)*

J U D G M E N T

The appellant was charged with the offence of attempted rape contrary to Section 4 of the Sexual offences Act No. 3 of 2006. Particulars of the offence are that on the 17th day of January 2011 at ***[particulars withheld]*** village within Trans-Nzoia County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of B N L a woman aged 50 years without her consent.

The appellant was convicted and sentenced to serve 5 years in prison. He appealed against conviction and sentence and raised the following grounds :-

1. *That the Learned Trial Magistrate erred in law and fact in convicting the appellant without sufficient evidence to warrant a finding of guilt.*
2. *That the Learned Trial Magistrate convicted the appellant in the absence of key witnesses such as those who arrested him and the Chief who received him.*
3. *That the Learned Trial Magistrate erred in law and in fact in disregarding the appellant's defence without assigning any reasons for doing so.*
4. *That the Trial Magistrate convicted and sentenced the appellant based on extraneous factors.*
5. *That the Learned Trial Magistrate misapprehended the doctrine of recent possession and in the process erred in applying it to the knife produced in Court.*

The brief facts of this case are that on 17/01/2011 Pw 1 B N the complainant a woman aged 50 years was passing through Bidii forest. At the junction of ***[particulars withheld]*** Primary school she met the appellant who had a bicycle. The appellant was facing the ground. The complainant went past the appellant. The appellant uttered some words to the effect that women such as the complainant are the ones who should be raped and left in the forest. The complainant went on. The appellant then said that he was talking to the complainant. It is after this that the appellant stopped his bicycle and went and held the complainant's dress and started to struggle with her. He pulled up her dress and removed a knife which was concealed in maize stalks which he had. He demanded that the complainant submit and enter the forest or he will kill her. At this time the complainant was screaming.

A motor cycle operator Pw 2 Robert Wanyonyi Sirito who was passing by stopped and demanded to know what the appellant was doing to the woman. The appellant threatened to stab him. The appellant took his bicycle and fled into the forest. As Pw 2 had known the appellant, he later led people to the appellant's house where he was arrested. He was taken to the office of the Area Chief. Enraged members of the public wanted to lynch the appellant but the Chief called Police Officers from Kitale. Pw 3 PC Paul Kamau Mwangi proceeded to the Chief's Office where he prevailed upon the enraged members of the public to leave the appellant alone. He re-arrested the appellant and took him to Kitale Police Station where he preferred the charge against him.

In his defence, the appellant stated that on 17/01/2011 he went to work on his land. He later saw people come to where he was working. They told him that the Chief wanted to see him He went to the Chief's office where he was placed in custody. He was asked to remove his shoes. He was later taken to Kitale Police Station where he was placed in cells. On the following day, he had his fingerprints taken before being arraigned in Court for an offence which he did not commit.

The appellant's appeal was opposed by M/S Limo who argued that there was enough evidence adduced by the Prosecution. The offence occurred in broad daylight. The appellant was found by Pw 2 while still struggling with the complainant. The appellant had pulled up the dress of the complainant. She urged the Court to dismiss the appellant's appeal and affirm the conviction and sentence.

The duty of a first appellate Court was well set out in the case of **Okeno Vs Republic [1972] EA 32.** An appellant on a first appeal is entitled to expect the evidence as a whole submitted to fresh and exhaustive examination. This examination has to be to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion.

In the present case, the complainant testified that she did not know the appellant prior to 17/01/2011 when the incident happened. However, there is evidence from Pw 2 who found the appellant struggling with the complainant. Pw 2 had known the appellant before. He had carried the appellant on his motor cycle up to his house. Pw 2 therefore knew the appellant and where he stayed. There is evidence that after the complainant reported the incident to the Area Chief it is Pw 2 who led other people to the appellant's house where he was arrested. Though Pw 1 the complainant did not know the appellant, there was Pw 2 who knew him and where he stayed.

There was no reason at all why the complainant would have wrongly implicated the appellant. The appellant contends that he was convicted based on contradictory evidence. I have looked at the evidence of all the witnesses and find no contradiction on the same. Pw 1 had recorded in her statement that the appellant had one knife whereas Pw 2 testified that the appellant had two knives. This contradiction was not material and it did not affect the evidence adduced. Material evidence which was not contradicted is that the appellant was found struggling with the complainant. He was trying to push her into the forest. He was lifting her dress. He had expressed what he wanted from the complainant. The appellant was coercing the complainant into submitting to sex under threats of being armed with a knife. The knife which the appellant had was found and taken to the Chief's office upon his arrest. It was produced as *exhibit 1*.

The appellant contends that he was convicted in absence of key witnesses such as those who arrested him and the Chief who received him. The Prosecution had presented evidence which was enough to prove the case facing him. Even if the Chief was called, his evidence will not have added any much weight to the case of the Prosecution. The complainant's evidence and that of Pw 2 as well as the Officer who received the appellant from the Chief's office was enough. Pw 2 was among those who arrested the appellant. There was no need of calling any more witnesses who participated in his arrest and in any case the appellant is not disputing the fact that he was arrested. The arrest of the appellant was not a case of mistaken identity. Pw 2 knew him and where he stayed.

The appellant merely stated on how he was arrested. He would not have expected the Trial Magistrate to assign reasons why he was arrested. The Trial Magistrate's duty in the circumstances was to consider whether the Prosecution had proved its case which he did. The appellant had contended in his defence

that the evidence of the witnesses was contradictory. The Trial Magistrate considered the fact that Pw 1 saw one knife whereas Pw 2 saw two knives and made a finding that the contradiction was not material. The appellant cannot therefore say that his defence was not considered by the Trial Magistrate. The appellant also contended that the Trial Magistrate took into account extraneous factors in convicting and sentencing him. I have looked at the record. I find that the Trial Magistrate only confined his judgment to the evidence adduced before him. There was no extraneous matter taken into account.

The appellant contends that the Trial Magistrate misapprehended the doctrine of recent possession and applied it wrongly. There is nowhere where the doctrine of recent possession was applied by the Trial Magistrate. It is the appellant who does not know about the doctrine of recent possession and its applicability.

The Trial Magistrate fully considered the Prosecution case and found that the offence of attempted rape had been proved. The conviction arising therefrom was prosper and the sentence was proper. In the circumstances, I find that the appellant's appeal lacks any merit. The same is hereby dismissed in its entirety.

Dated, signed and delivered at Kitale on this 12th day of November, 2013.

E. OBAGA

JUDGE

In the presence of:

M/S Limo for State.

Court Clerk: Lobolia

E. OBAGA

JUDGE

12/11/2013