REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal No. 41 of 2010

(From original conviction and sentence in criminal case No.3 of 2010 of the Chief Magistrate court at Malindi Before Hon. L. W. Gitari - CM)

SAFARI SULEIMAN …….....……APPELLANT

-VRS-

REPUBLIC ……..……RESPONDENT

JUDGMENT

1. The appellant was charged, tried and convicted for the offence of attempted rape contrary to section 4 of the Sexual Offences Act. He was sentenced to ten years imprisonment. He now appeals to this court against conviction and sentence on several grounds which can be summarised into one; That the ten year sentence handed down by the Lower Court was excessive.

2. But in his written submissions, the appellant in addition raised new grounds, including the alleged violation of his Constitutional right to be arraigned in court within reasonable time under Section 72 of the old Constitution:

3. He also challenged the quality of the evidence used to convict him. The above notwithstanding, this being a first appeal, the court is obliged to review afresh the evidence in the Lower Court, and to make its own conclusions – see **OKENO VS R [1972]EA 32**

The State has supported the sentence and opposes the appeal.

4. Briefly, the prosecution case in the Lower Court was that the complainant HB, wife of CTB was at her home. HB went to relieve herself in a thicket nearby. The appellant emerged suddenly, held her hand and said he wanted to have sex with her. HB resisted and her husband who was nearby heard and came to her rescue. On seeing CTB, the appellant fled leaving behind a pair of sandals. CTB first reported to the elders, the appellant's parents and eventually to police who arrested the appellant.

5. The appellant did not cross-examine any of the witnesses, or even complain as he has done in his submissions, that he was not furnished with the witness statements. Be that as it may, his assertion that the prosecution had the onus of proving the charge against him is accurate.

6. The appellant when placed on his defence stated: "The charge is true. I committed the offence. I want court to forgive me as it is my first offence"(sic). The court reserved its judgment, and after the same was read, the accused was asked to mitigate. He stated: "I had raped the complainant and we talked. This is the document." Apparently there was a previous episode of a similar nature involving the accused and HB.

7. In his submissions the appellant has given a long narration of what in my view ought to have been given as a defence in the Lower Court, namely, that he was carrying on an adulterous consensual relationship with HB but the two were caught red-handed by CTB on the fateful day.

8. In the circumstances of this case, the trial magistrate was entitled to conclude that the accused did not challenge the evidence of the complainant. If indeed there was an affair going on between him and the complainant, it is too late to raise such an allegation at this stage. Secondly, his own mitigation upon conviction was an admission that he had 'raped' the complainant and not that she had had consensual sex with him at any time. At any rate even if CTB had previously done so, her evidence in respect of the charge before the court is that on 3-1-10 she refused the appellant's advances; which was well within her rights.

9. Looking at the proceedings in the Lower Court, I cannot find any misdirection on the part of the trial magistrate. She was entitled to form the conclusion that she did. The accused not only demanded to have sex with CTB after pouncing on her, he held her hand, causing CTB to shout in resistance. The uncontroverted facts show that the appellant had formed the intention to have sex with CTB, a neighbour, who was someone else's wife, and who in his own admission he had previously raped. He hid in the bush lying in wait for HB and when she appeared, he demanded sex of HB while holding her hand thereby causing her alarm. He would undoubtedly have executed his intent had CTB not come quickly to the victim's aid.

10. In **MUSSA S/O SAIDI VS R (1962)EA 454** the Spry J. grappled with a similar difficulty as regards an attempted, albeit, different offence. He said inter alia:

"The principles of law involved are very simple but it is their application that is difficult. If the appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny ....The burden in the prosecution is therefore first to prove the intention, and secondly to prove an overt act sufficiently proximate to the intended offence. The intention will, in the majority of case, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with any other reasonable explanation.

Secondly, even if the intention is established, the act itself must not be too remote from the alleged intended offence."

11.Applying the above reasoning to the facts of this case, I think that the prosecution successfully discharged its burden in the Lower Court. I do concur with the guilty verdict returned by the trial court.

12**.** Complaints by the appellant regarding delayed arraignment in court after arrest have no place in the appeal and are properly the subject of a suit for damages (see **JULIUS KAMAU MBUGUA VS R (2010)e KLR.**

13.With regard to sentence, the penalty provided for the offence for which the appellant was convicted is a minimum of five years imprisonment, which can be enhanced to life imprisonment. The trial magistrate, correctly noted while sentencing the appellant at the admission in his mitigation that he had previously raped the complainant and concluded that the "impunity...should be discouraged." This was a relevant factor for consideration.

14. I do not think that the sentence meted out was manifestly excessive. This court would only interfere with the sentence of the Lower Court while exercising its discretion imposed a sentence which was

manifestly excessive or inadequate, or evidently overlooked a material factor, took into consideration an irrelevant factor, and acted on a wrong principle (see **DIEGO VS R [1995] KLR 621, SAMUEL GITHUA NJOROGE V R [2007]e KLR.** I find no merit in the appellant's complaint regarding the sentence.

15. In conclusion, I find no merit in the appeal which I dismiss in its entirety, while confirming the conviction and sentence in the Lower Court.

Delivered and signed at Malindi this **11th May, 2012** in the presence of the appellant, Mr. Kemo for the state, [cc Evans].

C. W. MEOLI

JUDGE