



*(From Original Conviction and Sentence in Criminal Case No. 82 of 2005 of the*

*Senior Resident Magistrate’s Court at Voi: K. Muneeni – S.R.M.)*

**MARTIN**

**MWANDAWIRO.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The Appellant **MARTIN MWANDAWIRO** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Voi Law courts. The Appellant was arraigned in court on 8<sup>th</sup> February 2005 on a charge of **ATTEMPTED RAPE CONTRARY TO SECTION 141 OF THE PENAL CODE**. The particulars of the charge were that:

***“On the 6<sup>th</sup> day February 2005 at Tanzania Village Voi division in Taita-Taveta District within Coast Province attempted to have carnal knowledge of MWN without her consent”***

The Appellant entered a plea of **‘Not guilty’** to the charge and his trial commenced on 20<sup>th</sup> May 2005. The prosecution led by **INSPECTOR MUNGA** called a total of three (3) witnesses in support of their case.

The complainant **MWN** told the court that on 6<sup>th</sup> February 2005 at about 4.00 p.m. she was walking home from Voi town. She decided to take a shortcut through Tanzania village. She came across the Appellant seated under a tree near Voi river. The Appellant suddenly grabbed her and pulled her into a maize plantation. He quickly undressed her and forced her to lie down. Then the Appellant removed his own trouser and lay on top of her between her legs. The complainant screamed for help. **PW2 SAMUEL OBALO** who was also at Voi river harvesting sand heard the complainant’s calls for help. He rushed to her aid and with the help of the spade which he was carrying he drove the Appellant away. **PW2** then helped the complainant dress up and took her to the police station where the matter was reported. The Appellant was later arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied having attacked the complainant at all. On 14<sup>th</sup> July 2005 the learned trial magistrate delivered his judgement in which he convicted the Appellant of the offence of Attempted Rape and thereafter sentenced him to serve seventeen (17) years. Being aggrieved the Appellant filed this appeal. The appeal was opposed.

Before I embark on considering the merits of this appeal I wish to note that although the Appellant filed his appeal in July 2005 immediately after being sentenced, it has taken a full six (6) years for this appeal to be heard and determined. The reason for this long delay has been the fact that the Appellant has been suffering mental illness which required treatment. Several times the Appellant appeared in court but as a

Judge and as a human being I could see very clearly that he was not in a fit mental state to comprehend or to follow the proceedings. To have insisted that the appeal proceed in those circumstances would have amounted to a grave injustice against the Appellant.. The court therefore had to wait for the Appellant to recover sufficiently before the hearing could proceed. It was not until 25<sup>th</sup> May 2012 and after several bouts of treatment that I found the Appellant became sufficiently calm and lucid to enable this appeal hearing to proceed. Having explained the delay I will now proceed to discuss the merits of the appeal.

**PW1** told the court that as she was on her way to her home from Voi she came across the Appellant sitting by the river. The Appellant attacked her and pulled her into a nearby maize plantation where he proceeded to remove her skirt, biker and underpant. He then forced her to the ground and spread her legs. The Appellant then removed his trouser and lay on top of her. The incident occurred at 4.00 p.m. It was broad daylight and visibility was good. The incident must have taken several minutes. As such I have no doubt that the complainant had ample time and opportunity to enable her to see the Appellant very well.

Although sexual offences are often committed in secret and ordinarily would have no eyewitness this is one peculiar case in which there was an eye witness to the incident. This eyewitness was **PW2** who was also by the river at the material time harvesting sand. **PW2** told the court that he heard a woman scream. He rushed to the scene brandishing the shovel which he had been using to harvest sand. **PW2** told court that he noted the broken maize stems and followed the trail. He describes at page 11 line 14 the scene that met his sight:

***“I followed broken maize crops 6 meters or so. I found people down the girl was down, Martin (accused) was also down. The skirt, blouse had been removed. Accused had opened his trousers. His buttocks were naked. He was ready. He was on top of the girl – his legs between her legs ...”***

**PW2** has given a very clear, detailed and graphic description of what he saw. Once again I note that it was 4.00 p.m. It was broad daylight thus visibility was good. **PW2** then used his spade to chase away the Appellant and thereafter helped **PW1** to dress.

In those circumstances it is quite clear that the intention of the Appellant was to rape the complainant. His plans were only thwarted by the arrival of **PW2** at the scene. What else would a grown man be doing lying unclothed on top of a lady between her spread legs? The facts as presented to court clearly indicate that the offence of attempted rape had been committed.

Both **PW1** and **PW2** identify the Appellant as the man who attempted to rape the complainant. Both had a good look at the Appellant. In the case of **PW2** the Appellant was somebody whom he knew before this incident. He identifies the Appellant as ‘**Martin**’. There is therefore evidence of recognition. I am satisfied that there has been clear positive and reliable identification of the Appellant as the perpetrator of this offence.

In his defence the Appellant claims that the charge was framed against him by **PW1** because she owed him a debt for goods which she had taken on credit from his kiosk. This defence is not convincing. Appellant does not say what items were taken on credit. The defence does not in any way dislodge the evidence of the prosecution. I am satisfied that the prosecution did prove the charge against the Appellant beyond reasonable doubt. The conviction was sound and I do hereby confirm the same.

The Appellant was allowed to mitigate after which he was sentenced to serve 17 years imprisonment. The sentence though lawful was in my view somewhat excessive. Whilst not trying to belittle the seriousness of such an offence I note that this was an attempted rape. The complainant did not suffer any grievous injuries. As such I am inclined to set aside the 17 year term and substitute in its stead a term of ten (10) years imprisonment to run from the date of conviction in the lower court.

It is so ordered.

**Dated and Delivered in Mombasa this 30<sup>th</sup> day of July 2012.**

**M. ODERO**  
**JUDGE**

In the presence of:

Mr. Jami for State

Appellant in person