REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 2 of 2011

BETWEEN

ABRAHAM KIPKOGEY MAIYO::::::::::::::::::::::::APPELLANT

AND

REPUBLIC::RESPONDENT

(Being an appeal from the decision of the Senior Principal Magistrate Hon. A. Onginjo dated 27th December, 2010 in Eldoret CMCRC No. 6209 of 2010)

JUDGMENT

Abraham Kipkogei Maiyo, the appellant, was charged with the offence of attempted rape contrary to Section 4 of the Sexual Offences Act No. 3 of 2006. It was alleged that on 25th December, 2010, at in Keiyo South District within the Rift Valley Province, the appellant unlawfully and intentionally attempted to rape **J.C.K** (hereinafter "the Complainant.")

In an alternative count, the appellant was charged with committing an indecent act contrary to section 11(a) of the Sexual offences Act No. 3 of 2006. The allegation was that on the same date, and at same place, the appellant unlawfully and indecently touched the private parts namely vagina and breast of the same lady J.C.K.

The appellant appeared before **A. Onginjo**, (SPM) on 27th December, 2010 and in answer to the charge stated ***"True"***. The prosecutor then stated the facts of the offence and when the appellant was asked to react to those facts, stated ***"Facts are true."*** The Learned Senior Principal Magistrate then entered a plea of guilty and convicted the appellant. The appellant said nothing in mitigation and the learned magistrate sentenced him to serve five (5) years imprisonment.

The appellant was not satisfied with his conviction and sentence and has appealed to this court on the grounds that the charge was defective; that the learned magistrate failed to specify the count upon which she convicted him; that the facts did not support the charge and that the learned trial magistrate failed to evaluate all the circumstances surrounding the case.

When the appeal came up for hearing before me on 17th March, 2011, **Mr. Oluoch**, the Learned Senior Deputy Prosecution Counsel conceded the appeal on the ground that the facts did not disclose any offence under the sections the appellant had been charged. Counsel for the appellant concurred and added

that section 169 of the Criminal Procedure Code was not complied with.

I have considered the record before the trial magistrate and agree with the learned Senior Deputy Prosecution Counsel that the conviction of the appellant was not proper. Besides the Learned trial court not stating upon which count she had convicted the appellant, she also failed to notice that the facts which were stated by the prosecution did not disclose the offences which were preferred against the appellant. The facts were brief. They were as follows:-

"On 25th December, 2010, in Keiyo South at around 5:30p.m. complainant 18 years old a student at C Secondary School, left her home to go to a nearby river to wash her clothes and beddings. At 6:00p.m. accused person appeared and demanded to have sex. Complainant declined and continued washing. Accused moved closer and got hold of complainant. She refused, and accused started fondling her breasts, complainant pushed accused away and freed herself and ran home while screaming. In company of relatives complainant went to K Police Station and reported.

On 26/12/2010 police traced and arrested the accused and he was escorted to K Police Station and charged."

Those facts did not indicate that the appellant attempted to rape the complainant. Attempted rape as an offence is created by section 4 of the Sexual Offences Act. The Section reads as follows:

"4. Any person who attempts to unlawfully and intentionally commit and 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 be not be less than five years but which may be enhanced to imprisonment for life."

A plain reading of the above section shows that an attempt to rape must involve penetration with genital organs, which was not the case here. So the appellant could not be convicted of the attempt to rape the complainant on the facts which were narrated by the prosecution.

The facts did not also state that the appellant ever touched the complainant's vagina. The prosecutor stated that on the material date the appellant started fondling the complainant's breasts and she pushed him away. The girl was aged 18 years. She was therefore not a child. So, was an offence under section 11 (A) of the Sexual Offences Act No. 3 of 2006 demonstrated by the facts? The Learned Senior Principal Magistrate made no specific finding in that regard. The appellant is recorded to have stated ***"True"*** when the charge was read to him. I assume that the plea was in respect of the principal count. So the alternative count may not have been read and explained to the appellant and when he purportedly admitted the facts, the admission was not in respect of the alternative count.

In the premises, there could have been no conviction on the alternative count. For those reasons this appeal must be allowed. The conviction of the appellant is quashed and the sentence set aside. The appellant is accordingly set free unless he is otherwise lawfully held.

DATED AND DELIVERED AT ELDORET
THIS 5TH DAY OF MAY, 2011

F. AZANGALALA
JUDGE

Read in the presence of:-
Ms. Chepkorir H/B for Mr. Nyambegera for the appellant and Mr. Oluoch for the State.

F. AZANGALALA
JUDGE
5TH MAY 2011