



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

[CORAM: F. AZANGALALA J.]

H.CRA. NO. 170 OF 2009

B E T W E E N

RONALD KIPCHUMBAKEMBOI ::::::::::: APPELLANT

A N D

REPUBLIC ::::::::::::::::::::::::::::::: RESPONDENT

[Being an appeal from the Judgment of the Senior Resident Magistrate - N. Shiundu dated 24th September, 2009 –

in Criminal Case No. 1237 of 2009 at Eldoret Chief Magistrate's Court]

JUDGEMENT

The appellant, **Ronald Kipchumba Kemboi**, was charged with attempted rape contrary to section 4 of the Sexual Offences Act No. 3 of 2006. It was alleged that on 19th February, 2009, within Uasin Gishu District of the Rift Valley Province, the appellant attempted to have carnal knowledge of **S.A.O** without her consent. The appellant faced an alternative charge of indecent assault on an adult contrary to section 11(1) of the same Act based on the same facts.

After hearing all the four (4) witnesses who were called by the prosecution, the Court found that the appellant had a case to answer. He made a sworn statement in which he said he was an hotelier and worked as usual on the material date and after duty went home at 6.00 a.m. While in his house, an hour

later, two old men and a girl knocked at his door. He then accompanied them to Eldoret Police Station where he was arraigned on an offence he did not commit.

On the basis of the evidence adduced, the trial court found the appellant guilty as charged in the main count. After regarding the appellant's mitigation, the trial court sentenced the appellant to five (5) years imprisonment. He has appealed to this Court against both conviction and sentence on the main ground that he was forced to proceed with the trial before he was furnished with witness statements.

During the hearing of the appeal, the appellant appeared to abandon his appeal on conviction and urged that the sentence imposed upon him was manifestly excessive in the circumstances and should be interfered with. On the other hand, **Mr. Oluoch**, the learned Senior Deputy Prosecution Counsel, submitted that the sentence meted out to the appellant was the minimum the court could impose.

As the first appellate court, it is my duty to re-examine and re-evaluate the evidence upon which the appellant was convicted and arrive at my own independent decision thereon. (**See Okeno -vrs- Republic [1972] (E.A.)**). The prosecution case was that **S.A**, the complainant (P.W.1), on the material date left work at around 11.30 p.m. She could not find a vehicle at her normal bus stage but found a taxi in which the appellant was. He invited her to board the same taxi and share the hire charges. The complainant obliged and when the pair were dropped near their houses, the appellant pulled the complainant to his house as she screamed. When they entered the house, the appellant locked the door and wanted to rape the complainant. He bit her on the left hand thumb and on the left breast. The complainant continued screaming which screams attracted neighbours who included **Job Kimutai Sambu** (P.W.2). The neighbours broke into the house and rescued the complainant.

The police were called and arrested the appellant who was later charged by Cpl **Suleiman Cheruiyot** (P.W.4) of Eldoret Police Station. The complainant was issued with a P.3 form by the same officer which form was duly completed and signed by **Joseph Chesanay**, (P.W.3). The latter classified the injury sustained by the complainant as harm.

In his defence, the appellant gave the sworn statement already referred to above.

In his judgment, the learned Senior Resident Magistrate found that the appellant had been arrested at the scene of the incident and his defence that he was arrested from his house in the morning for an offence he did not know was not believable.

On my own independent re-consideration and re-evaluation of the evidence before the learned Senior Resident Magistrate, I have no doubt in my mind that the learned trial magistrate was entitled to accept as true the evidence of the complainant and **Job Kimutai Sambu** (P.W.2 who rescued her. However, was the offence of attempted rape proved to the required standard? The relevant section reads as follows:-

“4 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.”

In view of the provisions of the above section, I entertain doubt whether indeed the evidence adduced before the learned Senior Resident Magistrate proved the charge of attempted rape. There was no penetration with the appellant's or the complainant's genital organs. The complainant herself testified that

she was bitten on her left hand thumb and on the left breast. The medical evidence adduced however did not support the alleged injury on the breast. So, despite the apparent admission of the appellant in his submissions, I am unable to find that the offence charged was proved to the required standard.

The evidence however, clearly proved beyond reasonable doubt that the appellant assaulted the complainant and caused her harm. An offence under Section 251 of the Penal Code was therefore established satisfactorily as required in law.

In the premises, I allow the appellant's appeal on conviction for the offence of attempted rape and the same is quashed and is substituted with a conviction for assault causing actual bodily harm contrary to section 251 of the Penal code.

With regard to sentence, it is noted that the appellant was sentenced to five years imprisonment, which is the minimum sentence on conviction for the offence of attempted rape. Under Section 251 of the Penal Code, the maximum term on conviction is five (5) years imprisonment. I have found that the appellant in fact committed the offence of assault contrary to the said section. The circumstances surrounding the assault do not attract the maximum allowed under the section. In my view, a shorter sentence would be appropriate. I therefore set aside the sentence of five (5) years imprisonment and substitute therefore a term of three (3) years imprisonment from the date of his conviction by the trial court.

The appeal is therefore allowed to the limited extent stated. Right of Appeal explained.

Orders accordingly.

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

F. AZANGALALA

JUDGE.

Read in the presence of:

- (i) **Ronald Kipchumba Kemboi**, the appellant and
- (ii) **Mr. Oluoch**, Senior Deputy Prosecution Counsel for the state.

F. AZANGALALA

JUDGE