REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. OF 362 OF 2008

ELVIS KIBET BIWOTT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from original conviction and sentence in Eldama Ravine R.M.CR.C.NO.233/2010

by Hon D. M. Machage, Resident Magistrate, dated 18th May, 2010]

JUDGMENT

Before the court below the appellant was charged in count 1 with **attempted rape** contrary to **section 4** of the **Sexual offences Act** and in count 2 with **assault causing actual bodily harm** contrary to **section 251** of the **Penal Code.** The offences are alleged to have been committed on 27th February, 2010 at Nguberet village in Koibatek District.

It was the prosecution case that the complainant who was on the way to visit her grandmother met the appellant on the road near his home and after exchanging greetings the appellant dragged her to his house. Once in the house, the appellant held the complainant's mouth while trying to have forced sex with her. He began to remove the complainant's skirt, bikers and pants but the complainant held tight on the garments. But in the process, the appellant tore her pants and broke a button from her skirt. Meanwhile the appellant had removed his manhood but once again was frustrated by the complainant who got hold of it and squeezed it hard before escaping as she screamed for help. Outside the appellant's house was his mother, P.W.2, S.K. A short distance away was the appellant's father, P.W.V, K. Arap S. After this intervention, the complainant went to her grandmother's home from where she reported the incident to the Assistant Chief, P.W.4, S.K, that very night. Because the complainant had sustained injuries in the course of the struggle, she went to Mogotio Health Centre the next morning where a clinical officer, P.W.3 Roseline Nyagor attended her. According to the clinical officer, the complainant had tenderness on the face and nasal region with a blood clot on the nose. There was also tenderness on the neck region, on the right shoulder and the right side of the waist. The matter was reported to the police, the appellant arrested and subsequently charged.

In his defence, the appellant while admitting that the complainant was in his house on the day in question denied attempting to rape her; that he only pushed her causing her to fall when she demanded a kiss from him. He explained that the complainant was his girlfriend and that he had terminated the relationship.

In view of this evidence, the issue of identification not being in contention, the only question that fell for determination before the trial court and which is the primary ground in this appeal is whether the appellant attempted to rape the complainant and whether he assaulted her.

Section 4 of the **Sexual Offences Act** under which the first count was premised provides that:

"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……"

Unlike **Section 388** of the **Penal Code**, defining acts constituting an attempt to commit a criminal act, the **Sexual Offences Act** makes no such provision. However, by dint of the **Second Schedule** of the **Sexual Offences Act, Section 388** of the **Penal Code** is not repealed and is therefore applicable. It stipulates as follows:
"388(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

The offence under **section 4** of the **Sexual Offences Act** is committed when a person attempts to unlawfully and intentionally commit an act which causes penetration with his genital organ without the consent of the other person or where the consent is obtained by force or by means of threats or intimidation of any kind. See also **section 3** aforesaid. **The Indian Penal Code (Act XLV of 1860)** by **Ratanlal Ranchhoddas** and **Dhirajlal Keshavla Thakore** defines the essential steps of attempt to commit a crime as follows:

"In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly attempt to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempts fails, the crime is not complete but the law punishes the act. An "*attempt*" is made punishable because every attempt, although it fails of success, must create alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded."

The *actus reus*, from the above and from the definition under **section 388** of **attempted offence** cannot be defined with the same precision as the *actus reus* of a substantive complete offence. It *(actus reus)* will therefore depend on the facts and circumstances of each case. In a somewhat uniquely similar facts as the appeal before me, in the case of **Attorney General's Reference (No.1 of 1992)** (1993) 2 All ER 190 the Court of Appeal of England laid the law on attempted rape as follows:

"It is not, in our judgment, necessary, in order to raise a *prima facie* case of attempted rape, to prove that the defendant with the requisite intent had necessarily gone as far as to attempt physical penetration of the vagina. It is sufficient if there is evidence from which the intent can be inferred and there are proved acts which a jury could properly regard as more than merely preparatory to the commission of the offence. For example, and merely as an example, in the present case, the evidence of the young woman's distress, of the state of her clothing, and the position in which she was seen, together with the respondent's act of dragging her up the steps, lowering his trousers and interfering with her private parts, and his answers to the police, left it open to a jury to conclude that the respondent had the necessary intent and had done acts which were more than merely preparatory. In short that he had embarked on committing the offence itself."

The complainant in this matter testified that when she met the appellant, the latter grabbed her from the back and forced her to the ground. While on the ground, the appellant held the complainant by her throat. He carried her to his house where he pushed her down on the bed. He lifted her skirt and tore her pants before removing his penis. All the while the complainant was screaming, attracting the appellant's parents. What was the intention of the appellant in all this? There is no doubt from the fact that he forcefully carried the complainant to his bed, tore her under garment after lifting her skirt and even removed his penis, that he intended to have sexual intercourse with her.

It was not necessary, as contended by learned counsel for the appellant that it ought to have been proved that there was an attempt to penetrate the complainant. It is the evidence of the intention to rape coupled with acts which cannot be regarded as mere preparatory acts to the commission of the substantive offence that constitutes proof of attempted penetration. The steps taken by the appellant were sufficiently proximate to the compete offence with an obvious intention of committing the complete offence.

The appellant's own parents confirmed that they heard screams from the appellant's house and shortly the complainant emerged. They also confirmed that the complainant was distressed. The clinical officer's observation and findings of the injuries sustained by the complainant strengthened the evidence of attempted rape. The Assistant Chief who saw the complainant on the very night of the incident also confirmed that the complainant told him of the attempted rape as she cried. The complainant also recounted the events to P.W.6 Cpl. Jackson Kelly the next morning.

From these events, like the learned trial magistrate, I am persuaded that the offence of attempted rape was proved to the required standard. I, however, find no purpose or justification for the second count or for the learned magistrate's order that the sentences would run consecutively. The conviction on the second count is quashed and sentence set aside. Otherwise, the appeal fails for the reasons earlier given and is dismissed.

Dated, Delivered and Signed at Nakuru this 3rd day of June, 2011.

W. OUKO

JUDGE