REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 108 OF 2009

BAYA YAA.....APPELLANT

VRS

REPUBLIC.....RESPONDENT

JUDGEMENT

BAYA YAA(the appellant) was convicted on a charge of attempted rape contrary to section 3 as read with section 4 of the Sexual Offence Act No. 3 of 2006. He pleaded guilty and was sentenced to 10 years imprisonment. The charge against him was that on 16th day of July 2009 in **MALINDI DISTRICT**, of the Coast Province, he unlawfully attempted to rape one **J.G** by pushing her down and attempting to cause a penetration into her genital organs.

Appellant admitted the charge whose facts as narrated to the trial court by the prosecutor were that on 16/07/09, the complainant left her home at about 5.00am heading to the cattle shed. She met the appellant who stopped her but she refused because she did not know him. She continued walking. Appellant followed her, grabbed her from behind and pulled her into the bush. He felled her down then started to pull out her clothes while lying on top of her.

The complainant screamed and people ran to her rescue. Appellant was beaten and escorted to Malindi Police Station where he was rearrested. The complainant sustained slight injuries.

Appellant confirmed those facts as being correct. The prosecution informed the court that appellant was a first offender and in mitigation, appellant asked for leniency saying he would not repeat the offence. The trial court before sentencing him ordered for a age assessment report which showed that appellant was 18 years – he was thus sentenced to 10 years imprisonment.

He now appeals both against the conviction and sentence in the following amended grounds;-

1. The sentence imposed was unlawful.

2. The Trial Magistrate convicted him without giving him enough time to reflect on the charge.

3. He did not have adequate time and facilities to prepare for a defence.

4. He ought to have had an advocate assigned to him at the State`s expense.

5. He should have been provided with an interpreter

Appellant filed written submissions saying that the sentence was unlawful because at the provisions of section 4 of the Sexual Offences Act provide for a five year sentence which can be enhanced to life imprisonment, section 389 of the Penal Code provides that any person who attempts to commit a felony or misdemenour is liabel to one half of such punishment as may be provided for, and if the penalty is death or life imprisonment, then the sentence should not exceed life imprisonment. It is the appellant`s argument that he should not have been sentenced to more than seven years imprisonment, and in any event, for such an attempt, a five year sentence should have been the sentence. His argument is that the court ought to have considered the less punitive sentencing option and he refers to the decision in **EVANSON MUIRURI GICHURE V R CR APP NO. 277 of 2007**.

The appeal is opposed, and **MR KEMO** on behalf of the State submitted that the plea was unequivocal and was read to the appellant in a language which he understood. As regards sentence, it was **MR KEMO`s** contention that the sentence was not harsh as the offence attracts life imprisonment. Section 4 of the Sexual Offences Act provides as follows;-

"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 for life"

The sentence as it stands is not illegal, but I think the trial magistrate ought to have indicated why in her view the five year option was not sufficient and what informed her decision to enhance the same to ten years. The actions of the appellant certain demonstrated a prelude to his intentions and I have no doubt in my mind that her intention was to forcefully invade the complainant`s sexual privacy without her consent. The plea was unequivocal, the appellant had just began pulling the complainant`s clothes while lying on top of her, actual body contact had not yet been achieved. I take into account the appellant`s age, and the sentiments regarding court`s considering the less punitive sentence – which would mean that the Trial Magistrate ought to first have considered the five year option, then justify the need for enhancement – she did not do this. However let it be made clear to the appellant, that the Sexual Offences Act is independent of the Penal Code, and infact section 389 of the Penal Code which he cites, relates to offence under the penal code, the provision reading as follows;-

"Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one half of such punishment, as may be provided for the offence attempted but if that offence is one punishable by death or life imprisonment, he shall not be liable to imprisonment for a term exceeding seven years"

In this instance, not only is the offence one not falling under the provisions of the Penal Code, but even if section 389 were to be extended from general application or for arguments sake then clearly it states "if no other punishment is provided for" – in this instance, there is a punishment provided for. My finding is that the sentence although legal, was harsh under the circumstances, since no justification was laid out for enhancing the same and the trial court ought to have first considered the less punitive option. It is for this reason that I interfere with the ten year sentence by setting it aside, and substituting it with five years imprisonment, which shall take effect from the date of conviction.

The rest of the arguments by the appellant do not hold water, his plea was unequivocal, the charge was read to him and the language used in court shows there was interpretation in English-Kiswahili and even on appeal his language of choice to conduct the appeal was Kiswahili. The quest for provision of an advocate by the State has no basis as the same would not have arisen in 2009 under the old constitution – the provision he seeks to rely on had not come to life then and the 2010 Constitution does not apply retrospectively. So the appeal succeeds and the sentence is reduced accordingly to five years imprisonment.

DELIVERED AND DATED THIS 7th DAY OF OCTOBER 2011

H A OMONDI

JUDGE