REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
OF KISII

Criminal Appeal 51 of 2009

JAMES NYAMOSI …… APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

JUDGMENT

The appellant was charged with the offence of attempted rape contrary to **section 4** of the **Sexual Offences Act.** The particulars of the offence were that on the 3rd day of August, 2008 in Kuria District within Nyanza Province, he willfully and unlawfully attempted to have carnal knowledge of **M.M** without her consent. In the second count, the appellant was charged with the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code.** The said offence was said to have been committed against the aforesaid lady at the same time and place as in the first count.

After a full trial the appellant was convicted of the two counts and sentenced to 14 years' imprisonment on the first count and two years' imprisonment on the second one. Both sentences were to run concurrently.

The appellant was aggrieved by the said convictions and sentences and preferred an appeal to this court.

In his petition of appeal, he stated that the learned trial magistrate erred in law and in fact in convicting him without sufficient evidence. He further stated that the learned trial magistrate failed to consider the merits of his defence that the charges against him could have been a frame up. He further faulted the learned trial magistrate for not considering that the complainant and her witnesses were relatives who could have conspired to fix him. As regards the sentence that was handed down by the trial court, the appellant alleged that it was manifestly excessive in the circumstances of the case.

This being the first appellate court, it is mandated to consider afresh the evidence that was tendered before the trial court, evaluate the same and reach its own conclusions. It must however bear in mind that the trial court had the benefit of seeing the witnesses as they testified and should therefore give due allowance for that, see **OKENO –VS- REPUBLIC** [1972] E.A. 32.

The prosecution evidence briefly stated was as hereunder.

M.M, PW1, testified that on 3rd August, 2008 at about 2.00 p.m., she was on her way from M towards her home when she met with the appellant at a secluded place. He told her that he would rape her and proceeded to hold her breasts. He hit her on the face and she fell down. The appellant tore her skirt and biker while holding her throat. The complainant screamed and the appellant started hitting her with a club. Members of the public rushed to the scene and the appellant ran away.

The complainant showed the trial court the skirt that was torn by the appellant as well as the biker. The complainant was treated at Isibania Sub District hospital and also at Kehancha District Hospital. The incident was first reported to the Administration Police at M camp. Later a report was made at Isebania police station. She was issued with a P3 form that was filled and produced before the trial court. The complainant added that the appellant is her brother in law.

S.W, PW2, is a sister to the complainant. She stated that on the material day she heard the complainant screaming and when she rushed to the place where the screams were coming from, she found the appellant assaulting the complainant who was lying on the ground. She added that there were other people at the scene. The appellant had also torn the complainant's skirt and biker, PW2 added. When the appellant saw PW2 and other people he ran away.

Similar evidence was adduced by **SM PW3.**

Police Constable Simon Wachira, PW4, of Kehancha police station testified that on 7th August 2008, the appellant was taken to the said police station by Administration Police Officers. It was alleged that he had attempted to rape the complainant and in the process tore her skirt and biker. PW4 was handed the torn skirt and biker which were produced in court. He also issued the complainant with a P3 form which was filled at Kehancha District Hospital and produced as an exhibit by PW4.

When the appellant was placed on his defence, all he stated was as follows:

> **"I stay in Ngisiru. I am a farmer. I have three children who are my siblings. I have two children in school. I pray to be forgiven."**

In his submissions, Mr. Masese for the appellant stated that although it was alleged that several people went to the rescue of the appellant, none of them was called as a witness. I do not agree with Mr. Masese because PW2 and PW3 are among the people who went to the rescue of the complainant. The two witnesses heard PW1 screaming and when they rushed to the scene they found the appellant assaulting the complainant as she lay down with her skirt and biker having been torn. That was sufficient corroboration of the evidence by PW1.

Mr. Masese further submitted that no doctor was called to produce any evidence to the effect that the complainant had been assaulted. The treatment notes were produced by the complainant herself and the P3 form was produced by PW4. In his view, the production of the said documents by PW1 and PW4 was fatal to the second count of assault causing actual bodily harm.

With regard to the sentence, counsel submitted that the appellant, being a first offender, the trial court handed down a sentence that was manifestly harsh and excessive.

Mr. Kemo, Senior Principal Prosecution counsel, opposed the appeal. He submitted that there was overwhelming evidence that the appellant attempted to rape the complainant. The appellant also assaulted the complainant and the medical evidence that was produced to prove the second count was not challenged by the appellant. When he was put on his defence, the appellant merely prayed for forgiveness

meaning that he had actually committed the offences. Mr. Kemo added that the appellant was a brother in law of the complainant and she had no reason to frame up such a close relative.

I have considered the evidence that was tendered before the trial court.

PW1 clearly demonstrated that the appellant attempted to rape her. The two met in a secluded place and the appellant categorically told the complainant that he would rape her. He proceeded to manifest his intention by hitting and felling her down and further tore her skirt and biker. He did so while holding her throat to prevent her from screaming. Those are clear acts that demonstrated that the appellant had the requisite ***mens rea*** to commit rape.

Secondly, when the complainant screamed, the appellant assaulted her in an attempt to silence her. PW1 and PW3 heard the complainant's screams and rushed to the scene to rescue her. They found the appellant assaulting the complainant and when he saw them he took off. PW2 and PW3 also assisted PW1 to get to her home and later took her to hospital. They sufficiently corroborated the evidence of PW1.

Where there is no objection to the production of a P3 form by an Investigating Officer, the same may be produced in evidence. PW4 was therefore competent to produce the complainant's P3 form. The appellant was not prejudiced in any way by such production. But as regards the complainant's treatment notes, the complainant was not competent to produce the same. However, that did not in any way weaken the prosecution case as far as the second count was concerned.

The appellant's defence almost amounted to admission of the charges that had been preferred against him. He merely asked for forgiveness. A person does not ordinarily ask to be forgiven unless he is satisfied that he has committed the offence being charged with.

Turning to the sentence, the learned trial magistrate stated that the minimum sentence for attempted rape is 14 years but that is not correct. The minimum sentence under **section 4** of the **Sexual Offences Act** is imprisonment for a term of five years. However, the same may be enhanced to life imprisonment. The learned trial magistrate misdirected himself when he wrongly believed that he was sentencing the appellant to the minimum sentence of 14 years. The appellant, being a first offender and who showed remorse and asked for forgiveness did not deserve a sentence of 14 years. I allow the appeal against sentence as regards count 1 and set aside the 14 years' imprisonment and substitute therefor with imprisonment for a term of five years.

On count two, **section 251** of the **Penal Code** provides that any person who commits an assault occasioning actual bodily harm is liable to imprisonment for five years. The sentence of two years that was passed by the trial court is reasonable and I will not interfere with the same.

The end result of this appeal is that all the grounds of appeal against conviction are rejected but the appeal against sentence in respect of count one only is allowed as hereinabove stated. The two sentences shall run concurrently.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF MARCH, 2010.

D. MUSINGA

JUDGE.

22/3/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Mutai for the state

N/A for the appellant

Court: Judgment delivered in open court on 22nd March, 2010.

D. MUSINGA

JUDGE.