REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 55 of 2009

(From original conviction and in Criminal Case No. 103 of 2009 sentence of the Senior Resident Magistrate's Court at Kilifi before Hon. C. Obulutsa – SRM)

STANLEY CHILANGO ……..……..……..….APPELLANT

VERSUS

REPUBLIC ……………………………..……RESPONDENT

JUDGMENT

Stanley Chilango (the appellant) was convicted on a charge of attempted rape contrary to section 141 Penal Code and he was sentenced to serve ten (10) years imprisonment. The appellant had denied the charge whose particulars were that on the 16th day of January 2006, at about 8.00pm, in Kilifi, he attempted to have carnal knowledge of Y.E without her consent. He faced an alternative charge of indecent assault on a female contrary to section 144(1) of the Penal Code that on the same date and place, he unlawfully and indecently assaulted Y.E by touching her private parts, namely vagina.

Appellant denied the charges, and after due trial where prosecuion called three witnesses and defence had two witnesses, he was convicted.

Y (PW1) told the trial court that on 16-1-06 appellant went to her home to say he wanted to show her an alternative plot to cultivate, as he had rented out the one PW1 had been cultivating. As PW1 went to fetch water, she met the appellant and as she passed him, he held her hand and knocked her down – he held her down, tore her pants and dress and touched her private parts. She struggled and called for help – then she got up and ran leaving the appellant with her lesso. PW1 informed her brother in-law and they returned to the scene and found appellant there. Appellant said he was sorry for what he had done. The torn garments and lesso were all produced as exhibit.

J.M (PW2) a son of the complainant confirms that appellant went to their home and spoke to his mother and his mother left, only to return running, saying appellant had almost raped her. He accompanied her back to the scene and found appellant there, covered in soil and grass, and he had a *kikoi*.

In his sworn testimony, appellant confirmed that PW1 was known to him and had rented his land. It was his evidence that one day he went to see her about the rent due and after a brief chat PW1 accompanied him to go and see his wife in relation to the alternative land. On the way, PW1 went to relieve herself then she went home and reported that appellant had sexually molested her – so he was arrested charged. In cross-examination appellant confirmed that PW1 had no grudge against him.

His wife Florence Chilango (DW2) confirmed that PW1 was their neighbour and had gone to see her at her home on 16-01-06 at 8.00pm claiming that appellant had attacked her. She requested DW1 to go and see what had happened and DW1 went and found pants on her land. On cross-examination, she confirmed, the report was that appellant had attempted to rape the complainant.

The trial magistrate in his judgment observed that the parties were known to each other as in-laws and were in each other's company with a view to PW1 being shown an alternative plot by appellant. He found the prosecution evidence to be credible and consistent.

Appellant challenged the findings on grounds that:

(1) The prosecution witnesses evidence was not free from error.
(2) The case was not proved beyond reasonable doubt
(3) The case needed a lot of investigations

(4) There was lack of corroboration

(5) His defence was rejected without good reason.

(6) The sentence was harsh and excessive.

In his written submissions, the appellant points out that the charge sheet does not have the word Kenya Police – this is a misplaced argument – he is referring to the copy of typed records- I can confirm from the original that the charge sheet is a proper one with Kenya Police Logo (if that makes any difference to her) and has OB No. as 21/18/01/06

He submits that the trial magistrate failed to consider the fact that complainant was his tenant who owed him money as a result of cultivating his land and having failed to make payment, she fabricated this case against him. He asks this court to compare PW1 claim that she was on her way to fetch water, when appellant attempted to rape her, in comparison with PW2's evidence that she had left in the company of the appellant to go and see appellant's wife over land issues.

Further that since the offence is alleged to have taken place at 8.00pm then the trial magistrate ought to have considered issues of identification

Miss Waigera in opposing the appeal urges this court to consider the evidence that appellant and PW1 left her home together and so the issue of identification should not arise and that the evidence of PW1 and PW2 corroborated each other. Although the evidence of PW1 and PW2 are contradictory – PW1 claims to have met the appellant while on her way to fetch water – this is found in the lower court record.

> ***"As I went to fetch water, I met the accused. I passed him, he held my hand and knocked me down…"***

Whereas PW2's evidence is as follows;

> ***"….when the accused came. He talked to my mother…they left shortly she came running saying she was almost raped"***

What I can confirm – whichever way one looks at it, is that appellant and PW1 ended up together, away from home on pretext of going to see an alternative plot on the date in question – this is confirmed both by prosecution witness and the appellant.

I also consider the fact that appellant was found still standing at the scene with PW1's lesso/kikoy (which issue he did not challenge). Her torn underpants were found at the scene by prosecution witnesses and this was even confirmed by appellant's own witness who infact is his wife.

The fact that Pc Koma refers to a skirt whilst PW1 referred to a dress, does not negate the conduct complained of – especially in light of the torn underpant.

The evidence although largely circumstantial points to these facts.

(1) PW1 and appellant were together.

(2) PW1 fled leaving appellant and she said he had attempted to rape her – confirmed by his action of holding her hand, forcefully pinning her to the ground, and tearing her underpants and touching her vagina.

ALL The above inculpably point to the guilt of appellant and no one else. The conviction was safe and I uphold it.

As for the sentence, the offence carried a maximum life imprisonment under the Penal Code – I take no account that PW1 escaped before appellant even got undressed, and under the circumstances thereto, I consider the ten year sentence rather harsh to that extent. I interfere with the same by setting aside he sentence and substituting it with a five (5) year imprisonment sentence which shall take effect from the date of conviction.

Delivered and dated this **11th** day of **May 2010** at Malindi.

H. A. Omondi
LADY JUSTICE