REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 151 OF 2010

(From original conviction and sentence in criminal case No. 84 OF 2008 of the Resident Magistrate's Court at Eldama Ravine - D. M. Machage {R.M.} dated 9th March, 2009)

MOSES KIPTOO KIBET…….…….....
…….APPELLANT
VERSUS

REPUBLIC……..….....
……..RESPONDENT

JUDGMENT

The Appellant was charged on three counts, Count I, attempted rape contrary to Section 141 of the Penal Code, *(Cap. 63, Laws of Kenya)*, and an alternative charge of indecent assault on a female contrary to Section 144(1) of the Penal Code aforesaid.

The Appellant was also charged with the offence of assault contrary to Section 251 of the Penal Code.

The Appellant was found guilty and was convicted on the charges of attempted rape, and assault, and was sentenced to 7 years on Count I and 2 years on Count II, both sentences to run concurrently.

There was no evidence led on the alternative charge of indecent assault and the trial court ought to have made a finding of not guilty and acquitted the Appellant.

However very aggrieved both on his conviction and sentence on Counts I and II, the Appellant has come to this court on appeal on two grounds, viz -

1. THAT I beg the esteemed court to consider my humble appeal, Since I am the first in our family which is parentless, I humbly pray the honourable court to order for my liberty and or reduced the sentence so I can be able to go and write my siblings and facilitate their future living standard.

2. THAT my Lord I humbly pray the honourable court to consider my humble appeal and order my acquittal since no one from our entire family can work on my behalf or stand to help me in the future.

The Appellant followed these grounds with what amount to mitigation grounds, and prayer for leniency -

1. The complainant was ready to withdraw the case in court, because we had reconciled at home by giving her two goats and (2,000/=) two thousand shillings according to traditional customs.

2. The complainant was forced by the prosecutor to follow what she was told by the police to state in her statement.

3. We took the alcohol with the complainant from 2 p.m. and she was buying me, because she had been paid her salary from the Sisal Estate Lomolo. There were many people in the place of drinks, who saw us kissing one another before we went, though they didn't come as witnesses, because I was not given chance to call them.

4. The complainant did not report this matter anywhere, because we had agreed together to have sex on our way home. PWII is aunt to the complainant that's why the complainant was worried, having been found by him on preparation for sex, she decided to scream out of shame.

5. Both of us were drank and sexually immoral, we were not even able to hide ourselves and that's why we were found by PWII on the roadside.

6. There was no force or struggle between me and the complainant, before PWII came. The injury she had occurred accidentally without our knowledge on the arrival of PWII.

7. What the complainant told the court was the truth, statement recorded in the Police Station is what she was told to say.

8. I did not touch her private parts, she did not inform the court about this, likewise to all witnesses.

The Appellant relied on these grounds when the appeal was heard before me on 12th July 2010.

Miss Nyagol, State Counsel who appeared for the Republic - Respondent opposed the appeal and submitted that on the facts, the Appellant was properly convicted, and got away with a light sentence as the punishment for attempted rape is life imprisonment and 5 years for assault. Instead the Appellant had been sentenced to 7 and 2 years respectively which were to run concurrently.

I am unable to uphold both the conviction and sentence on Count I of the charge of attempted rape under Section 141 of the Penal Code. The particulars of the charge show that the offence was committed on 3rd March 2008, in Koibatek District.

The charges cannot be sustained because the charge of attempted rape under Section 141 of the Penal Code and indecent assault under S. 144(1) thereof were repealed by Section 49, and Schedule of the Sexual Offences Act *(No. 3 of 2006 which came into force or commenced on 21st July 2006).* Consequently no person could be charged under that Section as the said Section had been repealed.

Repealed together with Section 141 and 144(1) of the Penal Code was Section 184 of the Criminal Procedure Code (Cap. 75, Laws of Kenya) which before the repeal provided as follows -

"S. 184. When a person is charged with rape and the court is opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 144, 145, 148 and 166 of the Penal Code, he may be convicted of that offence although he was not charged with it."

The amending and replacement Section provides thus -

"S. 184. Where a person is charged with rape and the court is of the opinion that he is not guilty of that offence but he is guilty under one of the sections of the Sexual Offences Act, he may be convicted of the offence although he was not charged with it."

The repealed Sections 144, 145, 148 and 166 of the Penal Code related respectively to *indecent assault on females* (s. 144(1)) *defilement of girls under 14 years of age* (s. 145), *procuring defilement by threats or fraud or administering drugs* (S. 148) and *incest by males* (S. 166). The new Section 184 of the Penal Code refers to *any other offences under the Sexual Offences Act* but retains the apex or arch offence of *"rape"* which if not proved may be substituted for any other offence under the Sexual Offences Act. It therefore appears to me that unless the offence is one of *"rape"* and evidence is lead to show the commission of some other offence under the Sexual Offences Act, the court has no jurisdiction to convict the accused of any other such offence.

Section 77(4) of the then applicable Constitution provided inter alia,
"that no person shall be held to be guilty of a criminal offence on account of an act or omission that did not at the time it took place, constitute such an offence …".

Whereas the offence of attempted rape existed under S. 4 of the Sexual Offences Act, 2006, it did not exist under Section 141 of the Penal Code, and the Appellant would not legally be charged under that Section of the Penal Code. The section did not so exist. The charge was therefore a nullity.

For that reason, the Appellant's conviction and sentence on Count I of the charge, is therefore quashed, and the sentence set aside.

The evidence on record did not support the Count II - the alternative charge of assault contrary to Section 251 of the Penal Code. PW1 in cross-examination by Mr. Chebii testified that she was the one who had the knife which she had been using at her work place - *"while I was down he pulled the knife off me"* and that is when her fingers were cut. PWII testified inter alia that the *"appellant went away with his rungu, and the woman with the knife."*

PWIV testified inter alia that he Appellant *"grabbed her, struggled with the accused, picked a knife which the complainant had and stabbed her." "The knife was never recovered."* In cross-examination, PWIV testified - *"the accused having snatched the knife ran away with it."*

In his sworn evidence DW1 (the Appellant) testified that *"the complainant had wanted to pick a knife from the pocket, I pushed her when it cut her."*

In cross-examination, the Appellant complained that he had not been told to bring any witnesses. There were so many people there. In cross-examination, the Appellant stated *"the complainant only took what I had, alcohol."*

What clearly emerges from the evidence is that both the charges of assault contrary to Section 251 of the Penal Code, have not been proved, the knife alleged to have been used was the complainant's, the cut was accidental, hence the accused did not have a guilty mind. It appears also that the prosecution persuaded PW1 to say that she fell down. PWII testified that he found the appellant standing and contradicted himself that the Appellant was holding the complainant on the ground.

In light of the contradictory evidence, the conviction and sentence of the Appellant on the alternative charges of both indecent assault and assault is not sustainable. I therefore quash the conviction of the Appellant on charge of assault and set aside the sentence.

I direct that the Appellant be set free unless otherwise lawfully held.

Dated, signed and delivered at Nakuru this 29th day of October 2010

M. J. ANYARA EMUKULE
JUDGE