



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Criminal Appeal 72 of 2008**

**SAMWEL WANAMBISI.....APPELLANT
VRS**

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Samwel Wanambisi was convicted of the offence of attempted rape by Webuye Senior Resident Magistrate and sentenced to seven (7) years imprisonment. He was acquitted on count 1 for the offence of robbery with violence contrary to section 296 (1) of the Penal Code.

The Appellant appeals against both conviction and sentence. Mr. Situma argued the six (6) grounds of appeal. He submitted that the charge of rape was not properly framed because it was under section 10 instead of section 3 of the Sexual Offences Act. The evidence of PW1, PW3 and PW4 was contradictory on how the complainant and accused were dressed at the material time.

The state opposed the appeal on grounds that the evidence of the complainant and that of PW3 was well corroborated on the charge, the state submitted that the appellant was convicted of attempted rape and not rape as earlier charged. The appellant ran away on seeing PW3 approach the scene and this points guilt at the Appellant.

PW1, the complainant testified that on 23rd August, 2007 around 4.00 p.m, she was walking home from Kimilili Hospital. The accused was following her behind on a path along a maize plantation. The accused attacked the complainant by grabbing her on the neck. When she screamed, the accused took her scarf and put it in her mouth, to prevent her from screaming. The accused knocked her down and ordered PW1 to put her legs apart. He tore her pants and raped her. Then he took her purse containing Ksh.3,800/= before leaving the scene. PW3 came to the scene as accused was walking away. He escorted the complainant to hospital.

PW2 testified that he was walking along the path at a maize plantation. He met a young man going to the opposite direction and about 15 metres ahead found the complainant lying on the ground crying. PW1 told PW2 that the accused had raped her.

PW4 received the report at Webuye Police Station. After investigating the matter, he arrested, charged the accused with the offence.

PW5, the Clinical Officer, produced the P.3 form. He found no evidence of rape. On the charge sheet, the appellant's counsel pointed out the anomaly of using section 10 for rape instead of section 3 of the Sexual Offences Act. The offence was correctly named as rape and the correct particulars of that offence given. The court and the defence proceeded with a clear

mind during the trial that the offence was of rape. The mere misquoting of the section did not occasion any failure of justice and the anomaly is curable under section 354 of the Criminal Procedure Code. Furthermore, the court found no evidence of rape and used section 180 of the Criminal Procedure Code in convicting the accused of a lesser charge of attempted rape. I find that the defect is curable under section 382 of the Criminal Procedure Code and does not occasion failure of justice.

PW1 knew the accused before the incident. She said he followed her closely behind as she walked home from the hospital. It was in a maize plantation along a footpath. It was at 4.00 p.m at broad day light. PW3 saw a youngman leaving the scene. He had been attracted by screams of PW1. Immediately after passing with the young man who was walking away from scene, he found the complainant lying on the ground with her legs apart. PW5's evidence was that PW1 had bruises on the chin and lower lip and pain on swallowing. This corroborates the evidence of PW1 that she struggled with the Appellant to resist his move. This is when she sustained bruises externally. The Appellant pushed a scarf inside her mouth and PW1 continued to resist and scream. This cloth and the grabbing of her neck by the Appellant could have caused some injury on the throat.

PW2 said PW1's clothes were mud stained when he found her lying on the ground. It is my finding that the evidence of PW1 was well corroborated and recognition of accused, very clear and positive.

On the contradictions on the colour of the innerwear of PW1 and the T-shirt or shirt of the Appellant, these are negligible and do not create any doubt in identification of the complainant on one hand and the Appellant on the other hand. PW2 and PW3 knew the complainant who was a neighbour. The fact that PW2 referred to her as O instead of SW does not really matter. O could have been a synonyme or nickname of the girl.

I find that the trial court rightly convicted the Appellant of the offence of attempted rape based on adequate evidence. The maximum sentence provided for attempted rape is imprisonment for not less than five years and which can be enhanced to life imprisonment. The sentence of seven (7) years imprisonment is therefore not excessive except that no reason was given for the enhancement. For this reason, I reduce the sentence to five years imprisonment. The appeal succeeds in part. I hereby uphold the conviction by the trial court.

**F. N. MUCHEMI
JUDGE**

Dated, Delivered and Signed at Bungoma

This 26th day of November, 2009 in the presence of the appellant and his counsel Mr. Situma and the state counsel Mr. Onderi.