REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT BUNGOMA

Criminal Appeal 101 of 2007

(Arising from Original BGM SPM CR. NO.2655 of 2003)

THOMAS TOKOYI MACHONGO……..…..APPELLANT

VS

REPUBLIC…....……...RESPONDENT

JUDGMENT

Thomas Tokoyi Machongo hereinafter referred to as the Appellant was arraigned before the Resident Magistrate, Bungoma to answer a charge of attempted rape contrary to section 141 of the Penal Code. He was charged with another count of indecent assault on a female. As rightly noted by the learned trial Magistrate however, the second count should have been an alternative charge and not an independent count on its own. The particulars of the charge are as in the charge sheet. The Appellant denied both counts and the matter went to full trial with the prosecution calling a total of 3 witnesses. On his part, the Appellant testified on oath and called no witnesses. This being a first appeal, the law enjoins me to re-evaluate and re-consider the evidence tendered before the trial court and arrive at my own decision as to whether the conviction against the Appellant was sustainable or not.

In a nutshell, PW1 told the court that she was at home studying on the material date and time. Somebody knocked at the door and when she opened, she found the Appellant standing there. She said that he got hold of her, pulled her outside the house and tried to push her down. She said that the Appellant tried to unzip his trousers as he caressed her breasts. She screamed and her brother PW2 came to her rescue. On seeing PW2, the Appellant is said to have run away. According to PW2, when he heard his sister screaming, he just asked who it was and the Appellant just took off. PW2 did not say what the Appellant was doing when he saw him and before he ran away. The matter was later reported to the Police Station. The Appellant was arrested and charged with the said offences.

In his defence, the Appellant denied having tried to rape the complainant. He said that he had disagreed with her father over a bicycle he had sold to him which later turned out to be defective. The learned trial Magistrate after considering that evidence was satisfied that the charge of attempted rape had been proved. She therefore found the Appellant guilty, convicted him and sentenced him to a prison term of six years with hard labour. Being dissatisfied with the said conviction and sentence, the Appellant filed this appeal. He has cited seven grounds of appeal which I will nonetheless not replicate for the purposes of this appeal. Learned Counsel for the state opposes the appeal and supports both the conviction and the sentence. I have considered the said grounds along with the submission by the learned State Counsel, and the evidence adduced before the trial court. On the issue of corroboration, I am in agreement with Learned Counsel for the State that the same is not mandatory for a conviction to be sustainable. A conviction can lie on the strength of a single witness. Before a court can nonetheless convict on such evidence, it is incumbent upon the magistrate to caution himself or herself of the danger of convicting on such evidence. He/she must be satisfied that the evidence of the single witness is truthful and credible. I am discussing the issue of single witness evidence here because as far as I am concerned PW2's evidence did not corroborate the complainant's evidence because he did not tell the court what he saw the Appellant doing to the complainant. All he told the court was that on seeing him,

the appellant just ran away. That evidence cannot be said to have corroborated the evidence of attempted rape. Coming to the complainant's evidence, she too did not convincingly explain how the appellant tried to rape her. Whereas she contended that he tried to knock her down, she did not say if he succeeded or if she was standing all the time. The assumption is that she was standing. If she was standing how could the Appellant manage to unzip his trouser, and still caress her breasts at the same time as stood there? The complainant's evidence was in my considered view not credible at all. The learned trial Magistrate should have evaluated the same properly and tested it for its veracity and truthfulness before relying on the same to convict. The issue of recognition or identification of the Appellant was in my considered view a non-issue. It had to be established first that the appellant had attempted to rape the complainant – which was never done. Mere intention to have forcible carnal knowledge of another does not amount to attempted rape contrary to what the learned trial Magistrate appears to have concluded. My finding is that the evidence before the trial Magistrate was insufficient to support a conviction on the charge of attempted rape. Most of it boarded on speculation and had no probative value whatsoever. The learned trial Magistrate erred in finding that the prosecution had proved its case against the appellant beyond reasonable doubt. This appeal has merit and it must therefore succeed. I allow it and quash the conviction against the Appellant and set aside the sentence of 6 years imprisonment with hard labour. I order that the Appellant should be set at liberty unless he is otherwise lawfully held.

W. KARANJA

JUDGE

DELIVERED, Signed and Dated at Bungoma this 28th day of February, 2008.

In presence of Mr. Ndege for State and Appellant in person.