REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 601 OF 2006

JOSHUA MUSEMBI MATHEKA……. APPELLANT

V E R S U S

REPUBLIC …….……..……..RESPONDENT

J U D G M E N T

The appellant, Joshua Musembi Matheka has filed this appeal against sentence and conviction emanating from a decision wherein he had been charged with the offence of attempted rape contrary to Section 141 of the Penal Code that on 7th day of November 2004 at Westlands within Nairobi Area Province, attempted to have carnal knowledge of R N without her consent. He faced a second charge of indecent assault on a female contrary to Section 144 (1) of the Penal Code that on 7th day of November, 2004 at Westlands within Nairobi area province, unlawfully and indecently assaulted R N by touching her private parts. Although the charge sheet reads as two counts, I notice that at plea it is shown that the attempted rape was a main charge and the indecent assault was an alternative charge and plea was taken in that matter. The appellant pleaded not guilty to both counts.

At the hearing, R N N(P.W.1) narrated that on 7/11/04 at about 8.00pm, she was inside her kiosk seated, when someone entered, closed the door and grabbed her breasts. There was a chimney lamp inside the kiosk and she recognized the person as the accused who had been her customer for about a year. She tried to shout but he grabbed her throat then raised his hand and fiddled with her vagina. The man was not talking and he struggled to stop her pulling down at her trousers whose pockets got torn on both sides. P.W.1 believed appellant wanted to rape her. They fell on the ground and struggled – the appellant unzipped his trouser and P.W.1 kept shouting. A customer walked in and asked what the problem was and P.W.1 told him, so he removed appellant and took him out. The torn trousers were identified by P.W.1 and produced as Exhibit 1. It was P.W.1's testimony that she had not consented to have sex with the appellant nor was he her lover. Appellant was arrested on 22/11/04 and P.W.1 says that before his arrest he would pass by her kiosk and tell her-

*"**I will come and sleep with you**"*

P.W. 2 ***(Peter Mwendwa Mosu***) had gone to buy milk at the kiosk when he heard commotion and the sound of something falling and someone talking as if being strangled. He entered into the kiosk and found two people, one on top of the other. There was a lantern lamp inside the kiosk and she saw both P.W.1 and appellant and P.W.1 told him appellant wanted to rape her. He noticed that appellant had unzipped his trousers and P.W.1 wore a pair of trousers whose pockets were torn at the sides – she had not removed the trousers. P.W.2 held the appellant and pushed him outside and appellant went away. P.W.3 Police Constable Gitau is the one who received the report about the incident and arrested the appellant. On being put to his defence, the appellant gave sworn testimony saying he differed with P.W.1 about some supplies of vegetables she was making to the butchery where he worked – that was on

7/11/04. The vegetables were bad, so he stopped orders for them. The next day, P.W.1 brought a letter from the Chief summoning him on allegations that the appellant had abused and harassed her. Appellant obliged but P.W.1 did not turn up and was told to leave and return the next day. On 21/11/04, P.W.1 went to the butchery, ordered for meat, which she then rejected and reminded appellant that she could have him jailed. He claims that P.W.1 had been his lover. On 22/11/04, appellant was arrested by police. As for P.W.2, appellant says he had been working as a watchman at the butchery and had been sacked and selling liquor with P.W.1. So when P.W.1 differed with appellant, due to her liason with P.W.2, they accused appellant of setting them up with the police and P.W.2 threatened to have him jailed. He also stated that there were people sleeping inside the kiosk next to P.W.1 and wondered why P.W.1 did not take her torn garment to the Chief and says police just picked the clothes from P.W.1 later.

The appellant had one defence witness, Benjamin Maina who is employed at the D.O's office in Westlands. He says he is an elder and that the appellant's case started on 7/11/04, when P.W.1 reported a case of insults by the appellant. The appellant attended in obedience to the summons but since P.W.1 had delayed, appellant reported to his job. The learned trial magistrate in his judgment stated that the main issue for determination was whether the accused committed either of the two respective offences alleged and stated-

*"**P.W.1's evidence was very clear and consistent. She explained logically the whole sequence of events."***

He noted that P.W.1 explained that appellant had been making advances towards her even before that date and that she reported the attempted rape to the Chief. The learned trial magistrate also considered evidence by the defence witness who said that P.W.1 only reported about being insulted but noted that D.W.1 did not produce any record of the alleged report. He also noted that P.W.2 consistently corroborated the evidence of P.W.1 and that on cross-examination appellant never suggested to P.W.2 that there was an existing grudge between them and so appellant's defence was found to be inconsistent with his cross-examination of P.W.2 and appeared to be an afterthought. The learned trial magistrate said he believed P.W.1 and P.W.2 and that on cross-examination of P.W.1, appellant never raised the issue of them having been lovers and summed up his finding thus-

*"**I find that the accused had taken active steps to fulfill his clear intention of having unconsented sex with P.W.1. I find the main charge proved beyond reasonable doubt."***

It is against this background that the appellant was sentenced to serve seven (7) years imprisonment. In his memorandum of appeal, the appellant stated that the learned trial magistrate-

1. ***failed to appreciate that the current charge leveled against him was a mere frame up. If the initial report is put into consideration,***

2. ought to have appreciated that the time lapse between the date of the alleged offence and the date of the report flawed the prosecution case,

3. failed to consider that the prosecution case was not proved to the required standard of proof,

4. failed to attach any due weight to his statement of defence.

In his submissions, appellant told the court that P.W.1 did not initially make a report of attempted rape to the Chief nor did she hand in to the Chief the torn trouser and that this is an afterthought. This he says is borne out by the evidence of P.W.3 who said in his testimony that." The initial record by the Chief was of assault. He says attempted rape is such a serious offence such, that if a report had been made, he would have been arrested immediately as is shown by the action taken by police when finally a report of attempted rape was made to them on 22/11/04. He lays emphasis on the question of the initial report being assault, saying that is why the AP who first received the report that very night told P.W.1 and P.W.2 to come the next day, and referred them to the Chief, an indication of a trivial offence. He points

out that the time lapse between date offence is alleged to have taken place and date of his arrest flaws prosecution case as there is no evidence that he had gone underground. Appellant also wonders how P.W.2 got access into the kiosk, yet P.W.1 had said when appellant got into the kiosk, he closed the door and that there is no evidence of P.W.2 breaking the kiosk door to gain entry.)

Appellant further points out to the fact that the Chief to whom the initial report was made, was never called as a witness and says this is because, prosecution knew his evidence, would, have been adverse to their case and he has referred to the decision in ***Bukenya -Vs- Uganda (1971) E.A. page 549*** which held that the evidence from essential witness ought to be called by the prosecution.

Appellants insists that his defence was ***bona fide***, true and intact and displaced the prosecution case. He also complains that the sentence is harsh and excessive.

The appeal is opposed by the state – the learned State Counsel Miss Gateru, submitted that there is strong evidence to show that appellant attempted to rape P.W.1 who positively identified appellant under conditions which were conducive for identification as both P.W.1 and P.W.2 testified that there was a lamp at the kiosk where the offence took place. The learned State Counsel pointed out to certain acts by appellant which support the charge i.e. – he tried to pull down her trouser, raised his hand and touched ***(fiddled***) her vagina and he unzipped his trouser. As for the 7 years sentence, the learned State Counsel submits that it is lenient considering that the offence carries life imprisonment as a maximum sentence.

It is true that the offence is alleged to have occurred on 7/11/04 and appellant was arrested on 22/11/04 when the report was finally made to the police (P.W.3). In between this period it seems appellant was not in hiding because P.W. 1 has indicated that before being arrested the accused would pass by my kiosk by the roadside telling me, "***I will come and sleep with you.***" P.W.3 is not the one who received the initial report yet he says on cross-examination that between 7th and 22nd November, 2004, investigations were going on. Who was carrying out the investigation in the intervening period since P.W.3 had not yet received the report? A logical answer would be that it was the Chief. Yet the Chief never testified to confirm that he was carrying out any investigations related to attempted rape.

Then again there is the question as to whether this complaint is a frame up borne out by the fact that P.W.1 on cross-examination state "I told the Chief you wanted to rape me. He however recorded "***abusive language***" and assault. As you attempted to rape me you were using abusive language, assault is a general term." This is also confirmed by P.W.3 who says "***The initial record by the Chief was of assault.***" Given this apparent variance as to what P.W.1 complained about, it was vital that the Chief ought to have been called as a witness to confirm just exactly what P.W.1 complained about and also why he did not take immediate action either by arresting the appellant or reporting to police or referring P.W.1 to police to arrest the appellant. There is no explanation whatsoever given by the Respondent as to why this crucial witness was not called and while am alive to the fact that the prosecution does not have to call each and every witness to prove its case, in this instance, given the contradicting scenario, then calling the Chief to testify was crucial and that was the spirit in which ***Bukenya –Vs- Uganda*** was considered – so that in the absence of any explanation as to why the vital witness was not called, then one is left to infer that the omission was only because he would have given adverse evidence to the prosecution.

And if the record by the Chief had in part "***abusive language***" wouldn't that give credit to what the appellant said about a disagreement they had had with P.W.1? P.W.1 on cross-examination says appellant was using abusive language as he attempted to rape her, yet in her evidence in chief, she said "***The man was not talking.***" And in fact she does not mention even one word purported to have been uttered by the assailant. Then there is the evidence of P.W.2 which appellant challenges on the basis of an existing grudge and he also wonders why the other people sleeping in the nearby kiosks did not get to hear the commotion which was taking place in the P.W.1's kiosk. P.W.1 explained this saying that the other kiosks were closed and she is the only one who used to open on Sundays – this is confirmed by P.W.2. What is the credibility of P.W.2 – of course there is no evidence led to show that there existed a grudge between appellant and P.W.2. However it is instructive to note that whereas in his evidence P.W.2 said he had gone to the kiosk to buy milk, on cross-examination he said "***I just came to relax around the kiosk after work.***" - however that does not remove the fact the he went into P.W.1's kiosk

and found her with appellant who had unzipped his trouser and this part of the evidence has not been controverted or shaken at all and it corroborates what P.W.1. is saying – but does that prove an attempt to rape?

Section 139 of the Penal Code defines rape as unlawful carnal knowledge of a woman without her consent or where consent is obtained by force or by means of threats. So an attempt to rape would mean attempting to perform the sexual act. The appellant did not manage to remove P.W.1's trouser, he tore at the pockets, he unzipped his trouser – suppose he just wanted to place his genitals against P.W.1's body without inserting them – would that be an attempted rape? I think not – it fits more with indecent assault. Then of course there is the improper, touching or fiddling with P.W.1's genitals. Of course there appears to be a very thin line in the scenario obtaining here, a man trying to remove a lady's trouser and then unzipping his trouser, fondling her genitals – what would be his intention? To rape or just to feel her in a rather indecent manner and without her consent? What about the fact that one was on top of the other – would that be a prelude to an attempt at rape or a continued process of indecent assault. All would have been watertight and would have pointed to an attempt at rape, save for that contradiction as regards what P.W.1 reported to the Chief on that night when the offence took place. J.J. R. Collingwood in his work Criminal Law of East and Central Africa (***London, 1967***) at page 68-69 writes thus " ***on a charge of attempted rape, it must be shown not only that the accused intended to gratify his passion but that he intended to do so at all costs and notwithstanding any resistance on the part of the woman."***

That seems to have been accomplished here except that the contradiction in the initial report makes me very hesitant to conclude objectively that appellant had no other intention other than to have sexual intercourse with the complainant. Such was the situation considered in the case of ***MULIRA -VS- REPUBLIC (1953) 20 E.A.C.A. 223*** where the appellant entered into complainant's bedroom as she lay on the bed, put his hand over her mouth, removed his own pair of shorts and lifted the complainant's petticoat. She screamed and a passerby flashed a torch into the room and the appellant fled away. The Appellate court set aside the conviction of attempted rape and substituted it with "***assault with intent to ravish."***

So from the foregoing, my finding is that the evidence does not prove beyond reasonable doubt that appellant intended to rape P.W.1. However there was the alternative charge of indecent assault and from the evidence already alluded to there is no doubt that appellant indecently intruded into P.W.1's bodily privacy and I therefore find that appellant indecently assaulted the complainant within the meaning of Section 144 (1) of the Penal Code which was the law applicable at the time. It has a maximum sentence of 5 years imprisonment with or without corporal punishment. Consequently I order that:-

(1) ***Appellant's appeal on the main charge is allowed. The conviction for attempted rape is thus quashed***.

(2) The sentence imposed upon the appellant on the main charge is set aside.

(3) I find the appellant guilty on the alternative charge of indecent assault on a female. On this alternative charge he is sentenced to a prison term of three years which is to take effect from the date that he was sentenced by the lower court i.e. 10th January, 2006.

Delivered, signed and dated this 7th day of April, 2008.

H.A. Omondi

Judge.