REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Criminal Appeal 66 of 2005

(From Original Bungoma SPM Cr. No.1216 of 2004)

ANDREW KITUYI WASIKE……………………………APPELLANT

VS

REPUBLIC……………………………………………..RESPONDENT

(From Original Bungoma SPM Cr. No.1216 of 2004)

JUDGMENT

The appellant Andrew Kituyi Wasike and another were jointly charged with the offence of attempted rape C/S 141 of the Penal Code before the Senior Principal Magistrate's court in Bungoma. He pleaded not guilty to the charge. The matter went to full hearing with the prosecution calling a total of four witnesses. On his part, the appellant made a very brief statement of defence after he was placed onto his defence. He was found guilty as charged and convicted accordingly. He was sentenced to a prison term of 3 years. Being dissatisfied with the said conviction and sentence, he filed this appeal through Khakula and Co. Advocates. He was relying on 3 grounds of appeal but at the hearing, he abandoned the first ground and pursued grounds 2 and 3. These grounds were as follows:

2. The learned magistrate erred in law and in fact by convicting the appellant on evidence that was not corroborated.

3. The learned magistrate erred in law when she totally discounted the appellant's defence.

The learned counsel expounded these grounds in court at the hearing of the appeal. Learned counsel for the state opposed the appeal and urged the court to uphold the conviction and the sentence. I have considered these grounds along with the submission by both counsel. Before I analyse the evidence adduced before the trial court, I would like to comment on the said grounds. On ground 2, there is no law that says that a magistrate cannot convict on evidence that is not corroborated. Indeed by dint of section 143 of the Evidence Act,

"*No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.*"

All that a magistrate is required to do is to caution himself on the danger of basing a conviction on uncorroborating evidence.

Hitherto, case law required corroboration of the complainant's evidence is sexual offences. This was on the misconceived basis that women and girls could not be trusted to tell the truth when it came to sexual offences. Fortunately, this myth was displaced by the Court of appeal in the case of *(MUKUNGU -V- R [2002] 2 EA 482.* Where the Court of appeal held that:

"*The requirement for corroboration in sexual offences affecting adult women and girls in unconstitutional to the extent that the requirement is against them qua women or girls and is an*

infringement of section 82 of the Constitution of Kenya

isions which hold that corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with section 82 of the constitution."

This position was also adopted in the case of ***FUAD DUMILA MOHAMMED -V- REPUBLIC Criminal Appeal 210 of 2003 (Mombasa).*** Where it was held that this corroboration was no longer mandatory. Had the learned Magistrate found the complaint's evidence truthful and credible, she would have been entitled to convict on it. Ground 2 does not on the face of it therefore amount to a ground of appeal.

On ground 3, I agree with the learned Counsel for the state that the appellant only said that he did not commit the offence. There was nothing much for the learned Trial Magistrate to analyse in that defence.

Be that as it may however, it is my duty to re-analyse the evidence adduced before the trial court, re-evaluate the same and come to my own conclusion as to whether the conviction against the appellant was safe or not. Briefly, the evidence before the trial court was that the complainant J. M was walking home early on the morning of 13.8.2002. She heard people calling behind her. She did not stop. She tried to go to PW2's homestead to escape but the gate was locked so she stood there. Her pursuers reached her. She said she identified 2 of them. She said that one of them was called 'Makoha' who was not in court. She described the other as "Wekesa the first accused" A few sentences later, she described the 1st accused (Appellant herein) as Andrew. According to the charge sheet, however, Andrew and Wekesa were 2 different persons. 'Wekesa' was accused 2 – who is not in this appeal. As rightly stated by Mr. Khakula in his submission, this witness appeared to confuse the accused persons. In that case, the learned trial Magistrate should have looked for other evidence to corroborate that of the complainant.

PW2 Paul Wanjala the neighbour who went to the complaint's rescue told the court that with the help of his spotlight, he was only able to see and identify one 'Makoha' who was not in court. On cross-examination by the Appellant, he categorically said that he had not seen the appellant at the scene. PW2 in his evidence in chief also said that when he went to the scene immediately after hearing the noise, the complainant told him that she had identified Wekesa (2nd accused) and 'Makoha' who was not in court. She had not mentioned the appellant at all. One would therefore wonder, how could she have forgotten to mention the appellant to PW2 who arrived at the scene immediately after the incident? This is itself ought to have sowed the seed of doubt on the mind of the learned Trial Magistrate. Such doubt should have benefited the appellant herein.

The judgment of the learned Trial Magistrate does not show that she cautioned herself as to the danger of convicting on the uncorroborated evidence of the complainant. Nor did she seem to have noted these discrepancies. The learned trial Magistrate made the wrong finding when she said that the identification was proper. Having reconsidered this evidence, my considered finding is that the learned Trial Magistrate should have given the appellant the benefit of doubt. The conviction against the Appellant was not therefore safe. Accordingly, I allow this appeal, quash the conviction and set aside the sentence of 3 years imprisonment.

W. KARANJA

JUDGE

DELIVERED, Dated and Signed at Bungoma this 16th day of May 2007 in presence:- Mr. Ndege for state and appellant in person.