REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Criminal Appeal 112 of 2006

JOEL KINYUA MUNYI……..APPELLANT

VERSUS

REPUBLIC……...…….RESPONDENT

JUDGMENT

The appellant was charged with the offence of attempted incest contrary to section 166(1) of Penal Code as read with section 388(1) of the Penal Code. Section 168 is also relevant because the charge sheet shows that the relationship of the parties was of half-sister. The evidence of prosecution is that the complainant was at home in the kitchen when appellant her half- brother approached her and told her he would have sex with her. To execute his intention he forced the complainant down and tried to remove her pants and was touching her breasts. He was not successful because the complainant managed to escape. The first person the complainant saw was Samuel Ireri Munyi another half-brother. Then she went to her grandmother she said she never told her grandmother about it but that she reported the matter to Kiritiri Police Post. She testified that as she was struggling with appellant her skirt got torn and also her blouse she exhibited these items exhibits. The appellant was arrested after 3 days. She also said she told of the events to Ireri. The evidence of Ireri shows that complainant called him and was crying. She did not tell him what had happened but the appellant told him of a story of finding the complaint with another man and he had slapped her hence she was crying. PW3 the father of the two said he was told by complainant what had happened. He testified that he talked to appellant but appellant told of another story as to why there was struggle between them. This was a different story from which he told his brother Samuel Ireri. Then the father said after talking to both of them the complainant went to police. This witness identified the blouse (MF1 2).

PW2 received the report of incident from her daughter (complainant) she identified the clothes her daughter was wearing (MF1 1-2).

PW5 testified that he was asked by the father of appellant to arrest him which he did and escorted the Appellant to Kiritiri Police Post where the appellant was received by PW6.

In his defence the appellant gave unsworn statement which was a mere denial. He alleged a grudge and denied having committed the offence. His mother gave evidence on his behalf but stated she knew nothing of his case. The evidence produced by the prosecution was in support of main count of incest and that of indecent assault on a female and the third of malicious damage to property in the clothes of the complainants. The accused was convicted on main count and second count. The Judgment of trial Magistrate dealt mainly on count No.1 where he even referred to authority in support of his judgment. On count II malicious damage to property the facts were that the appellant destroyed the clothes of the complainant, the clothes were identified by witnesses as hers. The Appellant did admit that he struggled with the complainant even in his mitigation he said. "**I was only struggling to get a panga from the complainant".** A finding that the appellant committed that offence is supported by evidence and conviction was in order.

In the circumstances it is my finding it is my finding that the prosecution did prove the two counts

beyond reasonable doubt. On the grounds of Appeal the record shows that the appellant pleaded to all the counts and on each count he pleaded "**Not guilty"**. Also in all cases the appellant cross-examined all the prosecution witnesses as recorded. The grounds of Appeal are found to be without merit. The trial Magistrate found that the distressed state of the complainant corroborated the complainant's evidence. The appellant himself admitted being at the scene and struggling with the complainant.

For above reasons I do not see any reason to interfere with the conviction. On the issue of sentence I find that the appellant has already served one year on count II. The sentences were ordered to be served consecutively. I find this to be unjust as the offences occurred during the same transaction. The proper order should have been for sentences to run concurrently.

I therefore set aside the order for the sentences to run consecutively. I substitute an order for the two sentences to run concurrently so that the maximum period of sentence to be served is 4 years.

Orders accordingly.

Dated this 19th July, 2007.

J. N. KHAMINWA

JUDGE