**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 214 of 2006**

**STEPHEN KINUTHIA GUCHU……...…....……APPELLANT**

**AND**

**REPUBLIC…….RESPONDENT**

***(An Appeal from the Judgement of Senior Resident Magistrate S.M. Mokua dated 1st August, 2005***

***in Criminal Case No. 1428 of 2004 at the Thika Law Courts)***

**JUDGEMENT**

The appellant was charged with the offence of attempted rape contrary to s.141 of the Penal Code (Cap.63), the particulars being that he, on 18th February, 2004 at [particulars withheld] in Maragua District in Central Province, attempted to have carnal knowledge of ***C N N*** without her consent. In the alternative, the appellant had been charged with the cognate offence of indecent assault on a female, contrary to s.144(1) of the Penal Code; and the particulars were that the appellant herein, on 18th February, 2004 at [particulars withheld] aforesaid, unlawfully and indecently assaulted ***C N N*** by touching her private parts.

It was the complainant's testimony that, as a day-scholar at [particulars withheld] Secondary School, she was performing a punishment prescribed by the Deputy Principal, on 18th February, 2004 and this involved digging into the ground. As she worked away at about 9.00 a.m., three boys came along, and one of them offered to assist her and was now digging in her allotted punishment area with a forked hoe. The offer apparently was not entirely innocent, as the helper wanted to know what he would be paid, for helping; he then made certain overtures, and felled the complainant (PW1) in the trench, and held her blouse, whereupon PW1 bit his finger and he took to his heels as one of the teachers came by. Thereafter the Deputy Principal was informed, and he called the Police. It was PW1's testimony that the appellant had lain upon her and covered her mouth when she had fallen into the trench. It is her screams that had caught the attention of a teacher in this mixed school. The appellant was subsequently arrested, and PW1 recorded a statement at the Police station.

PW2, ***Joseph Mungai Nyoike***, the Deputy Principal at Ngurweini Secondary School testified that he had given tasks to members of PW1's class, as punishment. He approached the place where PW1 had been working, as he had heard screams from that direction, and as he walked along, he saw somebody, not in school uniforms, running away. The local Assistant Chief helped to arrest a person who answered to the description of PW1's attacker; and in the presence of PW2, PW1 identified the person said to have attempted to rape her.

After the learned Magistrate ruled that there was a case to answer, the appellant herein elected to make an unsworn defence. He said he was a carpenter, and on the material day he had woken up in the morning, and gone to wok at the farm where he remained all through up to 3.00 p.m. in the afternoon, after which he went to the river and he was there arrested by some two people, for reasons not known to him.

The relevant parts of the trial Court's judgement are as follows:

***(i) "The evidence of PW1 is very consistent, that the accused got hold of her, wrestled with her and, once she was down, he lay on her [even as he covered] her mouth.***

"***It is clear that the accused had [the] intention of having sex with the complainant.***

***(ii) "The incident took place during day-time, [and] the complainant was able to see the accused.***

"***The circumstances surrounding the case point [to the fact] that there was an attempted rape."***

***(iii) "The evidence by the prosecution is well corroborated and very consistent…"***

(iv) "*The prosecution has therefore proved its case beyond reasonable doubt and hence the accused is found guilty [of] the offence [as] charged….*"

In mitigation, the appellant herein informed the Court that he had a chest problem and experienced occasional headache, and was only 17 years old. The Court suspended sentence, and sought a Probation Officer's report. The Court also made orders for age-assessment at the Thika District Hospital. On 1st August, 2005 the Court recorded that both the probation report, and the Thika District Hospital report showed that the appellant herein was aged over 18 years. On that basis the learned Magistrate noted that: "The offence the accused committed does not call for the accused being placed on probation"; and he sentenced the appellant herein to a prison term of 15 years.

Before this Court, the appellant has contended that:

(i) there was inadequate identification of him as the culprit;

(ii) the Magistrate should have found PW1 not to be a credible witness;

(iii) the offence charged wasn't proved beyond reasonable doubt;

(iv) the trial Court ought to have summoned additional witnesses;

(v) less than due weight was laid on the defence testimony.

It was the appellant's preference that learned State Counsel ***Ms. Gateru*** should make her submissions first, and she would then make any necessary response, in addition to his written submissions which he brought along.

***Ms. Gateru*** did not oppose the appeal, as she considered that there was no proof beyond reasonable doubt, that the appellant had intended to rape the complainant. Counsel considered that the argument about compensation to the appellant for his help to PW1, which resulted in PW1 being felled and the appellant running away, by itself would not show *intention* to rape. Learned counsel submitted that the conviction was not safe. While urging that the appellant's manner of demanding compensation was wrong, she submitted that a different charge should have been laid against the appellant.

As the submissions for the respondent coincided with the appellant's position, he had nothing to say in response.

After considering all the evidence in this case, and taking into account the submissions of both sides, it has become clear to me that the outcome of this appeal must rest on ***two*** primary legal domains: firstly, whether what the appellant was held to have done, at the material time, amounted to *attempted rape*; and secondly, whether there was a proper identification of the appellant as the culprit.

On the second point, I believe the findings of the learned Magistrate to be entirely correct: the appellant was one of the three young men who approached the complainant as she did her penal work at a trench; and it was the appellant who offered his help. The appellant, from the testimony of the complainant, was by no means a total stranger, and it was not at all abnormal that he should make his offer of assistance to her. What was unusual was his demand for compensation for his assistance; and then the occurrence of a scuffle after such a demand was made.

And so the only question remaining is whether the body-contacts between the appellant and the complainant, which resulted in loud protests, which attracted the Deputy Principal (PW2), and which occasioned the appellant's taking-off, were as a result of an *attempted rape.*

To resolve this question I have to briefly consider the legal principles touching on the offence of *attempted rape.*

The law regarding attempts, in relation to crime, is that the culprit did have the *mens rea*, but the *actus reus* itself did not take place; the facts of the case must be considered, to see if the attempt was actually accomplished, so as the render the suspect guilty of the offence of attempting to commit a particular crime. On this point, and in relation to rape, J.J.R. Collingwood in his work, ***Criminal Law of East and Central Africa*** (London, 1967) writes (pp.68-69):

"**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*."**

The requirement of intent (the *mens rea*) not only to have sexual intercourse with the complainant, but to have it *against the complainant's will*, as a basis for the offence of attempted rape, is equally-clearly expressed in ***Blackstone's Criminal Practice*** (Oxford U.P., ed. Peter Murphy, 2002) at section B3.9 (p.210):

"***The mental element in attempted rape is the same as that required for the full offence, namely, an intent to have sexual intercourse coupled with, at least, awareness that the other may not be consenting…It is not necessary to prove that the accused had gone so far as to attempt physical penetration of the vagina or anus. It suffices if acts be proved which [could be regarded] as more than merely preparatory…."***

On the basis of the foregoing principles, whether or not there has been, on the facts of any given case, an attempted rape, is for the Court to determine through judicious assessment.

On the facts of the case now before the Court, I think it cannot be said *for certain*, that in the tussle which took place between PW1 and the appellant, at the trenches in the school compound, the appellant had no intent other than to have sexual intercourse with the complainant, against her will. I am reinforced in that view by the outcome of a past decision of the Court of Appeal for Eastern Africa, in ***Mulira v. R*** (1953) 20 EACA 223.

In the ***Mulira*** case the appellant had been convicted of *attempted rape* of his employer's wife. The appellant had entered her bedroom where she was lying on the bed, at night. He switched off the bedroom light, put his hand over the complainant's mouth, removed his own pair of shorts, and lifted the complainant's petticoat. The complainant screamed for help, whereupon a passerby flashed a torch into the room, and the appellant ran away. The appellate Court set aside the conviction of attempted rape, and substituted one of *assault with intent to ravish*, for the reason that it had not been proved beyond reasonable doubt that the accused *intended* to rape *despite any resistance* on the part of the complainant.

Similarly, I do hold in the instant case, that it had not been proved beyond doubt that the appellant herein *intended* to rape PW1 *despite any resistance* on her part.

As already noted, an alternative charge of indecent assault on a female had been brought against the appellant herein. Since, as I have already held, the charge of attempted rape was inappropriate in the circumstances of this case, the trial Court should have considered whether an offence of indecent assault on a female had been committed.

In this respect I have to set out the relevant legal principle. It is stated in ***Blackstone's Criminal Practice*** *op. cit* (section B3.84, p. 235) that:

"***The test for indecent assault is primarily objective. An indecent assault is defined as an assault committed in circumstances of indecency. Circumstances of indecency need not involve any indecent touching of the victim or a threat of indecent touching. The assault or the circumstances accompanying it must, however, be capable of being considered by right-minded persons as indecent… Spoken words may constitute circumstances of indecency on the part of the person using them. If the circumstances of the assault are incapable of being regarded as indecent, the assault cannot become indecent because of some secret motive of the accused. Where the assault is indecent in itself, the basic intent needed to establish assault is enough…Where the circumstances are such that the assault could be considered indecent, it must at least be proved that the accused intentionally assaulted the victim with knowledge of the indecent circumstances or being reckless as to the existence of them….This means intention or recklessness with regard to circumstances which are shown to contravene standards of decent behaviour with regard to sexual modesty or privacy. Whether or not the victim appreciates the fact of*** the indecency is irrelevant."

On the facts of the case before this Court, the appellant began an argument over the compensation he should get, for helping the complainant to dig the trench; and he pressed on with his claim, to the point of forcing PW1 down the trench, covering her mouth while lying on her and holding her blouse. If it were not for such close bodily proximity which the appellant achieved with the complainant, it would perhaps not have been possible for her to bite him – a fact not contested through cross-examination.

From the evidence it is quite apparent that the appellant had invaded the privacy of the complainant's body and of her intimate apparel, and had committed upon her a *hostile act* accompanied by *circumstances of indecency*.

S.144(1) of the Penal Code (Cap.63) under which the alternative charge had been brought thus provided:

"***Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment with hard labour for twenty-one years."***

This was the law applicable as at the material time, though it has subsequently been repealed by the Sexual Offences Act, 2006 (Act No. 3 of 2006).

I hold that the evidence adduced before the trial Court had established with certainty, and beyond reasonable doubt, that the appellant, on the material date, *indecently assaulted* the complainant, within the meaning of s.144(1) of the Penal Code which was the applicable law at the time.

Consequently I will make orders as follows:

1. ***The appellant's appeal on the main charge is allowed.***

2. ***The appellant's conviction for attempted rape is set aside.***

3. ***The sentence imposed upon the appellant on the main charge is set aside.***

4. ***I find the appellant guilty on the alternative charge, of indecent assault on a female.***

***5. I impose against the appellant a three-year term of imprisonment, which shall take effect as from the date of the Judgement of the trial Court.***

**DATED** and **DELIVERED** at Nairobi this 26th day of September, 2007

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J**

**Court Clerk: Tabitha Wanjiku**

**For the Respondent: Ms. Gateru**

**Appellant in person**