REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 142 Of 2005

SIMON KANDENGE ONDEGO…….....……..APPELLANT

VERSUS

REPUBLIC…….....……..RESPONDENT

JUDGMENT

The appellant, Simon Kandenge Ondego, was charged with **attempted rape contrary to Section 141 of the Penal Code**. The particulars of the offence were that on the 10th of February 2004 at [particulars withheld] Forest, Nakuru, the appellant attempted to have unlawful carnal knowledge of S C B without her consent. He was alternatively charged with the offence of **indecent assault of a female contrary to Section 144(1) of the Penal Code.** The particulars of the offence were that on the same day and in the same place, the appellant unlawfully and indecently assaulted S C B by touching her private parts. The appellant pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged and sentenced to serve four years imprisonment with hard labour. Being aggrieved by his conviction and sentence, the appellant appealed to this court against the said conviction and sentence.

In his petition of appeal, the appellant raised five grounds of appeal faulting the decision of the trial magistrate in convicting him. He was aggrieved that the trial magistrate had failed to give the due weight to the evidence of DW2 and DW3 and thus thereby convicting the appellant. He was aggrieved that the trial magistrate had reached the erroneous finding that the evidence of PW3 corroborated the evidence of the complainant. The appellant faulted the trial magistrate for reaching the erroneous decision finding the appellant guilty of attempted rape in the absence of any evidence adduced to support such a finding. He was finally aggrieved that the trial magistrate had reached the decision convicting him after shifting the burden of proof from the prosecution to the appellant. At the hearing of the appeal, I heard powerful submissions made by Mr Ogolla, Learned Counsel for the appellant and Mr Gumo, Learned Assistant Deputy Public Prosecutor for and against the appeal. Whereas Mr Ogolla urged this court to allow the appeal against conviction, Mr Gumo urged the court to uphold the decision of the trial magistrate. I will revert back to the submission made after briefly setting out the facts of this case.

PW1 S C B (*the complainant*) and PW3 H B went to collect firewood at the [particulars withheld] Forest. The date was the 10th of February 2004. According to PW1 and PW3 as they were collecting firewood, the appellant confronted the complainant and tackled her to the ground. The complainant testified that the appellant unhitched her skirt and forcefully tried to remove her blouse. According to the complainant, in his attempt to remove the skirt, the appellant tore it. He also tore off the buttons of her blouse. The impression the complainant got is that the appellant wanted to rape her. She narrated how the appellant demanded to have sexual intercourse with her. Upon her refusal the appellant whipped her on the back with a plastic whip and then threw her to the ground. A struggle between herself and the appellant ensued. The complainant screamed. Her screams attracted the attention of PW3. When PW3 responded to the complainant's cry for help, she saw the appellant on top of the complainant. PW3 screamed. The appellant left the complainant and ran away from the scene. The torn skirt and blouse were produced in evidence as exhibits by the prosecution.

PW2 Dr. Phillip Wainaina Kamau testified that he examined the complainant on the 11th of February 2004 and established that the complainant had sustained soft tissue injuries on her back and hips. PW2 was of the view that the injuries sustained by the complainant were caused by a fall to the ground. PW4, Police Constable John Wachira attached to Rongai Police Station testified that the complainant made a

report to the police that the appellant had attempted to rape her. When PW4 summoned the appellant to the police station, following the complaint made against him by PW1, the appellant explained that he had pushed the complainant to the ground when she resisted his attempt to disarm and thereafter arrest her for trespassing into the forest. PW4 stated that the appellant told him that at the time, the complainant was armed with a panga. PW4 made the decision to charge the appellant with offence.

When the appellant was put on his defence he called two witnesses, DW2 J S and DW3 J K S. All the witnesses who testified for the defence stated that on the material day the two defence witnesses and the appellant (*who were employed as forest guards at the Deloraine Estate*) were on duty guarding the forest. They found the complainant and PW3 felling trees for firewood. According to DW2, he instructed the appellant to arrest the complainant. The appellant could not however arrest the complainant immediately because she was armed with a panga. According to the defence, when the appellant attempted to arrest the complainant, the complainant screamed attracting attention of several people who were nearby. The appellant and the two defence witnesses fearing for their lives ran away and reported the incident to Rongai Police Station. The complainant and PW3 were later arrested and charged with the offence of trespassing into the forest. The complainant and PW3 admitted the charge and were fined. The appellant denied that he had attempted to rape the complainant.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced by the witnesses in the trial before the magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demenour of witnesses. (*See* **Okeno –vs- Republic 1972 E.A. 32**). The issue for determination by this court is whether on the evidence on record, the prosecution proved its case against the appellant on the charge of attempted rape to the required standard of proof beyond reasonable doubt.

The charge which the appellant was convicted is that attempted rape. In the commentary on **The Indian Penal Code (Act XLV of 1860)** by **Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore (26th Edition (Reprint 1991)** in defining the essential ingredients of an attempt to commit an offence, the said authors stated at page 517 (*under the Chapter dealing with attempts to commit offences*) as follows:

"***In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly attempt to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempts fails, the crime is not complete but the law punishes the act. An "attempt" is made punishable because every attempt, although it fails of success, must create alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if the he had succeeded."***

For the prosecution to prove the offence of attempted rape in this case, they must establish that the appellant had the intention to rape the complainant. They must also establish that the appellant had put his intention into motion by making preparations to commit the offence. Finally the prosecution must establish that the appellant made the attempt to put into effect his intention to rape the complainant. The High Court of Tanganyika grappled with the difficulty that the courts faced in dealing with inchoate offences in the case of **Mussa s/o Saidi –versus- Republic [1962] E.A. 454.** In a case dealing with attempted larceny, Spry J (*as he was then*) stated at page 455;

"The principles of law involved are very simple but it is their application that is difficult. If the appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny (Penal Code S. 380). The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence. The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompartible with anyother reasonable explanation. Secondly, even if the intention is established, the act itself must not be too remote from the alleged intended offence."

In the present case we have two conflicting versions of the events that took place on the material day.

Upon re-evaluating the evidence and also considering the submissions made before me by Learned Counsel for the appellant and Mr Gumo for the State, the following facts are not disputed. It is not disputed by the appellant that he was in the forest at the time when the complainant alleges that the appellant attempted to rape her. It is further not disputed that there arose a struggle between the complainant and the appellant which resulted in the complainant being thrown to the ground by the appellant. Whereas the complainant states that the appellant threw her to the ground in an attempt to rape her, the appellant insists that he was attempting to arrest the complainant for trespassing into the forest and cutting trees therein. To effect arrest, the appellant testified that he needed to disarm the complainant first as she was armed with a panga. To prove that the appellant attempted to rape her, the complainant produced in evidence her skirt and blouse which were allegedly torn by the appellant when he made the attempt to rape her. The evidence of the doctor who examined the complainant was inconclusive. He stated that the complainant had sustained injuries on the back and hips which were consistent with a fall to the ground. There was no medical evidence to support the complainant's allegation that she had been whipped severally by the appellant with a plastic whip.

If the evidence of the complainant was considered without putting into account the evidence adduced by the defence, would it constitute the essential ingredient of attempted rape? I do not think so. It is clear from the evidence adduced by the prosecution witnesses that the appellant had no intention to rape the complainant. The only evidence that was adduced by the prosecution is that of the complainant who made allegation that the appellant sought to have sexual intercourse with her without her permission. PW3 who was with the complainant did not form the impression that the appellant wanted to rape the complainant, yet she was first on the scene when the complainant screamed for help. Indeed PW2's testimony confirms the evidence of the defence witnesses when she states that she found the appellant on top of the complainant beating her up. PW3 even talked to the appellant.

Although in rape cases it can be said that the intention is formed when the offender finds himself in a situation where an opportunity presents itself to him, (*rape in most cases being an opportunistic crime*) in the instant case, I agree with the submission made by the appellant that it would have been extremely foolhardy for him to have attempted to rape the complainant while he was aware that there were more than five people lurking in the vicinity. It is evident that PW3 and the two defence witnesses where seeing the struggle between the appellant and the complainant. None of them thought that the appellant was attempting to rape the complainant. Whereas it is possible that the appellant attempted to rape the complainant it is also plausible that he was restraining the complainant in a bid to arrest her. In the Mussa s/o Said case (*supra*) it was stated that the overt "*act must be of such character as to be incompartible with any other reasonable explanation*." In the present appeal, the appellant has maintained a consistent story from the time he was arrested by PW4 that he intended to arrest the complainant who had then trespassed into the forest. The explanation by the appellant that the complainant was resisting arrest hence the struggle cannot therefore be ignored.

The upshot of the analysis and re-evaluation of the evidence is that the defence of the appellant raised reasonable doubt to the prosecution's case. I do hold that the prosecution failed to prove its case against the appellant to the required standard of proof beyond reasonable doubt. The appeal must therefore be allowed. The conviction of the appellant is quashed. The sentence of four years imprisonment with hard labour is set aside. The appellant is set at liberty and ordered released from prison unless otherwise lawfully held.

DATED at NAKURU this 30th day of January 2006.

L. KIMARU

JUDGE