



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Criminal Appeal 99 of 2005
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Criminal Appeal 99 of 2005

EVANS MIRABA HAMISI APPELLANT

VERSUS

REPUBLIC RESPONDENT

**(From original conviction and sentence of the RM's court at Keroka in criminal
case No. 1072 of 2004)**

JUDGMENT:

Appellant was convicted of the offences of attempted rape contrary to s.141 Penal Code in that on 26th November 2004 at Kisii central District he attempted to have carnal knowledge of ABC without a consent. He was also convicted for the offence of indecent assault contrary to s.144 (1) Penal Code in that on the same day and place he indecently assaulted ABC by touching her private parts. He was sentenced to 4 years imprisonment in the first count and 3 years imprisonment in the second count, to run concurrently.

The complainant was the only witness who gave evidence about the incident. She said that on the fateful day at about 11 p.m. she was going home from a clinic. She was carrying a baby. Someone, whom she later identified as the appellant, emerged from the bush and told her to stop. He had a metal bar. She started to run away but he threw the metal bar at her. She fell down. He held her breasts and private parts. He also tore her dress as he was pushing her to the bush. She started screaming and other people rushed to her rescue. He ran away. She went and reported to Ramasha police station. Appellant was later arrested and charged.

PW2 PC Ojwang Martin said he received report from the complainant on that day. He wrote her statement. Later appellant was arrested by the area assistant chief.

Appellant denied the offence and said he was at home that night.

As I said the trial court after analyzing the evidence found the appellant guilty on both counts and convicted him. However there was a serious issue of identification. The incident happened at 11 p.m. which was at night. The complainant did not tell court how she was able to see and identify her assailant

in the dark. She did not say if there was any kind of light which enabled her to identify the assailant.

In her examination in chief the complainant said she knew the appellant initially. However in cross-examination she clearly said that she did not know the appellant person initially. This was contradiction in her evidence which raises serious doubts as to if she was actually able to identify her assailant.

The complainant's evidence on identification needed to be corroborated. The trial magistrate found such corroboration in the evidence of PW2. However, with respect the evidence of PW2 did not corroborate that of the complainant. She may have reported the same night but PW2 never witnessed the incident. He did not say that he identified appellant as the assailant. All what he said was what the complainant told him and that is no corroboration. He further said the complainant had a torn dress. That dress was never produced as an exhibit in court. Infact PW2 never said if the complainant gave him the name of her assailant. He only said he identified the accused (appellant). Accused was not there then. If she really knew the assailant she should have given the name to PW2.

The complainant said on screaming people went to her rescue. She gave names of some of them. They should have been called as witnesses to confirm if they did saw the appellant.

The evidence on record therefore falls far short of proving any of the two charges. I allow the appeal, quash the conviction and set aside the sentence.

Appellant be set at liberty forthwith unless otherwise legally held.

Dated 17th March 2006.

KABURU BAUNI

JUDGE

Cc – Mobisa

Mr. Kemo for State

Appellant present