



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 58 of 2003**

**DAVID NGARI WANIARA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from both sentence and conviction of the Senior Magistrate's Court at Murang'a in Criminal Case Number 367 of 2002 by F. F. Wanjiku – S.P.M.)***

**J U D G M E N T**

David Ngari Waniara hereinafter referred to as the Appellant was tried jointly with Joseph Kimani Muriu (*hereinafter referred to as the Co-Accused*) before the Senior Principal Magistrate Muranga. They were charged with one count of stealing from the person contrary to Section 279 (a) of the Penal Code and another count of Attempted Rape contrary to Section 141 of the Penal Code. The Complainant in both counts is Jemimah Wairimu Waweru (P.W.1).

The Appellant, the Co-Accused and another are alleged to have stolen a green bag, a sweater an umbrella, a wrist watch, a head dress and cash Kshs.260/- from the Complainant. They are also alleged to have attempted to have carnal knowledge of the Complainant without her consent. The Appellant and the Co-Accused also faced an alternative charge of indecent Assault on a female contrary to Section 144 (1) of the Penal Code in that they unlawfully and indecently assaulted the Complainant by touching her private parts.

The trial magistrate convicted the Appellant of the offence of theft from the person and sentenced him to serve 6 years imprisonment. The Appellant was however acquitted of the charge of attempted Rape. The Appellant has now brought this appeal contending *inter alia* that the trial magistrate erred in convicting him as the exhibits were not recovered from him, and that the trial magistrate erred in rejecting his defence as He was simply a victim of mistaken identity.

I have reconsidered and evaluated the evidence that was adduced before the trial magistrate. Apart from the Complainant there were two other independent eye-witnesses. These were Kenneth Irungu Mwangi (P.W.2) and Mwangi Kamau Solomon(P.W.3). These two witnesses had earlier observed 3 men accost the Complainant and prevent her from getting into a Matatu. Out of concern, P.W.2 decided to rescue the Complainant, but became even more worried when the 3 men followed them. It was then that P.W.2 sought P.W.3's assistance to accommodate the Complainant. While P.W. 2 and P.W.3 were still standing with the Complainant one of the three men grabbed the Complainant's handbag and ran away with it. P.W.2 and P.W.3 ran after the man. The remaining two men then accosted the Complainant who had fallen down. One man held the Complainant down by the shoulder whilst the second person removed her panty in an effort to Rape her.

The Complainant screamed upon which P.W.2 and P.W.3 gave up their chase of the man who had ran with the bag and went back to where they had left the Complainant. They found the other two men still struggling with the Complainant. P.W.2, P.W.3 and the Complainant raised an alarm and members of the Public together with occupants of a matatu which was passing by, came to their rescue. The two men were apprehended and escorted to Makangu AP's camp. The Co-Accused was one of the two apprehended. The second person appears to have died before the commencement of the trial.

All the 3 eye-witnesses claimed that it was the Appellant who was the man who grabbed the Complainant's bag and ran away with it. It is note worthy however that none of the witness knew the Appellant before nor did they give any description of the man who grabbed the Appellant's bag and ran away with it.

It is evident that the man who took the Complainant's handbag ran away and disappeared into the bushes. The evidence of identification by P.W.1, P.W.2 and P.W.3 was rather doubtful given that they were not called to any identification parade to identify the Appellant. The absence of the evidence of arrest also leaves a gap in the prosecution evidence. Nevertheless it is clear from the evidence of P.W.4 that a few days after the Complainant's things were stolen from her, the Appellant led the police officers to his home where some of the stolen items including the Complainant's identity card were recovered from the Appellant.

In his defence, the Appellant simply denied having committed the offence. He offered no explanation for his possession of the stolen items. Why would the Appellant have the Complainant's stolen items in his house just two days after the theft? In the absence of any other explanation from the Appellant, the presumption is that the Appellant was the person who stole the items from the Complainant. The Appellant's conviction was therefore safe. The offence of which the Appellant was convicted carries a maximum sentence of 14 years imprisonment. The sentence of 6 years was therefore not manifestly excessive as to warrant the intervention of this court.

The upshot of the above is that I find no substance in this appeal and do therefore dismiss it in its entirety.

***Dated, signed and delivered this 29<sup>th</sup> day of May 2006.***

**H. M. OKWENGU**

**JUDGE**