



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAKURU**  
**CRIMINAL APPEAL 333 OF 2004**

*(From original conviction and sentence in Criminal Case No. 536 of 2003 of the Chief Magistrate's Court at Nakuru – S. MUKETI, PM)*

**CHARLES IRUNGU THIGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged with attempted rape contrary to **Section 141** of the **Penal Code**. The particulars of the offence were that on the 7<sup>th</sup> day of March 2003 at Nakuru District, the appellant attempted to have carnal knowledge of J W G without her consent. After a full trial, he was convicted and sentenced to 10 years imprisonment. The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court. Although he filed the appeal in person, during the hearing of the same he was represented by Mr. Gakinya, Advocate.

The complainant, **J W G, PW1**, testified that the appellant used to take chang'aa at her neighbour's place. On the material day at about 5 p.m., while she was resting on her bed, the door to her room was flung open and the appellant entered and locked it. She said that the appellant held her neck and started strShe further stated that the appellant tore her pants and removed his trouser and shirt. He also had a condom. She screamed and a neighbour by the name David Mwangi, PW2, accompanied by a Mr. Nyongesa forced the door open and went in. David Mwangi and Nyongesa told the appellant to leave the complainant's room and he ran away, leaving behind a bicycle that he had. PW1 and PW2 decided to go and report the incident to the police at Bondeni Police Station. While they were there, the appellant also arrived and said that his bicycle had been stolen. The police arrested him. PW1 said that she was hit on the head by the appellant and was given a PW3 form and referred to a hospital for examination. PW1 said that the appellant was not her friend and she even denied any knowledge of him, although she had earlier said that she used to see him going to her nieghbour's place to drink chang'aa.

In cross examination, she said that they went to the police station at about 6.00 p.m. She went there dressed as she was at the time of the alleged incident. She denied that the appellant had accompanied her to her house.

PW2 said that he heard screams emanating from the house of PW1 at 6 p.m. and together with a Mr. Nyongesa they kicked open the door. He said that they found the appellant having pulled down his pair of trousers and his inner wear upto the knees. Having witnessed that, they decided to walk out of the room and Mr. Nyongesa commented that "**these were worldly things**". Mr. Nyongesa was not called as a

prosecution witness. PW2 further testified that an unnamed friend who was at the scene slapped the appellant. There was a police officer by the name Kingori, who told PW1 and PW2 to take the appellant's bicycle to the police station. That police officer did not testify during the trial.

In cross examination, PW2 said that the appellant had been drinking alcohol with the complainant that evening.

**PW3, Police Constable Pascal Keny** testified that PW1 and PW2 went to Bondeni Police Station and reported that the appellant had attempted to rape PW1. When they went to PW1's house together with her, there were signs of struggle. He said that they recovered a bra, a T-shirt and a skirt and he produced those clothes as exhibits. However, those were the very same clothes which the complainant wore when she went to report at the police station. That was stated in cross examination by the appellant.

**PW4, Dr. Koguyo Vitalis** said that he examined the complainant 5 days after the alleged incident. He said that she had a swollen forehead and scratch marks on the right side of her head and the left ear lobe.

In his defence, the appellant testified that on the material day, he was taking beer with the complainant at a bar in Flamingo area. Afterwards, he suggested to her that they book a room for the night but she told him that they could go to her place. They went to the complainant's house and the landlord, DW3, was seated outside near the kitchen. The appellant said that they locked the door from inside and had sex with PW1. He used a condom. PW2 had said that when he went inside PW1's room where she was with the appellant, he found a condom wrapper there. The appellant testified that they stayed there for about 30 minutes. PW1 then started asking for money but the appellant said that he had no money. PW1 told the appellant she would say that he had raped her and she screamed and started scratching herself. The appellant jumped out of the bed and as he started dressing up, the door was forced open. Some people went in and beat him up and took some items from him. He decided to go and report to the police. On reaching the police station, he found PW1 and PW2 there.

The appellant called two witnesses. The first one, **Lucy Wangoi, DW2**, testified that the complainant had left her child at her place. PW1 went with the appellant to take some alcohol. DW2 was given Kshs.20/- to buy a soda. As she did so, the landlord asked DW2 to call PW1 as she had not paid her rent. The appellant then paid rent for PW1. After some time, DW2 heard PW1 asking for some more money. In cross examination, DW2 said that when PW1's house was opened, she saw several condoms.

The second witness, **Kigothi Gathochi, DW3**, was the complainant's landlord. He testified that on the material day, the complainant and the appellant went to his property where the complainant had rented room No.7. They were drunk. They went to a place where chang'aa was on sale. DW3 told the complainant to pay her rent. After about half an hour she paid Kshs.300/- which was the outstanding balance of her Kshs.800/- rent. Shortly thereafter, DW3 heard the complainant screaming and saw some people beating up the appellant. In cross examination by the prosecutor, the witness said that he had seen the appellant and the complainant go to the complainant's room and lock themselves therein.

The learned trial magistrate rejected the appellant's defence saying that it did not cast any doubt on the prosecution evidence. She did not consider the evidence of DW2 and DW3 at all.

I have carefully considered all the evidence that was tendered before the trial court. PW1 was not truthful when she denied any knowledge of the appellant and that he was not her friend. PW2 told the court that PW1 had been taking alcohol together with the appellant on the material day. That evidence contradicted that of PW1. DW2 and DW3 had also seen PW1 and the appellant not only drinking together but also going into the room of PW1 and locking themselves therein. That evidence supports the defence that was put forward by the appellant. It is difficult to imagine that the appellant randomly entered the complainant's room in broad day light, leaving some people seated outside, and suddenly began to force himself into the complainant. I believe the two knew each other and had gone to the complainant's room together.

The complainant said that the appellant tore her pants as he was removing them. If that was so, such

important would be exhibit ought to have been shown to the police since the incidence was promptly reported but that was not done. When the police went to the house of PW1, they did not recover the alleged pair of pants. The complainant did not even make such an allegation when she went to report the matter to the police.

When the complainant screamed, the first people to go to her aid were PW2 and his friend Nyongesa. However, their reaction upon finding PW1 and the appellant in such a compromising position was rather unusual, if indeed they were satisfied that the appellant was attempting to rape the complainant. The two just walked out and Mr. Nyongesa commented – “these were worldly things”. Mr. Nyongesa and a police officer who was at the scene at the material time were not called as prosecution witnesses. No reason was given for that. In ***BUKENYA AND OTHERS VS UGANDA [1972] E. A. 549***, it was held that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution case. The learned trial magistrate did not properly evaluate the appellant’s defence and the evidence of his two witnesses and contrast the same with the prosecution evidence. In ***OUMA VS REPUBLIC [1986] KLR 619***, it was held that at the time of evaluating the prosecution’s evidence, the trial court should consider the accused’s defence and satisfy itself that the prosecution had by its evidence left no reasonable possibility of that defence being true.

The appellant’s conduct immediately after the alleged offence was not consistent with that of a person who had been seen attempting to commit such a serious offence. He went to the police station on his own to report the theft of his bicycle by PW2. He was arrested and he must have told the police his fashion of the story. If he said that they had had consensual sex with the complainant whereas the complainant reported a case of attempted rape, considering the circumstances under which the alleged offence was committed, both the appellant and the complainant should have been medically examined that evening. They were in the police station at the same time, a few minutes after the alleged offence was committed.

The medical examination of the complainant by pW4, five days later was of no value. There was nothing to indicate that the scratch marks that she had were inflicted by the appellant.

All in all, I am satisfied that the appellant’s conviction was unsafe. I therefore allow the appeal, quash the conviction and set aside the sentence that was passed by the trial court. The appellant should be set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at Nakuru this 15<sup>th</sup> .day of December, 2006.

**D. MUSINGA**

JUDGE

Judgment delivered in open court in the presence of the appellant and N/A for state.

**D. MUSINGA**

JUDGE