REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL APPEAL NO. 116 OF 2006

(From original conviction and sentence in Criminal Case No. 809 of 2005 of the Resident Magistrate's Court at Eldama Ravine – W. M. KAGENO, RM)

JACKSON KIPRONO……..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 17th day of July 2005, at Koibatek District, he attempted to have carnal knowledge of H A K without her consent. He pleaded not guilty to the said charge. After a full trial he was convicted and sentenced to five years imprisonment. He was aggrieved by the said conviction and sentence and preferred an appeal to this court.

The facts of the case briefly stated were as follows:-

The complainant, **H A K, PW1**, was walking home on the material day at about 6.00 p.m. She met the appellant along the way. She knew the appellant very well. The appellant greeted her twice but she did not respond. The appellant asked her whether she was dumb and again she did not respond. The appellant then threatened her by saying ***"Today I will deal with you"***. He grabbed her by the neck and pulled her down. He had by then dropped down a bicycle which he had been pushing. The complainant and the appellant started struggling as the complainant screamed. The appellant raised up the complainant's skirt but he could not reach her private parts as she was wearing a biker shorts. He tried to pull down the biker shorts but the complainant held it tightly.

The complainant's screams were heard by **Stephen Gitimu Muguthi (PW2**) who rushed to the scene. He found the appellant holding the complainant as he tried to pull her into some bushes. PW2 tried to separate them but he was unable. He advised the complainant to hold onto the appellant's bicycle which was lying nearby. PW2 went and called a person by the name Richard Kirui and they were able to separate the two who were by then involved in a vicious struggle. PW2 knew the appellant very well because he used to work for the appellant. PW2 called the complainant's husband and they all proceeded to Mogotio police station. A report was made to police Constable Silvanus Madegwa, PW3, who then arrested the appellant and locked him up in the police cells. The following day PW3 began his investigations. He went to the scene and realised that there were signs of struggle.

In his defence, the appellant stated that on 17th July 2005, at about 8.00 p.m., he was going home as he pushed his bicycle. He noticed that there was somebody ahead of him who was walking rather slowly.

As he was about to overtake the person, he decided to greet the person. The person did not respond to his greeting. He greeted the person again but still there was no response. He then asked the person whether she was dumb. The appellant said that he bent down to try and identify the face of the person. The person then threw down a luggage that she was carrying and started screaming; calling Richard Kirui, as she was near his house. The appellant said that he was shocked by the turn of events and did not run away. Shortly thereafter Richard Kirui and other people went to the scene and the complainant told them that the appellant wanted to rape her. The complainant's husband also went there and upon hearing what had happened, he slapped the complainant twice and he hired a vehicle which took them to Mogotio police station.

The trial court did not believe the appellant's defence. The trial court further noted that it was highly impressed by the demeanour of the complainant. The trial court was satisifed that the appellant's motive in holding the complainant, pushing her down, pulling her towards the bush and attempting to remove her under pants showed that his motive was to have carnal knowledge of her.

In his appeal, the appellant stated that there was no sufficient evidence to warrant his conviction. He further lamented that his defence was rejected without any cogent reasons. He urged the court to allow his appeal and quash the conviction and set aside the sentence that had been passed against him.

In ***OKENO VS REPUBLIC*** ***[1972] E.A. 32,*** the Court of Appeal held as follows:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya V R, [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala Vs R [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In so doing, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see PETERS V SUNDAY POST [1958] E,A, 424."

I have carefully considered all the evidence that was tendered before the trial court. It is not in dispute that on the material day, that is, 17th July 2005, the appellant had an encounter with the complainant. The complainant said it was at about 6.30 p.m. PW2 also talked of the same time but the appellant said that it was around 8.00 p.m. The complainant said that she met the appellant along the way as she headed home and he greeted her twice but she did not respond. The appellant then asked her whether she was dumb. The appellant on the other hand said that he saw somebody walking ahead of him and he did not know who the person was. As he was about to overtake that person, he greeted the person twice but there was no response. He then asked the person whether she was dumb. That is the other diverging point between the evidence of PW1 and the appellant.

The appellant said that he bent down to try and identify the person and immediately thereafter the person dropped the luggage she was carrying and began to scream. PW1 said that after the appellant asked her whether she was dumb, he said to her in kiswahili ***"Leo niko na wewe"*** – meaning ***"today I will deal with you"*** and thereafter the appellant held her by the neck, pulled her down, started pulling her towards the bush. She started screaming and meanwhile the appellant was raising up the complainant's skirt and trying to remove her under pant. PW2 heard the screams of PW1 and when he rushed to the scene he found PW1 and the appellant engaged in a struggle. The appellant was pulling the complainant towards some bushes but the complainant was strongly resisting and continued to scream.

Thus far, the evidence of PW1 was materially corroborated by the evidence of PW2. The trial court had the benefit of seeing the demeanour of the two persons and it was highly impressed by the complainant's demeanour. An appellate court cannot question that. All I can say is that I find the complainant's evidence to be very consistent and flowing.

On the other hand, the appellant's evidence was not quite believable. If indeed he was innocently

walking home when he met the complainant, after greeting her twice without any response, what business did he have bending down to identify who she was? Why did he have to ask her whether she was dumb? Was that action sufficient to cause the complainant to start screaming for help, which the appellant admits she did?

I find the appellant's defence to be hollow. The learned trial magistrate rightly rejected the same. The appellant's conduct sufficiently manifested his intention or raping the complainant and I am satisfied that he was properly convicted. The sentence of five years' imprisonment that was passed by the trial court was rather lenient, considering that the maximum sentence for attempted rape is life imprisonment with hard labour. Consequently, I dismiss this appeal in its entirety.

DATED, SIGNED and DELIVERED at Nakuru this 15th day of December, 2006.

D. MUSINGA

JUDGE

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

D. MUSINGA