REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 559 OF 2003

FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 954 of 2002 OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT LIMURU

STEPHEN WAKABA MUTURI……...……..APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

JUDGMENT

The appellant, **STEPHEN WAKABA MUTURI,** was charged with **ATTEMPTED RAPE** contrary to section 141 of the Penal Code. The Alternative charge was for **INDECENT ASSUALT ON A FAMALE,** contrary to section 144(1) of the Penal Code.

After his trial, the Court convicted the appellant for Attempted Rape, and sentenced him to 3 years imprisonment, with hard labour.

In his appeal against conviction the appellant submitted that the learned trial Magistrate erred by convicting him on the strength of the evidence of PW1 and PW2 only. In his view, there should have been other independent witnesses. He says that as PW1 and PW2 were cousins, the former should have screamed, as the incident occurred in a public place.

The appellant also said that PW2 should not have been believed, as there was no reason why she had to run off home, instead of going for help from nearby homesteads.

Furthermore, as no knife was adduced as exhibit before the trial court, the appellant says that the court should not have accepted the assertion that he was armed with a knife.

Also as the person who went to report the incident was the father to the complainant, the appellant says that he should have testified in court. Connected to this issue is the appellant's defence, in which he had testified that the complainant's father used to be his employer. In his view, there was no way he could have committed the offence and then remained at his home, where he was later arrested. The appellant had given an alibi defence, in which he had said that on the material day he had been **"making"** a toilet at his home. He then got cattle feeds, and was back home by 6.30p.m. Thereafter, he did not leave his home until the next day. He could not, therefore, have committed the offence at 8.00p.m., said the appellant.

In answer to the appellant's submissions, learned State Counsel, Ms Mwenje said that she supported the conviction and sentence. First, she made the point that both identifying witnesses, i.e. PW1 and PW2, knew the appellant well. She said that the two ladies boarded the same matatu as the appellant, and that they alighted at the same stage.

PW1, B W K said that on the material date, 21st March 2003, she was from home, at about 8.00p.m. She was in the company of PW2, when the appellant asked them who they were. PW2 said that she and PW2 told the appellant that they were on their way home. It is then that the appellant is said to have grabbed PW1, while demanding to now if she had ever had sex. When PW1 answered in the negative, the appellant is said to have asked her if she had been circumcised. The appellant was armed with a knife, and threatened to stab PW1, if she screamed. At that point, the appellant lifted up the skirt of PW1 and started touching her private parts. PW1 said that the appellant dragged her to a farm. Her shoes came off in the process. When she asked the appellant to allow her put on her shoes, he let go of her and PW1 ran home.

The foregoing incident is said to have happened near PW1's home. That would perhaps explain why PW2 rushed to report the incident at PW1's home. In effect, it would be an adequate answer to the appellant's contention that PW2 could have sought help from the nearby homesteads.

When PW2, George Mbugua, testified, he said that on 21.3.03, at about 8.00 to 9.00 p.m. he was coming from his place of work. He was heading home. He said that he met PW1 and the complainant in the same *matatu*. He boarded the *matatu*, and later, all three of them alighted at the same place.

PW2 said that after walking for a short distance, the appellant grabbed him, while demanding to know his relationship to PW1. When he said that PW1 was his cousin, the appellant pushed him into the ditch. The appellant then rushed home, to notify their cousin. However, when he and his cousin came back to the scene, both PW1 and the appellant were no longer there.

Several discrepancies emerge between the testimonies of PW1 and PW2. Whilst PW1 said that she was coming from home, at the material time, PW2 said that they were in the same matatu headed for home. Then PW1 said that she was the person who the appellant threatened to stab, if she screamed. But PW2 says that the appellant threatened to stab him. So the question is, who exactly did the appellant threaten to stab.?

PW1 testified that there were people passing on that road, at the time the incident occurred. That statement quickly brings into focus the appellant's question as to why PW1 did not scream. Granted, PW1 also said that the appellant had threatened to stab her, if she screamed, but one cannot help wondering how one individual could have the audacity to accost two people, along a road, where other people were passing, and try to rape one lady. The story does not ring true.

And as if that is not enough, the male companion to the lady, instead of helping her, or even just shouting for help, rushes off home, to seek assistance.

Of course, on PW2's part, he would justify his action on the basis of his evidence, which was to the effect that there were no people on that path, at the hour when the incident occurred. That would lead to the question, whether there were passing along the road (as PW1 said) or were there no people on the path, as PW2 said? I am afraid, I have no means of resolving that inconsistency.

Therefore, to my mind, a doubt is raised as to the version of events which reflects the truth.

Another issue on which the two witnesses are not in agreement relates to the place to which PW1 was dragged by the appellant. PW1 said that she was dragged into a shamba, but PW2 said that PW1 had been dragged into the bush.

Taken each on its own, the inconsistencies may appear somewhat minor. However, when it is considered that there are several inconsistencies between two witnesses, I hold the considered view the sum total of the said inconsistencies is material.

I therefore hold that it would be unsafe to uphold conviction, in the light of the said inconsistencies.

As regards the actions of the appellant, the question that arises is whether his actions amounted to or disclosed the offence of attempted rape. Assuming for a moment that the appellant did lift-up PW1's skirt

and then touched her private parts, such an action is without doubt very indecent indeed. There is no doubt about that. However, when coupled with the questions which PW1 said she was asked i.e. whether she had ever had sex, and also whether she had been circumcised, would be right to conclude that the appellant was attempting to rape the complainant?

Rape is defined at S. 139 of the Penal Code as follows:

> **"Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the action, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape."**

In order to be convicted for Attempted rape, the accused person would have to be found to have attempted to commit the act defined above. Therefore, I must ask myself if the appellant tried to have unlawful carnal knowledge of PW1.

To my mind, it is not necessary that the accused person does more, for him to be deemed to have intended to have carnal knowledge of the complainant. He had asked her whether or not she had had sex before. That clearly shows that sex was on his mind. He also asked her if she had been circumcised. That too is a statement which has a direct bearing to the female genitalia. At the same time, the questions were being asked when the appellant was said to have threatened to stab the complainant. He had also lifted up her skirt. Given those circumstances, I would hold that if the rest of the prosecution evidence had been watertight, I would have upheld the finding by the learned trial Magistrate that the appellant had attempted to rape the complainant. I cannot see what else, he may have wanted to do, after dragging her off the road, lifted up her skirt and touched her private parts.

The next issue in this appeal was not canvassed by the parties. However, I have noted that the learned trial magistrate convicted the appellant for **"Rape under section 215 of the CPC."**

That statutory provision stipulates as follows;

> **"The court having heard both the complainant and the accused person and their witnesses and evidence, shall either convict the accused and pass sentenced upon or make an order against him according to law, or shall acquit him."**

The said section makes absolutely no reference to the offence of rape. It cannot therefore form the basis for convicting a person for the said offence. S. 215 of the Criminal Procedure Code merely sets out the action which a court of law should do after it has received evidence at the trial.

In my understanding, an accused person can only be convicted on the basis of the statutory provision which sets out the offence with which he has been charged.

Therefore, in the appellant's case, he could only have been convicted on the basis of section 141 of the Penal code. As he was not so convicted, that too is yet another ground upon which the conviction herein must be upset.

Accordingly, I do now allow the appeal, quash conviction and set aside the sentence.

I direct that the appellant should be set at liberty forthwith, unless he is otherwise lawfully held.

Dated at Nairobi this 20th of December, 2004

FRED A. OCHIENG

AG. JUDGE

Appellant in person

Wambui – Court Clerk