

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO.160 OF 2002

(From Original Conviction and Sentence in Criminal Case No.931 of 2002 of the Senior Resident Magistrate's Court at Voi –E. N. Maina, Ms –S.R.M.)

LIVERSON MWASAU MWASARU.....APPELLANT

=V E R S U S=

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was charged with the offence of Attempted Rape contrary to S.141 of the Penal Code. There was an alternative charge of Indecent Assault contrary to S.144(1) of the Penal Code. He was convicted of the main offence of the attempted rape and sentenced to imprisonment for 18 months. He appeals against the conviction and the sentence.

The Prosecution facts of the case are that on 10.10.2001 as the complainant Mwanaidi Mwasaru walked home from Mgambonyi Trading Center, in company of another woman, PW.5, they were joined by the appellant. After a while the said PW.5, Mary Mkambila, branched to her home leaving the appellant and the complainant to continue with their journey. It is alleged by the complainant that soon thereafter the appellant started fondling her breasts and thereafter twisted her right hand and tried to strangle her. He then tried to pull her into a bush but the complainant screamed and PW.2, Jonathan Mwadoli Mwasaru, heard her screams and went to her rescue. He did not find the appellant. He escorted her to the witness's sister's house where the complainant slept. The incident was reported to the Chief's askaris who arrested the complainant the next day. PW.2 could not remember who complainant's attacker was.

The accused denied the charge on oath and called one witness. He states that the complainant requested him to help carry a load from the Trading Center to the cross-road which he did and he went back to the market to his brother at his shop thereafter.

The State Counsel, Miss Kwena did not support the conviction. Indeed considering the evidence on record, there was no sufficient evidence to prove the offence of attempted rape. There is no evidence from which to read or assume what the appellant intended, even if this court would assume that complainant was at the scene. Fondling her breasts, which the complainant did not appear to thwart, did not amount to an attempted rape. There is little to support the alleged fondling. Nor was twisting the complainant's hand, if it can be believed, amount to anything much in the line of the charge. Furthermore, there is no evidence on the record to suggest any good reason why the complainant would want to scream against the appellant who had not actually managed to pull her at all. Finally, the witness, PW.2, was not much of a witness, was he?

The State Counsel was right in not supporting the conviction as indeed the same was not in any way proved even on the balance of probability.

I accordingly allow the appeal, quash the conviction and set aside the sentence. The appellant is accordingly, hereby released from prison forthwith, unless lawfully held. It is so ordered.

Dated and delivered at Mombasa on the 5th day of August, 2002.

D. A. ONYANCHA

JUDGE