



REPUBLIC OF KENYA



KENYA LAW
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**Mutungi v Republic (Criminal Appeal E105 of 2021)
[2023] KEHC 24160 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E105 OF 2021
GMA DULU, J
OCTOBER 16, 2023**

BETWEEN

FREDRICK MWANZIA MUTUNGI APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E016 of 2021 delivered on 28th October, 2021 at Makueni Law Court by Hon. J. N. Mwaniki (CM))

JUDGMENT

1. The appellant was convicted of attempted rape contrary to Section 4 of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence being that on 15th July 2021 at Kivutini village in Kilala Sub Location in Makueni County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of M.N.M (name withheld) without her consent. He denied the offence.
2. On conviction, he was sentenced to fifteen (15) years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds:-
 1. The learned trial Magistrate erred in law and fact when he convicted and sentenced him without observing that the charges before court were defective for both being at great variance with the evidence on record.
 2. The learned Magistrate erred by convicting him without considering that there was no evidence to prove the offence of attempted rape to the required standard in law of beyond reasonable doubt.



3. The learned Magistrate erred by shifting the burden of proof to the appellant and misapprehending and misdirecting himself on the evidence hence arrived at a wrong conclusion.
4. The learned trial Magistrate erred when he dismissed the defence case which contained the possibility of being framed.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions. Both sides relied on decided court cases.
5. This being a first appeal, I am duty bound to reconsider and re-evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] EA 32.
6. In proving their case, the prosecution called four (4) witnesses. The appellant on his part decided to keep quiet and tender no defence statement.
7. Though the appellant has contended in his grounds of appeal that his defence was dismissed by the trial court without cogent reasons, that ground of appeal cannot stand as the appellant did not tender any defence at all. Thus the trial court was entitled to consider only the evidence of the prosecution on record.
8. The burden was on the prosecution to prove all the element of the offence of attempted rape to the required standards of beyond reasonable doubt. See *Woolmington v Director of Public Prosecutions* (1935) AC 462, and *Sawe v Republic* (2003) eKLR.
9. What constituted attempt to commit an offence has been considered in a number of judicial decisions. In the case of *Moses Kabue v Republic* (2015) eKLR, the High Court stated as follows:-

“It may be proved by the doctrine of “dangerous proximity”, and the presence of a “substantial step towards a course of proximity.” The dividing line between legal and illegal conduct is whether there is a “substantial step” towards committing a specific crime.”
10. Thus for an attempt to commit an offence to be proved the provisions of Section 388 of the *Penal Code* which codifies the definition of attempt to commit a crime must be proved by the prosecution beyond any reasonable doubt.
11. In the present case, the complainant PW1 Mary Nduku Mutinda stated that-

“He dragged me towards some bush along some grass. He was then fondling my buttocks and breasts. I screamed as I suspect he wanted to rape me. The accused hit and fell me face down. The person laid on top of me and strangled me. He threatened to kill me. Luckily I heard noise of people coming to the scene. The accused was still fondling my buttocks. The person pressed my throat and almost lost consciousness. He took away my two phones and hit me and told me to die.”
12. In my view, with the evidence on record, the prosecution did not prove an attempt to rape beyond any reasonable doubt for the following reasons. First, the appellant did not say anything that suggested an intention to have sexual intercourse. Secondly, the appellant did not try to do anything like attempting to undress the complainant PW1. Thirdly, the appellant did not do anything that would suggest that he intended to use his penis.



13. Thus the allegation in the charge that he attempted to cause his penis to penetrate the vagina of PW1 was not proved.
14. The evidence of PW1 was however that the appellant fondled her breasts and buttocks, to which the appellant chose not to respond in his defence. Thus, that evidence of PW1 stands unshaken. In my view, the evidence on record established the lesser offence of indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*, which provides as follows:-

“ Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both”.
15. I will therefore quash the conviction for attempted rape and substitute it with a conviction for committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act* and sentence the appellant accordingly.
16. Consequently and for the above reasons I quash the conviction for attempted rape and set aside the sentence imposed by the trial court.
17. I however convict the appellant for committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*. The appellant will now serve three (3) years imprisonment from the date he was imprisoned by the trial court.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF OCTOBER 2023 VIRTUALLY AT VOL.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Kazungu for State

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