



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 11 OF 2020

PATRICK ETOON LOOSE.....APPELLANT

-VERSUS

REPUBLIC.....ESPONDENT

(Being an appeal from the conviction and sentence dated 9th April 2019 of the

subordinate court by Hon. R.M. Oanda P.M. in S.O. 41 of 2018 at Kilgoris Law Courts)

JUDGMENT

1. The appellant, **PATRICK ETOON LOOSE**, was convicted and sentenced to 7 years' imprisonment for the offence of attempted rape contrary to **Section 4** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 18th September 2018, at [particulars withheld] location in Transmara West Sub-county within Narok County, he intentionally and unlawfully attempted to cause his penis to penetrate to the vagina of SKD without her consent.

2. SKD (PW1) testified that she was 23 years old. On the material day at about 7 p.m. she was in a club known as Kwa Maggie club when she met the appellant at the door. He asked PW1 about their mutual friend and PW1 told him that she was on her way. The appellant ordered her a big cup of Bambua and one egg. At about 9 p.m., the appellant said that he would go for "plan B" and asked her to take over from his girlfriend. They were all asked to leave the club when the time ended. PW1 testified that as she was walking towards her place, she met the appellant at Casablanca bar. He held her hand and took her to a field. He slapped her. She screamed but the appellant tore her clothes which she identified as a blue trouser and a biker. She also identified her shoe which had been recovered at the scene. PW1 testified that the appellant did not get to her underwear as her screams had attracted one person who came to her rescue. She testified that she reported the matter at Enosaen police and went to Enosaen health center the following morning. She testified that she knew the appellant as 'Turkana' and stated that she knew him as a friend to her friend. She also testified that there were lights from Casablanca bar and that she had lost consciousness because she was drunk.

3. Pascal Sikawa Naigwa (PW2) testified that as he was leaving Casablanca bar that evening at about 8:30 p.m. he was told that someone had been raped. He found PW1 laying on the ground. He recalled asking that the police be called. The following day, he met PW1 who told him what had happened.

4. PC David Maoki (PW3) testified that he heard that there had been a murder incident at Enosaen area. He learnt that two men had attempted to rape PW1. PW1 screamed. One man managed to escape but the other one was too tipsy to run away. PW1 was rescued and the appellant arrested the following day and charged with the offence. PW3 produced PW1's torn blue trouser, torn bicker and sandals.

5. Mary Moota Guragura (PW4) testified that she and her sister in law met PW1, who was a neighbor, at Maggie's pub that night and had a drink at the bar. PW4 told her companions that they should go home. She testified that they waited for PW1 but she never came. She went to PW1's house to sleep and later heard people calling for help to assist PW1. She woke up, went outside and found people surrounding her. PW1 had torn clothes. She covered PW1 with a 'leso' and took her to the house. The following morning, she saw some women carrying a man who had been beaten up. The man later died at the hospital.

6. Irene Chelangat Koech (PW5) recalled that the deceased and the appellant had gone for a drink at Silent bar where she worked that evening. The deceased, the appellant, whom she knew as Turkana and PW1 left the bar together. The next day, she heard that the deceased had died in hospital.

7. CI Josephat Kariuki Mwangi (PW6) told the trial court that he was called by PW8 who informed him of a murder case and asked him to arrest PW1. He went to PW1's house with some of his colleagues and she told them that she had been raped the previous night. She took them to the scene near Casablanca. PW6 testified that he spotted one red slipper at the scene. They took Pw1 to the camp and the D.C.I.O came in with 'Turkana'.

8. Kaborok Benard Cheruiyot (PW7) stated that he had examined PW1 on 19th September 2018. He observed that she had swollen and tenderness on the exterior neck. Fingers had been used to inflict the injuries. There were no injuries on the genitalia.

9. Senior SGT Haron Marondi (PW8) stated that he received a report from a nurse at Huduma Centre that someone who had been brought to his clinic with a serious wound on the head had died. As he carried out his investigations, he heard that PW1 had been gang raped. He found PW1, interrogated her and found out that two people well known to her had tried to seduce her. There was a confrontation and people had come from Casablanca bar. During the confrontation, someone hit one of the two men with a sharp object on the head. The injured man went to the house bleeding. PW8 testified that one of the men involved in the altercation was the appellant, whom he referred to as 'Turkana'. He was traced and arrested.

10. In his defence, the appellant stated that he had been arrested together with others and interrogated for something he did not know about. He stated that he did not know the name 'Turkana.' He also told the trial court that his parents were killed and he was fending for himself.

11. Aggrieved by the trial court's decision to convict him and sentence him to 7 years' imprisonment, the appellant has come to this court on appeal and challenging the trial court's decision on several grounds which I will reproduce verbatim:

a. That my lord I did not pleaded guilty to the charges and I firmly maintain the same;

b. That your lordship I am too remorseful to offence as I joined a wrong company that head to commit the offence am now rehabilitated. I pray your honorable court to review my 7 years sentences or give me a non-custodial sentences;

c. That your lordship I was a first offender and did not understand the seriousness of the offence I was confused;

d. That your lordship I am too remorseful and I pray that may your honorable High Court consider my mitigation and remorseful grounds and set conviction aside or determine for a non-custodial sentences.

12. In opposing the appeal, Mr. Otieno submitted that the appellant was properly convicted by the trial court as he had been identified by PW1 who knew him. The doctor had confirmed that PW1 had injuries on the body which tallied with the complainant's evidence that she had been beaten up. Counsel argued that although the complainant was the only witness the law allowed for such evidence under Section 124 of the Evidence Act. He urged the court to dismiss the appeal on conviction and uphold the sentence imposed

13. The appellant made oral submissions reiterating his written submissions that he was under the heavy influence of alcohol when the act occurred. He stated that he regretted his actions and was deeply remorseful for his actions. He submitted that it was his right to benefit from the least severe punishment. He asked the court to reduce his sentence to a non-custodial sentence as he had been jailed for 7 years and was 25 years old at the time.

14. The evaluation of the evidence and consideration of the parties' submissions, leads me to the determination of the issues arising in this appeal.

ANALYSIS AND DETERMINATION

15. The appellant was charged and convicted for the offence of attempted rape contrary to Section 4 of the Sexual Offences Act which stipulates:

4. Attempted rape

Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.

16. An attempt to commit an offence was defined by the Court of Appeal in the case of **Francis Mutuku Nzangi v Republic [2013] eKLR** thus:

"Our understanding of this provisions [section 388 of the Penal code] is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible."

17. The definition of attempted rape by the court in **Njau v Republic CRIMINAL APPEAL NO 130 OF 1992 [1993] eKLR** is also applicable. The court held:

"On this occasion the Court is asked to decide whether attempted rape was committed in the circumstances described above. Any crime of attempt consists of the following elements: (a) an intent to commit the crime, (b) an overt act towards its commission, (c) the failure to complete the crime, and (d) the apparent possibility of committing it. And to attempt to rape is, therefore to try to accomplish sexual intercourse with a person without consent of that person. Accordingly, attempted rape as an offence, is conduct indicating a determination to gratify sexual passion in spite of resistance or lack of conscious consent."

18. The prosecution called 8 witnesses to testify in support of its case against the appellant. The facts of the case as told by the prosecution witnesses were that PW1 had been having drinks with the appellant on the night in question. He and another man who was lynched by the public, tried to seduce PW1 and attempted to rape her when she turned down his overtures. PW1, PW5, PW6 and PW8 all identified the appellant by his moniker, 'Turkana.' PW1 stated that when the appellant's girlfriend failed to turn up at the bar that night, 'Turkana' asked her to take over from the girlfriend as his "Plan B". He attempted to implement his intentions forcefully by tearing PW 1's garments including her trousers and biker but was stopped in his tracks by someone who came to the rescue of PW1 when he heard her screaming. In as much as the appellant was drunk at the material time, the deliberate nature of his actions depicted a man in control of his faculties. He declared his intentions by asking PW1 to replace his girlfriend and committed overt acts including undressing the appellant and physically assaulting her to subdue her and achieve his purpose of raping her.

19. PW1 knew the appellant. Hers was a case of recognition of a person well known to her which the court in the case of *Anjoni v Republic (1980) KLR 59* held to be more reliable than the identification of a stranger. She also testified that there was light outside Casablanca bar, where the appellant got a hold of her. The conditions were therefore conducive for a positive identification of the appellant as PW1's assailant.

20. The prosecution led corroborative evidence in support of PW1's testimony. PW2 and PW4 testified that they saw PW1 laying on the ground outside Casablanca bar after the incident in torn clothes. PW1's torn garments and a slipper she had misplaced at the scene were produced as evidence by PW3. PW5 testified that she had seen the appellant in the company of PW1 on the material night. PW7 produced medical evidence confirming that PW1 had been injured the day before he examined her. I agree with the trial court that the prosecution proved beyond reasonable doubt that the appellant attempted to rape PW1 and his conviction was therefore well founded. The appeal on conviction is therefore dismissed.

21. Next I turn to the appeal on sentence. The appellant has urged this court to set aside his sentence on the grounds that he was a first offender and did not understand the seriousness of the offence he was committing. He states that he is now rehabilitated and is remorseful of his actions. He has urged this court to consider his mitigation and substitute his sentence with a non-custodial sentence.

22. An appellate court will ordinarily refrain from interfering with the discretion of the trial court on sentence unless it is demonstrated that in exercising its discretion, the Court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (See *Shadrack Kipchoge Kogo vs Republic Criminal Appeal No. 253 of 2003* and *Thomas Mwambu Wenyi v Republic [2017] eKLR*)

23. The trial court was required to weigh the mitigating factors against the aggravating factors in imposing the sentence upon the appellant. In meting out the impugned sentence, the trial court considered the fact that the appellant was a first offender but noted that he was not remorseful of his actions.

24. The objectives of sentences as set out in Sentencing Policy Guidelines, 2016 are that sentences are imposed to punish the offender for his or her criminal conduct; to deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences; to enable the offender reform from his criminal disposition and become a law-abiding person; to address the needs arising from criminal conduct such as loss and damages; to protect the community by incapacitating the offender and to communicate the community's condemnation of the criminal conduct.

25. The appellant's intention to commit a more serious offence than the one he actually committed and his undressing and assault of PW1 as he attempted to execute his heinous intentions were aggravating factors. The need by society to condemn gender based violence is also an aggravating factor which warrants a stiffer penalty. I have weighed these factors against the appellant's mitigation that he is an orphan and his plea to this court that he is now rehabilitated and is remorseful of his actions.

26. The statute sets out a custodial sentence for the crime of attempted rape. From the evidence I have already set out above, I find that the appellant is not deserving of a non-custodial sentence. However, since one of the objectives of meting out sentences is to rehabilitate offenders and reform them to law abiding citizens, I will reduce the sentence imposed on the appellant as he has now seen the error of his ways. I will also take into account *that the appellant was in custody throughout the trial prior to his sentence in accordance with Section 333 (2) of the Criminal Procedure Code. Consequently*, I hereby set aside the sentence of seven (7) years' imprisonment imposed on the appellant and substitute it with a term of imprisonment of five (5) years to run from the date of the trial court's judgment.

DATED, SIGNED AND DELIVERED AT KISII ON THIS 4TH DAY OF MARCH 2021.

R.E. OUGO

JUDGE

In the presence of;

Appellant In person -Present

Mr. Otieno Senior State Counsel Office of the DPP

Ms Rael Court Assistant