REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NUMBER 172 OF 2015

CORAM: JUSTICE S.M GITHINJI

(From original conviction and sentence in criminal case number 381 of 2015 of the Principal Magistrate's Court at Sirisia)

HASSAN SHIKUKU :: APPELLANT

VERSUS

REPUBLIC:: RESPONDENT

JUDGMENT

Hassan Shikuku, the appellant herein, was charged on the main count with the offence of **attempted rape, contrary to section 4 of the Sexual Offences Act number 3 of 2006.**

The particulars of this charge are that on the 27th day of March 2015 at around midnight in [paticulars withheld], Cheptais Sub-County within Bungoma, the appellant unlawfully attempted to cause his penis to penetrate the vagina of D N without her consent.

In the alternative, he faced a charge of committing an **Indecent Act with an adult, contrary to section 11(A) of the Sexual Offences Act No. 3 of 2006.**

The particulars of this offence are that on the 17th day of March, 2015 at around midnight at [paticulars withheld], in Cheptais Sub-County within Bungoma County, the appellant intentionally touched the vagina of D N with his penis, against her will.

The prosecution case is that the complainant by the time of the alleged offence was aged 20 years. She was married. On 27.3.2015 at about midnight she was in her house asleep, with her then, one year old child. She heard the door being opened. She enquired who it was but sooner than later saw someone entering while having a torch. She raised alarm and hid under the bed. She did not see who it was. The intruder picked ugali of which the complainant had prepared and ate it. She saw him while eating the ugali. When he finished he pulled her from under the bed and threw her on the bed. He held her pant and tore it. He used his penis to penetrate her. He however did not ejaculate as she kept on resisting. She made effort to scream but he kept on assaulting her. The episode lasted for about 3 hours. He picked a knife and threated to stab her. She cheated him and fled to her neighbour's house. The neighbour gave evidence as PW-3. Complainant got to her house at about 5am. The complainant told PW-3 that Phenicas intruded into her home at about 1.00am. He ate her food and had intercourse with her. The said Phenicas was armed with a bottle and knife. The complainant ran away and locked Phenicas in the house. They went back to her home to find out whether he was still therein, and found that he had

escaped through the window. He had stolen money., the complainant's pant and some beddings.

The two reported the case to the village elder and at Chepkube Police Station. The complainant said she recognized the assailant as Phenicas, a person she had known for about 2 years. He used to buy eggs from her.

PW-4 issued the complainant with a P-3 form. She was examined at Cheptais Sub-County Hospital on 29.3.2015. She had head and abdomen injuries as a result of the struggle. Vaginal examination revealed no injuries and discharge. The hymen was broken. She was not pregnant and HIV test was positive. Nothing significant was noted in urinalysis.

On 12.4.2015 the appellant was spotted by PW-1 at [paticulars withheld] market. He was arrested and taken to Chepkube Police Station where he was charged with the offences.

In his unsworn testimony, in defence, he stated that he is an eggs vendor. He said he was not the one who attempted to rape the complainant. He could not however remember what happened on 27.3.2015 at midnight.

The trial magistrate, on 28th August, 2015 found that the main count had been established by the prosecution beyond reasonable doubt. He convicted him and sentenced him to serve 10 years imprisonment.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that:-

> **1. The trial court depended on contradictory evidence and failed to properly analyze the same.**
>
> **2. There was no DNA evidence and the medical evidence did not connect him to the offence.**

In his submissions, on appeal, the appellant averred that he was not examined by a doctor, and the evidence did not point at him as the culprit. He was not arrested at the scene but at his place of work. The name given by the complainant as of the culprit, is not his as he is called Hassan Shikuku and not Phenicus.

The state opposed the appeal on the grounds that DNA test is not a requirement in Sexual Offences, the name issue was clarified by the complainant who explained that the appellant at home is known as Phenicus Shikuku but when he later converted to Islam he was given the name Hassan.

I have re-evaluated the entire evidence in the file. There are two issues of which I need determine. One is whether the recognition of the appellant by PW-2 was proper. The second one is whether the adduced evidence supports the offence of which the appellant was convicted of and sentenced to serve 10 years imprisonment.

On the issue of recognition, the complainant stated she saw someone enter while having a torch. At that point she did not identify or recognize him. She said, "I did not see who it was." She saw him later while eating ugali. She was under the bed then. She did not tell the court the source of light she used or which enabled her see him. In her evidence she did not indicate that the torch she saw was on, and up to what time or point. If she had another source of light in the room, she could have seen someone enter, having a torch even if the torch was off. She could as well have seen the assailant using the same source, while eating ugali. She never said anywhere in her evidence that she used the torch light to see and recognize the assailant. The trial magistrate therefore misdirected himself when he observed in the judgment that, "**The victim at the time relied on the intruder's torch as the source of lighting.**" Such was an assumption rather than a fact. In the case of ***Turnbull and others (1979)3 AR ER 549***, the court observed that:-

> ***"…….Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

I wish to add that such mistakes are at times made in broad daylight.

In ***Nzaro versus Republic (1991)KAR 212*** and ***Kiarie versus Republic (1984) KLR 739,*** the court of appeal held that identification/recognition at night must be absolutely watertight to justify conviction.

In this case apart from the claim by the complainant that she saw and recognized the appellant, there is no any other evidence connecting him with the offence. The circumstances under which he was allegedly seen, by a person who was so scared that she hid under the bed, and saw him from thereunder at night without disclosure of the source of light which enabled her to, can hardly be depended on to arrive at a safe conviction.

On the second issue, the appellant was convicted and sentenced for attempted rape. The evidence adduced was however in support of an offence of rape. The complainant herself, who was then aged 20 years, and at least had a child aged one year and was married, stated in her evidence that the assailant used his penis and penetrated her. If she was penetrated with a penis, where does the offence of attempted rape come from? The complainant given her circumstances was conversant with what she was talking about when she said she was penetrated. She was simply not new to that. The prosecution and the court were not justified in charging and convicting the appellant with the offence of attempted rape where the facts discloses the ingredients of rape itself. Complainant said she was penetrated but the assailant did not ejaculate. Ejaculation is not an ingredient for the offence of rape. The ingredients for the rape are spelt out clearly under **Section 3(1) (a), (b) and (c) of the Sexual Offences Act No. 3 of 2006.**

In brief they are penetration with a genital organ, lack of consent by the victim, or where consent is obtained by force, threat or intimidation. Ejaculation is nowhere. PW-3 in her evidence said the complainant told her that the assailant had intercourse with her. Intercourse is a short for sexual intercourse. Sexual intercourse is defined by Concise Oxford Dictionary as:-

> **"Sexual contact between individual involving penetration, especially the insertion of a man's erect penis into a woman's vagina, culminating in orgasm and the ejaculation of semen."**

Complainant's evidence and that of PW-3 leaves no doubt that complainant was explicit in that she was penetrated. Such evidence cannot be merely ignored without existence of strong evidence to the effect that there was no such claimed penetration but an attempt to.

The evidence of PW-5 the Clinical Officer does not indicate that there was no penetration. The only such suggestion comes as an allegation on which the complainant was referred to the hospital where the witness said the allegation was that she was assaulted on 27.3.2015 by a person known to her at about 1.00am while she was about to be raped. Though he made no observation on and in her vagina which suggests she was penetrated, such was possible given that two days had passed prior to the examination, and the complainant was a mature lady, who was not having it for the first time. The evidence was not good enough to provide basis for ignoring direct evidence by the complainant, in favour of an inconclusive opinion finding. It is therefore firm and well settled that the evidence adduced does not support the offence the appellant was convicted and sentenced of.

On the foregoing reasons I do find the appeal merited. It is allowed. I accordingly do quash the conviction and set aside the sentence. The appellant should be set free unless otherwise lawfully held.

Judgment read in the presence of the state counsel, court assistant and the appellant this 17th day of July 2017.

S. M. GITHINJI

JUDGE