REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 25 OF 2015

GUMATHI LAFTE ....APPELLANT

VERSUS

REPUBLIC …………………………..…………. RESPONDENT

(From the original conviction and sentence in Criminal Case No. 636 of 2014 of the Principle Magistrate's Court at Marsabit by BOAZ M OMBEWA– Senior Resident Magistrate)

JUDGMENT

The appellant, **GUMATHI LAFTE**, was convicted on the charge of attempted rape contrary to section 4 of the Sexual Offences Act **.** He was then sentenced to five years imprisonment.

The particulars of the offence were that on 1st August 2014 at **Laisamis** sub- location, Marsabit County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **M L** by use of threats.

At the hearing the appellant was represented by Mr. Makori Oundu the learned counsel, who relied on grounds the appellant had filed in person. The appellant had raised seven grounds as follows:

1.That the learned trial magistrate erred in law and in facts by failing to note that the prosecution witnesses tendered contradictory and conflicting testimonies,

2.That the learned trial magistrate erred in law and in facts when he failed to observe that the charges of defilement were not proved beyond reasonable doubt as required under the prescribed law (sic),

3.That he was denied a chance to call his witnesses,

4.That the learned trial magistrate erred in law and in facts in failing to make a finding that when the offence was committed the accused person was a minor hence giving a wrong sentence,

5.That he was denied a fair hearing by being denied the services of a court interpreter,

6.That the trial was illegal, null and void for he was detained at Laisamis police station for more than 24 hours; and

7.That the learned trial magistrate erred in law and in facts in flouting the provisions of section 169 C.PC.

The counsel of the appellant while making oral submissions added another ground namely; that the appellant was tried and convicted without the charge being read and explained to him.

The state opposed the appeal through Mr. Mwangangi, the learned counsel.

The facts at the trial court were briefly as follows:

On the 1.8.2014 at about 9.30 A.M, **M L** was fetching some firewood in company of some other women. The appellant gave chase to them but the other women in her company managed to escape. Since she was expectant, she was unable to run fast. he caught up with her and pushed her down. he struggled to have sex with her but she resisted. she managed to hold on to her skirt. The appellant ejaculated on it. He was later arrested and charged.

The appellant in his defence contended that he had been framed up.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

The grounds the appellant has raised can be divided into two broad categories; procedural and evidential grounds. I will start by addressing the procedural ones.

Section 169 (1) of the Criminal Procedure Act provides as follows:

> **(1)" Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it"**

Upon my perusal of the record, I have established that the trial magistrate framed the issue for determination and gave the reasons for the decision he arrived at. There was therefore compliance with section 169 (1) of the C.P.C.

It is now settled law that where an accused alleges that his right has been breached, the remedy lies in a civil court for damages and not in an acquittal. This was decided in the case of **Julius Kamau Mbugua v Republic [2010] eKLR** where the court of Appeal on the issue said:

> **"The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum."**

My perusal of the court record indicate that on 4.8.2014 when the plea was taken, and on 11.8.2014 when the facts were read out to him he was provided with David Arugura and Boniface Bullo who were sworn in as Rendille interpreters. On the subsequent hearing dates I have noted that the record indicate that there was interpretation into Rendille language. Sabdiyo who is a native Rendille speaker was at hand not only to interpret to the appellant but also to the court what witnesses said in Rendille. The contention that the proceedings were conducted in a language he did not understand is misplaced.

It was contended that the appellant was tried and convicted without the charge being read to him. When he pleaded guilty to the substantive charge, the alternative charge was not read to him and correctly so. However, when he disputed the facts, the alternative charge ought to have been read to him but this was not done. Since he was not convicted on this charge, no prejudice was occasioned to him by this omission.

The appellant contended that at the time of the trial he was a minor. Although this was not raised during the trial, when it was raised on appeal, I made an order for his examination . At a glance the appellant does not appear to be as young as he wanted this court to believe. An age assessment was done by Dr. Mwanzia on 17.12.2015. His opinion was that at the time he was over 18 years of age. His conclusion was reached after noting that all posterior molars have sprouted and mature and that sockets for posterior molars were adequate.

I agree with the doctor's opinion for the appellant's appearance is that of one in mid twenties. This explains why the trial magistrate did not make any order for age assessment. This ground of appeal has no basis.

The appellant contended that he was denied a chance to call his witnesses. After he was put on his defence on 4.2.2015, he indicated that he wished to tender unsworn statement of defence and did not have any witness to call. On this particular day the record does not say in which language the interpretation was done however, Sabdiyo a native Rendille speaker and who interpreted during the hearing of this appeal was present. He cannot be heard to complain that he was denied a chance to call his witnesses or that no interpretation was done for him in a language he understood.

I wish now to turn to the grounds touching on evidence.

The first issue I would wish to address is what constitutes the offence of attempted rape.

An attempt to commit a crime is defined in the **Oxford Concise Law Dictionary (2nd Edition)** as;

> ***"Any act that is more than merely preparatory to the intended commission of a crime; this act is itself a crime".***

*The sexual offences Act does not define what "**attempted rape**" is. However we shall fall back to the definition provided by section 388 of the Penal Code which was not repealed by the second schedule of the Sexual Offences Act. It states as follows:*

> **"(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**
>
> **(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.**
>
> **(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence"**

From the Statutory and the Dictionary definitions, we are able to say that attempted rape is comprised of the following ingredients:

(1) Lack of consent from the complainant,

(2) An act beyond mere preparation towards penetration; and

(3) An intervention or withdrawal by the culprit due to whatever reason.

In the instant case the explanation by the complainant that the culprit was not able to penetrate her genitalia due to the spirited struggle with him and that he ejaculated on her skirt, was more than mere preparation on the part of the appellant. This was an attempted rape.

Having established that the offence of attempted rape was committed, the next question we need to answer is who the perpetrator was. The evidence of **K L** is that at about 1 PM, he received a report that his sister in - law had been raped. He works with a roads construction company. When the appellant went to ask for some water, he called the complainant who gave him the description of the culprit. The description fitted the appellant who was now before him. He arrested him. Although the investigating officer did not record from the complainant as to how she was able to recognize her assailant, the evidence on record confirms that the appellant was at the scene at the time the complainant herein said he attempted to rape her. In his own evidence during cross examination, the appellant conceded he saw the women and that the expectant one (complainant) fell down. I do not find any evidence on record that will suggest that the complainant and the other women falsely implicated him. Indeed **S L (PW3)** who was in company of the complainant testified that she saw the appellant push the complainant down. the finding by the trial court that the appellant attempted to rape the complainant is founded on evidence and cannot be faulted. The conviction was therefore safe.

The appeal is dismissed on both conviction and sentence.

DATED at Marsabit this 9th day of February 2016

KIARIE WAWERU KIARIE

JUDGE