REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 25 OF 2011

WASHINGTON OGOLA WABUTABO ……..…APPELLANT

V E R S U S

REPUBLIC ……RESPONDENT

(Appeal arising from Mumias Senior Resident Magistrate's Court Criminal Case No. 929 of 2008 in the judgment of [HON. H. WANDERE, SRM] delivered on 15.2.2011)

J U D G M E N T

The appellant was charged with the offence of attempted defilement contrary to **section 9(1)(2)** of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant *on the 1.9.2008 in Mumias District within Western Province, attempted to defile **F N**. The appellant was convicted and sentenced to serve ten (10) years' imprisonment.*

The grounds of appeal are that the prosecution evidence was uncorroborated and fabricated, the appellant's defence was not considered and the sentence is harsh. Mr. Ombito, counsel for the appellant abandoned all the other grounds and relied on the ground of appeal relating to sentence. Counsel submitted that the sentence is harsh and the court can reduce it. The appellant has three children and would like to come back to the society and build the Nation. The State opposed the appeal and submitted that the trial court convicted the appellant under section 9(2) of the Sexual Offences Act and the sentence is proper.

Four witnesses testified before the trial magistrate. **F N** was the complainant. She testified that she was a standard seven student at [particulars withheld] Primary School. On the 1.9.2008 she was going to get vegetables from their farm and she saw the appellant along the road armed with a panga. The appellant held her and said he was going to rape her. The appellant threatened to cut her with a panga if she resisted. The appellant cut her on the shoulders. She bit the appellant's fingers and screamed. One J (PW2) heard her screams and went to her rescue. G took her home and the matter was reported to the police. She was taken to Makunga Health Centre where she was treated.

PW2 J W M testified that on the 1.9.2008 he was at his farm when he heard a girl crying "do not kill me". He went to the scene and saw the appellant holding a panga over PW1's neck. PW1 was on the ground crying and upon inquiry PW1 got up and ran towards him. She was bleeding from the left shoulder. PW2 knew the appellant who is his neighbor. The complainant was taken to the police station at Makunga. The appellant left with his panga. **PW3 WYCLIFFE MESECHERE** was a clinical officer based at Makunga Health Centre. He produced the P3 form of the complainant which showed that PW1 had a cut wound on her left shoulder measuring 4x1 cm. **PW4 PC HELLEN CHEPCHIRCHIR** was based at the Mumias police station. She investigated the matter and had the appellant charged with the offence.

The appellant was put on his defence. In his unsworn testimony he testified that the charges were false and the evidence was just lies. He was arrested and taken to an AP camp. He denied committing the offence.

The main issue for determination is whether there was attempted defilement and whether it is the

appellant who attempted to defile the complainant. According to PW1 and PW2 the incident occurred in the morning hours. It is the evidence of PW1 that it was around 10.00 a.m. when she was accosted by the appellant. PW2 saw the appellant holding a panga over PW1's neck. According to PW1 the appellant wanted to defile her. Given the evidence on record it is clear that it is the appellant who was found with the complainant. PW2 knew the appellant as a neighbor and saw him struggling with the complainant. It is the evidence of PW1 that the complainant wanted to have sex with her and he threatened to cut her with a panga. I do find that the trial court properly convicted the appellant.

The next issue is that of sentence. Counsel for the appellant contends that the sentence under section 9(2) is not the minimum sentence. The court can consider the circumstances of the case and impose its own sentence. Under section 9(2) of the Sexual Offences Act it is stated that the sentence for attempted rape is a term of not less than ten (10) years. It is therefore clear that 10 years imprisonment is the minimum sentence. The court cannot go below that period. There is no discretion left to the court to impose any sentence lower than 10 years' imprisonment. The court can go beyond the period of 10 years. I therefore find that the sentence of 10 years imposed by the trial court is proper. The appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 15th day of May 2014

SAID J. CHITEMBWE

J U D G E