REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO 115 OF 2011

BOSCO MAKAU MBONDO ……..…….....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 384 of 2009 by Hon B.T Jaden, PM on 14/6/2011)

JUDGMENT

1. The appellant was charged as hereunder;-

Count 1 - Assault causing actual bodily harm contrary to **Section 251** of the **Penal Code.**

Particulars of the offence being that on the **20th** day of **January, 2009** at ***[particulars withheld]*** **Village**, **Athi River Location** in **Machakos District** within the **Eastern Province;** unlawfully assaulted **E N** thereby occasioning her actual bodily harm.

Count II- Attempted rape contrary to **Section 4** of the **Sexual Offences Act No. 3** of **2006.**

Particulars of the offence being that on the **20th** day of **January, 2009** at ***[particulars withheld]*** **Village, Athi River Location** in Machakos District within the Eastern Province; unlawfully and intentionally attempted to commit an act which causes penetration with **E N,** a woman aged **20 years.**

2. In the Alternative charge the appellant was charged with indecent act with adult contrary to **Section 11(6)** of the **Sexual Offence Act No. 3** of **2006.**

> Particulars of the offence being that on **20th** day of January, 2009 at ***[particulars withheld]*** **Village, Athi River Location** in **Machakos District** within the **Eastern Province;** indecently and unlawfully assaulted **E N** by touching her private parts.

3. He was tried, convicted and sentenced as follows –

Court 1 – six (6) months imprisonment.

Count 2 – five (5) years imprisonment. Sentences were to run concurrently.

4. Being dissatisfied by the conviction and sentence thereof the appellant now appeals on the grounds that;-

i. **That** the learned magistrate erred in law and fact by not considering evidence of all witnesses.
ii. **That** the learned magistrate erred in law and fact in convicting the accused whereas there was no convicting evidence.
iii. **That** the learned magistrate failed in law and fact by not considering the defence of the accused and his witnesses.

5. Briefly, the facts as presented by the prosecution are that on the **20/1/2009, PW1, E N,** the complainant was going to fetch firewood when she was hit from behind. She fell down. Her assailant attempted to remove her underpants as he touched her vagina. She raised an alarm and so did somebody else. The person left her. She stood and found her mother and grandmother who took her to hospital. The matter was reported to the police. The appellant was arrested and charged.

6. In his defence the appellant denied having committed the offence. He stated that he found the complainant and another lady cutting trees on their **Land Parcel No. 3394** at Kivai area. He sought to know why they were there yet they were not members of Kivai Residents Organization. It was further his evidence that the complainant had trespassed onto that farm and attempted to construct thereon, and having questioned them they framed him up.

7. The appeal was canvassed by way of written submissions. It was submitted on behalf of the appellant that evidence adduced by the prosecution was contradictory which had to be resolved in favour of the appellant. The sentence passed in **Count 1** was illegal as the **Penal Code** proved for a term of **five (5) years.**

8. The State conceded to the appeal. Learned State Counsel, **Mr. Mukofu** stated that there was material contradiction in the evidence tendered by the prosecution witnesses. Further, he alluded to the testimony of the complainant in respect of injuries described. He submitted that the complainant testified that she was hit on the head five (5) times then hit with a butt on the head. She fell down and he stepped on her abdomen. PW2 said the complainant complained of an aching head. The clinical officer examined her at 3.00pm and only noted mild tenderness on the right elbow joint which swelling probably was caused by bone injury. There being no injuries per the complainant's testimony he called upon the court to find that the inconstencies did shake the prosecution's case, which made it unsafe for the conviction.

9. This being the first appeal, I am duty bound to re-evaluate and reconsider evidence adduced at the trial, bearing in mind that I neither saw nor heard witnesses who testified prior to reaching my own conclusions. (See ***Okeno versus Republic [1972] E.A. 32).***

10. It has been argued by the defence and admitted by the State that the evidence adduced by the prosecution was so inconsistent such that it could not pass the test of securing a conviction on both counts. In her evidence the complainant stated that her assailant hit her five (5) times on the back of her head as she collected firewood. When she turned, he head-butted her and she fell down. He then stepped on her stomach – (I believe she meant abdomen). He forcefully tried to remove her biker and pant which got torn in the process. She raised an alarm and so did somebody else. The person left and when she stood up her mother and grandmother were there. He identified her assailant as the appellant, a person she described as her neighbour. She denied knowledge of any land problem that existed within Kivai Welfare Association.

On cross-examination she stated that her mother and mother in-law did not find the appellant at the scene. She said there was a person grazing cattle nearby while her mother was some 300 meters away.

12. PW2, **R N K** stated that she was at home at 5.00am when she heard screams and ran to the thicket where she found another lady called **Margaret.** While some 10 meters away she saw the appellant carrying a "*God father*" hat. She went to where the complainant was who told her that the appellant attempted to rape her and had hit her on the head.

13. PW4, Robert Kilonzo, the clinical officer who examined the complainant at 3.00pm stated that she complained of headache but had no visible injury on the head and neck. She had pain on the right elbow joint with a swelling. On cross-examination she stated that the complainant did not give her any history of attempted rape or indecent assault.

14. There is a remarkable contradiction between the evidence adduced by PW1 and PW2 in respect of the time the offence was allegedly committed. In her evidence PW1 said on standing after the incident the people she saw were her mother and grandmother. On cross-examination she talked of the mother and mother-in l-aw. She did not mention PW2. According to PW1 she was taken to hospital by her mother and grandmother. On cross-examination she contradicted herself and stated that her mother was some 300 metres away. Her evidence was silent on PW2. The prosecution did not call her mother, grandmother or mother- in-law as witnesses. They called PW2 who alleged that she took the complainant to the Health Center for treatment. According to her the complainant told her the appellant attempted to rape her. Surprisingly when she complained to the police the nature of the complaint per the P3 form was that she had been assaulted. The clinical officer said she did not give any history of attempted rape.

15. The complainant's evidence that she was hit on the head five times and butt-headed was not supported by medical evidence. Although medical evidence shows that she had a swelling on the elbow, she was silent on that particular fact.

16. The question to be posed is if indeed she sustained injuries as alleged?

17. In the case of ***Kiilu and Another versus Republic [2005] IKLR 174*** the **C.A** held;-

> ***"the witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore unreliable witness which makes it unsafe to accept his evidence?.***

18. The complainant herein was the witness the court ought to have relied on. Her evidence was however contradictory and inconsistent such that it ought to have created an impression in the mind of the court that she was not telling the truth.

19. The appellant explained that he found the complainant and another lady having trespassed onto their land parcel No. 339/4 damaging trees. It is an established principle of law that the burden of proof in criminal matters is on the prosecution to prove the guilt of the accused person beyond any reasonable doubt. (***Sekitoleko versus Uganda [1967] E.A. 531).***

20. Courts have stated that a witness may be untruthful in certain aspects of his evidence but truthful in the main substance of evidence. Mere discrepancies may be explained away such that inconsistencies if satisfactorily explained would not necessarily result into such evidence being rejected.

21. However, in this case where on weighting the evidence adduced in totality some falsehoods are established. A good example is where the complainant alleged there was an attempt to rape her yet she did not make the allegation to the police officer who received the report and the clinical officer who examined her. Another allegation is failure of the prosecution to prove that she was hit five (5) times on the head and butt-headed, then kicked in the abdomen. These were falsehoods that cast doubt to the prosecution's case which needed to be explained away. No such clarification was made. In the premises, conviction should not have been founded on such evidence.

22. With regard to the sentence imposed in respect of count 1, the sentence provided for the offence of assault causing actual bodily harm is five (5) years imprisonment. The sentence imposed was six (6) months imprisonment but not six years. In the premises it was within the law.

23. From the foregoing, the appeal succeeds. The conviction on both counts is quashed. The sentence imposed on both counts is set aside. The appellant shall be set at liberty unless otherwise lawfully held.

DATED SIGNED and **DELIVERED** at **MACHAKOS** this **12TH** day of **JUNE, 2014.**

L. N. MUTENDE

JUDGE