REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 128 OF 2009

MUTHUI MBUVI……...…..……APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(Being an appeal from the original Conviction and Sentence in Kitui Senior Principal Magistrate's Court Criminal Case No. 342 of 2008 by Hon. T.M. Mwangi RM on 25/6/2009

JUDGMENT

1. The appellant was charged with attempted rape contrary to **Section 4** of the **Sexual Offences Act No. 3** of **2006.**

Particulars of the offence being that on the **17th** day of **May, 2008** at about **2.00am** at ***[particulars withheld]*** **Village, Mulundi Sub-Location Kyangwithya East Location** in **Kitui District** of the **Eastern Province,** unlawfully and intentionally attempted to have canal knowledge with **R M.**

In the alternative charge the appellant was charged with **Indecent Assault** with an adult contrary to **Section 11(6)** of the **Sexual Offence Act No. 3** of **2006.**

Particulars of the offence being that on the **17th** day of **May, 2008** at about **2.00am** at ***[particulars withheld]*** **Village Mulundi Sub-location Kyangwithya East Location** in **Kitui District** of the **Eastern Province,** committed an act of indecency with an adult namely **R M** by touching her private parts namely the vagina.

2. He was tried, convicted on the main count and sentenced to serve **ten (10)** years imprisonment.
3. Being aggrieved by the conviction and sentence in his amended grounds of appeal he states that ;-

i. The trial magistrate erred in law and fact by failing to appreciate that cogent evidence was not adduced to support the charge;
ii. Vital witnesses were not called to support the case;
iii. He was held in custody for more than the stipulated time which was a violation of his rights and that the magistrate failed to comply with S**ection 211** of the **Criminal Procedure Code.**

4. The appellant relied on written submissions. In addition thereto he stated that the translation was from Kiswahili to Kamba. Proceedings were conducted in English which was prejudicial.
5. The appeal was opposed by the State. **Mrs Gakobo** submitted that the complainant recognized

the appellant as the person who entered her house and demanded to have sex with her. Moonlight enabled her to recognize him. He tore her clothes leaving her naked but did not complete the act of rape. Evidence adduced by the clinical officer confirmed that she sustained injuries due to the struggle.

6. Further, she submitted that the defence of *alibi* raised by the appellant was considered. The record showed that the evidence adduced was translated into Kikamba language which confirmed that the appellant understand proceedings.
7. This being the first appellate court, I have the duty to subject the evidence adduced at trial to a fresh review and scrutiny and come to my own conclusions bearing in mind that I neither saw nor heard witnesses who testified. (***see Pandya versus [1957] E.A. 336, Okeno versus Republic [1972] E.A. 32.)***
8. The appellant was charged with the offence of attempted rape. In order for a person to be guilty of the offence, the prosecution has a duty of proving that the person accused attempted to unlawfully and intentionally commit an act which causes penetration with his or her genital organs. (***See Section 4*** *of* ***the Sexual Offences, Act No. 2006).***
9. In this case, PW1, **R M** stated that the appellant entered her house at 2.00am and demanded to have sex with her. She struggled with him until outside. She was able to recognize him as there was moonlight. She screamed raising an alarm but he raped her. PW2, **P M** the complainant's son aged ten (10) years said when he woke up a person was hitting his mother. They struggled and went out. His mother asked him to get a stick and hit him. The person told him not to do so. They went to his aunt's place where they slept. He identified the person as the appellant.
10. The complainant did not specify what exactly the appellant did that would amount to an attempted rape. Stating that he raped her would suggest that the appellant unlawfully penetrated her having used physical force or duress upon her. She stated that the appellant undressed her leaving her naked. PW2 does not seem to have seen his mother naked for he was silent on that fact.
11. The complainant was examined by **PW3, Dorcas Wanza Munyao** a clinical officer. She went to hospital alleging having been raped. Her genitalia was normal. She however had oedema (swelling) on the left orbital region with a red eye. She had scratch marks on her face. She examined the complainant on the **4th June, 2008.** The age of the injuries sustained was estimated as **three (3) days.** It was stated she was raped on the **17th May, 2008.** If this was the case it would mean that the injuries would have been sustained **14 days** prior to the date she was examined. The question will be if indeed the injuries were **three (3) days** old - could they have been sustained after the **17th May, 2008?**
12. The complainant reported to **PW4, No. 68975, PC Francis Ndirangu,** that she had been raped. She perused the P3 form issued. She stated that;-

    "… **I charged the accused with the offence of attempted rape."**

13. On cross examination she stated that she established that the appellant assaulted the complainant in attempt to rape her.
14. In reaching her decision the learned trial magistrate stated thus:-

    "**From the material evidence of PW3 it is clear that there is no evidence PW1 had been raped because both PW1's P3 form and treatment record showed that… she had no lacerations or bruises in her vagina."**

However, she did not state why she believes it was an attempt as opposed to rape. Similarly the investigating officer, PW4 did not tell the court why she decided to charge the accused with the offence of attempted rape when the complainant was categorical that she had been raped. The magistrate started that the complainant being a married woman her hymen was broken prior to the material night. The question that remains lingering are why she did not appreciate that the appellant could have penetrated her but did not bruise her?

15. In the case of **Kiilu** and **Another versus Republic [2005) 1KLR 174** the Court of Appeal held that:-

"**The witness upon whose evidence it is proposed to relay should not make an impression in mind of the court that he is not straight forward person or raise a suspicion about his trust worthiness, 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 the evidence.**

The question to be posed is whether the complainant was a doubtful person that they did not believe her"

16. These questions that remain unanswered left a doubt to the prosecution's case.
17. In the alternative count, the appellant allegedly touched her private parts. It is not stated what he used to touch her private parts (vagina). To be guilty of the offence it must be established that the offence used his genital organ to touch the others genital organ (see ***Section 148 of the Criminal Procedure Code.*** Without such evidence, the alternative count cannot be proved.
18. Having re-considered and re-evaluated the evidence adduced at trial, it is apparent the charges were not proved beyond reasonable doubt. In the result, I allow the appeal. The conviction is quashed and sentence imposed set aside. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **3RD** day of **JUNE, 2014**

L.N. MUTENDE

JUDGE