

REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE NO: 71 OF 2014

J W B.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant was charged with the offence of attempted defilement contrary to **Section 4** of the **Sexual Offences Act No; 3 of 2006**. The particulars of the offence were that the appellant on 30/7/2010 in Kakamega central District, within the western province, intentionally and unlawfully attempted to cause his genital organ namely penis to penetrate in to the genital organ namely vagina of **F S S** without her consent.

ALTERNATIVE CHARGE: Indecent Act contrary to **Section 11(1)** of the Sexual Offences Act No; 3 of 2006 Laws of Kenya; That on the 30th day of July 2010 in Kakamega Central District, within the Western Province, intentionally and unlawfully conducted his genital organ namely penis into genital organ namely vagina of **F S S** without her consent.

The appellant was convicted and sentenced to serve 5 years imprisonment. The grounds of appeal are that he pleaded not guilty to the charge, the case was fabricated, and sentence is harsh and that there was a land dispute with his brothers which led to the criminal case. The appellant filed written submissions which simply enumerates the above grounds.

The state opposed the appeal. **MISS OPIYO**, state counsel, submitted that the case was proved beyond reasonable doubt. The appellant was positively identified. The complainant was pregnant and she sustained the injuries.

The record of the trial court shows that four witnesses testified for the prosecution. PW1 **F S S** was the complainant. She testified that on 30/7/2010 she was looking after her cattle at about 5 pm at her farm when the appellant went there. The appellant complained that she was destroying his crops. The appellant held her arms and tore her dress. It was at the middle of the road and there was sugarcane on both sides of the road. The appellant dropped her down and tried to have sex with her. She raised alarm and one **R (PW2)** who was passing went to the scene. The appellant ran away. Her dress, petticoat and innerwear were torn. She sustained injuries on the forehead and neck. She knew the appellant as he is her in law. She reported the matter to the assistant chief and then to the police. She was pregnant at the time. It is her evidence that the appellant has been trying to seduce her before then.

PW2 R J testified that on 30/7/2010 at about 5 pm he was from river Kofua when he heard a woman screaming. He went to the direction and saw the woman lying down and a man on top. He shouted and the man rose up and ran towards a sugarcane farm. He saw the complainant whom he knew and noted that she had injuries on the forehead and chest. PW2 knew the appellant. The matter was reported to the police. According to PW2 the incident occurred in the middle of the road. **PW3 ROBERT WANYONYI** was a clinical officer at Navakholo sub District hospital. He filled the P3 form for PW1. It is his evidence that PW1 was pregnant and went to the hospital on 31/7/2010.

PW4 PC PATRICK WAFULA was based at the Navakholo police post. The matter was reported at the police post and investigated the case. The appellant was arrested on 14/8/2010 and charged with the offence. He produced PW1's petticoat and innerwear as exhibits.

The appellant was put on his defence. He gave sworn evidence and stated that on 30/7/2010 he visited his brother (DW2) at 2 pm. They went to Atiendo market at 3 pm and on their way they found the complainant taking care of her cattle. They left her and went to the market. The complainant's cattle trespassed into his land and the matter was reported at the AP camp. The complainant was also summoned by the area assistant chief and the matter was resolved. It is his evidence that his family has had a land dispute with the family of PW2.

ALI OCHANJI was **DW2**. His evidence is that on 30/7/2010 he was with the appellant when they found the complaint's cattle had trespassed on the appellant's farm. They reported the matter at the AP camp he later learnt that the appellant was charged with attempted rape.

The main issue for determination is whether the appellant attempted to rape the complainant. The evidence of PW1 and **PW2** shows that the incident occurred at about 5 pm. The appellant was known to both PW1 and PW2. The defence evidence is that there was a land dispute with the family of PW2 and that the case involved trespass of cattle to his land. The defence evidence does not allege that there was any dispute between the appellant and PW1. PW1 was injured and a P3 form was produced to prove that fact. The evidence shows that there was an attempt to rape PW1. Her clothes were torn and were produced in court as exhibits. It is therefore clear that an attempt was made to rape PW1 and the evidence shows that it was the appellant who made the attempt. The defence evidence does not raise any doubt on the prosecution case. The evidence of DW2 is merely intended to assist the appellant. The incident occurred at 5 pm while the appellant and DW2 were allegedly together at 3 pm. It is established that the appellant was alone when the offence was committed.

In the end I am satisfied that the prosecution proved its case beyond reasonable doubt. The appellant was known to the complainant and was caught by PW2 when he was attempting to rape the complainant. The appeal lacks merit and the same is disallowed.

Dated, signed and Delivered at Kakamega this 9th day of July 2014.

SAID J. CHITEMBWE

JUDGE