



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 56 of 2008

LAWRENCE NKONGE ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(An appeal against the judgment of P. Ngare SRM Chuka in PMCC Case No. [.....]*

*delivered on 29<sup>th</sup> April 2008)*

JUDGMENT

The appellant was charged in a lower court with the offence of attempted rape contrary to section 4 of the Sexual Offences Act No. 3 of 2006. In the alternative count, he was charged with the offence of indecent act with an adult contrary to Section 11(6) of the Sexual Offences Act No. 3 of 2006. After trial, he was convicted by the lower court on count 1 and was sentenced to 10 years imprisonment. This court is duty bound to re-evaluate the evidence of the lower court and in this regard the case of Okeno Vrs. Republic 1972 EA 32 is relevant. It was stated in that case 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 Vrs. 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 Vrs. 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 Vrs Sunday Post (1958) EA. 424.”*

In evidence that was adduced in the lower court was simply this:- PWI the complainant an employee of a hotel in Kiriaini was on 12<sup>th</sup> February 2007 on her own at the hotel. It was 2pm. The appellant entered the hotel and without speaking to her begun to remove a mirror from the wall. He said that the mirror belong to him. She stated that he then suddenly begun to remove her clothes. As a result he tore her T shirt and struggle ensued. PWI screamed. At that time, they were struggling on the ground, a customer by the name of Eric Gitonga came and pulled away the appellant from the top of PWI. PWII was the area assistant chief who was informed that the appellant was being beaten by members of public for attempted rape. He spoke to PWI and she confirmed that the appellant had attempted to rape her. He arrested the appellant. The police officer who investigated the matter stated that he had seen the torn t shirt. It was however not produced before court. After those witnesses gave evidence the prosecution closed its case even though at one time it had indicated to the court that it intended to call EG as a witness. Without giving any explanation, when the case next came for hearing, prosecution proceeded to close the case. The appellant on being called to give his defence stated that the charges he faced were framed up. He said that on the material date, he just found himself in hospital. The learned magistrate in his considered judgment had this to say:-

*“I accordingly find for the prosecution that accused attacked the complainant with the sole aim of having carnal knowledge of her. The conditions prevailing at the time were conducive to him as he found himself with the complainant inside the hotel and were it not for the screams he would have gone ahead with his quest to have carnal knowledge with her. The screams that the complainant signify lacks of consent on her part and accused is clearly at fault. He is guilty and is convicted as charged.”*

At this initial stage I wish to deal with an issue raised by the appellant in his submissions. He faulted the finding of guilt to the prosecution’s failure to call EG as a witness. Section 143 of the Evidence Act provides that there is no required number of witnesses in order to prove a fact. That section is as follows:-

*“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact.”*

The prosecution has a duty to assist the court to be able to determine the truth. Accordingly, they have a duty to call witnesses who would assist the court in that regard. This indeed was the finding in the case of Bukenya and Others Vr. Uganda Criminal appeal No. 68 of 1972 where it was held as follows:-

*“The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent. The court has the right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case”*

I have re-examined the lower court's evidence and in my view, the evidence of PWI suffices to prove the case against the appellant. PWI repeated what had been done to her to PWII. The fact that EG did not attend court does not reduce the weight of the prosecution's evidence in this case. However in considering that evidence and the charges that the appellant faced in the lower court, in my view, they more proved the alternative count rather than count number 1. PWI stated that the appellant simply entered and begun to remove a mirror. He then begun to struggle with her in an attempt to remove her clothes. That evidence proves the offence of indecent act against PWI. I therefore will quash the conviction against the appellant on count 1 and will also set aside the sentence. The judgment of the court is:-

1. *The conviction of the appellant on the count of attempted rape on count 1 is hereby quashed and the sentence of 10 years passed by the lower court is hereby set aside.*

2. *I do hereby convict the appellant on the alternative count of indecent act with an adult contrary to Section 11 (6). I hereby sentence him on that alternative count to imprisonment of 2 years and that term of imprisonment will begin to run from the date of his conviction on count 1 at the lower court.*

Dated and delivered at Meru this 2<sup>nd</sup> day of October 2009.

**MARY KASANGO**

**JUDGE**