REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL NO 130 OF 1992

NJAU ……..…….…… APPELLANT

VERSUS

REPUBLIC ……..…..……RESPONDENT

(From the Original Conviction(s) and Sentences in Criminal Case No 880

of 1991 of the Resident Magistrate's Court at Chuka -

Mr David J Nyaga - District Magistrate 1)

JUDGMENT

This is an appeal against the conviction and sentence of the appellant, Robert Mbae Njau, for the offence of attempted rape contrary to section 141 of the Penal Code.

In the District Magistrate's Court of the First Class, the appellant was arraigned on the charge, that on September 28, 1991 at about 3.20 pm, at Mugumango sub-location in this district, he attempted to have carnal knowledge of HMR [particulars of her full name withheld], a farmer in Chogoria location. To this charge the appellant protested innocence, whereupon evidence was called by the Republic against him, and the appellant also gave an unsworn statement, but without preferring to call a witness on his side.

At the end of the evidence and statement, the trial magistrate went over the evidence, and after considering it, he found that the appellant confronted the lady HMR, got hold of her, pushed her into a water furrow, tried to pull down her pants, and to stop her from screaming and looking at him to identify him, he put mud in her mouth and eyes. The appellant's unsworn statement that he was attacked by a man when the appellant was trying to take his coins from the water, and that the man ran away, was not believed by the trial magistrate, who gave his reasons for not buying that story.

The magistrate was of the view, that confronting the lady, getting hold of her and trying to forcibly remove her pants could not be a mere indecent assault. All these actions and the appellant's attempt to stop the lady from screaming was, in the opinion of the magistrate, strong evidence, that the appellant had the intention to have sex with her against her will and without her consent. The magistrate was satisfied beyond any reasonable doubt that the appellant attempted to have carnal knowledge of the lady without her consent, and he found the appellant guilty of the charge and convicted him accordingly.

Upon his conviction the Republic drew the attention of the magistrate to the penal provisions of the law which imposes a maximum sentence for attempted rape to be imprisonment for life with corporal

punishment also permitted in addition. Asking the Court to note the permitted sentence, the Republic, however, informed the Court that the appellant was a first offender, a record which the appellant himself pleaded with the Court to consider in mitigation of any sentence that might be chosen. The appellant informed the Court that he had worked for this country as a teacher for twelve years; and that he had old parents, one brother and one sister in school, all of whom he took care.

The magistrate considered all these extenuating factors, but proceeded to note that the offence committed was serious; that the victim was a married woman. The magistrate considered that the appellant deserved a custodial sentence, as a deterrence to the appellant and other like-minded persons. These considerations moved the magistrate to pass a sentence of imprisonment for five years, and, in addition, the appellant was to be inflicted with bodily pain by five strokes of the cane.

All these happenings aggrieved the appellant, who has come to this Court on appeal, seeking to reverse all that – the conviction and sentence. He strongly believes that the magistrate erred in convicting him on the charge of attempted rape when the evidence only went to point at assault, and the conviction was against the weight of evidence. He attacked the sentence of imprisonment for five years with five strokes of the cane as manifestly excessive. For these reasons, he asked me to quash the sentence, set aside the conviction and acquit him.

At the hearing of this appeal, Mr A Mbaya for the appellant argued that the magistrate believed the evidence of the complainant, but that the evidence did not prove the offence charged, because all she said was that the appellant tried to remove her pants, and the appellant himself did not remove his own trousers, a fact of which the third prosecution witness also testified to. It was Mr Mbaya's contention that such evidence did not prove the offence of attempted rape, and did not even amount to indecent assault. On sentence, Mr Mbaya was of the view that it was excessive, noting that the appellant had already served eighteen months in gaol. To Mr Mbaya, this appeal should succeed.

"Not so, said Mr Mutuku, the state counsel representing the Republic in opposing the appeal. Saying that attempted rape is a serious offence in which intention must be proved, and that it consists in what falls just short of rape, Mr Mutuku pointed on the evidence on record where it is stated that the appellant held the complainant's neck, lifted her clothes, and started removing her pants. All this was happening at 3.30 pm in a water furrow, away from the path, where the appellant put soil on the complainant's mouth. These, he said , were acts of attempted rape, and the conviction of the appellant on that charge was proper. On sentence, Mr Mutuku said that as the sentence allowed is jail for life with or without corporal punishment, five years and five strokes was a manifestly lenient sentence.

That is where the matters stood last Friday when, owing to an extremely heavy work-load waiting to be attended to by me alone, I reserved this judgment for the couple of days or so, to consider and write it to be ready for delivering to-day. During those few days, I have careful studied the record of the proceedings and judgment in the Magistrate's Court, to see for myself the goings-on there and to see what the advocate and state counsel say before me in the appeal.

After evaluating the evidence and the appellant's unsworn statement, this Court finds enough evidence given by the witnesses to support the magistrate's findings of fact. The complainant, the second prosecution witness D G, the third one (S M), and the fourth prosecution witness (M'A B) [particulars of their full names withheld], all between them said on oath, to the effect that the complainant, a married woman was going to her matrimonial home after visiting her sister Dorine Gatakaa (PW2) and her mother. On the way she met a male stranger, the appellant, who gave her a chase, she running screaming for help. He caught up with her, held her neck and throat, slapped her, threw her into a water furrow, jumped into the water furrow himself, beat her and put mud or soil in her mouth and eyes. With one hand holding her throat, he tried to push her pants down with the other hand. The complainant struggled against it and the appellant did not succeed in removing the lady's pants. He, too, wearing a shirt and black pair of trousers, did not unbutton or remove his own trousers. But the third prosecution witness saw the appellant holding the complainant tightly, in the water. The complainant's screams attracted many people to the scene; the people surrounded the appellant, arrested him, and one of them took the complainant out of the water furrow, wiped her eyes and mouth, removing the mud which the appellant had filled into the

complainant's mouth and eyes. She was full of mud. Witnesses had seen the appellant try to lift the complainant's clothes. This Court considers that this evidence justified the magistrate's findings on the facts.

The magistrate was right in rejecting the appellant's unsworn statement. It appeared too fantastic to be true. He said that he had come from a headteachers' seminar at Gitoro. On the way he felt tired, thirsty and dusty. He went to a water furrow to wash his hands and drink some water, and while there his money fell into the water, and as he took it out, he felt a person pull him from behind. The appellant did not know the man. Then the man hit the appellant with a fist sending the appellant splash into the water and the assailant ran away. The appellant saw the complainant with a young man coming whereupon the appellant got out the water, got hold of the young man and asked him who it was that had hit the appellant. The two, the appellant and the young man held each other. The complainant screamed, and that is how a lot of people came to the scene and started beating him. They arrested him and took him to the police. He could not walk or talk, for he was unconscious. This story seems too far-fetched to be believed, and the magistrate rightly disbelieved the appellant.

On the correct finding, supported by the prosecution evidence, that the appellant tried to lift the complainant's clothes, tried to remove her pants, tried to stop her from screaming by filling her mouth with mud, holding her throat, and the lady's struggle with him and screaming in a water furrow away from the way or path, but those struggles making the appellant unable to remove the pants from the complainant, the Court is to decide whether on these facts, the magistrate was right in holding that the offence of attempted rape had been committed.

The law on the offences of rape and attempted rape is intended to protect the person. It is to avoid hurt to any individual's person. While it also stops offending morals and religion, this law is basically to avoid mercenary violations of the person not proving fatal.

On this occasion the Court is asked to decide whether attempted rape was committed in the circumstances described above. Any crime of attempt consists of the following elements: (a) an intent to commit the crime, (b) an overt act towards its commission, (c) the failure to complete the crime, and (d) the apparent possibility of committing it. And to attempt to rape is, therefore to try to accomplish sexual intercourse with a person without consent of that person. Accordingly, attempted rape as an offence, is conduct indicating a determination to gratify sexual passion in spite of resistance or lack of conscious consent.

The reason for punishing attempt to rape is to prevent some harm which is foreseen as likely to follow the act of attempt. The ground on which the likelihood stands is the common working of natural causes as shown by experience. It is punished if there are grounds for expecting that the act done will be followed by other acts in connection with which its effect will be harmful. The accompanying intent is what renders an otherwise innocent act harmful.

Emminent judges have puzzled as to where the line must be drawn to demarcate acts which are attempts to commit a crime, and those which are not and are preparatory only. Each case must depend on its own circumstances. But the principle on which to draw the line, is similar to that on which all other lines are drawn by the law. Public policy, that is to say, legistlative considerations are at the bottom of the matter. The Court must consider the nearness of the danger, the greatness of the harm, and the degree of apprehension felt. Broadly speaking, a person attempts to commit a crime when his conduct reaches a point at which an ordinary person would have gone so far that it could reasonably be assumed that he would probably persist on his designs.

Seen against the background of these legal principles, one wonders what the appellant, a male adult, on a tropical afternoon in a water furrow, struggling with a female, attempting to lift her dress and pull down her pants, gagging her with mud to stiffle her screams and dimming her power of sight, but failing to undress her, courtesy of rescuers, would be intending to do to the woman away from the view of passers-by. Surely, he was not in search of reeds under the woman's skirt, or fish under her pants. He had the instrument of raping, the ability to use it, the intention and attempt to employ it for rape. Was he not an ordinary man with normal erotic gadgets in him?

As an ordinary male adult under our climate, it was reasonably to be expected that on lifting the woman's dress, lowering or removing her pants, it would not take him time to unzeep, unbutton or tear off his own trousers, flick out his own person and gratify his passion. He would have persisted in this design had he not been interrupted by the people who heard the woman scream. He sought the woman's private parts and was going for them when he was halted by rescuers.

It is in the public interest and it is the legislative objective of the Penal Code to protect the persons of women. In a male stranger chasing after a woman he does not know and struggling with her to remove her dressing off her, one sees the nearness of danger to the woman. The greatness of hurt and the high degree of apprehension in a sexual offence, must be borne in mind. Do not be oblivious to the reputed high libidinous propensities in our men. When one bears all these things in mind the Court is of the view, that in Kenya, attempted rape begins from the point you start molestingly searching for a woman's body beyond or under her skirt. Reaching her vulva or outer labium but failing to enter is only aggravated attempt.

The difference between stopping at fumbling with her and not passing the labial threshold is in the severity of the sentence to be exacted – the nearer you get to her sacred body the greater the penalty. Rape and attempted rape, like all offences against the person are not wrongs about which there should be semantic quibbles, a play on words and finesse. We have to get to the heart of the matter – the protection of the person, and, in particular, the person of woman.

This being what the Court conceives to be the right approach to sex-related offences, the prescribed maximum sentence for attempted rape being a term of imprisonment for one's life with or without corporal punishment, I think that the five years jail with five strokes of the cane passed against this appellant who threw the complainant into a water furrow, jumped onto her, beat her, filled her with mud, was in the circumstances of the case a fair and reasonable sentence in to-day's Kenya.

For a man who had been a teacher for twelve years, having old parents, a brother and a sister to take care of, he fell short of being responsible. Had the complainant not put up a struggle for long enough to be rescued by members of the public, I fear the worst would probably have occurred to her.

For these reasons, I dismiss this appeal and uphold both the conviction and sentence. Order accordingly.

Dated and Delivered at Meru this 24th day of November, 1993

R.C.N KULOBA

……

JUDGE