REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU
CORAM: OMOLO, LAKHA & BOSIRE, JJ.A.
CRIMINAL APPEAL NO. 6 OF 2000

BETWEEN

DANIEL NYARERU ACHOKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction & sentence from the judgment of the High Court of Kenya at Kisii (Waweru J) dated 15th day of October, 1999

in
H.C.CR.A. NO. 187 OF 1999)
****

JUDGMENT OF THE COURT

Daniel Nyareru Achoki , the appellant, was charged and tried on one main count of attempted rape contrary to Section 141 as read with section 388 (1) and an alternative count of indecent assault on a female contrary to Section 1 44 (1) both under the Penal Code. In actual fact, the correct charge should have been under Section 141 by itself, but if an additional section was felt to be necessary, it should have been under Section 389 , not 388 (1) of the Penal Code . At the end of trial, the Senior Resident Magistrate at Kisii found the appellant guilty on the charge of attempted rape, convicted him thereon and sentenced the appellant to life imprisonment with hard labour and three strokes of the cane. Having thus convicted the appellant on the main charge of attempted rape, the learned trial magistrate correctly made no findings on the alternative charge of indecent assault.

The appellant appealed to the superior court at Kisii, (Waweru, J.), who after hearing the appeal, dismissed the same as regards the conviction but reduced the sentence of imprisonment from one of life to seven years, with hard labour. The three strokes of the cane were confirmed. The appellant now comes before us on a second appeal and that being the position, only matters of law fall for our consideration.

Mr Gacivih, for the Republic, conceded before us that the conviction on the charge of attempted rape cannot be sustained. The particulars of that charge were to the effect that:-

"... On the 26th day o f April, 1999 at [particulars withheld] in Nyamira District within Nyanza Province, attempted to have carnal knowledge of C.K.K."

Section 139 of the Penal Code defines what constitutes a charge of rape. That section is in these terms:-

"Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by any means of threats or inti midation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed rape."

This definition makes it clear beyond a peradventure that it is lack of consent on the part of a woman or girl that is at the core of the crime of rape. Indeed, lack of consent is so vital that even if there be an apparent consent obtained by force, personation etc., a charge of rape would still lie against the ravisher. A fortiorari, if there is consent, there cannot be rape. So a charge of rape must allege in its particulars:-

(i)that the act of sexual intercourse was unlawful;

(ii)that the act of sexual intercourse was without the consent of the woman or girl.

We suppose it is the lack of consent which makes the act of carnal knowledge unlawful, but the section uses both expressions, that is, "unlawful" and "without consent" and the prosecution would be well advised to use both. Whether the charge be one of rape under Section 140 or attempted rape under Section 141 of the Penal Code , the particulars must nevertheless state that the attempted unlawful carnal knowledge was without consent of the woman or girl.

The particulars of the offence of attempted rape upon which the appellant was convicted did not state that the attempted carnal knowledge was unlawful and was without the consent of C.K.K (P.W. 1). That charge did not disclose an offence known to the law and the appellant was wrongly convicted on it. The alternative charge of indecent assault, however, remained and still remains on the record. Both the magistrate and the superior court made no findings on it. It is accordingly still open for us to make findings thereon. The evidence which was accepted by the magistrate and confirmed by the superior court was that the appellant accosted the complainant, knocked her down, tore away her knickers and lay on top of her. He was at the same time lowering his own trousers and he tried to get in between her thighs. P.W. 1 was all the time screaming and her screams brought along T.O.O (P.W. 2) who said he found the appellant lying on top of the complainant. This evidence was accepted by the magistrate and by the Judge on first appeal. There cannot be any basis upon which this Court can interfere with their findings of fact. On the material before them, they were entitled to make the findings they did make. It is clear to us that the mother of the complainant (P.W. 3) who had been with the complainant was left far behind by P.W. 1 and the mother only arrived at the scene after P.W. 2 had rescued P.W. 1 from the appellant. These facts apart from supporting a charge of attempted rape, which charge, as we have said was incurably defective, also supported the alternative charge of indecent assault under Section 144 (1) of the Penal Code . Accordingly, we set aside the conviction recorded under Section 141 (1) of the Pena l Code and we substitute therefor a conviction under Section 144 (1) of the Penal Code . We set aside the sentence of seven years imprisonment and substitute it with one of four years imprisonment with hard labour to run from the date of the original sentence by the magistrate. We also sentence the appellant to receive three strokes of the cane. Those shall be our orders on the appeal.

Dated and delivered at Kisumu this 23rd day of March, 2000.

R. S. C. OMOLO

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR