REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO 24 OF 1995

ALISON KITHURE……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

JUDGMENT

Alison Kithure, the appellant was charged with three counts, namely (1) attempted rape contrary to section 141 of the Penal Code (2) assault causing actual bodily harm contrary to section 251 of the Penal code and (3) Malicious damage to property contrary to section 339 (1) of the Penal Code. After trial he was found guilty on all counts, convicted and sentenced to 3 years, 1 year and 1 year imprisonment respectively.

The Republic had examined four examined four witnesses in the court below: Grace Kaburo (P.W.1) the complainant; John Mwantani (P.W. 2) a loader; Cypriano Mutuma (P.W. 3) a farmer and P.C. Rotich (P.W. 4). The court below heard that on 10th November, 1993 at 7 p.m. the complainant took some bananas to her Kiosk. She found the appellant seated on a bench outside her Kiosk. He demanded to know from her why she had called him a thief. The complainant told the appellant she knew nothing about those allegations. He punched her on the left side of the head and she fell down.

She tried to stand but the appellant kicked her and she fell. He kicked her on the stomach; and tore her petticoat and skirt. With one knee pressing on her stomach and the other between her legs the appellant tried to remove her knickers in order to have sexual intercourse with her. At that point in time Mwantani and Mutuma arrived. They removed the appellant on top of the complainant, and escorted her home.

The p. 3 detailed the injuries she sustained. These were classified as harm. The appellant was charged accordingly.

The appellant made unsworn statutory defence. He found the complainant at her Kiosk and asked her which bananas she had accused him of stealing. She replied the appellant was a thief and hit him, grabbing his private parts while sending her husband to come with a panga. He then hit her with a fist on the head and she released him.

Mutuma (P.W. 3) then held him while the complainant hit him with a piece of Sugar cane.

The learned magistrate in his judgment considered the two sides of the story. He believed the witnesses for the Republic and dismissed the defence of the appellant.

I must evaluate the evidence for myself and reach my own finding. I have set out the evidence in its entirety a first appellate court must do. Mwantani (P.W.2) testified he found the appellant lying on top of the complainant pinning her on the ground. He was hitting her with his fist. After separating them the complainant told them the appellant was accusing her of stealing his bananas. This was similarly the evidence of Mutuma (P.W. 3). More of the two witnesses saw a torn petticoat or skirt. P.C. Rotich (P.W. 4) was not given the two items and did not produce them. They were produced by the complainant herself, quite irregularly. They were only mud-stained as the learned magistrate observed and recorded.

In all sexual offences there must be corroboration of the act of intercourse and identity of the accused. The complainant did not tell the two witnesses who arrived at the scene that the appellant had intended to rape her. This would not have been corroboration, but would have alluded to the appellant's motive. There were no overt acts that manifested the intent of the appellant to commit rape.

The learned magistrate did not address his mind fully to the evidence and the standard of proof required in a charge of attempted rape. There was also no evidence to support a charge of malicious damage to property. The conviction of the appellant in counts one and three is quashed and the sentence set aside.

The learned magistrate found the evidence of the complainant as to the assault corroborated by her witnesses. Indeed this was so. They found the appellant on top of the complainant and he was bearing her. Their evidence discredited and impeached the unsworn defence of the appellant in totality. In this respect the learned magistrate came to the correct finding. I find no merits in the appeal against conviction of assault and dismiss it so.

The appellant was awarded one year imprisonment. He had not mitigated before the learned trial magistrate and the court below must have been left in a hopeless situation to apportion any sympathy on him. The learned trial magistrate recorded why he took a stern view of the offence and why he thought a deterrent sentence was called for. I agree with him. Appeal against sentence is also dismissed.

Order: Conviction and sentence on count 2 upheld

: Conviction on count 1 and count 3 quashed

: and sentence set aside

Dated and delivered at Meru this 24th day of May , 1995

C.O. ONG'UDI

JUDGE