Case Number:	Criminal Appeal 53 of 2009
Date Delivered:	30 May 2011
Case Class:	Criminal
Court:	High Court at Kisii
Case Action:	Judgment
Judge:	Milton Stephen Asike-Makhandia
Citation:	ABRAHAM OTIENO v REPUBLIC [2011] eKLR
Advocates:	-
Case Summary:	..
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

No. 2823

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 53 OF 2009

ABRAHAM OTIENO …….... APPELLANT

-VERSUS-

REPUBLIC ……..……RESPONDENT

JUDGMENT

(Being an appeal from the original Conviction and Sentence of the Senior Principal Magistrate's Court

at Migori Hon. Ezra O. Awino in Criminal Case No. 340 of 2008 delivered on 6th March, 2009)

Abraham Otieno, the appellant was jointly charged with one **Dennis Omondi** before the Senior Principal Magistrate's court, Migori with the offence of attempted rape contrary to section 4 of the **Sexual Offences Act**. The particulars of the offence were that on 20th July, 2008 at M[....] market in Migori District of Nyanza Province, the two intentionally and unlawfully attempted to cause penetration of genital organ of **E.A.**.

The two entered a plea of not guilty and they were tried for the offence. In brief the prosecution case was that the complainant, **E.A.** (PW1) was on 20th July, 2008 at 8.00p.m in the hotel where she worked and stayed. The appellant, co-accused in the company of other two people whom she did not know came to the hotel. She knew the appellant and the co-accused though. Though the door to the hotel was closed, the appellant, co-accused and those two other people forced it open and entered. They caught hold of her and pulled her towards the door intending to rape her outside in the bush. She screamed and people who heard her screams came to her rescue and arrested the two while the other two made good their escape. She had lights on in the house and besides her, there were two other girls in the room, Q.**, H.** and some other children.

The next witness called by the prosecution was **P.C Irine Chelimo** (PW2). Her testimony was simply that she received the file on 15th November, 2008 when the case was already before court. Otherwise it was the investigating officer who recorded the statements. That then marked the close of the prosecution case.

Surprisingly, the learned magistrate on that scant and incredible evidence found for the prosecution on a case to answer and put the appellant and the co-accused on their defence. I cannot fathom how on such evidence, the learned magistrate could have reached such decision. Be that as it may, the appellant in his unsworn statement stated that he was arrested and taken to **bond** and thence to **Migori** where he was charged and ordered to keep peace. Then later he was charged with the instant offence. He wanted the court to make inquiries into the matter. He was so arrested by the chairman of the shopping centre.

In convicting the appellant and the co-accused this is how the learned magistrate rendered himself: ***"…It is also on record that the door was forced open and damaged. I have not found any basis for the complainant to frame up the accused persons. It is also normal practice for the accused persons to be made to execute bond to keep good conduct where there is no enough evidence to charge them. And it is in order for them to be charged when evidence is available even if they had executed bond or not. It is now not good law that a sexual offence requires corroboration, the requirement for corroboration in sexual offence affecting adult women and girls is unconstitutional. See Mukungu –vs- Republic 2202 2 E.A 482…".*** He thereafter sentenced the appellant to five (5) years imprisonment.

There is no doubt at all that any right thinking person, leave alone the appellant would have been disgusted by such conviction and sentence as it had no basis at all in law and fact. If anything it was a total miscarriage of justice. One is left wondering whether truly the learned magistrate was alive to the tenets of law and the oath of his office when he convicted the appellant as aforesaid. Or did he do so upon extraneous considerations. Was he the grand master who was approached by external forces in order that he may invoke our criminal justice system unfairly to settle scores. From what is on record I have no doubt at all in my mind that the learned magistrate had no conviction at all in the judgment he crafted and eventually delivered as aforesaid. He must have been dancing to the tune of external forces. The magistrate was a senior judicial officer, of the rank of Ag Senior Principal Magistrate. There can be no justification for such scrappy and injudicious decision.

The appellant through **Messrs Omonde Kisera & Co. Advocates** filed this appeal. Six (6) grounds were advanced. These were:

"1. The learned trial magistrate erred in law and fact in failing to find that the prosecution had not proved its case beyond any reasonable doubt as required by the law in respect of the evidence on record.

2. The learned trial magistrate erred in law and fact in failing to find that the evidence on record was not safe for conviction on it (sic) revealed no material ingredients of the offence charged and pointed only to probable opinion which was not proved beyond any reasonable doubt.

3. The learned trial magistrate erred in law and fact in convicting the appellant against uncorroborated evidence of a single witness in the name of the complainant.

4. The learned trial magistrate erred in law and fact in finding that the evidence of damaged door and screams only pointed to the offence of attempted rape and no other.

5. The learned trial magistrate erred in law and fact in failing to consider the fact that the appellant had been earlier made to bond to keep peace for lack of evidence.

6. The learned trial magistrate erred in law and fact in convicting the appellant without first of all making a finding that the offence had been proved beyond any reasonable doubt as required by law…".

When the appeal came up for hearing, counsel for the appellant failed to turn up. As he did not wish to have the appeal adjourned, the appellant opted to prosecute the same in person, the absence of his counsel notwithstanding. He made a wise decision for when **Mr. Gitonga**, learned state counsel, rose to address the court, he conceded to the appeal. He submitted that the ingredients for the offence of attempted rape had not been proved by the prosecution as set out under section 4 of **Sexual Offences Act**. As such the conviction was illegal.

In answer, the appellant submitted that he was convicted only on the evidence of the complainant.

It must be clear from what I have so far in this judgment that the learned state counsel was right in conceding to the appeal. The appellant was charged under section 4 of the **Sexual Offences Act**. That section provides interlia:-

"…Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life…".

For an offence of attempted rape to be deemed to have been committed under the section, the prosecution must prove that the culprit acted in such manner that there was no doubt at all as to what his intention was. The intention must be to rape. It must be shown that he was about to rape the victim but was stopped in tracks and or in the nick of time. The intention to rape must be manifest. Such intention can be manifested for instance by word of mouth or conduct of the culprit. If the culprit proclaims his intention to rape and directs his efforts towards that goal for instance, by holding the victim or pushing her to the ground, undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but does not go the whole hog because of *factus interveniens*, that would be good evidence of attempted rape. Alternatively, if the culprit without expressing his intentions verbally gets

hold of the victim, fondles her, removes her clothes including her pants and also undresses himself in preparation thereof but for one reason or another something happens which compels him stop, again that would be good evidence of attempted rape.

Nothing of the sort however happened in the circumstances of this case. What happened simply put was that the appellant and his team came to the house where the complainant was in the company of **Q., H.** and other young children and forced the door open. They never said what had brought them thereat. They pulled her towards the door and when she screamed people came but the four fought them off. The complainant suspected rape. Can these by any stretch of imagination pass for attempted rape" Is it possible that perhaps, the four were bent on having her elope with one of them" From the conduct of the appellant and his team that possibility cannot be wholly excluded. Forcing a door open and pulling out a victim cannot be evidence of attempted rape as the complainant imagined. There could be an innocent explanation for such conduct least of which would be attempted rape.

The appellant advanced a solid and plausible defence. On the evidence on record and the casual manner the prosecution handled the case, there can be no doubt at all that this case was framed against the appellant for reasons which are not quite apparent on record. The appellant alluded, to being arrested by the chairman of the shopping centre and was bonded to keep peace. Is it possible that this case was a perpetuation of the previous misunderstanding between the two"

The appeal is allowed, the conviction quashed and the sentence imposed set aside. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

Judgment dated, signed and **delivered** at Kisii this 30th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE