



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL APPEAL NO. E018 OF 2020**

**STEPHEN OTIENO ONYANGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment, conviction and sentence of Hon C.I.Agutu, SRM in Ukwala SRM Criminal Case No. 29 of 2019 delivered on 2<sup>nd</sup> June, 2020)*

**JUDGMENT**

**Introduction**

1. The Appellant herein **Stephen Otieno Onyango** was charged before the Senior Resident Magistrate's Court at Ukwala in Criminal Case No. 28 of 2019 on the first count with the offence of attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act No. 3 of 2006, the particulars of the offence being that on the 12<sup>th</sup> day of November, 2019 at Ugunja Township, West Uholo location in Ugunja Sub-County within Siaya County, he intentionally attempted to cause his penis to penetrate the vagina of AAO [FULL NAME WITHHELD FOR LEGAL REASONS], a child aged sixteen years. The appellant also faced the alternative charge of committing an indecent act with a child contrary to **Section II (1) of the Sexual Offences Act no. 3 of 2006**.

2. In the second count, the appellant faced the charge of assault causing actual bodily harm contrary to Section 251 of the Penal Code the particulars of which were that on the 12<sup>th</sup> day of November 2019, at Ugunja township, West Siaya County wilfully and unlawfully assaulted AAO thereby occasioning her actual bodily harm.

3. The appellant denied both charges and the prosecution called 5 witnesses. The trial magistrate, Hon. C.I. Agutu after considering the prosecution evidence as well as the appellant's defence found the appellant guilty as charged on both counts and sentenced him to serve 10 years' imprisonment.

4. Aggrieved by the said conviction and sentence, the appellant filed his petition of appeal based on the following grounds:

*a) That he pleaded not guilty.*

*b) That there was a lot of contradiction from the testimony of PW1.*

*c) That he did not have any weapon that could make other two men to run away leaving him with the lady alone.*

*d) That the key witness who happened to have recorded statements, in this case was never called testify.*

*e) That PW4 had given a lot of unproven testimony and his statement was full of fabrication.*

*f) That there was a lot of contradiction between testimony of PW1 and PW4 in that none of them could locate the house where I stay.*

*g) That indeed there was a scuffle on the road when I was abused by PW1 and his two men but I never attempted to grab this lady.*

*h) That there was no evidence to support a case of attempted defilement.*

*i) That he would adduce more grounds on receiving copies of proceedings and judgment.*

*j) That he wished to be present during the hearing of this appeal.*

### **Appellant's Submissions**

5. The appellant was supplied with a record of the trial court proceedings and judgment free of charge upon which he filed his written submissions to canvass the appeal. The appellant submitted that the learned trial magistrate erred when she finally came to the conclusion that the appellant was guilty of the charges yet they were not proven by PW2 the medical officer who was in high possibility of knowing the truth and the amount of harm ascertained to the complainant.

6. It was submitted that the learned trial magistrate failed when she fully failed to analyse and evaluate the evidence of PW1 which was full of contradictions and inconsistencies but relied on the same testimony in arriving at her wrong conclusion to convict the appellant. The appellant relied on the case of **Criminal Appeal No 102 of 957 EAC Ramkrshan Denkerai Pandya** where it was held that ***"There should be no inconsistencies, contradictions material discrepancies and farfetched evidence where witness acted as a doubtful character in the court of law and which is quite difficult to distinguish truth and untruth"***

7. The appellant submitted that the case against him consisted of mere fabrications and untrue stories made to fix him as he did not have any weapon that could have made the two men run and leave him with the girl. The appellant further submitted that the prosecution failed to prove the case beyond doubt by failing to produce the crucial witness in the case and thus the trial magistrate erred in law and fact when she used insufficient evidence to enter a conviction.

8. It was submitted that PW4 who was the investigating officer in this matter and at the same time the arresting officer gave out unproven testimony full of fabrication. Further, it was submitted that the prosecution's case relied on circumstantial evidence and had failed to meet the test for admission of circumstantial evidence.

### **Analysis & Determination**

9. This being a first appeal, the role of this court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

10. The evidence as laid out before the trial court was as follows: PW1 the complainant AAO testified that on the material date, she was in the company of two young men, E, an in-law and his friend D. It was her testimony that they met the appellant, who was then a stranger to them seated by the road side at Nyamasare. She stated that the appellant beckoned her but she ignored him and upon alerting her companions of the same, they told her to ignore him.

11. PW1 testified that the appellant then followed them using a motor bike and demanded to know why she had pointed at him to which E responded by telling the appellant that she had alerted them to his call. She further testified that the appellant then stated that he was a past convict and alerted them of the marks on his face. It was her testimony that the appellant then slapped her on her left cheek and pulled her off to a rental house and during this her companions were scared and did not retaliate.

12. PW1 testified that the appellant then took her to a house and demanded to have sex with her. The complainant was specific that the appellant gave her three choices; to have sex with him if she wanted to go home, to lock her up or to defile her. She stated that the appellant threatened her with death and she greatly feared. It was her testimony that the appellant forcefully removed her blouse leaving her bare breasted. She stated that the appellant wanted to remove her trousers but he was interrupted by a knock on the door and upon opening the door, and to his utter amazement there stood a uniformed police officer in the company of her companions, D and E who entered the room and arrested the appellant. She stated that she later got to learn the appellant's name as Stephen.

13. In cross examination, the complainant reiterated that the appellant slapped her on the road and that her companions did not see the appellant beckon her. She further stated that at the time of appellant's arrest, they were just the two of them-her and the appellant in the room. She clarified that E was her in-law and not her boyfriend. PW1 said that she was seeing the accused for the second time during the court session.

14. PW2 Calvin Oduor, a clinical officer based at Ambira Health Centre confirmed that PW1 visited the above-mentioned facility and complained of general body pains during her oral history. It was his testimony that the complainant also narrated that a defilement attempt was made against her by a stranger. PW2 testified that the complainant was managed on pain killers and then released. On cross examination, PW2 said that the complainant visited the facility at night as she said she was coming from the police station.

15. PW3, EOJ testified that he hailed from Busia County but had come to the area to visit his blood sister who is married to the complainant's brother. It was his testimony that the complainant informed them that the appellant was beckoning her, but he and D advised her to ignore him. He further testified that the appellant then followed them on a motor bike and made open threats and even slapped the complainant. He testified that the appellant boasted of his influence as his family was rich before pulling the complainant and getting away with her. He testified that motorists informed them to look for the complainant and he reported the incidence at Ugunja and got police to accompany him and D to the house that they had managed to trace, where the appellant was holding the complainant. PW3 testified that when they opened the door, they found that the complainant was bare breasted. In cross examination PW3 stated that they met the appellant in an open area. He further stated that the appellant was openly belligerent when he accosted them before dragging the complainant away and this scared them. He further stated that they followed the appellant to the scene of crime in the company of the police.

16. PW4 No. 119679 P.C. Douglas Wangila testified that on the 12<sup>th</sup> November 2019 at 1530hrs, he received a report from two boys that a girl they were with had been taken away by an older, belligerent man. It was his testimony that together with his other colleagues, they rushed to the scene and managed to rescue the girl, who they found half naked as she did not have a top. He stated that they arrested and charged the appellant. In cross examination PW4 reiterated that the appellant was inside the house which was near Elizabeth School and that he arrested him.

17. PW5 No. 104732 Nelia Muthoni's testimony corroborated that of PW1, PW3 and that of PW4. It was her testimony that on the 12<sup>th</sup> November 2019, two young men reported that they had been accosted by a man who sat on the road side at Nyamasare who threatened them and went away with the complainant. It was her testimony that officers were dispatched to the scene and they arrested the complainant. PW5 produced the complainant's birth certificate which indicated that she was born on the 23<sup>rd</sup> October 2003.

18. Placed on his defence, the appellant testified that on the material date he was heading home from Ugunja when he met a policeman who called him and as he approached the policeman he saw a land cruiser with 3 occupants inside where he sat. He stated that he was taken to the station where he stayed for 2-3 days. He denied committing the offence.

### **Determination**

19. Having considered the evidence adduced in the trial court, the grounds of appeal and the submissions as detailed, the main issue for determination is whether the prosecution proved their case against the appellant on the two counts and whether the sentence imposed was lawful and commensurate with the offences charged.

20. The Appellant herein was charged under Section 9(1) and (2) of the Sexual Offences Act. No. 3 of 2006 and section 251 of the Penal Code. The section under the Sexual Offences Act provides as follows:

***(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.***

***(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.***

21. Under section 251 of the Penal Code, ***any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.***

22. To prove the case of attempted defilement, the prosecution must prove the ingredients of defilement (age, positive identification) except penetration and the steps taken by the Appellant to execute the defilement which did not succeed.

23. **An attempted offence is an inchoate offence defined in law. Section 388 of the Penal Code** defines attempt in the following terms:

***(1) Where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfilment manifests his intentions by some overt act but does not fulfil his intentions to such an extent as to commit the offence, he is deemed to attempt to commit an offence.***

***(2) It is immaterial except so far as regards punishment whether the offender does all that of necessary on his part for completing the commission of the offence or whether the complete is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention.***

***(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.***

24. From the foregoing provisions, it is easily deducible that when a court is faced with any charge on an attempted nature, care must be taken to ensure that the attempt as opposed to mere acts of preparation, is proved. However strong the evidence is, if it only relates to actions in preparation to commit a certain crime, that evidence cannot justify a conviction on an attempted charge. For clarity purposes, evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise, the intention to commit the crime must also be proved.

25. Mativo, J in **Moses Kabue Karuoya v Republic [2016] eKLR** held that:

***“At the risk of repeating the position laid down in the above cited authorities, I reiterate that the key ingredients of the offence before me can be summarized as follows, namely, (a) Intend to commit the offence; From the evidence tendered, I find that intent was established. The second requirement is the accused must (b) Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve. Evidence tendered is that the appellant knocked her down, lied on her, lowered her panty & forcefully opened her legs. Lastly the accused must (c) Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence. It is said the appellant forced the complainant down, lied on her, lowered her under wear to knee level, forced her thighs open and ejaculated after which he felt relieved and let her go. These were overt acts which viewed in the circumstances show a clear intention to commit the offence, but the appellant fell short of completing the offence owing to the circumstances explained. Justice Asike-Makhandia (as he then was) [in Abraham Otienovs Republic, High Court Criminal Appeal no. 53 of 2009, Kisii] put it more succinctly when he said:-***

***“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 a 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 for one reason or another something happens which compels him to stop, again that would be good evidence of attempted rape.”***

26. In this case, the complainant’s evidence was that on the material day she was on the Nyamasare road in the company of two other young men when the appellant confronted them, slapped her and pulled her away and led her into a room where he outlined his plan (intention) to defile her by giving her three choices namely; To have sex with him if she wanted to go home, to lock her up or to defile her. The appellant went further by taking off the complainant’s top clothing by force leaving her bare breasted. However, the appellant was interrupted as he wanted to remove the complainant’s trouser by a knock on the door which turned to be the police who arrested him.

27. It is clear from the narrated circumstances that the appellant had formed the intention of defiling the complainant and he told her that that was what he wanted to do to her. From the evidence tendered, I find that intent was established. He began to put his intention to commit the offence into execution by undressing her. He was in the process of removing her trousers but was interrupted. These were overt acts, the laying down of the choices the complainant had, coupled with the forceful undressing of the complainant, which viewed in the circumstances show a clear intention to commit the offence, though the appellant fell short of completing the offence owing to the sudden but unexpected appearance of the police.

28. In this case, I find that there was sufficient evidence that the complainant was a child aged 16 years. The birth certificate produced by PW5 indicated that the complainant was born on the 23rd October 2003. As it was daytime, the complainant was able to recognize the appellant. All other prosecution witnesses also recognized the appellant as they caught him in the act, locked up in a room and ready to defile the complainant after removing her upper clothing and ready to remove her trousers to execute the act of defilement. The complainant being a minor had no capacity to consent to sexual intercourse with the appellant.

29. The appellant has taken issue with the testimony of PW1 in that it is full of contradictions in itself and further that it contradicts that of PW4 with regard to the appellant’s house. In **Phillip Nzaka Watu vs. R (2016) e KLR**, the Court of Appeal expressed itself thus:

***“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed it has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”*** (Emphasis supplied)

30. In the instant case, I am alive to the caveat mentioned earlier that unlike the trial magistrate, this court did not have the benefit of seeing these witnesses testify and thus assess their demeanor. I note for instance that the trial magistrate noted that the prosecution witnesses were calm and eloquent and that their narration was in tandem throughout with that of the complainant. I have perused the trial record and it is my opinion that there was no material contradiction in the prosecution case during the trial so as to prejudice the appellant. Consequently, it is my opinion that this ground of alleged contradictions in the prosecution’s evidence is devoid of any merit and it fails.

31. On the alleged failure by the prosecution to call the alleged vital witnesses, section 143 of the Evidence Act provides that:

***“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.”***

32. In the case of **Paul Kanja Gitari v Republic [2016] eKLR** the court of appeal expressed itself that:

***“The state of the evidence tendered with all of its inconsistencies means that the appellant’s complaint that some vital witnesses were not called is also not idle. It is of course trite that there is not number of witnesses required for the proof of a fact. See Section 143 of the Evidence Act. However, it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the court to draw an inference that had such witnesses been called, their evidence would have been averse to the prosecution case. See BUKENYA & OTHERS v UGANDA [1972] EA 549. Given the totality of the evidence and the specific circumstances of this case, we are not satisfied that evidence was tendered that proved the case against the appellant. His conviction was unsafe and this entitles us to interfere.”***

33. However, that decision states that such inference is only to be made where the prosecution calls evidence that is barely adequate. I am guided by the case of **Mwangi v R [1984] KLR 595** where this Court stated:

***“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”***

34. The prosecution is not duty bound to call all persons involved in the transaction and its failure to call them is not necessarily fatal unless the evidence adduced is barely sufficient to sustain the charge. In **Keter v Republic [2007] 1EA135** the court was categorical that:

***“The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the***

*charge beyond any reasonable doubt.”*

35. The Court of Appeal at Mombasa in **Sahali Omar v Republic [2017] eKLR** held that:

*“The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. **Keter v Republic [2007] 1 EA 135**). In this case, the testimony and evidence adduced by the five prosecution witnesses was sufficient to prove that the complainants had been defiled by the appellant. As such, the situation hardly called for the drawing of an adverse inference with regard to the ‘missing’ witnesses.”*

36. I further reiterate what the Court of Appeal stated in **Benjamin Mbugua Gitau v Republic [2011] eKLR** that:

*“It would have been critical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys.”*

37. In this case, note that the prosecution did not call one of the boys who was in the company of the complainant when the events leading to this case arose. I also note that the prosecution prayed for summons to issue to the aforementioned DJ on the 17/02/2020 however the prosecution was not successful in tracing him. That notwithstanding, I find that the evidence adduced by the prosecution was sufficient and corroborative enough to sustain the charge and all its essential elements against the appellant beyond reasonable doubt and as such, failure to call the aforementioned DJ did not in any way prejudice the appellant. This ground also fails.

38. In the end, I find and hold that the offence of attempted defilement was proved in law and the conviction of the appellant was sound.

39. On whether the offence of assault causing actual bodily harm was proved beyond reasonable doubt, the complainant testified on how the appellant slapped her on her cheek before pulling her away and slapping her again when she resisted going his way and later attempting to defile her. PW3 also witnessed the slapping. Although she did not have visible injuries on examination, she was in pain and was given painkillers as per the P3 form and evidence of PW2 the clinical Officer. That charge was proved beyond reasonable doubt.

40. On sentence, since the sentence remains within the law and was rightly arrived at after receiving the appellant's mitigations, and considering the circumstances under which the appellant committed the offence with very serious threats to the life of the complainant, and bragging that he was an ex convict evidenced from his facial marks seen by the court which he used to threaten the victim saying he was a jail bird and feared nobody, and that he was capable of doing anything heinous with impunity, I see no justification in disturbing the sentence imposed on count one.

41. I however note that the trial court did not sentence the appellant on count two of assault causing actual bodily harm which I hereby sentence him to serve twelve months imprisonment.

42. The upshot is that I uphold the conviction and sentence imposed on the appellant in count one and sentence the appellant in count two to serve twelve months imprisonment from date of sentence in the lower court. The two sentences to run consecutively. The entire appeal against conviction and sentence is found to be devoid of any merit and the same is dismissed.

43. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 27TH DAY OF APRIL, 2021**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

The Appellant virtually, at Kisumu Maximum Prison

Mr. Kakoi Principal Prosecution Counsel for the State

CA: Modestar and Mboya