REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

(Coram: A. C. Mrima, J.)

CRIMINAL APPEAL NO. 48 OF 2019

ELLY ODHIAMBO OGOLA…….....APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R.O. Odenyo, Senior Principal Magistrate in Migori Chief Magistrate Sexual Offences Case No. 7 of 2019 delivered on 13/06/2019)

JUDGMENT

1. *Elly Odhiambo Ogola*, the Appellant herein, was arraigned before the Chief Magistrate's Court at Migori on 14/01/2019 where he was charged with the principal charge of attempted rape with an alternative charge of committing an indecent act with an adult.

2. The particulars of the offence of attempted rape were that '*on 11th day of January 2019 at [particulars withheld], intentionally and unlawfully attempted to cause his penis to penetrate the vagina of A. A. O. without her consent.*'

3. The Appellant denied the charges and he was tried. Six witnesses testified in support of the prosecution's case. **PW1** was the complainant, **A.A.O**. **PW2** and **PW5** were farmers and residents of Karungu in Nyatike Sub-County. **PW3** was an uncle to the complainant**. PW4** was a *boda boda* rider within Sori market. The investigating officer one **No. 55639 PC Cylus Bweneti Wekesa** attached to Karungu Police Post under Macalder Police Station. He testified as **PW6**. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court except for PW1 whom I will refer to as '**the complainant'**.

4. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave an unsworn defence without calling any witness.

5. The court rendered its judgment on 13/06/2019 where the Appellant was found guilty of the offence of attempted rape and was convicted. He was sentenced to 10 years' imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by timeously filing a Petition of Appeal where he challenged the judgment, conviction and sentence on two main grounds being that the defence was not considered and that the sentence was too harsh.

7. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant argued that he was a minor and that he was not treated as such during trial and sentencing. He also contended that no medical evidence was produced to confirm the alleged injuries and that the scene was not visited. The Appellant prayed for the appeal to be allowed, conviction quashed and sentence be set-aside.

8. The appeal was opposed by the State. It was submitted that the offence was proved beyond any peradventure. It was further submitted that since the complainant was below the age of majority then the proper charge was attempted defilement. To that end, this Court was urged to exercise its discretion under **Section 354** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya and allow a conviction on attempted defilement since there was overwhelming evidence of the commission of the crime.

9. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno 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, analyse 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 demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of attempted rape, or alternatively those of the offence of committing an indecent act with an adult, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions.

11. I will now endeavour to ascertain if the offence of attempted rape was proved. The starting point is the law.

12. **Section 388** of the **Penal Code** defines ***"attempt"*** as follows: -

> **388 (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**
>
> **(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the 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.**

13. The above section brings out the two main ingredients of an attempted offence; the ***mens rea*** which constitutes the intention and the ***actus reus*** which constitutes the overt act towards the execution of the intention.

14. In **R vs. Whybrow (1951) 35 CR APP REP, 141**, **Lord Goddard** C.J., had the following to say on *mens rea* when the court was albeit dealing with the offence of attempted murder: -

> ***..... But if the charge is one of attempted murder, the intent becomes the principal ingredients of the crime.***

15. Eminent learned authors in criminal law, **J. C. Smith** and **Brian Hogan** in their book **Criminal Law, Butterworths, 1998 (6th Edition) at page 288** while discussing the aspect of *mens rea* in an attempted murder had this to say:

> ***.... Nothing less than an intention to kill will do.***

16. And in **Cheruiyot v Republic (1976 - 1985) EA 47** **Madan, JA**, as he then was, while approving the holding in **R v. Gwempazi s/o Mukhonzo (1943) 10 EACA 101, R v. Luseru Wandera (1948) EACA 105** and **Mustafa Daga s/o Andu vs. R (1950) EACA 140**, stated as follows on *mens rea* in an attempted murder charge: -

> ***In order to constitute an offence contrary to Section 220, it must be shown that the accused had a positive intention unlawfully to cause death.... The essence of the offence is the intention to murder as it is presented by the prosecution.***

17. The Court of Appeal had yet another occasion to look at the aspect of the *actus reus* in attempted offences. In the case of **Abdi Ali Bare vs. Republic (2015) eKLR** learned Honourable Justices Githinji, Mwilu and M'Inoti had the following to say as they considered the offence of attempted murder: -

> ***..... The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence. In the work quoted above by Smith & Hogan, the authors give the following scenario at page 291 to illustrate the distinction:***
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> > *D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position. loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder....*
>
> ***In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder. In CROSS & JOINES' INTRODUCTION TO CRIMINAL LAW, Butterworths, 8th Edition (1976), P. Asterley Jones and R. I. E. Card state as follows at page 354:***
>
> > *..[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted....*
>
> ***The learned authors add that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit murder or***

whether the accused had done more than mere preparatory acts.

18. From the foregone, 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.

19. 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.

20. I must now apply the above principles to this case. For completeness of consideration, I will reproduce the evidence of the complainant.

> **I am called A.A.O I am a resident of [particulars withheld] Village in Sori in Nyatike sub county. I finished my form 4 last year.**
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> **On 11/01/2019 at about 5:00pm, I was on my way to the lake to wash utensils and to bathe. When I reached the lake, I finished washing utensils and clothes. I then took off my clothes and started to bathe. I was about 3 meters inside the water.**
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> **A person came from behind me and started to strangle me. At first I thought it was my sister who was playing. But I realized it was not my sister when the person started to squeeze my neck and started to fall me in the water. I struggled with the person as I went out of water. The person continued to hold me by neck and continued to strangle me. I saw that it was a man. He strangle me as he led me into a thicket nearby. He pushed me down on the ground. he was naked. I sensed danger and struggled to free myself. The man who holding me and strangling me is now sitting there (pointing at accused)**
>
> **Accused tried to force his penis into my vagina but failed as I was still having my pant on. when he tried to remove my pant, I got hold of his finger, twisted it and he was forced to stop strangling me. I screamed. Some women who were nearby asked what it was. Accused fled the scene. He took his slippers which had been lying by as he fled.**
>
> **I had not known accused prior to that day he tried to rape me. I recognized him at the hospital even though he was now having clothes.**
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> **<u>Cross examined by accused</u>**
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> **It is after we had struggled for some time and even come out the lake that I realized you were naked, when you started to strangle me I had applied soap on my head and was in the process of rinsing myself.**
>
> **I do not know where you had left your clothes by the time you attacked me. I heard you say your name at the hospital. I had not know you before that day.**
>
> **<u>Re-examination</u>**
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> **I had not know accused before that day. I heard him tell the doctor his name when the doctor had treated me and had called him for examination.**

21. The evidence of the complainant was corroborated by PW2 and PW5. The complainant testified that she was naked when the assailant pounced on her. She only had an underpant. The assailant was naked as well. In the course of the struggle the assailant pushed the complainant to the ground. He held her and tried to force his penis into the complainant's vagina. There were three reasons why penetration was not successful. One, the assailant was obstructed by the complainant's underpant. Two, the intervention of PW2 and PW5 after the complainant screamed. Three, the complainant held one of the fingers of the assailant and twisted it and the assailant loosed her.

22. The question which now calls for an answer is whether the actions of the assailant were immediate to the commission of the offence or *'were merely remotely connected with the commission of the specific offence attempted on the basis of common sense.'*

23. A review of the evidence reveals a scenario where there was nothing more the assailant was to do to insert his penis into the complainant's vagina. Had it not been the complainant's underpant, the twisting of the finger of the assailant by the complainant, the screaming after the complainant's neck was freed and the intervention of PW2 and PW5, the assailant would have committed the offence. I find that the assailant took the last step towards commission of the offence.

24. There was evidence that the assailant ran away after he was confronted by PW2 and PW5. Members of public gave chase and did not lose sight of him until he was eventually arrested. PW3 was one of those who took part in the chase. He however gave up the chase on the way so as to take his niece, the complainant, to hospital. When PW3 and the complainant reached the hospital they found the assailant escorted there by members of public and both immediately identified him as the assailant.

25. I must however address the issue raised by the prosecution that the correct charge was attempted defilement. I think the Learned prosecutor did not get the appellant's argument. The appellant's submission on the age related to the appellant himself and not to the complainant. The appellant submitted that he was a child during the trial and despite such, the court did not accord him appropriate treatment including the place of his remand and the benefit of sentence.

26. The appellant raised the issue of his age on his second court appearance. The court made an order that his age be assessed. An Age Assessment Report was filed with the court. It settled the age of the appellant at around 20 years old. The appellant's contention was hence misplaced and is for rejection.

27. The appellant was therefore rightly found guilty and convicted with the offence of attempted rape. The appeal on conviction is hereby disallowed.

28. On **sentence**, the appellant was ordered to serve 10 years in prison. The offence carries a minimum sentence of 5 years in prison which may be enhanced to life imprisonment under **Section 4** of the **Sexual Offences Act.** The court however did not sentence the appellant on the basis of the minimum sentence as provided by the law. Instead, the court considered the mitigations and the circumstances of the case and arrived at the impugned sentence.

29. The High Court in **Wanjema v. Republic (1971) EA 493,** rightly so, laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

30. Applying the said parameters in this case I do not think I will be fair to fault the sentencing court. Apart from submitting as such, there was no demonstration how the sentence was excessive. The appeal on sentence is also declined.

31. The appeal is hence dismissed in its entirety.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 22nd day of May, 2020.**

A.C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Elly Odhiambo Ogolla, the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant