REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 131 OF 2019

LKM ……..……..…. APPELLANT

-VERSUS-

REPUBLIC ……..…..……..……..…… RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C. A. Mayamba (SRM) in Kilungu Senior Resident Magistrate's Court Sexual Offence No. 29 of 2019 delivered on 20th August, 2019).

JUDGMENT

1. **LKM** the Appellant herein was charged with the following offences:

> **Count I: Attempted rape contrary to section 4 of the Sexual Offences Act No. 3 of 2006.** The particulars were that the Appellant on the 4th day of April 2019 at around 7:30 pm at [Particulars Withheld] market within Makwa sub-county within Makueni county intentionally and unlawfully attempted to cause his genital organ (penis) to penetrate the genital organ namely vagina of **FMS** without her consent.
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> **Count II: Assault causing actual bodily harm contrary to section 251 of the Penal Code.** The particulars were that on the 4th day of April 2019 at around 7:30 pm at [Particulars Withheld] market Ngaamba sub-location in Mukaa sub-county, assaulted **DMM** biting him on the forehead thereby occasioning him actual bodily harm.

2. The matter proceeded to full hearing with the prosecution calling four (4) witnesses. The Appellant made a sworn defence and called no witnesses. After a full hearing, he was found guilty but insane and sentenced to serve under the President's pleasure.

3. Being aggrieved with the judgment herein he filed this appeal citing the following amended grounds:

> a) **That,** the trial Magistrate erred in matters of law and facts for failing to find that the surrounding circumstances in this case did not warrant for the Appellant to be convicted and later sentenced under the President's pleasure based on the fact that the Appellant participated fully in this case and even cross examined the witnesses.
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> b) **That,** the trial Magistrate erred in matters of law and facts by convicting the Appellant under the President's pleasure under section 166 of the Criminal Procedure Code without finding that the section had already been declared unconstitutional.
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> c) **That,** the trial Magistrate erred in matters of law and facts by failing to note that the burden and standard of proof by the prosecution was not discharged and thus the prosecution case was not proved beyond reasonable doubt as provided for under the law, thus the guilty verdict was unsafe and could not be supported having regard to the evidence and that on any ground it was a miscarriage of justice.

4. A summary of the case is that Pw1 **FMS** was seated in her shop at [Particulars Withheld] on 4th April 2019 at around 7:30 pm when the Appellant went there and held her hand. He dragged her out, threatened and attempted to rape her. She screamed for help and her father who was passing by came to her rescue.

5. The Appellant hit and bit him as he tried to rescue her. She reported the case and was issued with a P3 form. She identified the treatment notes (EXB1) and P3 form (EXB2). She denied having been instigated by the father to complain against him because of charcoal business. She confirmed knowing the Appellant.

6. Pw2 **DMM** who is Pw1's father confirmed having found her daughter under attack on 4th April 2019. Pw1 called him as he was headed home. He found the Appellant dragging Pw1 who was pregnant. He struggled with the Appellant who bit him on the face. He reported to the police and was referred to Sultan Hamud hospital for treatment. He identified the treatment notes EXB3 and the P3 form as EXB4. He

confirmed knowing the Appellant as a neighbor.

7. Pw3 **Eric Kasiamani** is the clinical officer who examined both Pw1 and Pw2. He found Pw1's genitals to be normal while Pw2 had been bitten on the face. The face had deep human bites. He assessed the injury as harm. He produced the treatment notes an P3 forms as EXB1 – 4 respectively.

8. Pw4 **No. 58486 Senior Sergeant Francis Okungu** received both Pw1 and Pw2 on 4th April 2019 at 7:30 pm at Salama police station. He narrated their reports and how he referred them to Sultan Hamud hospital. He was the investigating officer.

9. In his sworn defence the Appellant stated that he was sleeping on the day in issue as he was under medication. He also said he was still undergoing treatment and did not know anything else about the case. He denied having gone to Ulu market.

10. The appeal was canvassed by way of written submissions.

11. The Appellant in his submissions raises two main issues namely:

i. The prosecution did not prove its case against him.

ii. That the sentence meted out on him is unconstitutional.

12. Learned counsel Mr. Muriuki for the DPP has submitted that the two charges against the Appellant were proved by the prosecution. Further that the Appellant's defence was considered by the trial court. He further submits that the trial court did not err in its findings and the Appellant was given a sentence that will benefit him in the long run.

Analysis and determination

13. This is a first appeal and this court has a duty to re-evaluate and reconsider the entire evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see the witnesses and give an allowance for that. See **Okeno –vs- R (1972) E.A 32. In Kiilu & Anor –vs- R (2005) 1 KLR 174** the Court of Appeal stated thus:

> ***1. "An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
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> ***2. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

The same was reiterated in the case of **David Njuguna Wairimu –vs- R (2010) eKLR** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

14. I have considered the evidence on record, grounds of appeal, submissions of both parties and authorities cited. I find the main issue for determination to be whether the prosecution proved its case against the Appellant on both counts to the required standard. In other words, were the ingredients of both offences proved?

15. In the 1st count the Appellant was charged with the offence of attempted rape contrary to section 4 of the Sexual Offences Act which provides:

> ***"Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organ 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."***
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> Section 388 of the Penal Code defines "attempt" as: -
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> **Attempt defined**
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> ***388 "(1) When a person, intending to commit an offence begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil 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 competing the commission of the offence, or whether the complete fulfilment 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."

16. This section brings out the two main ingredients of an attempt offence. First is the *mens rea* which constitutes the intention. Next is the *actus reus* which constitutes the overt act towards the execution of the intention. It is therefore trite to note that there is a difference between preparation to commit an offence and attempting to commit an offence.

17. An attempted offence is indeed a failed offence. It is therefore important for the prosecution in an attempt offence to show what the culprit exactly did which led to the failed action. See **David Aketch Ochieng –vs- R (2015) eKLR; Daniel Ombasa Omuoyo – vs- R (2016) eKLR & John Mokua Atandi –vs- R (2018) Eklr**.

18. In the instant case Pw1 testified that the Appellant grabbed her hand and dragged her outside. He was threatening to have sexual intercourse with her on that day. She screamed and was rescued by her father (Pw2). Besides this, there is nothing else he did before she was rescued. Pw1 did not even say she was injured anywhere. This is confirmed by the evidence of Pw3 the clinical officer. He examined her and found no injury on her outer body or her genitals (EXB1 and 2).

19. Is there anything he did besides the threats that would lead one to conclude that he attempted to rape Pw1? At no point in her evidence does she state that the Appellant touched her private parts or any part of her body. There was no attempt to remove or tear her clothes. There is no evidence of any attempt by the Appellant to remove his clothes or even penis.

20. The medical notes (EXB1&2) produced in evidence also show that Pw1 was not in any way physically injured. Her genitals were intact. From the evidence, it is clear that the Appellant was preparing to commit the act and thus had not attempted to do so. I find that there was no attempted penetration of F.M.S's vagina without her consent as stated in the particulars in the charge sheet.

21. On the 2nd count there is all the evidence from Pw1, Pw2 an Pw3 showing that Pw2 was injured. The medical evidence supports that. Pw1 and Pw2 explained that they were able to see the attacker with assistance of electric lights from Pw1's shop. They went to Salama police station soon thereafter to report and gave the Appellant's name. The Appellant was arrested by members of the public over another offence.

22. In his defence he said that all he knew is that he was unwell and under medication. He could not remember anything else. I find no reason why Pw1 and Pw2 could lie against him. Infact they say nobody would dare rescue Pw1 because the people at the market feared the Appellant. I find the prosecution case in **count II** proved against the Appellant.

23. The record shows the Appellant was a known mental patient at Mathari National Teaching & Referral Hospital. A letter from the said facility dated 1st August 2019 was filed in court. The court had referred him to the said facility for mental assessment.

24. The report plus his defence confirm that the Appellant was on medication for a mental illness at the time of commission of this offence. He was not himself. This condition brings to play the provisions of section 166 Criminal Procedure Code. Which state as follows:

"Section 166(1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.

(2) When a special finding is so made, the court shall report the case for the order of the president, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct."

25. The upshot is that this appeal partially succeeds and I make the following orders

i. The special finding of guilt but insane by the trial court on count I is quashed and sentence set aside.

ii. The finding of guilt but insane on count II is upheld.

iii. The order directing the Appellant to be held at the President's pleasure indefinitely is hereby set aside.

iv. The Appellant shall serve three (3) years imprisonment from date of conviction on count II.

v. The proceedings herein be typed and a certified copy of the record be transmitted to the Ministry concerned for consideration by his Excellency the President.

vi. Meanwhile, the Appellant will be held at Kamiti G.K prison to await the President's order as he continues with his medication.

vii. His case will be reviewed by the trial court for progress reports as provided for under section 166 Criminal Procedure Code and in any case before the expiry of two (2) years.

Orders accordingly.

Delivered, signed & dated this 25th day of June 2020, in open court at Makueni.

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H. I. Ong’udi

Judge