REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 135 OF 2019

LKM.....APPELLANT

-VERSUS-

REPUBLIC .....RESPONDENT

(Being an appeal from the Judgment of Hon. C.A Mayamba (PM) in Kilungu Principal Magistrate's Court Criminal Offence No. 28 of 2019 delivered on 20th August, 2019).

JUDGMENT

LKM the Appellant was charged with two 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 5th day of April 2019 at about 1030 hours at [particulars withheld]village, Ngaamba location in Mukaa sub-county within Makueni county intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **MNM** without her consent.
>
> **Count II: Assault causing actual bodily harm contrary to section 251 of the Penal Code.** The particulars were that the Appellant on the 5th day of April 2019 at about 1030 hours at [particulars withheld] village Ngaamba location in Mukaa sub-county within Makueni county assaulted **MNM** thereby occasioning her actual bodily harm.

He denied the charges and the case proceeded to full hearing with the prosecution calling three (3) witnesses. The Appellant gave a sworn defence and called no witnesses. After the full hearing the trial court found the Appellant guilty but insane, pursuant to section 166 of the Criminal Procedure Code. He was committed to serve under the President's pleasure.

The judgment aggrieved the Appellant who has filed this appeal raising the following grounds: -

> **That,** the evidence adduced by the prosecution was uncorroborated, inconsistent, controvertible, conflicting and contradictory which would have attracted acquittal.
>
> **That,** disregarding in totality his defence was driven by malice and in maladies.
>
> **That,** the trial court erred in law and fact drawing inference of guilty verdict from extraneous matters calling extrinsic evidence not tendered.
>
> **That,** piecemeal and ex-parte scrutiny analysis and evaluation of evidence to warrant or sustain a conviction in *lieu* could qualify and acquittal.

A summary of the case is that on 5th April 2019 Pw1 **MNM** left her home for [particulars withheld]market where she has a shop. On the way she met the Appellant who is a neighbor. He was carrying a book. He told her, that her child was learned. Thereafter he asked her to spit on his chest and hold his hand which she did. He then grabbed her hand and inserted his hand into her blouse. He grabbed her breast which he pulled. She screamed for help as he hit her with fists on her face. He tore her petticoat and innerwear. He held onto her genitals. He hit her twice and she fell down as she screamed.

Some Maasai men came to her aid and on seeing them the Appellant crossed the road and sat down. He was arrested and taken to Salama police station where a report was made. Pw1 went to hospital at Kilungu. She was admitted on 8th April 2019 at Shalom hospital and discharged on 13th April 2019. She still experiences pain in her right hand, chest and breast.

Pw2 **Eric Kasiamani** the clinical officer who examined Pw1 found her with a swollen left eye, tenderness on right shoulder joint. He produced the outpatient card (EXB1) and P3 form (EXB2).

Pw3 **No. 106942 P.C Florence Menza** of Salama police station received instructions to investigate this case on 5th April 2019 1:00 pm. The Appellant had been arrested by members of the public. He gave evidence on the report he received from Pw1.

The Appellant gave a sworn defence. He said he was asleep on the day in issue as he was sick and under medication. He claimed to know nothing. He produced his medical note (DEXB1).

The appeal was disposed off by written submissions. I have perused the Appellant's submissions and he basically raises two issues namely:

The prosecution did not prove its case against him.

He should not have been committed to serve his sentence at the President's pleasure. The reason being that the sentence is unconstitutional.

Learned counsel Mr. Muriuki submits that the prosecution case was proved to the required standard and the Appellant's defence was considered. Further that the court well considered the circumstances of the case and correctly concluded that the Appellant had some mental challenges. Finally, that section 166 Criminal Procedure Code was correctly applied by the trial court.

Analysis and determination

This is a first appeal and I am duty bound to re-analyse and re-consider all the evidence on record and come to my own conclusion. See **Okeno –vs- R 1972 E.A 32; Simiyu and Anor -vs- R (2005) I KLR 192.**

I have carefully considered the evidence on record, the grounds of appeal, the submissions by the parties and the listed authorities. I find two issues falling for determination. These are:

> Whether there was an act to cause penetration which was not successful and whether Pw1 was assaulted.
>
> Whether the appellant was positively identified as the perpetrator.
>
> Whether section 166 Criminal Procedure Code was properly applied by the learned trial Magistrate.

Issue no. (i) Whether there was an act to cause penetration which was not successful and whether Pw1 was assaulted.

The Appellant was charged with attempted rape contrary to section 4 of the Sexual Offences Act. The section provides:

> **"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."**

In the case of **Benson Musumbi –vs- R (2019) eKLR** the court stated thus: -

> "In order to prove an attempt to commit an offence, the prosecution must prove the mens rea which is the intention and the actus reus which constitute the overt act which is geared to the execution of the intention. The actus rea must be more than mere preparation to commit the act as there is a difference between mere preparation to commit an offence and attempting to commit an offence."

Section 388 of the Penal Code defines "attempt" as:

Attempt defined

> **"Section 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 of completing the commission of the offence, or whether the complete fulfilment 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.**

This definition clearly brings out the two main ingredients as set out in the above stated case. The prosecution must therefore prove the *mens rea* (intention) and the *actus reus* (*the overt act*) geared towards execution of the intention. Courts have dealt with this issue in several cases e.g. **David Aketch Ochieng –vs- R (2015) eKLR (Makau J.); Daniel Ombasa Omwoyo –vs- R (2016) eKLR (Okwany J) John Mokua Atandi –vs- R (2018) eKLR (Majanja J).**

In the instant case, Pw1 testified that the Appellant lured her into spitting on his chest, holding his hand before he grabbed her, hit her, grabbed and pulled her breast and tore her petticoat and underpants and held onto her genital. He then hit her hard and she fell down. He continued hitting her on the head as she screamed. The medical notes (EXB1) and P3 form (EXB2) confirm that she suffered injuries classified as harm.

In his defence he denied knowing anything about the charge saying he was asleep as he was under medication.

I have considered the evidence on record and the question that keeps popping is whether in the circumstances the Appellant did anything towards penetrating Pw1 which was not completed.

In the case of **David Aketch Ochieng** (*supra*) Justice Makau had this observation to make on attempted defilement: -

> "The Appellant was charged and convicted with an attempted defilement contrary to section 9(1) of the Sexual Offences Act No. 3 of 2006. What is attempted defilement? It can safely be stated be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations from the complainant's vagina and/or bruises or lacerations of culprit's genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or inner wear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement"

In the instant case Pw1's breast was touched, inner wear and petticoat torn and her genitals held. There was no mention of the Appellant removing his trousers or even any attempt to do so. At no point in her evidence does Pw1 say she saw the Appellant's penis. He did not at any point try to insert it inside of her. All that has been shown is that he was preparing to commit the act and thus had not attempted to do so. He however had all the intention to do so.

The medical notes and P3 produced in evidence also show that there was no injury noted on her genitalia. The injuries noted were on her right eye and right shoulder joint, which the clinical officer (Pw2) classified as harm (EXB2).

My conclusion is that the offence of attempted rape in count I was not proved but assault in count II was proved.

In his defence the Appellant produced a document (DEXB1) showing that he was on medication for some mental problem. This needs to be addressed. From the record I see that on a number of occasions he told the court he was unwell. His conduct on 5th April 2019 as narrated by Pw1 clearly speaks to that.

My finding just as the learned trial Magistrate did is that when the Appellant committed this offence he was not himself. He is therefore found guilty but insane on count II.

Section 166 Criminal Procedure Code has not been repealed as alleged and is therefore still applicable, but with a few developments here and there. See **Rep –vs- SOM 2018 eKLR, Rep –vs- ENW (2019) eKLR**

The upshot is that the appeal partially succeeds and I make the following orders:

> **The finding of guilty but insane on count I is quashed.**
>
> **The finding of guilty but insane on count II is upheld.**
>
> **The order directing the Appellant to be held at the President's pleasure indefinitely is hereby set aside.**
>
> **The Appellant shall serve four (4) years imprisonment from date of conviction on count II.**
>
> **The proceedings herein to be typed and a certified copy of the record be transmitted to the Ministry concerned for consideration by his Excellency the President.**

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

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