REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 42 OF 2016

DAVID AMUKU......................................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From the original conviction and sentence in

S.O.A Criminal Case No.38 of 2015 of the Chief

Magistrate's Court at Busia by Hon. Washika

Wachira – Senior Resident Magistrate)

JUDGMENT

1. The appellant, **DAVID AMUKU,** was convicted for the offence of attempted defilement contrary to section 9 (1) (2) (sic) of the Sexual Offences Act No. 3 of 2016.

2. The particulars of the offence were that on 22nd January 2015 at **xxxx** village, **ONG'AROI** Sub location within **BUSIA** County, intentionally attempted to cause his penis to penetrate the vagina of **E.W**, a child aged twelve years.

3. He was convicted after trial and sentenced to ten years imprisonment.

4. He now appeals against both conviction and sentence.

5. The appellant was in person. He raised six grounds of appeal which I have summarized as follows:

a) That the learned trial magistrate erred in law and in fact by ignoring that his rights were violated.

b) That the learned trial magistrate erred in law and in fact by relying on circumstantial evidence, hearsay and contradicting evidence.

c) That the learned trial magistrate erred in law and in fact by relying on evidence that did not support the charge.

d) That the learned trial magistrate erred in law and in fact by ignoring the appellant's defence.

6. The state conceded the appeal through Mr. Omayo, the learned counsel.

7. The facts of the prosecution case were briefly as follows:

When the appellant met the complainant on the way, he told her that he wanted to have sexual intercourse with her. She reported to her parents. The issue was reported to the police and the appellant was arrested and charged.

8. The appellant denied any involvement in the offence and contended that this was a case borne out of a grudge.

9. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

10. I have taken note of the incorrect citing of the section under which the appellant was charged. It ought to have read:

"Contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act"

From My perusal of the record, my finding is that the appellant understood the charge against him and this did not therefore prejudice him in any way. The error is curable under section 382 of the Criminal Procedure Code.

11. An attempt to commit a crime is defined under section 388 of the Penal Code as follows:

> ***(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.***

In the **Oxford Concise Law Dictionary (2nd Edition)** an attempt to commit an offence is defined as:

> ***Any act that is more than merely preparatory to the intended commission of a crime; this act is itself a crime.***

While **Black's Law dictionary (9th Edition)** at page 146 attempt is defined as follows:

> ***An attempt to commit an indictable offence is itself a crime. Every attempt is an act done with intent to commit the offence so attempted. The existence of this ulterior intent or motive is the essence of the attempt… Yet although every attempt is an act done with intent to commit a crime, the converse is not true. Every act done with this intent is not an attempt, for it may be too remote from the completed offence to give rise to criminal liability, notwithstanding the criminal purpose of the doer.***

12. For an attempt to commit an offence, the actions complained of must go beyond mere preparations. The test usually applied is the **"BUT FOR TEST."** In the instant case, what was the evidence against the

appellant? Did it pass the test?

13. **E.W (PW1**), in her evidence testified that when she was going to school she met with the appellant. He announced to her that he wanted to have sexual liaison with her. To use her words as captured by trial court he told her:

> **"I want kukutomba kabisa wewe "(I want to fuck you thoroughly)**

Other than uttering these words and making a promise to buy her a gift, he did not do anything else. There was no physical contact between the two. She went and reported to her parents.

14. The medical evidence was adduced by **Caleb Barasa (PW2),** a clinical officer. The **P3** form he produced indicated that all systems were normal. There was no evidence to show that there was an attempt. I would not have expected any after what the complainant testified transpired. He however contradicted his finding while testifying when he alleged it was an attempt. He had no evidence to back his averment.

15. The evidence at the disposal of the trial magistrate only amounted to an insult to the modesty of **E.W.** This could have fallen under the repealed section 144(3) of the Penal Code which provided:-

> ***Whoever, intending to insult the modesty of any woman or give, utters any word, makes any sound or gesture or exhibits any object, intending that the word or sound shall be heard, or that the gesture or object shall be seen, by the woman or girl, or intrudes upon the privacy of the woman or girl, is guilty of a misdemeanour and is liable to imprisonment for one year.***

Parliament in its wisdom repealed the section and left the likes of **E.W** with no redress in the Criminal Court.

16. Where the evidence is at variance with the particulars of the charge, an accused person is entitled to an acquittal. The evidence on record was not only at variance with the particulars of the offence in the substantive charge but was also at variance with the alternative charge.

17. I therefore find that the prosecution counsel rightly conceded to the appeal. The appellant's conviction is quashed and the sentence set aside. He is accordingly set free unless if otherwise lawfully held.

DELIVERED and **SIGNED** at **BUSIA this 29th day** of **May, 2018**

KIARIE WAWERU KIARIE

JUDGE