REPUBLIC OF KENYA

IN THE HIGH COURT OF KAKAMEGA

HCRA NO. 7 OF 2017

PETER HERMAN MUREMA ::::::::::::::::::::::::::::::::::APPELLANT

V E R S U S

REPUBLIC ::RESPONDENT

(Arising from the Judgment of Hon. D.Ogal in criminal case no. 167 of 2015 at Senior Principal Magistrate's court at Hamisi)

J U D G M E N T

1. Peter Herman Murema the appellant herein was charged with the offence of attempted defilement contrary to section 9 (1) as read with section 9(2) of the Sexual offences Act No. 3 of 2006. The particulars were that the appellant on the 13th day of February, 2015 at [paticulars withheld] village, [Particulars withheld] sub location, Jepkoyai location within Vihiga county, intentionally attempted to cause his penis to penetrate the vagina of L.M a child aged 11 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.The particulars being that the appellant on the 13th day of February, 2015 at [paticulars withheld] village, [Particulars withheld] sub location, Jepkoyai location within Vihiga county intentionally touched the buttocks, breast / Vagina of L.M a child aged 11 with his penis .

3. He denied the charges and the matter proceeded to full hearing. He was found guilty and convicted of the principal count and sentenced to ten (10) years imprisonment. Being dissatisfied with the judgment he has appealed against both conviction and sentence raising the following grounds :-

i. THAT his arrest came as a result of mistaken identity since it was at night and on a highway whereby there were to many passerby .

ii. THAT, the trial magistrate erred in law by convicting and sentencing him based on circumstantial evidence.

iii. THAT, the police failed in their work to conduct proper investigations and bring the right culprit to book.

iv. THAT, the learned trial magistrate erred in law and fact when he dismissed his defence evidence that was strong enough to award for his acquittal .

4. A summary of the case before the lower court is that PW2 **Lorna Amboko** was at home on 13/02/15 9 pm when she heard a child screaming . Soon thereafter she heard a watchman (PW5) shout for help . She

ran in his direction and found him with a man. She flashed and saw that the man was the appellant who was drunk and was standing opposite the shop where the watchman was . She goes on to say that she saw him lying ontop of a minor . Both had their clothes on and she took away the minor.

5. PW3 **Wycliffe Munai** responded to a scream and he met the appellant, PW1 and PW5 who was preventing the appellant from hitting PW2. He separated them and asked the them to go home. He later had the appellant arrested .

Pw4 ***E L*** is the father of the minor (PW1). He received a report that PW1 who is mentally challenged had been found in Chepkoyai and was with Aps. He went for her, and explained that PW1 had lost her way as she went to her maternal grandmother's home.

6. PW5 ***Isiah Agida*** was the first to shout after hearing a child's scream . He said he walked in the direction of the scream and met a woman and others who rushed. He found PW2 at the scene pulling the appellant off a young girl and he helped her pull off the appellant. In her evidence PW1 (L.M) with Limitation explained that the appellant had spread her legs and pulled her skirt to lay on top of her but he did nothing more.

7. The appellant in his sworn defence denied the charged. He explained that on 13/02/15 9 pm he boarded a motor vehicle at Majengo for home.He alighted at Boyani and bought some items then started walking home. He met four (4) people who asked him where he was going and was arrested even before he responded. He was beaten at the station and later taken to Serem court . He says the underlying reason for his arrest was a land issue .

8. When the appeal came for hearing the appellant submitted that there was no evidence adduced to show the age of PW1, her mental status, and her being a student. He complained that he had not been informed of his right to legal representation. He submitted that the evidence of PW2 and PW5 was contradictory and inconsistent and he asked the court to allow the appeal .

9. The State through Mr. Juma conceded the appeal. He submitted that the age of 11 years was never confirmed by the prosecution, and the trial court never considered the issue.

He further referred to PW1's evidence and submitted that

intention was not proved . He argued that the evidence of PW2 and PW5 was contradictory.

10. According to him the ingredients to be proved in a charge of attempt to commit a crime are found in section 118 of the Penal Code and these must be proved . The witnesses said PW1 and appellant were fully clothed, and it was not clear what PW1 was doing on the ground. It was his submission that the appellant was only preparing and not attempting to commit the offence . That these actions are distinct and must be treated as such.

11. He referred to the case of **Abdi ALI Bare vs R (2015) eKLR** .When the court of Appeal in considering the offence of attempted murder expressed itself as follows:-

> "……. **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 habit 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."

12. This being a first appeal I am duly bound to reevaluate the evidence and arrive at my own independent conclusion being alive to the fact that I did not hear nor see the witnesses (see **Okeno vs R (1989) KLR 313** and **Odhiambo vs R (2005) 1 KLR 564.)**

13. I have duly considered the evidence, grounds of appeal and the submissions by both the appellant and respondent. Several issues have been raised by the appellant and the State touching on :-

i. Mental capacity of PW1.

ii. Pw1'S age

iii. Whether there was any intention by the appellant to penetrate PW1.

Issue (**i) &(ii) PW1's mental capacity and her age.**

14. PW4 ***E L*** is the father to PW1 . He explained that PW1 is mentally challenged. A mental status report of PW1 was filed in court before the commencement of the trial . The report shows that she has an incoherent speech , no time orientation , not able to assess and lacking insight .

In conclusion the report says the child has mental retardation .

15. Against this background and after hearing her the trial court directed that she gives unsworn testimony which was not tested through cross examination. Her evidence would therefore require proper corroboration .

16. Now, that it was confirmed by medical evidence that PW1 was mentally challenged could the charge under Section 9 (1) as read with Section 9 (2) of the Sexual Offences Act apply to her?. My answer would be in the negative. Section 146 of the Penal Code makes provision for her.

It provides:

" **Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the**

person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years. "

PW1 would therefore be properly covered under section 146 of the Penal Code and there would be no need for the age assessment .

17. Issue (iii) **Whether " intention" was proved in the circumstances of this case.**

One only needs to look at and consider the evidence before the court to arrive at the conclusion. Was there any attempt by the appellant to penetrate the complainant?

Section 388 of the Penal Code defines the word "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.

18. Two main ingredients can be discerned from this definition namely:

(i) Intention

(ii). The overt act.

The key witnesses to this incident are PW2 (Lorna Amboko) and PW5 (Isaiah Agida Omoke). PW2 clearly contradicts herself in her own evidence . She states as follows at page 11 lines 10-15 .

" **He was asking someone to assist him. I ran towards where he was . I met him in the company of a man. That man was standing opposite the shop where the watchman was . I asked the watchman for a spot light. I shined it on the man's face. I was able to identify him as Peter, the accused . He was lying on top of the minor but they still had their clothes on. I am the one who pulled him off the minor . I assumed that he wanted to rape her, Peter was drunk . I asked Peter what he was doing ."**

19. It cannot be true that she found the appellant drunk and standing next to PW5 opposite the shop and at the same time lying on PW1 on the ground . It is either one of the two or none . She was therefore lying to the court and I find her to be an incredible witness. PW5 in his evidence states that he found PW2 at the scene . That she was pulling the appellant from off the complainant and he assisted her. PW2 does not mention anything close to this.

20. Mr. Juma invited this court to draw a distinction between preparation and attempting to commit a crime. I am in agreement with the distinction given by court of Appeal in **Abdi Ali Bare vs Republic (Supra) .**

I am of the view that the court can only move to make that distinction when sufficient material has been placed before it to enable it move in that direction . In this case the evidence of PW2 and PW5 is so contradictory to the extent that it is not clear as to what they exactly saw, or who was speaking the truth.

21. In the case of **Kiilu vs R(2005) 1 KLR 174** the court had this to say in respect to such witnesses :

> **"The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is not a straight forward person , or raise a suspicion about his trustworthiness, or do (say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.**

22. PW1 in her limited evidence said the appellant did not do anything to her. It's only at the end she says he parted her legs and pulled her skirt up. She did not mention anything about being placed on the ground. The appellant says this was a fabrication to satisfy some ulterior motives. From the evidence on record I tend to agree with the appellant.

23. The State has graciously conceded this appeal. I find that the appeal has merit and I allow it. The conviction is quashed and sentence set aside.

The appellant to be released unless otherwise held under a lawful warrant.

Orders accordingly

Delivered, signed and dated this 18th day of August, 2017 at Kakamega .

H. I. ONG'UDI

JUDGE