REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 38 OF 2015

CHARLES NEGA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. When CHARLES NEGA, the Appellant herein, appeared before the Senior Resident Magistrate's Court at Kehancha on 28/03/2014, he was treated to two counts. The first one was attempted defilement with an alternative count of committing an indecent act with a child and the second one was assault causing actual bodily harm.

2. He appeared not to agree with the prosecution and offered himself up for a trial on denying the charges. As the process took its course, the Appellant defended himself and courageously faced the five witnesses lined up by the State.

3. Having done his best the Appellant was placed on his defence and offered an unsworn defence. In a considered judgment delivered on 26/05/2015 he was found guilty of attempted defilement and convicted. A sentence of 10 years imprisonment was handed down upon mitigating.

4. His appeal to this court was mainly centered on the ground that the offence was not proved as required in law and that the conviction and sentence remain unsafe and illegal respectively.

5. This being the appellant's first appeal the role of this court is well settled. It was held in the case of **Okemo 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, analyze 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.

6. To enable this court discharge its said duty, let us have a look at how the charge of attempted defilement was presented before the trial court. The same read as follows:-

> ***"Attempted Defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act No. 3 of 2008.***
>
> ***CHARLES NEGA: On the 22nd day of March 2014 at [particulars withheld] Village in Kuria West District within Migori County, intentionally attempted to cause his penis to penetrate the vagina of M. M. a child aged 17 years."***

7. M.M. was the complainant and testified as PW1. She narrated what befell her as she had gone to the river to fetch some water. Having been confronted by the Appellant who was armed with a panga and who wrestled her to the ground, M.M. watched helplessly as the Appellant sat on her lower abdomen as she faced upwards. The appellant then hurriedly embarked on undressing M.M.'s private parts. He pulled the skirt which proved somehow difficult to come out since M. M. sat on it. The skirt got torn in the process. As the ordeal went on M. M. managed to raise alarm for the first time and the Appellant instantly removed his shirt and stuffed it into M.M.'s mouth. The appellant went on with the undressing. As this was a struggle, M.M. managed to remove the Appellant's shirt from her mouth and again raised alarm that caught the attention of M.M.'s brother who responded to the distress call timeously. The said brother testified as PW3.

8. On reaching at the scene M.M.'s brother found the Appellant bare chest and seated right on top of M.M.'s lower abdomen and as M.M. faced upwards. He then pulled the Appellant off his sister and as M.M. gained her freedom she attacked the Appellant using the appellant's panga. The Appellant shielded himself with his hand and was hence injured. M.M. then took off to her home where she reported the matter to her mother. The two then went to Kehancha Police Station and made a report.

9. The torn skirt which M.M. had worn as well as all the other clothes were produced in court as exhibits.

10. M.M.'s testimony was further corroborated by her mother who testified as PW2.

11. The Clinical Officer who testified as PW4 confirmed that M.M.'s lower abdomen was tender on palpation and that was certainly caused by a blunt object.

12. The investigating officer (PW5) informed the trial court that on gathering all the necessary evidence, the police gave an arrest order to the Administration Police Officers who then arrested the Appellant and was thereafter arraigned before the trial court.

13. When the Appellant was placed on his defence he opted to and offered unsworn evidence and explained that on the material day he truly went to the river to fetch water. He met M.M. with many other people and since the water was low the people were jostling for space. In the process he got into an argument with M.M. He however managed to fill his container at the same time with M.M. Both of them left and went the same direction. On the way they met M.M.'s brother (PW3) who was armed with a panga and who attacked him resulting to injuries on his hand and chest. The appellant allegedly reported the matter to Kehancha Police Station. He was surprised to face the charge of attempted defilement.

14. When a court of law is faced with any charge on an attempted offence, care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however strong the evidence may be if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge.

15. For clarity purposes, the 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.

16. But what does the law and settled judicial precedents as well as scholarly works have to say on the subject of attempted offences?

17. **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."

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

19. In the case of **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."

20. 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."

21. 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."

22. Recently 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 andattempting 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:

"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."

23. This court has carefully considered the evidence adduced by the prosecution to satisfy itself whether it was proved beyond any reasonable doubt that the appellant committed the offence of attempted defilement. There were two eye witnesses, M.M. and her brother PW3. The trial court in dealing with their evidence against the appellant's defence had the following to say:-

"...But the court had the occasion to observe both prosecution witness as they testified. Their versions were materially logical and consistent. From their demeanour I formed the opinion that they were credible and truthful witnesses. Their description of what transpired is corroborated by physical evidence of torn and soiled clothes and also by the findings of soft tissues injuries on M.M. I therefore dismiss the defence as a sham."

24. The foregone analysis is sound and logical. I hence accept it and further add that the intention on the appellant's part to commit defilement was clearly demonstrated when he pulled M.M. to the ground and stuffed her mouth with his shirt and then embarked on undressing her skirt. It is clear that the appellant's interest was only on M.M.'s private parts otherwise he would not have centered all his efforts to reveal M.M.'s lower abdomen. That caused M.M. some injuries on that part of the body as proved by the medical officer.

25. Further the *actus reus* was clearly proved. The appellant having put M.M. down and stuffed her mouth and began to undress her skirt left nothing to chance that what was to follow was the real sexual act. To me had M.M.'s brother delayed for a while, the appellant would have committed the sexual act with M.M as there was nothing else left to the actual commission of the actual sexual act. The undressing of M.M.'s private parts by the appellant was the last act towards the commission of a sexual act.

26. I therefore find that the *actus reus* as well as the *mens rea* on the offence of attempted defilement was proved in law. I will now look at the issue of M.M.'s age.

27. **Section 9(1)** of the Sexual Offences Act defines the offence of **'attempted defilement'** as follows:-

"9 (1) A person who attempts to commit an act which would cause penetration with a child is guilt of an offence termed attempted defilement."

Section 2 of the said Act defines a **"child"** as follows:-

"Child has the meaning assigned thereto in the Children Act (Cap. 141).

And, in **Section 2 of the Children Act**, Chapter 141 of the Laws of Kenya, a **"child"** is defined as:-

"Child" means any human being under the age of eighteen years;"

28. A Certificate of Birth for M.M. was produced in evidence and it revealed that M'M's age at the time the offence was committed was 16 years and 4 months. She was hence a child in law.

29. I however wish to further state that from the wording of Section 9 of the Sexual Offences Act (and unlike in the offences of defilement and rape where the exact age of the victim must be proved bearing the weight it has in sentencing), in an attempted defilement charge the prosecution only has to tender evidence that the victim was below the age of eighteen years and not necessarily the specific age. Needless to say if the specific age is availed to a trial court it equally has a bearing in sentencing upon conviction.

30. This court therefore finds that the offence of attempted defilement was proved in law and the conviction is hereby upheld. And since the sentence was the minimum possible in law, I see no justification to disturb the same.

31. The upshot is that the appeal is unmeritorious and is hereby dismissed.

DATED, SIGNED and DELIVERED at MIGORI this 28th day of January, 2016

A. C. MRIMA

JUDGE