REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL 283 OF 2013

DANIEL KYALO LUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of E.M Muiru RM in Criminal Case No. 944 of 2012

delivered on 9th May 2013 at the Principal Magistrate's Court at Makindu)

JUDGMENT

The Appellant has appealed against his conviction for the offence of attempted rape and sentence of five years imprisonment by the original trial court. The Appellant was charged with the offence of attempted rape contrary to section 4 of the Sexual Offences Act. The particulars of the offence were that on the 9th day of October 2012 at about 9.30 a.m in Mukaa District within Makueni County, the Appellant intentionally and unlawfully attempted to cause his penis to penetrate the virgin *(sic)* of C N, without her consent.

The Appellant was arraigned in court on 11th October 2012 where he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to five years imprisonment. The Appellant being aggrieved by the judgment of the trial magistrate appealed his conviction and sentence. The grounds of the appeal stated in his Memorandum of Appeal dated 11th November 2013 were substituted in new grounds dated 14th September 2015 which the Appellant availed the Court. The grounds were that the charge sheet was incurably defective due to variances in the evidence adduced by the prosecution witnesses and the details in the committal document; the evidence of the complainant was not corroborated by eye witnesses at the alleged scene of crime and there were no meaningful police investigations to support the indictment.

The Appellant availed written submissions to the Court wherein he provided the definition of rape and attempted rape, and stated that the same was not established nor proved beyond reasonable doubt as the prosecution did not adduce incontrovertible evidence to support the conviction of attempted rape. The Appellant cited the decisions in **Sawe vs R (2003) KLR 364** and **Yongo vs R (1983) KLR,** and section 214 of the Criminal Procedure Code in this respect. The Appellant contended that the evidence of PW2 to PW5 was inadmissible hearsay, and did not corroborate that of PW1. Further, that the evidence of PW3 and PW4 was that they received a report of the alleged incident and they were not material eye witnesses. The Appellant cited the decision in **Bukenya vs Uganda (1972) EA 549** in this respect.

Ms. Rita Rono, the learned counsel for the Prosecution, conceded the appeal in submissions filed in Court on 9/12/2015. The learned Counsel stated that the although the charge sheet was properly drafted, the evidence of the complainant brought out the ingredients of the offence of sexual assault contrary to section 5(1) (b) of the Sexual Offences Act No. 3 of 2006 and not that of attempted rape. The counsel also noted that none of the children who were with PW1 at the time of the alleged incident and who informed PW2 were called to give their testimony in order to corroborate the evidence of PW1 and PW2.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The key evidence given at the trial is as follows. The prosecution called five witnesses. PW1 testified on 9.10.12 at 9 a.m. she had taken her children back to school and as she stood on the side waiting for one of the children who had gone back to school they saw someone hiding in the bushes. As they left the scene she saw someone following them, and that the person had removed his pants and was touching his private parts. The person followed them with her children so they fled. On the way she warned another child of the man but the Appellant again emerged from the bushes still holding his private parts. PW1 stated that as they were running and screaming they encountered and informed a village elder called Felistus (PW2) who went and arrested the appellant.

PW2 was Felista Kavisa who testified that on 9.10.12 at 10 a.m. she had left her home to fetch some water. On the way she met with PW1 together with school children, and that one of the children told her of a man who was following them while touching his private parts. She stated that he was chasing them and touching his private parts. She said that she sent the children to get a policing officer by the name Mutuku who arrested him.

PW3 was Mutuku Mwange. who stated that on the material day at about 10 am he was at his home when two boys and a girl came and told him they were being chased by a man while holding his private parts. He then requested them to take him to the scene. He stated that when the Appellant saw him he started fleeing but upon capturing him, the Appellant alleged that the complainant was his friend and they had had sex. PW1 denied the allegations after interrogating her. He also stated that a pupil at school had also identified the Appellant. PW3 then took the Appellant to the sub-chief's office then to Salama police station.

PW4 was Titus Muindi Mutuku who testified that he is the community policing chairman and that on 2.10.21 he was called by the headmaster of [particulars withheld] Primary School and informed of an arrest. On getting to the school he found the Appellant together with a policing officer and a village elder. He stated that he was told by the Appellant that he had befriended the complainant and had been found together, an allegation PW1 denied. He also stated that he heard the account of the complainant of how the Appellant had chased her without his pants on. PW4 testified that he then informed the assistant chief of the arrest and later took the Appellant to the police station the next day where he also made his statement.

PW5 was PC Yuvilenis Nyaanga who testified that on 10.10.12 at about 1.50 pm he was at the police station when the Appellant was brought in by a community policing officer from Ndemiu accompanied by PW1. He stated that he was informed that the Appellant had chased the complainant with the intention of raping her. The complainant further informed him that during that time she was in the company of five school children. He was also informed that the Appellant had been hiding in the bushes, and when the complainant and children passed by he emerged and started chasing them and they ran away. PW5 testified that the complainant later informed the community policing person in the area and the area and he was arrested.

After the close of the prosecution case the trial court found that the Appellant had a case to answer and put him on his defence. The Appellant gave unsworn evidence and did not call any witnesses. The

Appellant stated on 9.10.12 at 10 am while he was going to work he met with someone he did not know together with three others. He stated that these persons started shouting at him and alleged that they had seen him in the bush half naked. He stated that he was later arrested. He alleged to have been accused falsely and faulted the investigating officer for relying on what he was told. He denied the allegations.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the issues are whether the Appellant was convicted on a defective charge, and if not, whether the Appellant's conviction for the offence of attempted rape was based on sufficient and satisfactory evidence.

On the first issue, the Appellant argued that the charge was defective as the offence was not supported by the evidence that was presented by the Prosecution. Section 134 of the Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitute as follows:-

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

In addition it was held in **Sigilani vs Republic, (2004) 2 KLR, 480** that:

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

I have perused the charge sheet and find that other than a spelling mistake where virgin was stated instead of vagina, the particulars of the offence of attempted rape were clearly spelt out, which included the section of the law creating the offence, the date of the offence, the place of the offence, the act constituting the offence and the name of the victim.

The provision that is therefore applicable to the Appellant's contention is section 214(1) of the Criminal Procedure Code, which gives the courts power to amend or alter charges, and prescribes certain procedures to be followed when this is done. The said section provides as follows:

> **"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**
>
> **Provided that—**
>
> **(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;**
>
> **(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."**

The Court of Appeal in **Yongo vs Republic** ***[1983] KLR, 319*** did hold that a charge that is not disclosed by evidence is defective and stated as follows in this regard:

> **"In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code**

where:

(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

(b) it does not, for such reasons, accord with the evidence given at the trial; or

(c) it gives a misdescription of the alleged offence in its particulars."

This holding was explaining the circumstances when a charge is considered to be defective in substance, so as to guide a court when it is altering the said charge. I have perused the proceedings of the trial court and note that at no time did the Court find any variance between the charge and the evidence, or make any orders as to the amendment or alteration of the charge. The trial of the Appellant therefore proceeded on the basis of a charge for the offence of attempted rape, which on its face was not defective in any material respect and he was eventually convicted of the said offence.

In order to find out if there was an error made in this respect, one must interrogate the elements of the offence of attempted rape. Section 4 of the Sexual Offences Act which creates the offence provides as follows:

"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."

Section 2 of the Act defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

Section 388 of the Penal Code in addition defines an attempt as follows;

" (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 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 **Francis Mutuku Nzangi v Republic [2013] eKLR**, the Court of Appeal explained these provisions as follows;

"Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible."

The offence under section 4 of the Sexual Offences Act is therefore committed when a person attempts to unlawfully and intentionally commit an act which causes penetration with his genital organ without the consent of the other person or where the consent is obtained by force or by means of threats or intimidation of any kind. The intention to rape must therefore be shown, and that intention is manifested by facts that point to an act of penetration. The complainant's evidence in this regard was as follows:

> **"On 9.10.12 at 9 a.m. I was from [particulars withheld] Primary School going home. I had taken my children to school. I came back with them since they had arrears in fees. So we stood on the way for one of the children to take lunch back to school for another child. While waiting for the child to come back we saw someone hiding in the bushes. Then the child came and we proceeded. A short while later I turned and saw someone following us and he had removed his pants. The pants were hanging and he was touching his private parts. He followed us and we ran with my children. He then went back. I saw another child and warned her. So he (the accused) again emerged still holding on to his private parts. As we were screaming we met with the village elder called Felistus and she called a community policing officer who came and arrested the accused person."**

I find that the facts of this appeal do not disclose attempted rape for several reasons. Firstly, although the Appellant was alleged to have removed his pants and was holding his private parts and following the complainant, there was no evidence of any steps he took to insert his genital organs into the genital organs of any person. Secondly, there was also no evidence of any words or actions on that would have shown an intention to use force, threats or intimidation on the part of the Appellant to undertake penetration. From the foregoing, it is clear that the charge on which the Appellant were tried and convicted was incurably defective and the trial court made no attempt to rectify it. The error or mistake in the charge was also **a substantial one** which cannot be cured under section 382 of the Criminal Procedure Code as it occasioned a failure of justice on the Appellants.

For these same reasons this Court finds on the second issue that there was insufficient evidence to convict the Appellant for the offence of attempted rape, particularly also in light of the fact that the evidence by PW1 who was the complainant was not corroborated by the evidence of any other witness who was present during the alleged incident.

The prosecution conceded that the Appellant ought to have been charged with the offence of sexual assault and not attempted rape. The provisions of **section 179** of the *Criminal Procedure Code empower a* court to convict an accused person for an offence which he was not charged but which is proved and was a lesser offence than that charged. It was explained by Asike-Makhandia J. (as he then was) in ***Kyalo Mwendwa v Republic*** **[2012] eKLR that** the *jurisdiction of the Court is to impose a substituted conviction for a minor cognate offence only. The offence of sexual assault is in this regard defined in section 5 of the Sexual Offences Act as follows:*

> **"(1) Any person who unlawfully—**
>
> **(a) penetrates the genital organs of another person with—**
>
> **(i) any part of the body of another or that person; or**
>
> **(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;**
>
> **(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault."**
>
> **(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.**

It is my view that the evidence adduced before the trial Court cannot also support a charge of sexual assault for the same reasons given in the foregoing, and particularly since the element of penetration is also crucial in the said offence.

I accordingly quash the conviction of the Appellant for the charge of attempted rape contrary to Section 296(2) of the Penal Code, and set aside the sentence imposed upon him for this conviction. We also order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 27th DAY OF JANUARY 2016.

P. NYAMWEYA

JUDGE