



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 17 OF 2016

MOSES MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.1297 of 2012 of the

Principal Magistrate's Court at Nkubu by Hon. N.M Idagwa – Resident Magistrate)

JUDGMENT

The appellant, **MOSES MURIITHI**, was Charged with an offence of attempted defilement of a girl contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on 16th June 2012 at [Particulars Withheld] village in Imenti Central District of Meru County, the appellant attempted to defile **M K** a girl aged 15 years.

The appellant was convicted and sentenced to serve ten years imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Kimathi instructed by the firm of Mutembei & Kimathi advocates. He raised five grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by finding that the charge had been proved.
2. That the learned trial magistrate erred in law and facts by failing to factor the defence of the appellant.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the prosecution case are briefly as follows:

When the complainant went to collect her phone from the appellant where she had taken it for charging, the latter grabbed her and attempted to defile her.

In his defence the appellant contended that when the complainant took her phone for charging, she took the battery of one Festus. When she returned it after several requests, he detained her phone and asked her

to tell her father to go for it. He was later arrested.

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**.

The first duty for the trial court is to ensure that the charge is correct in all aspects. This is mainly at the plea stage but it is equally important for such a court to satisfy itself before the calling of the first witness. In the instant case the charge was wrongly drafted for we do not have section 9(1) (2) of the Sexual Offences Act. The charge ought to have read:

" ... contrary to section 9 (1) as read with section 9 (2)"

Since the appellant understood the charge and fully participated in the trial, I find that he was not prejudiced. This defect is curable under section 382 of the Criminal Procedure Code.

An attempt to commit a crime is defined in the Oxford Concise Law Dictionary (2nd Edition) as:

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

The test that is usually applied to gauge whether an act amounted to an attempt or mere preparation is the **"but for..test"**.

If we assume that the events took the course the complainant narrated, then this only amounted to mere preparation. The but for test when applied to the facts shows that there was still a long way to get into the act of defilement.

Listening to the evidence of Festus Kinyua (PW3) after having listened to that by the complainant, you cannot help but to entertain the notion that the complainant was very economical with the truth. In her evidence she does not volunteer information that she had another person's battery in her phone. According to the appellant, she took the battery without his consent and he only discovered this after she had left. Much of the evidence of Festus on the issue of the battery agreed with the appellant's contention. He said it took time to convince the complainant to return Festus Kinyua's battery. The latter had to go for her at the trading center.

The evidence of Kinyua (PW3) is that he went in company of the complainant to the home of the appellant where she gave him his battery. She only volunteered this information during cross examination. Even then, she did not testify whether she gave Festus his battery. I find the complainant to be the kind of a witness who was described by the court of appeal in the case of **NDUNGU KIMANYI – V- REPUBLIC [1979] KLR 283 (MADAN, MILLER and POTTER JJA)** held:

"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or 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."

The appellant's defence was in so many instances supported by the evidence of Festus Kinyua (PW3) and it was not right for the learned trial magistrate to dismiss it. There was no ample evidence to base the conviction on.

In a nutshell, the appellant's appeal must succeed. The conviction is quashed and the sentence set aside. The appellant is set at liberty unless if otherwise lawfully held.

DATED at Meru 20th day of December 2016

KIARIE WAWERU KIARIE

JUDGE