REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 28 OF 2018

BRIAN KENNEDY ODHIAMBO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C.K. Kamau, Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 106 of 2015)

JUDGMENT

1. **Brian Kennedy Odhiambo**, the Appellant herein, was arraigned before the Senior Resident Magistrate's Court at Rongo on 07/04/2015 where he was charged with the principal charge of attempted rape with an alternative charge of committing an indecent act with an adult.

2. The Appellant denied the charges and he was tried. Four witnesses testified in support of the prosecution's case. **PW1** was the complainant, **MGA** Clinical Officer attached to Awendo Sub-County Hospital testified as **PW2** while one Kennedy Otieno testified as PW3. The investigating officer one **No. 81298 Corp. Josphat Kinya** attached to Awendo Police Station testified as **PW4**. The Appellant appeared was represented by **Mr. Kirui**, Counsel during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court except for PW1 whom I will refer to as '**the complainant'**.

3. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave an unsworn defence and called one witness, **David Madla Okati (DW2)**. Thereafter the court rendered its judgment where the Appellant was found guilty of the offence of attempted rape and was convicted. He was sentenced to 10 years' imprisonment.

4. Being dissatisfied with the conviction and sentence, the Appellant, through his Counsel, preferred an appeal by timeously filing a Petition of Appeal where he challenged the judgment, conviction and sentence on some 13 grounds.

5. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant argued that the offence was not proved as required in law and prayed for the appeal to be allowed, conviction quashed and sentence be set-aside. The appeal was opposed by the State which submitted that the offence was proved beyond any peradventure and prayed that the appeal be dismissed.

6. This being the Appellant's first appeal, the role of this appellate Court of first instance 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, analyse 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.

7. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of attempted rape, or alternatively those of the offence of committing an indecent act with an adult, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions.

8. I will now endeavour to ascertain if the offence of attempted rape was proved. The starting point is how the charge was presented before the trial court. The same read as follows: -

> ***Attempted Rape contrary to Section 4 of the Sexual Offences Act No. 3 of 2008.***
>
> ***On the 1st day of April 2015 at [****particulars withheld****] in Migori County within the Republic of Kenya, intentionally attempted to cause his penis to penetrate the vagina of MG without her consent.***

9. But what does the law and settled judicial precedents as well as scholarly works say about attempted offences?

10. **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.**
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> **(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.**

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

12. 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.***

13. 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.***

14. 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 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 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....*
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> ***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.***

15. From the foregone, it is easily deducible that when a court is faced with any charge on an attempted nature, care must be taken to ensure that the attempt as opposed to mere acts of preparation, is proved. However strong the evidence is, if it only relates to actions in preparation to commit a certain crime, that evidence cannot justify a conviction on an attempted charge.

16. For clarity purposes, 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.

17. I must now apply the above principles to this case. The complainant testified that she was accosted by the Appellant at around 8:00pm as she walked home from her work place. That, the Appellant demanded for sex from her and when the complainant refused the Appellant forced his way. That, the Appellant grabbed the complainant and hugged her, held her close to himself and fell her. As they were struggling, the Appellant pulled the complainant around four metres off the path. He then laid on her top while saying that he must have sex with her as he unzipped his trousers. As the complainant sensed danger she screamed and as people gathered the Appellant ran away.

18. PW3 was the first one to arrive at the scene as he lived barely five metres away. He only found the complainant lying on the ground and helped her before he returned home. PW2 confirmed that the complainant had sustained bruises on the head, shoulders and ears. PW2 produced the treatment notes and the P3 Form as exhibits.

19. The Appellant denied the offence and raised the issue of grudge. That, he had pledged to marry the complainant before their engagement broke when the Appellant realized that the complainant had children and that the complainant vowed to show the Appellant. Shortly, he was arrested and charged with the offence herein. The complainant was the only identifying witness and pursuant to **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya her evidence could sustain a conviction even without any corroboration. However, the trial court must have been satisfied that the complainant said the truth and must have recorded the reasons in the proceedings.

20. The court in its judgment had this to say about the complainant:

> **The only eyewitness is the complainant. Her testimony was candid……..**
>
> **……My observation of her demeanour as she testified satisfied me that she is a truthful and credible witness….**

21. Whereas on one hand I must remain alive to the fact that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that, I must also on the other hand revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to my own independent conclusion on the matter.

22. I keenly revisited the evidence of the complainant. She testified that she knew the Appellant as a customer at the hotel she used to work at. She denied ever having any relationship with him. However, PW4 testified that in the course of the investigations the Appellant told him that he was only being framed for a failed relationship. As a good investigator, PW4 investigated the matter and truly confirmed that indeed the complainant and the Appellant had been in a relationship. The inevitable question is therefore why the complainant lied to the court. Further, the complainant stated that the events as she narrated them, took two hours. She was a University student at the time she testified and must have been well versed with time. Could the ordeal as stated have really taken two good hours? I suppose not.

23. There was as well the unfinished business by PW4 who ought to have told the court if up on investigations there was any possibility of the complainant using the criminal justice system to settle scores with the Appellant. The defence raised by the Appellant was therefore corroborated by PW4. To me, the totality of the evidence on record portrayed the complainant as an untruthful witness who was out to mislead the court. She knew that she was lying to the court and insisted on it until when PW4 stated otherwise. The complainant did not lie for nothing, she had a pre-conceived target and it was obviously to settle scores with the Appellant on account of their failed relationship. With tremendous respect to the learned trial magistrate, I do not find the complainant as a truthful and credible witness. I therefore do not believe her testimony.

24. I must say that a witness who willingly choses to mislead the court runs the risk of discrediting his/her evidence. As choices have consequences, the complainant, a University Student, made an informed choice to avail herself as an untruthful witness and I so find her. Her evidence could therefore not found any conviction on either of the offences the Appellant faced.

25. The upshot is that there is only one way out in this appeal and is to allow it. The appeal is hence allowed, conviction quashed and sentence set-aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 08th day of March 2019.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Brian Kennedy Odhiambo the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant