



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**HCCRA NO. 178 OF 2017**

**KENNEDY TEMUNGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 888 of 2013 delivered on the 19<sup>th</sup> day of February, 2014 by Hon. E. Kigen, RM]**

**JUDGMENT**

1. This is an appeal from the judgment of Hon. Emily Kigen (RM) in Kabarnet Criminal case no. 888 of 2013 delivered on 19/02/2014 where the trial Court found the appellant guilty of the offence attempted defilement as follows:

*“The issues arising herein can be categorized into 2:*

*1. The identity of the perpetrator of the act.*

*2. The defence adduced.*

*The prosecution witnesses PW1, PW2 and PW3 had happened to be at the scene on that day at around that time of 6:00pm. In answer to the first question, the perpetrator is known. It was the accused. The accused could be placed at the scene. He in fact confirmed in his evidence that [he] was drinking alcohol at their home.*

*The evidence adduced by the defence were inconsistent as they could not exactly state who had hit the accused with the stone and where exactly he had been hit. There was a mix-up on whoever was selling the alcohol and their names were also mixed up.*

*Further evidence can be recollected when the accused was cross-examining Pw3 and he stated that, “Yes it is true I had wrested the girl to the ground but do you know what happened before that, her sister had refused to respond me my Ksh.30/=.” I have carefully examined the evidence and I find that the accused is guilty of the offence of attempted defilement.*

2. On sentencing, the trial Court said that -

*“The offence committed is serious and the same has become rampant within Baringo County. I have considered the mitigation and the fact that the accused is a first offender. **I hereby sentence the accused to serve 10 years imprisonment.** Right of appeal within 14 days.”*

3. The Appellant being aggrieved with the judgment filed a Petition of Appeal on the following grounds:

*a) That he is a first offender.*

*b) That the current offence originated from the use of alcohols and drugs of which I promise to abandon and become a good citizen as per the laws and rules of the land.*

*c) That the Honourable Court may re-evaluate and analyze this sentence a fresh as it may deem lenient to.*

*d) That I am the only boy whom my parents depend on me given that they are old in age.*

e) That the Honourable Court may grant me a lesser sentence or a non-custodial sentence as the Court may deem fit to.

4. The Appellant put his Submissions as follows:

a) That the sentence he is serving is excessive and oppressive and unable to meet the basic objective of the sentence.

b) He is suffering from ulcers and hence cannot serve the sentence as the treatment in prison cannot sustain the situation.

c) The offence resulted from differences in our families which have been already solved.

d) He is now born again and baptized.

e) That he has trained in carpentry, joinery, painting and polishing but does not have certificates due to prison transfers.

f) He prays for a lesser or non-custodial sentence which will enable him be a good citizen.

5. The DPP made oral submissions opposing the appeal and urged that the Appeal be dismissed, stating that the Appellant herein on 1<sup>st</sup> November 2013 confronted the complainant and pinned her down and was caught by Pw3 as he attempted to rape the Complainant, and further that the Appellant still held on to the Complainant and it had to take the efforts of two men to free her.

6. The Prosecutor also submits that the inconsistencies of the narration of events by the Defence only showed that it was not the truth and that it should be disregarded. It was, therefore, their submission that they have proved their case beyond reasonable doubt.

### **Determination**

7. On re-evaluation of the evidence before the trial Court, this Court finds the following issues as arising for determination:

a) Whether the offence of attempted defilement is proved against the appellant;

b) If so, whether the sentence is excessive; and

c) If not, whether the appellant is guilty of the alternative charge or any lesser charge in accordance with the law.

### **The Evidence**

8. The evidence of the Complainant is set out in full below:

***“Female minor sworn in and states***

*What is your name – F. K.*

*How old are you – Am 14 years*

*I go to [particulars withheld] Primary School and in standard 7, my home at Milima Marigat[particulars withheld].*

*I know accused the accused he is my neighbor at home.*

*I recall on 1/11/2013 at around 6.00 pm when I had gone to fetch water. **On my way downhill I met the accused who told me to lower the water pot. I refused but he went ahead to lower the pot for me.***

***He then grabbed me and tore my skirt then biker and my inner wear.***

*Torn Brown blouse – MF1*

*Torn beige biker – MF1 II*

*Torn white pant – MF1 III*

*I struggled to let him go by holding his short which he removed.*

*Torn Pink Skirt – MF1 IV*

*Torn green vest – MF1 V*

***I screamed and a lady called Gladys came and asked him to leave him. By that time he had pushed me to the ground. Ezekiel had asked him to leave me. By that time he had pushed me to the ground. Ezekiel and Robert also came and pulled him away from him thereby tearing his shirt. The accused was escorted to Marigat police and later in the evening I followed and recorded my statement.***

*I was hurt by the thorns on the legs when he pushed me to the ground.*

*He has never talked to me before and neither do I have a grudge with him. The clothes were taken by one Robert and Ezekiel to the Police Station.*

*That's all.*

#### **CROSS-EXAMINATION BY THE ACCUSED**

*That day you came to our home earlier.*

*- I was with my sister.*

***- Yes there was alcohol at our home that was being sold.***

*- I don't know if you drink alcohol of 30/=.*

***- I don't know what transpired with my sister because I had gone to fetch water at the river.***

*- You were alone when you wanted to rape me.*

***- Whoever beat you and tore your shirt were people who were trying to rescue me.***

*- I was wearing a games kit which is a wrap round.*

*- You then tore my clothes.*

*- I was not there when you were beaten as I had already run home.*

#### **RE-EXAMINATION**

*- It is true the accused was at our home during the day but he did not talk to me.*

***- He hold me to remove my clothes because he wanted to do bad manners to me."***

9. PW2 Robert Kachike who said he had responded to screams from the complainant testified as follows:

***"I recall on 1/1/2013 at around 6.00pm we were from working with one Ezekiel when we heard screams from one Gladys who was asking for help. We rushed to the scene and found the accused holding the skirt of the complainant and the other hand holding her tightly. The girl did not have upper clothes. They were on the ground and the girl was crying and was asking the accused to leave her alone. We forcefully removed and pushed away the accused from the girl. He had torn the complainant's clothes, upper clothes."***

10. PW3, Gladys Chemase, another eye-witness testified that –

***"I recall on 1/11/2013 at around 6.30pm while at my house I heard screams coming up the hill. It was a girl's sound. She was saying leave me alone as she screamed. I went to the scene and found Kenneth on top of the girl and besides her was a jerrican filled with water. Suddenly two men emerged Robert and Ezekiel. I called them to come over.... Then Robert and Ezekiel tried to release the girl from him and after a long struggle they managed."***

11. On cross-examination of PW3 by the accused, the Court minuted the remarks on his demeanor and statement as follows:

***"(Demeanor of the accused noted.)***

***- Yes it is true I had wrestled the girl to the ground but do you know what had happened before that? Her sister had refused to refund my change of Ksh.30/-"***

12. When put on his defence, the appellant gave an unsworn statement as follows:

*“My name is Kennedy Temunge from Marigat I do casual jobs within Marigat.*

*Your honour it was on 1/11/2013 at around 5.00 pm when I went to the complainants home FK, I was going to consume Busaa on reaching there I found the complainant and her elder sister. I ordered for 1 cup of busaa which goes for about Ksh.10/=. I took a second cup when the elder sister asked me to assist her ferry the alcohol to customer I had given a Ksh.50/= **I helped her carry 15 litres of busaa as she carried the containers. We left the complainant at home. On reaching there many customers came and I also took one cup of busaa and another one and cleared my debt of 50/=.***

*I took more glasses of alcohol and I joined other customers. **The complainant came and her elder sister asked her to ask me to pay my debt of Ksh.10/=. I told them that I didn't have and we started quarreling.***

***The complainant was also drunk she insisted that I pay the balance of Ksh.10/=, she later picked a stone and hit me on the head.***

***The other customers started beating me, Gladys Chemase and Robert Kachika and hence they tore my clothes.***

*They later escorted me to the police station, I slept in the police and was arraigned in Court on Monday. I did not report that I had been hit with a stone.*

*That's all.”*

13. DW2, DW3 and DW4 gave evidence and supported the appellant's evidence that they were taking alcohol when the appellant got into a quarrel and he was hit with stone and a fight ensued. There was discrepancy in their testimony as to who was selling the alcohol and who hit the appellant with a stone and where: there was a common thread, however, that the complainant by whatever name had hit the appellant with a stone following a disagreement about a balance of Ksh.10/- demanded from the appellant for his alcohol and a fight broke out.

#### **The law**

##### *Principles of the law of attempt*

14. This Court has in a recent decision discussed the law of attempt as settled, as follows:

##### **“Principles of the law of attempt**

8. *In accordance with the definition of attempt in section 388 of the Penal Code, the test for attempt requires a demonstration of an intention to commit the offence and overt act towards the commission of the offence which is sufficiently proximate or immediately connected to the attempted offence. See **Mwandikwa Mutisya v. R** (1959) EA 18 and **Mussa Said v. R** (1962) EA 454.*

9. *In discussing the principles of law on attempt in the case of attempted larceny, Spry, J. (as he then was) in **Mussa s/o Said v. R** (1962) EA 454, 455 Letters C- D said:*

*“The principles of law involved are very simple but it is their application that is difficult. If the Appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. (Penal Code, s. 380). The burden on the prosecution is therefore first to prove the **intention** and secondly to prove **an overt act** sufficiently proximate to the intended offence.*

*The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that **the act must be of such a character as to be incompatible with any other reasonable explanation.** Secondly, even if the intention is established, **the act itself must not be too remote from the alleged intended offence.”***

10. *In **Keteta v. R**, (1972) EA 532, 534, Madan Ag. C.J. (as he then was) put the matter succinctly as follows:*

*“A mere intention to commit an offence which is in fact not committed cannot constitute an attempt to commit it. There must also be an overt act which is immediately and remotely connected with the offence intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do.”*

15. Similarly, in **John Manyonge Walunya v. R**, KBT HCCRA No. 108 of 2017, this Court held as follows:

*“9. 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 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 fulfilment 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.

10. The appellant's conduct may only amount to an overt act if it is "**sufficiently proximate to the intended offence**" to constitute an attempt. See *Keteta v. R* (1972) EA 532. See also *Saidi v. R* (1962) EA 454. There was no overt act on the part of the appellant towards the execution of any intention to defile the child. **Inconsistent evidence of the child (PW1) that the appellant lay on her but did not remove his or her clothes does not support a finding of an attempt to defile her.**

See *Mutisya v. R* (1959) EA 18 on requirement of act constituting attempt to go beyond mere preparation." [emphasis added]

#### **Analysis of evidence,**

16. From the evidence, the defence raises a reasonable doubt as to the nature of the act complained – whether it was an attempted defilement or an affray arising out of a disagreement over unpaid alcohol. Moreover, for the offence of attempt to be proved there must be immediate overt acts towards the commission of the offence alleged to be attempted.

17. On the facts of this case, I find that the Appellant herein had gone to the Complainant's house to drink alcohol. This fact is admitted by the Complainant and the Appellant. The other fact not contested is that the Appellant had pinned the Complainant down, as the Appellant admits this. There was, however, no evidence as to whether the Appellant had removed his trousers or indeed his penis or otherwise manifest by some overt act, in his attempt to defile the complainant.

18. The Prosecution's evidence that the Appellant was on top of the Complainant was also admitted by the appellant but it is not inconsistent with the circumstances of a fight as alleged by the defence to have followed their disagreement over unpaid alcohol. The question whether the jerrycan at the scene contained water as alleged by the complainant and PW3 or alcohol as stated by the defence was not resolved by the evidence, and its benefit of the doubt must go to the accused. The accused admission of having wrestled the complainant down during the fight as set out in the cross-examination of PW3 is, with respect, an indicator that he was telling the truth. He only sought to explain that the situation was not, as it seemed, an attempted defilement but rather a scuffling during a fight allegedly started by the complainant who hit him with a stone following a disagreement of payment for alcohol taken by the appellant.

#### **Conclusion**

19. In the circumstances of the doubt as to the prosecution's evidence raised by the defence evidence and together with the fact that no overt act towards actual defilement was alleged or proved, I find that it was unsafe to convict for the offence of attempted defilement c/s 9(1) and (2) of the Sexual Offences Act. There was, in addition, no evidence at all that the alternative charge of indecent act c/s 11A of the Sexual Offences Act that could prove, in the circumstances of a possible fight, the commission of the indecent act as alleged. The offence would only be proved in this case, if there was evidence, as charged, of intentionally touching the buttocks of the complainant.

20. In this case, like the decision of Court in *John Manyonge Walunya v. R*, KBT HCCRA No. 108 of 2017, there was no overt act on the part of the appellant sufficiently proximate towards the execution of any intention to defile the child complainant. There was no evidence that the appellant had himself removed any of his clothes in readiness to defile the complainant. It was evidence of PW2 that the Green vest MFI V belonging to the accused was torn from the accused "*as we tried to pull him away from the girl*", and of the complainant, Pw1 that "*whoever beat [the accused] and tore [his] shirt were people who were trying to rescue me.*"

#### **Orders**

21. Accordingly, for the reasons set out above, noting that the appellant has been in custody for five (5) years five months since his arrest on 1/1/2013, the Court makes an order quashing the conviction of the appellant for the offence of attempted defilement contrary to section 9(1) and (2) of the Sexual Offences Act and sets aside the sentence of imprisonment for ten (10) years imposed on him.

22. The Register of Convicted Sexual Offenders shall be amended to reflect this determination acquitting the appellant of the sexual offence herein.

23. Consequently, the Court directs that the appellant be released from custody unless he is otherwise lawfully held.

Order accordingly.

**DATED AND DELIVERED THIS 4<sup>TH</sup> DAY OF APRIL 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person.

