REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 49 OF 2018

KEVIN ANGWENYI OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. R. K. Langat, Senior

Resident Magistrate in Rongo Magistrate's Court Criminal Case No. 415of 2017 delivered on 9/10/2018)

JUDGMENT

1. **Kevin Angwenyi Ochieng**, the Appellant herein, was was charged with the offence of G**reviuos Harm** contrary to **Section 234** of the **Penal Code, Cap. 63** of the Laws of Kenya. He also faced a second count of **Attempted Rape** contrary to **Section 4** of the **Sexual Offences Act** No. 3 of 2006.

2. He denied committing the offences and was tried. Five witnesses testified in support of the prosecution's case. The complainant testified as **PW2**. She was J.A.O. A son to PW2 testified as **PW1.** He was **V.O.O.** PW2's fellow villager and a motor cycle rider **Fredrick Ouma Omondi** testified as **PW3** whereas a Clinical Officer attached to Sare Dispensary testified as **PW4. PW5** was the investigating officer **No. XXX PC. David Karim** attached to Awendo Police Station. The Appellant was represented during the trial by **Mr. Odero Counsel.** For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court.

3. At the close of the prosecution's case, the trial court placed the accused person on his defence where he opted to and gave sworn defence without calling any witnesses. He stated that as he was weeding his sugar cane farm he heard children uprooting the sugar cane and confronted them. That, the children ran away and later a woman who alleged to be the mother of the children came to the farm claiming that the Appellant had assaulted her child. That, the Appellant pushed the woman aside and since it had rained she fell. That, nothing happened until three months later when he was arrested and charged.

4. Judgment was rendered on 09/10/2018 where the Appellant was found guilty as charged on both counts and convicted. He was sentenced to 3 years and 7 years imprisonment respectively.

5. Being aggrieved by the convictions and sentences, the Appellant through his Counsel filed a 'Memorandum of Appeal', albeit late and without leave of this Court, on 08/11/2018 alongside an application for bail pending appeal. At the hearing of the bail application it was agreed by the parties and approved by the Court that the bail application be abandoned and instead the main appeal be heard. Directions were given on the filing of the Record of Appeal and hearing. It was after those directions that the Appellant appointed **Messrs. E. Kisia & Associates Advocates** to appear for him. Messrs. Messrs. E. Kisia & Associates Advocates however also filed another 'Memorandum of Appeal' on 22/02/2019 without the leave of this Court.

6. The appeal was heard by way of written submissions on the part of the Appellant and by oral response on the part of the prosecution. **Mr. Kisia** Counsel who appeared for the Appellant filed very comprehensive submissions which he briefly highlighted on. The thrust of his submissions was that the ofences were not proved in law and made reference to the persuasive decisions in **Abraham Otieno vs. Republic (2011) eKLR**, **Darius Nyange Mboga vs. Republic (2017) eKLR** and **David Ochieng Aketch vs. Republic (2015) eKLR**. Counsel prayed that the appeal be allowed, the convictions quashed and sentences set-aside accordingly.

7. The appeal was opposed. **Mr. Okaka**, Learned Prosecution Counsel submitted that the offences were properly proved, the Appellant duly and properly convicted and the sentences were lawful. He submitted that there was ample evidence that the Appellant was at the scene of crime and committed the offences. On sentences, Counsel submitted that the fact that the offences were committed in the presence of a minor was an aggravating factor and relied on the decision in **Moses Kabure Karunga vs. Republic (2016) eKLR** and **Eric Onyango Odeng vs. Republic (2014) eKLR**. He urged this Court to dismiss the appeal.

8. This being a 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.

9. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offences of causing greviuos harm and attempted rape 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 the submissions.

10. Having considered the twin 'Memorandum of Appeal' on record which both were filed without the leave of this Court and for purposes of rendering substantive justice pursuant to **Article 159(2)(d)** of the **Constitution,** I will deem both 'Memoranda' to be properly on record and shall consider them in the discussion below. I will first deal with the offence of greviuos harm. For a conviction to stand in a charge of grevious harm, the prosecution must prove the following ingredients:-

(i) That the complainant sustained actual bodily harm without any legal justification;

(ii) It was the Appellant who unlawfully assaulted the complainant and occassioned the harm.

11. As to whether PW2 was assaulted without any legal justification a result of which she sustained bodily harm, the position is divided. The Appellant admitted being at the scene and contended that he was confronted by PW2 who protested an alleged assault on her children. That, in the process the Appellant pushed PW2 away and she fell. To him, he only chased away some children who were uprooting sugar cane from his farm as he was weeding.

12. PW2 had a different version of the events at the scene. She contended that she was confronted by the Appellant as she walked home from the trading center with PW1. That, the Appellant dragged her into the bush and a serious struggle ensued. That, the Appellant overpowered her and pushed her down where her hand got injured. PW2's evidence was corroborated by PW1 who was with PW2. He recognized the Appellant and affirmed the struggle. He remained at the road crying until when PW3 emerged. PW3 stated that he asked PW1 why he was crying and on being informed of the events he ran into the bush where he met PW1 and the Appellant struggling. That, the Appellant ran away on seeing him and PW3 told him that even if he ran away he had seen him so well. PW1, PW2 and PW3 all knew the Appellant as their fellow villager.

13. By placing the defence and prosecution evidence side by side, the prosecution evidence outweighs the defence. The prosecution evidence was well corroborated and coherrently flowed. The witnesses did not contradict one another and withstood cross-examination by Counsel. I find and hold that the defence was rightly rejected.

14. PW4 also corroborated the evidence of PW2 on the injuries sustained. He assessed the injures as 'maim'. He produced a P3 Form, X-Ray Film and the treatment notes as exhibits. That evidence was not otherwise challenged. I theefore find and hold that the ingredients of the offence of grievous harm were duly and adequately proved and that the conviction was proper.

15. On the offence of attempted rape, 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 30th day of May 2017 at [*particulars withheld****] in Migori County within the Republic of Kenya, intentionally attempted to cause his penis to penetrate the vagina of J.A.O. without her consent.***

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

17. 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.

18. 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.

19. 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.***

20. 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:***
>
> *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.***

21. I have as well engaged in this discussion. In **Migori High Court Criminal Appeal No. 28 of 2018 Brian Kennedy Odhiambo vs. Republic (2019) eKLR** after reviewing the legal parameters in an appeal against a conviction on attempted rape I had the following to say: -

> **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.**
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> **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.**

22. In this case there is evidence of the struggle between the Appellant and PW2. The Appellant did not at any point say that he was going to rape PW2. According to PW2 the Appellant first asked her to stop but she refused and kept on walking. That, the Appellant walked fast and passed them and blocked their way. The Appellant then told PW2 that since she had ignored him then she will know who he was. That, the Appellant attempted to slap PW2 but PW2 blocked the hand. The Appellant then held PW2 and pulled her into the bush where they continued struggling. The Appellant overpowered her and threw her down. The Appellant held PW2's biker and tried to remove it by force. Amid the sustained struggle the biker got torn on one side but it remained in place. PW2 testified that she removed the biker at home and not at the scene.

23. There was no evidence on how the Appellant was dressed and/or whether he undressed himself. Much of the evidence centred on the struggle. It is highly possible that the Appellant had clothes on otherwise the three witnesses who saw him would have otherwise so stated. Given that PW2 was not undressed and in the abscence of any evidence that the Appellant undressed himself I find that the acts were merely preparatory and did not attain the bar of an attempted rape. As said, for an attempt to be proved there must be proof of the last act towards the actual commission of the main offence. In this case, if indeed the Appellant intended to rape PW2, then there were several other acts he was to first complete including successfully undressing PW2 and himself. Infact the evidence did not prove the particulars of the charge in that the particulars stated that the Appellant using his penis attempted to penetrate the vagina of PW2 but their was no iota of such evidence. PW2 herself did not state that she saw the penis of the Appellant as the Appellant attempted to penetrate her vagina.

24. I must however say that in the struggle the Appellant may have committed indescent acts but he was far from attempting to rape PW2. Respetfully, I must interfere with the conviction on attempted rape.

25. On sentences, having quashed the conviction on attempted rape, the sentence is hereby set-aside. On the sentence of 3 years imprisonment on greviuos harm the Appellant submitted that it was excessive and harsh. As rightly pointed out the offence carried a maximum life imprisonment. The Appellant acted without any legal justification and injured PW2, a widow with several children to take care of. Settled, an appeal on sentence is one against the exercise of discretion. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

26. I find no justification to interfere with the sentence.

27. The upshot is that the following orders do hereby issue: -

(a) The appeal against the conviction and sentence on attempted rape be and is hereby allowed and the sentence of 7 years' imprisonment set-aside.

(b) The appeal against the conviction and sentence on grevious harm be and is hereby dismissed and the sentence of 3 years' imprisonment affirmed.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 7th day of May 2019.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Kisia, Counsel instructed by Messrs. E. Kisia & Associates Advocates for the Appellant.

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

Everlyn Nyauke – Court Assistant