REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 144 OF 2018

STANLEY MWITI MUREA ……APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Coram: F. GIKONYO J)

(Being an appeal on the judgment and sentence by Hon. G. Sogomo (S.R.M) delivered on 8th November 2018 Tigania PMCCr. Case No. 906 of 2015)

JUDGMENT

1. The Appellant herein was charged with the Offence of attempted rape contrary to section 4 of the Sexual offences Act No. 3 of 2006 and an alternative count of committing an indecent Act with an adult contrary to section 11 (a) of the Sexual offences Act No. 3 of 2006.

2. The particulars of the offence were that on the 8th day of December 2013 in Tigania West Sub-county within Meru County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of JMK without her consent. In support of the alternative count the particulars were that the appellant intentionally toughed the vagina of JMK with this hand against her will.

3. Three (3) witnesses testified in support of the prosecution case. Pw1, was the complainant, Pw2 the eye-witness and Pw3 the investigating officer.

4. The trial Court delivered its judgment on 8th November 2018 convicting the Appellant on the main count and discharging him of the alternative count. The trial Magistrate sentenced the accused person to ten (10) years imprisonment.

5. The appellant was aggrieved by the judgment and sentence of the trial Court and on 14th January 2019 filed a supplementary petition of appeal listing the following five grounds of appeal.

> **a. The learned trial Magistrate erred in law and in fact in convicting and sentencing the appellant on charges which was levelled against him but not proved on the laid-down standards of beyond reasonable doubt.**
>
> **b. The learned trial Magistrate erred in law and in fact in failing to note that the criminal proceedings had already been terminated by the Director of Public Prosecutions with the powers conferred upon them by Article 157 of the Constitution and Section 87 of the Criminal Procedure Code.**
>
> **c. The learned Magistrate erred in law and in fact by convicting and sentencing the Appellant herein and failing to critically and judiciously evaluate evidence adduced by the prosecution.**
>
> **d. The learned trial magistrate erred in law and in fact in failing to take cognizance of the glaring contradictions, inconsistencies and discrepancies on the face of the prosecution's case.**
>
> **e. The learned trial magistrate erred in law and fact in failing and fully relying on incredible, hearsay and framed up evidence orchestrated by the prosecution witnesses.**

6. On 21st January 2017 directions were given with the consent of parties to the effect that the appeal shall be canvassed by way of written submissions. The submissions were also highlighted on 3rd April 2019.

Appellants Submissions

7. The appellant submitted that the trial Court depended on contradictory evidence and failed to properly analyse the evidence. According to him, there was no medical evidence to prove penetration took place nor was there observation of the accused person. He also argued that the charge as drafted was defective and the trial Court failed to consider the appellants alibi evidence. He also submitted that fair trial procedures were not adhered to and that there was personal vendetta afforded by the prosecution. He lastly stated that sentence imposed on him was harsh.

Respondent Submissions

8. The complainant/victim and the prosecution both filed their respective submissions. They both submitted that the trial court was right in denying the application by the prosecution to withdraw the matter under Section 87 of the Criminal Procedure Act. That the prosecution clearly met the ingredients to prove a charge of attempted rape and that no medical evidence is required since the offence was not complete. That the appellant never sought to put up a formidable defence in the trial court bit in turn filed numerous applications. They aver that the judgment delivered was on sound evidence and the sentence meted was reasonable and legal in the circumstances.

Analysis and Determination

9. Before I embark on the evidence, some important issues have emerged and require immediate resolution.

Penetration not element in attempted rape

10. The offence of attempted rape is in the category of **"inchoate offences"** meaning "not completely formed or developed. The principle feature of these offences is that they are committed even though the substantive offence is not successfully consummated. See **Andrew Ashworth, *Principles of Criminal Law 395 (1991.)*** The offence is therefore in the overt act or acts committed with an intention to commit the substantive particular crime. See **Barbeler {1977} QD 80** on the elements of an inchoate offence below;

> **a. Intend to commit the offence;**
>
> **b. Begin to put his intention to commit the offence into execution by means which are adapted to its fulfillment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;**
>
> **c. Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence**

11. See also Mativo J in **Leonard Mwangi Muhuthia v Republic [2016] eKLR where he held;**

> **To my mind, in criminal law, an attempt to commit a crime is an offence when an accused person makes a substantial but unsuccessful effort to commit a crime. The elements of attempt vary, although generally, there must be intent to commit the crime, an overt act beyond preparation, and an apparent ability to complete the crime. The attempt becomes a crime in itself, and usually means one really tried to commit the crime, but failed through no fault of himself or herself. In criminal law, an attempt to commit a crime, is an endeavour to accomplish it, carry it beyond preparation, but failing short of execution of the ultimate design, either in whole or in any part of it. I find that these two elements were proved, namely; *(i) an overt act (ii) an intention to defile by committing the overt act.***

12. Accordingly for the offence of attempted rape, penetration as described in section 2 of the Sexual Offence Act is not one of the elements that must be proved such that medical report is needed. In any case, the circumstances and facts of this case do not even require any medical evidence as no issue required proof by such evidence. I therefore dismiss that argument by the appellant. Here, I am content to cite the expressions in **Joseph Muasya v Republic [2018] eKLR** that;

> **Medical evidence was really not necessary in this case of attempted defilement and indecent act, unless it showed that there was actual defilement which would make it a case of defilement rather than attempted defilement or that there were injuries consistent with attempted penetration, which would only further support the present charges.**

Defective Charge-sheet

13. The appellant has submitted that the prosecution loosely used the term vagina as opposed to genital organs rendering the charge sheet defective. I am aware that a charge sheet can be defective if it does not allege an essential ingredient of the offence or it cites an offence not known in law. In **B N D v Republic [2017] eKLR**it was held;

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

14. The main question therefore is whether the accused was charged with an offence known to law and was it disclosed in a sufficiently accurate detail to give the accused adequate notice of the charges facing him. Section 4 of the Sexual Offence Act provides as follows:-

> **4. Attempted Rape**

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.

15. The accused was charged with attempted rape contrary to section 4 of the Sexual Offences Act. The offence is established under section 4 of the Act is attempted rape. This is a lawful offence in line with the principle of legality. But, it seems the appellant is having trouble with the use of the term vagina in the charge sheet instead of ‘’genital organs’’ The term genital organs is used as a general term in the law. Thus, specifying the exact genital organs in question as it is known in ordinary English language in the particulars of the offence does not offend the law in any way. Such detail in my view of the actual genital organ in question in the particulars of the offence makes the charge clearer and unambiguous; the accused completely understands the charge as well as the particulars supporting the charge. When prosecution witness give evidence they refer to the genital by its name ‘vagina. Therefore, I think the Appellant seems to be placing too much premium on this point which to me is merely an inflation of a trivial point in the hope that it will pass for an indomitable argument. I find and hold that nothing turns on it. I reject the argument.

16. In any event, even if it was an omission, it is one that does not cause any prejudice to the accused. See Section **382** of the **Criminal Procedure Code** which provides;

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

17. During plea taking and trial he never raised any objection that the charge sheet was defective. This is a consideration when such claims are made on appeal for the first time.

18. On this point, I have found that the use of the word vagina as opposed to genital organs in the particulars of the offence does not render the charge sheet defective. Also, the charge is proper as it is known in law. I dismiss the grounds of appeal based on this point.

Proof beyond reasonable doubt

19. Back to evaluation of evidence which I must do with judicious wit so as; not to miss the grace and power of the testimonies of witnesses; and to give due proportion of weight to the evidence.

20. In this case the appellant went to the house of the complainant and informed her that he was confronted by his wife over an alleged affair they were having with the Complainant. Pw1, the complainant stated that the accused wished to actualize the affair when he visited her in her house. She stated that he grabbed her and pinned her on the sofa. He then unzipped his trouser and grabbed her vagina.

21. At the trial Court the accused person through his advocates on record only cross- examined the prosecution witnesses. He never testified during defence hearing or sought to call witnesses.

Alleged Inconsistencies in the testimonies

22. The appellant alleged that there were inconsistencies in the testimonies of Pw1 and Pw2; and in particular in the statement by PW2 to the police and her testimony in Court. Pw2 testified that she was at the back of the house when she heard commotion at the house. When she entered the house she found the accused person zipping his pants and when she asked the complainant what had transpired the complainant informed her that the accused person had attempted to rape her. She also stated that the accused person hurled insults before he left the house. In her recorded statement she only stated that she heard commotion in the house and when she got in she was informed by the complainant that the accused person had attempted to rape her.

23. I do not find any inconsistency. Both statements clearly show that the immediate reaction by the complainant was to inform Pw2 that the accused person had attempted to rape her. They both show that pw2 was ran to the house after hearing a commotion in the house. A commotion may be described as “a state of confused and noisy disturbance”. The fact that the complainant did not scream or raise alarm does not mean that the incident never occurred. Only serious inconsistencies will have a bearing on the evidence affected. See **Twehangane Alfred vs Uganda, Criminal Appeal No. 139 of 2001, [2003] U GCA 6,** that described the net effect of contradictions and inconsistencies as follows:-

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

24. I do find that the statement of Pw2 corroborates the statement of the complainant. It not only places the accused at the scene of the offence but also confirms that the offence actually occurred. The trial Court can convict on the testimony of one witness if the evidence substantially proves the offence alleged. The evidence of these two witnesses proves beyond doubt the offence of attempted rape was committed by the appellant.

Bias and Delay

25. The accused person has further alleged that the trial court failed to consider that there was an ongoing case involving the accused person and the husband to the complainant. He also avers that the court failed to consider that the complainant took considerable time to report the incident. The incident herein occurred on 8th December 2013 and the complainant reported the matter on 10th December 2013.It is not in dispute that the distance of the complainant's house to the police station is a fair distance, approximately 600 meters. In her recorded statement the complainant stated that she took time to report the aforesaid incident because she was consulting the issue with her husband who was away in Vihiga. During trial she stated that she took time to cool down from the act taking into account that she was violated by a relative. I am satisfied by this explanation especially looked at within the entire circumstances of the case.

26. Prompt reporting of commission of crime is most desirable. However, varied factors may be responsible for delay in making a report. Ordinarily, where there is some delay in reporting, the prosecution should endeavour to provide an explanation. A delay for 2 days may not impeach the integrity of the report or charge unless it is shown that the incident never took place or the charge is trumped up. I do not find any such factors in this case. It bears repeating that I also find the explanation given by PW1 to be plausible. Offences, especially sexual offences committed by relatives to other relative strikes down the courage of the victim to quickly tell such shameful ordeal to others. In this case the accused was a nephew to the complainant through marital relations with her husband. It is also not bereft to this court the shock and emotional disturbance affiliated with sexual offences. In the circumstances, I agree with the position taken by the trial magistrate.

27. With regard to the charges facing Titus Kalaine i.e threatening to Kill C/s 223 (1) of the Penal Code and others facing Judith Makena i.e. giving false information to a person employed in the public service c/s 129 (a) of the Penal Code it is clear from the reports filed that the same were as a result of this case. The husband to the complainant has been alleged to have sent abusive and threatening messages to the accused through text messages. The complaint was made in June 2015, two years after this case. There is also a copy of cash bail dated 4th June 2015. I do note that the charges do not have a co-relation to this case. If there was an aspect of malice I do note that the accused person was best placed to have presented such case during defense hearing. He however never sought to raise this during defense hearing. For all purposes, I do find that the cases in question are not of close connexion or to bear any antecedent value to the current case.

Application of Section 87 A of CPC

28. Whereas the Director of Public Prosecution is empowered under Article 157 to discontinue prosecution of a case, the court is required to interrogate the reasons given by the prosecutor to determine whether the application meets the threshold set out in Article 157 (11). Withdrawal should not be permitted if it oppressive to the accused person or if the DPP is acting maliciously or in bad faith, or is otherwise abusing court process or prejudices public interest and victim rights. Therefore, although the court may or may not refuse withdrawal of charges, the decision is based on informed exercise of discretion rather than arbitral decision by the court.

29. The matter herein had reached defence hearing. The application was also opposed by the victims/complainants advocate. The trial magistrate held that the application to discontinue the proceeding was at cross-purpose; E.Onderi recommended prosecution of the case whereas James Mwangi Warui sought to discontinue the case. These two state counsels were of the same rank i.e. Senior Assistant DPP. The court also factored in that it had already made a finding that a prima facie case lies against the accused person and subsequently placed him on his defense. It also found that the issues raised by Roseline Nthinyari who wrote a statement terming the charged rendered herein as a set up may be best dealt with during defence hearing.

30. I agree with the determination made by the trial magistrate. The reasons given to withdraw the case were not substantially proved. The basis was that Roselyne Nthinyari had made statements to the extent that the charges leveled against the accused person herein was a set up and that the prosecution office in Nairobi had called for the file to no avail. The use of *nolle prosequi* as a tool to discontinue proceedings has mutated over time and the immense powers that the Attorney General had has been subjected to scrutiny and the requirement to not only give formidable reasons but the discretion now solely lays on the trial Magistrate whether or not to allow the same. I therefore agree that the averments made by the Director of Public Prosecution would have been aptly determined during defence hearing. Termination was therefore not in the public interest or the law. I reject grounds pegged on that argument.

Sentence

31. The Appellant herein was sentence to ten years imprisonment. The provisions of Section 4 of the Sexual offences at provides;

> **"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."**

32. The minimum sentence is 5 years. The circumstances of this case did not warrant a harsher sentence than the minimum prescribed in law. I therefore find that the sentence of 10 years was harsh and excessive. I set it aside and in lieu thereof substitute with a sentence of 5 years in prison. The appellant is accordingly sentenced to serve a jail term of five years. This sentence shall commence from the date the appellant was sentenced by the trial court.

33. The upshot is that this appeal succeeds only to the extent I have specifically stated.

Dated, signed and delivered in open court this 20th day of May 2019.

F. GIKONYO

JUDGE

In presence of

Appellant – present.

Naikuni for appellant.

Namiti for D.P.P.

Mwirigi for victim.

F. GIKONYO

JUDGE