



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL APPEAL NO. 30 OF 2016**

**DOUGLAS NYAMBANE.....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. 90 of 2015 delivered on 13/03/2016)*

**JUDGMENT**

1. **DOUGLAS NYAMBANE**, the Appellant herein, was arraigned before the Senior Resident Magistrate's Court at Rongo on 23/03/2015 where he was charged under the Sexual Offences Act No. 3 of 2006. The principal charge was attempted defilement with an alternative charge of committing an indecent act with a child.
2. The Appellant did not to agree with the prosecution and offered himself up for a trial on denying the charges. As the process took its course, the Appellant defended himself and courageously faced the five witnesses lined up by the State.
3. Having done his best the Appellant was placed on his defence and offered a sworn defence. In a considered judgment delivered on 13/03/2016 the Appellant was found guilty of attempted defilement and convicted. A sentence of 12 years imprisonment was handed down upon mitigating.
4. The Appellant then engaged the services of **B. Rogito Isaboke Advocate** who preferred an appeal on his behalf and lodged a Petition of Appeal on 22/06/2016. Although Counsel for the Appellant neither sought for nor obtained leave to lodge the appeal out of time, this Court will nevertheless deal with the appeal on its merit.
5. Although the Appellant had preferred three grounds of appeal in the said Petition of Appeal, he only relied on the first ground at the hearing of the appeal. The ground was that the learned trial Magistrate erred in law and in fact in convicting and passing sentence against the weight of the evidence. He then took the Court through the evidence on record in arguing the appeal and prayed that the appeal be allowed accordingly. The appeal was opposed by the State through Miss Owenga Learned State Counsel.
6. This being the appellant's first appeal the role of this court 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, analyze 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. To enable this court discharge its said duty, let us have a look at how the charge of attempted defilement was presented before the trial court. The same read as follows:-

***“Attempted Defilement contrary to Section 9(1)(2) of the Sexual Offences Act No. 3 of 2008.***

***DOUGLAS NYAMBANE On the 20th day of March 2015 at 1900 Hrs in Migori County within the Republic of Kenya, intentionally attempted to cause his penis to penetrate the vagina of E.A. a girl aged eight years.”***

8. Before I venture into a look at the prosecution's case it is important to have a brief look at the witnesses who tendered their evidence before the trial court. **PW2** was the **complainant** whereas **PW1** was the complainant's mother. **PW3** was Clinical Officer and **PW4** was the complainant's father. The investigating officer was **PW5**. It was also alleged during the prosecution's case that the complainant was a neighbour to the Appellant.

9. The prosecution's case was that on 20/03/2015 at around 07:00pm PW1 left her children playing at her home as she rushed to the nearby shop which was about 100 metres away. She took around 10 minutes before she returned to her home. On return she did not notice the presence of one of her children, the complainant, among the other children and she promptly asked them. It was one of her children who informed PW1 that the complainant had gone to a toilet at the neighbour's house and one man who stayed at Omiti's house took the complainant into the inside of a house.

10. Without wasting time, PW1 who was accompanied by one of her other children, M.A. (not a witness) while armed with a spotlight from her phone rushed to the said toilet which about 20 metres away. She did not find the complainant thereat. She then headed to the house of Omiti and still did not find the complainant there. They searched the nearby rooms and came to one room which was unoccupied within the same compound. Its door had just been closed but not locked. PW1 and M.A. entered into the room and using the flashlight found a man who was half naked as he had lowered his trousers to the knees on top of the complainant. The complainant was lying on the floor facing upwards with her skirt totally removed while her blouse had been pulled upwards while she was holding her underpants in one of her hands. The man then asked PW1 what the problem was and on an equal footing PW1 asked the man what he was doing to her daughter. As the man wanted to escape PW1 caught him by the shirt and restrained him as she raised alarm. People readily gathered and overpowered the man. The man was then led to the nearby Police Post before he was taken to Kamagambo Police Station together with the complainant. After the incident was reported to the police at Kamagambo, the complainant was escorted by PW5 and one of her colleagues to the Rongo Sub-County Hospital where she was examined and treated.

11. It was PW3 who examined the complainant at the hospital and filled in the P3 Form. While relying on the initial treatment notes issued at the said hospital PW3 confirmed that the complainant's genitalia was intact and there was no sign of any penetration or an attempt thereof. A high vaginal swab laboratory analysis only revealed the presence of epithelial cells which according to PW3 suggested a urinary tract infection. PW3 also assessed the complainant's age and medically settled it at 8 years. PW5 then preferred the charges before court.

12. When the Appellant was placed on his defence he opted to and offered a sworn evidence. He raised an *alibi* and further stated that the complainant lived very far from where he lived and that he even did not know the name of that place. He did not call any witnesses.

13. When a court of law is faced with any charge on an attempted offence, care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however strong the evidence may be if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge.

14. For clarity purposes, the 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.

15. But what does the law and settled judicial precedents as well as scholarly works have to say on the subject of attempted offences?

16. **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.

18. 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."***

19. Eminent learned authors in criminal law, J. C. Smith and Brian Hogan in their book **CRIMINAL LAW, Butterworths, 1998 (6<sup>th</sup> 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."***

20. 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.”**

21. 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...”**

**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, 8<sup>th</sup> 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.”**

22. This Court has carefully considered the evidence adduced by the prosecution to satisfy itself whether it was proved beyond any reasonable doubt that the appellant committed the offence of attempted defilement. There were two eye witnesses, PW1 and the complainant. The evidence of the complainant was wholly corroborated by PW1 and further by PW3.

23. Like the trial court in its well researched judgment, I note that the actions and intention on the appellant's part to commit defilement were clearly demonstrated when he waylaid the complainant to an abandoned house, laid her on the floor, held her mouth so that she would not raise alarm, undressed her skirt and removed her underpants, pulled his trousers down to the knee level and laid on top of the complainant. In those circumstances what was to follow was the real sexual act. To me had PW1 just delayed for a while, the appellant would have committed the sexual act with the complainant as there was nothing else left to the actual commission of the actual sexual act. The undressing of the complainant's private parts and the laying on top of the complainant by the appellant were the last acts towards the commission of a sexual act. I am equally satisfied that the foregone acts did not amount to penetration. The *alibi* defence raised by the Appellant did not displace the strong prosecution's evidence against him. The appellant was properly placed as the perpetrator of the offence and was arrested in the act moreso he lived in PW1's neighbourhood.

24. I therefore find that the *actus reus* as well as the *mens rea* on the offence of attempted defilement was proved in law. I will now look at the issue of the complainant's age.

25. **Section 9(1)** of the Sexual Offences Act defines the offence of '**attempted defilement**' as follows:-

**“9 (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.”**

Section 2 of the said Act defines a “**child**” as follows:-

**“Child has the meaning assigned thereto in the Children Act (Cap. 141).**

And, in **Section 2 of the Children Act**, Chapter 141 of the Laws of Kenya, a “**child**” is defined as:-

**“Child” means any human being under the age of eighteen years;”**

26. An age assessment was done on the complainant and it revealed that her age at the time the offence was committed was 8 years. The

complainant was hence a child in law.

27. I however wish to further state that from the wording of **Section 9** of the **Sexual Offences Act** (and unlike in the offences of defilement and rape where the exact age of the victim must be proved bearing the weight it has in sentencing), in an attempted defilement charge the prosecution only has to tender evidence that the victim was below the age of eighteen years and not necessarily the specific age. Needless to say if the specific age is availed to a trial court it equally has a bearing in sentencing upon conviction.

28. This court therefore finds that the offence of attempted defilement was proved in law and the conviction is hereby upheld. And since the sentence remains within the law and was rightly arrived at after receiving the appellant's mitigations, I see no justification to disturb the same.

29. The upshot is that the appeal is unmeritorious and is hereby dismissed.

**DATED, SIGNED and DELIVERED at MIGORI this 07<sup>th</sup> day of March 2017.**

**A. C. MRIMA**

**JUDGE**