REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 104 OF 2017

MUTIE MUOKI MUTUKU.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Kithimani Senior Resident Magistrate's Court Criminal Case No. 15 of 2014, **E W Wambugu, RM** on 22nd August, 2017)

BETWEEN

REPUBLIC.....PROSECUTOR

AND

MUTIE MUOKI MUTUKU.....ACCUSED

JUDGEMENT

Introduction

1. The appellant herein, **Mutie Muoki Mutuku**, was charged in Kithimani Senior Resident Magistrate's Court Criminal Case No. 15 of 2014 with the offence of attempted defilement contrary to section 9(1)(2) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars of this charge were that on the 5th day of May, 2014 at 1900hrs at Wendano Village in Masinga Sub County within Machakos County, the appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of EM, a child aged 16 years.

2. After hearing, the Learned Trial Magistrate found the offence proved, proceeded to convict the appellant accordingly and sentenced the appellant to serve ten (10) years in prison.

Grounds of Appeal

3. Not being satisfied with the conviction and sentence the appellant appeals based on the following grounds that:

(1) That, the learned trial magistrate erred in both law and facts in convicting me the appellant on incurably defective charge contrary to Section 214 of the Criminal Procedure and the Sexual Offence Act No. 3 of 2006 hence a miscarriage of justice.

(2) That the learned trial magistrate erred both in law and facts in convicting me on overly contradictory uncollaborated and unreliable evidence from the prosecution witnesses hence in breach of the provisions of Sections 163 (1), (2) of the E.A Cap 80 i.e, insufficient and to sustain the conviction occasioning a series of miscarriage of justice.

(3) That the learned trial magistrate erred both in law and facts in convicting me the appellant while relying on the attributed evidence s of identification by PW1 and PW2 without considering that the same lacked merit in their totalities.

(4) That the learned trial magistrate erred in both facts and law by failing to notice that there was no investigating officer in the matter.

(5) That the learned trial magistrate erred on both law and facts by failing to find that the appellant had already reported to

his work place by the time the alleged offence was taking place, the magistrate failed to apply Section 173 of the Evidence Act which empowers him with extended powers for purpose of obtaining proper evidence.

(6) That my defence was improperly rejected having been implicated by the complainant's father and further coursed to testify the accorded unfair trial, hence a subject of erred in law and facts.

Prosecution's Case

4. At the hearing of the case the prosecution called six witnesses.

5. PW1 was the complainant, aged 17 years. According to her, on 5th May, 2014 at about 7.30pm she was with her sister on their way home from Wendano Market when the appellant emerged from a thicket and held her waist. According to the complainant, although it was dark, she recognised the appellant when the appellant spoke. When the complainant struggled to free herself from the grip, she fell down and the appellant pulled her towards the thicket. When her sister tried to intervene the appellant beat her using a stick. As a result the complaint got injured. It was her evidence that she did not however know the appellant's motive. The complainant and her sister then raised and alarm and when people started coming, the appellant ran away.

6. The second witness was the complainant's sister who testified as PW2. According to the proceedings, she was an adult and was a student at Ekalakala training in computer. On 5th May, 2014 at 7.00pm, she was with PW1 coming from the shop heading home when the appellant emerged from a thicket, and held the complainant by her waist. When the complainant raised an alarm, PW2 went to her rescue but the appellant who had a stick struck her hand. It was her evidence that she then stepped aside and raised an alarm as a result of which neighbours went and the appellant fled. According to her she did not know the appellant's intention. She however confirmed that she knew the appellant well.

7. It was her evidence that she did not know if that was the appellant's habit as she did not know his character. She however denied that the appellant had gone to their home to work.

8. PW3, **PC Daniel Kangogo** was at the report office at Masinga Patrol Base on 6th May, 2014 when at 1.30pm, PW2 reported that on 5th May, 2014 at 7.00pm while in the company of her sister, a man emerged from a thicket and attempted to defile her sister, the complainant who was aged 16 years. After the girls raised an alarm, members chased the appellant and arrested him. It was his evidence that PW2 had injuries on her knees. As a result PW3 gave her a note to go to the Hospital.

9. According to him the appellant was taken to the Station by an administration police from Ekalakala after which the witness placed him in the cell.

10. PW4, **Edwin Mutembei**, a clinical officer at Masinga Hospital. According to him on 6th May, 2014, the complainant was taken to the facility on allegation that there was an attempt to defile her. Upon examination, her skirt was torn and she had injuries on her knees due to friction while assisting the attempt. According to him the complainant was sober but had a problem walking due to the injuries. The other parts of her body were however normal. In his opinion the age of the injuries was 22 hours and her injuries were assessed as harm. The witness filled in the P3 Form which was exhibited.

11. PW5, **APC Samson Momanyi**, who was stationed at Kithyoko AP Post was on 6th May 2014 at Ekalakala AP Post when a about 10.00 am a group of people in the company of the complainant and her parents took the appellant whose hands were tied with a rope on the allegation that he had attempted to rape the complainant. The appellant was untied and booked while the complainant and her parents.

12. PW6, **Benjamin Maina**, was a senior clinical officer at Matuu Level4 Hospital. Upon examining the complainant and taking her history he assessed her age as 16 years and exhibited the age assessment report.

Defence Case

13. At the close of the prosecution case, the appellant was placed on his defence and he opted to make unsworn statement.

14. According to him, on 5th May, 2014 at 7.30 am he was guarding Wendano Secondary School from 7.30pm till the following day at 7.30 am when he went home to water his crops. He then retired to sleep. Upon waking up at 2.00pm he went to Ekalakala market where he purchased a few items and went to work. At 12.00 am, some students informed him that the daughter of **Ndeto** had alleged that he had raped her and that they had been sent by **Ndeto**. He then accompanied the students to **Ndeto's** home from where **Ndeto** insisted that they go to the Police Station where he was bean and locked in the cells. The next morning his fingerprints were taken and he was taken to Court.

The Judgement

15. The Learned Trial Magistrate found that the appellant had been positively identified by PW1 and PW2 and that the action of forcefully dragging the complainant towards the bush and the complainant's torn skirt was evidence of the appellant's intention to defile the complainant.

16. According to the Learned Trial Magistrate there was no doubt that the appellant had the intention of defiling the complainant considering that he emerged from the bush at night, got hold of her by force, dragged her towards the bush and stopped her sister from intervening. The Learned Trial Magistrate relied on the decision in **Omar Mohamed Ibrahim vs. Republic [2014] KLR**. In that case, it was noted by the Court itself that the appellant inflicted injuries on the complainant's neck while demanding to have sexual intercourse with her but she

escaped.

Determination

17. What the Learned Trial Magistrate did not respectfully appreciate was that in the case that was relied upon the intent was clearly expressed by the appellant. In this case the only reason why the Learned Trial Magistrate found there was intent to defile the complainant was the fact that the appellant emerged from the bush at night, got hold of her by force, dragged her towards the bush and stopped her sister from intervening. Period. Does this necessarily amount to an intent to defile? Whereas, it may be implied that there was an intention on the part of the appellant to harm the complainant, it cannot be conclusively said that the intention was necessarily to defile the complainant since from the evidence of PW1 and PW2 themselves they could not tell the appellant's intentions and there was no evidence of any overt act on the part of the appellant that could be inferred to be an inference that his actions were incapable of explanation upon any other reasonable hypotheses than that of his intention to defile the complainant. This was the position adopted by **Spry, J** (as he then was) in **Mussa s/o Saidi vs. Republic {1962} E.A. 454** where he stated that:

> **"The principles of law involved are very simple but it is their application that is difficult...The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with another reasonable explanation. Secondly, if the intention is established, the act itself must not be too remote from the alleged intended offence"**

18. The appeal was however conceded to by the Learned Prosecution Counsel, **Ms Mogoi**. That notwithstanding, in **Odhiambo vs. Republic (2008) KLR 565,** the court said:

> **"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."**

19. I however associate myself with the decision in **Charles Nega vs. Republic [2016] KLR** cited by **Ms Mogoi** that:

> **"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. 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."**

20. In that case the Court relied on the definition of "attempt" in section 388 of the ***Penal Code*** defines which states as follows:-

> ***(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."***

21. As rightly appreciated by the Court in the above cited case the above section brings out the two main ingredients of an attempt offence; the *mens rea* which constitutes the intention and the *actus reus* which constitutes the overt act towards the execution of the intention. In this case regrettably the evidence neither points to the *mens rea* not the *actus reus* which could be construed to be geared towards the commission of an offence of defilement. In order to constitute an offence of attempted defilement the evidence must point out to the intention to defile rather than merely the intention to harm the complainant in any other manner.

22. That is my understanding on the learned authors, **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 that:

> ***"....Nothing less than an intention to kill will do."***

23. As rightly appreciated by the Court of Appeal in **Abdi Ali Bare vs. Republic (2015) eKLR**:

> ***"…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. "***

24. Having considered the material placed before me in this appeal, it is my view that the prosecution did not prove that the action of the appellant was of such a character as to be incompatible with another reasonable explanation. Such inference as the Learned Trial Magistrate arrived at was with due respect too remote from the alleged intended offence. As was held by the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR**:

> **"We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear."**

25. In the premises I agree with the Learned Prosecution Counsel that the conviction was unsafe and the same cannot be upheld. Consequently, this appeal succeeds, the appellant's conviction is hereby set aside and the sentence quashed. It is directed that the appellant be released forthwith unless otherwise lawfully held.

26. Judgement accordingly

Judgement read, signed and delivered in open court at Machakos this 12th day of November, 2018.

G V ODUNGA

JUDGE

In the presence of:

Ms. Mogoi for the Respondent

Appellant in person

C/A Geoffrey