REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 8 OF 2016

MUSA MENGANYI RIOBA.....APPELLANT

-versus-

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. Aganyo, Resident Magistrate in Kehancha Principal Magistrate's Criminal Case No. 4 of 2014 delivered on 18/12/2014)

JUDGMENT

1. **MUSA MENGANYI RIOBA**, the Appellant herein, was arraigned before the Principal Magistrate's Court at Kehancha on 02/01/2014 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 an unsworn defence. He also called one witness. In a considered judgment delivered on 18/12/2016 the Appellant was found guilty of attempted defilement and convicted. A sentence of 10 years imprisonment was handed down upon mitigating.

4. The Appellant preferred an appeal with the leave of this Court. He filed a Petition of Appeal and put forth 8 grounds of appeal where he challenged the conviction and sentence moreso on identification and that the offence was not proved as required in law.

5. The Appellant filed written submissions in arguing the appeal and prayed that the appeal be allowed accordingly. The appeal was opposed by the State through Ms. 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. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of attempted defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. 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 written submissions.

8. I will now endeavour to ascertain if the offence of attempted defilement was proved. The starting point is how the charge was presented before the trial court. The same read as follows: -

> ***"Attempted Defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act No. 3 of 2008.***
>
> ***On the 29th day of December 2013 at [****particulars withheld****] in Migori County, intentionally attempted to cause his penis to penetrate the vagina of R.G. a girl aged 13 years."***

9. Then the evidence as tendered. The prosecution's case was presented by five witnesses. **PW1** was the **complainant** whereas **PW2** was the complainant's neighbour who was with the complainant during the alleged ordeal. She is **R.M**., a minor as well. **PW3** was a village elder one **Marwa Mwita Marwa** and the Clinical Officer **Robi Wanswi Abrahams Chacha** testified as **PW4**. The investigating officer **No. 62629 Cpl. Samuel Kimetto** from Kehancha Police Station testified as **PW5**. It emerged during the hearing that appellant and the complainant were neighbours. 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 save PW1 whom I will refer to as **'the complainant'**.

10. It was alleged that on 29/12/2013 at around 07:00pm the complainant and PW2 were walking home from Ikerege town where they had taken some maize for grinding at a posho mill. As they were nearing home, they were stopped by a voice of a man who was running towards them from behind. The man ordered them to stop or else will stab them with a knife. PW2 raised alarm as she ran towards a nearby homestead while the complainant was caught up by the man. The complainant had a bucket of flour on her head. As she was thrown to the ground, the flour spilled on the ground. The man then held the complainant's throat as to restrain her from raising alarm. He then struggled to undress the complainant. Before long, PW3 who had answered a distress call by PW2 ran towards the scene and shone his torch. The man, whom the complainant had identified as the appellant, then ran away before PW3 reached the scene.

11. PW3 assisted the complainant and PW2 and took them to the Ikerege AP Camp where they reported the matter. The following morning the complainant also reported the matter to Kehancha Police Station. She was referred to Kehancha District Hospital where she was examined and treated. A P3 Form was later filled. PW4 produced the treatment notes and the P3 Form as exhibits. PW5 undertook the investigations. He recorded statements from witnesses and visited the scene where he confirmed that the place was disturbed and there was spilled maize flour. On completing the investigations PW5 charged the appellant.

12. When the appellant was placed on his defence he opted to and offered an unsworn evidence. He called one witness, **Ikerege Peter Menganyi (DW2).** The appellant denied committing the offence and stated that he was busy working at a nearby homestead with DW2 when the alleged incident occurred.

13. The trial court evaluated the evidence and found the appellant guilty of attempted defilement.

14. When a court of law is faced with any charge on an attempted offence, care must 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.

15. 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.

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

17. **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."***

18. 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.

19. 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."***

20. 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."***

21. 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."***

22. 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, 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."

23. 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.

24. Perhaps before reaching a conclusion on whether an attempt was committed, it is prudent that the hotly contested issue of identification be settled. The complainant was the only eye witness. I say so because the record has it that when PW2 was confronted by the man she ran away long before the man caught up with the complainant. Further PW2 did not testify that she identified the voice to have been the appellant's. It was also an early evening; around 07:00pm, but dark enough that PW3 had to use a torch. It is not in dispute that the complainant knew the appellant well as her neighbour. It is also on record that the appellant was working at a homestead of one Yusuf (not a witness) which was just next to the road where the complainant and PW2 walked as they returned home. The man caught up with the complainant and fell her to the ground, held her neck and attempted to undress her. The man then ran away on hearing people running towards the scene.

25. When PW3 arrived at the scene, he asked the complainant what had happened and she readily stated that it was the appellant who had attempted to defile her. She also gave the name of the appellant. She did so even at the police station.

26. On that background, this Court is under a legal duty to weigh the evidence of the complainant who is the sole identifying witnesses with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under;-

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

27. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

28. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

29. I have carefully addressed my mind to the facts and the law in this case alongside the defence tendered. The attack was sudden and at night. The appellant was not arrested at the scene. Like PW2, the complainant did not recognize the voice of the man as that of the appellant. The events as they unfolded cannot be said to have given the complainant an opportunity to see and observe the attacker who had even held her neck. No sufficient evidence was led to satisfy the need that the appellant was undoubtedly the attacker. There are many questions which beg for answers. In that case, having cautioned myself on the dangers of relying on single-witness-evidence in the circumstances of this case, I am not satisfied that the evidence was water-tight to accord a positive identification of the attacker. The identification was therefore not free from error.

30. Having found that the appellant was not positively identified, I do not think that a consideration of the other grounds will be of essence herein.

31. The appeal hereby succeeds and the conviction is quashed. The sentence of 10 years is set-–aside and the appellant is set at liberty unless otherwise lawfully held.

32. Orders accordingly.

DATED, SIGNED and DELIVERED at MIGORI this 6th day of June 2017.

A. C. MRIMA

JUDGE