REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 64 OF 2014

Leonard Mwangi Muhuthia.....Appellant

Versus

Republic.....Respondent

(Appeal against Judgement, Conviction and Sentence in Criminal Case Number 347 of 2013,

R vs. Leonard Mwangi Muhuthia at Nyeri, delivered by W. Kagendo,S. P. M on 16 . 9. 13).

JUDGEMENT

The appellant herein seeks to quash the conviction and sentence imposed upon him by the Learned Senior Principal Magistrate in Criminal case number **347 of 2013, R vs Leonard Mwangi Muhuthia at Nyeri,** delivered **W. Kagendo, S. P.M**, on 16. 9. 2013 whereby the appellant was charged with the offence of attempted defilement contrary to Section **9 (1)** of the Sexual Offences Act.[1] The particulars of the offence were that on the 19th day of August 2013 in Mukuruweini District within Nyeri County intentionally attempted to cause his penis to penetrate the vagina of **LW M,** a child aged **3** years.

The appellant faced an alternative charge of committing an indecent act with a child contrary to section **11 (1)** of the Sexual Offences Act.[2] It was alleged that on the 19th day of August 2013 in Mukurweini District within Nyeri County, intentionally touched the vagina of **LW M,** a child aged **3** years.

This being a first appeal, this court has a duty to weigh conflicting evidence and draw its own conclusions.[3] It is the function of a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, the court should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses**.[4]** (Also see *Okeno v. R*[5])

PW1, LM- Minor. The court concluded on *voir dire* examination that the minor could not understand the nature of an oath and allowed her to give unsworn evidence. She said she knew the accused and referred to him as Wakimaru and said that his home was not far from her home. She said that the appellant poured cold milk on her with his penis and pointed at her private part. She said she felt pain. She said he removed her trouser and put her on his bed. She went home crying and reported to her mother.

The appellant was accorded an opportunity to cross-examine the child but he declined saying "he could not do a case with a child."

PW2 L W M, the mother to **PW1** testified that she met **PW1** crying and asked her the problem, she told her that Kimaru called her, took her into his house, placed her on his bed, removed her trouser and poured milk using his penis. She asked her what kind of milk and she said the milk of his penis. She examined her parts, it looked freshly wiped, but was reddish and that her trouser and legs had sperm stains. She took the child to the police and also Mukurweini Hospital. She confirmed the child was three years, born on 25.5.2010.

PW3 Paul Kamaru APC was the arresting officer while **PW4 Cpl Chizungu Sanga** recorded the statements and charged the appellant. He produced the trouser as an exhibit.

PW4 Patricia Njoki Wambugu, a clinical officer testified that she interviewed the child who told her that a person well known to her placed his penis on her vagina and poured cold milk on her vagina, he then wiped her with cold water and a piece of cloth. She felt pain and went to her mother crying and explained to her mother what happened. On examination, she had no injuries, no discharge or blood. She produced the P3 and treatment notes.

The trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence. The court complied with the provisions of section 211 of the Criminal Procedure Code[6] and the accused elected to give unsworn evidence. The appellant said that the child had been told by the mother what to say in court. The appellant never responded to the allegations against him.

The learned magistrate concluded that the evidence was credible and that the prosecution had proved its case and convicted the appellant as charged and sentenced him to **15** years imprisonment.

Aggrieved by the above verdict, the appellant appealed to this court seeking to overturn the said sentence. In his amended petition of appeal, the appellant raised three grounds, namely, ***(a)*** *that the evidence was doubtful,* ***(b)*** *that he was not accorded a fair trial, and* ***(c)*** *his defence was rejected.*

I have carefully considered the submissions made by the appellant and the state counsel. I have also reviewed the evidence on record and the relevant law. Section **9 (1) (2)** of the Sexual Offences Act[7] provides that:-

> ***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.*
>
> ***9 (2)*** *A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not be less than ten years*

I find it necessary to examine in detail what constitutes *'an attempt to commit an offence'.* The Act does not define this term but it defines **intentional and unlawful** acts. Section **43 (1)** of the Sexual Offences Act provides as follows:-

> *1. Any act is intentional and unlawful if it is committed-*
>
> *a. in any coercive circumstances;*
>
> *b. under false pretence or by fraudulent means;*
>
> *c. in respect of a person who is incapable of appreciating the nature of an act which causes the offence*

Section **43 (4)** provides as here below:-

The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act-

> a. asleep;
>
> b. unconscious;
>
> c. in an altered state of consciousness;
>
> d. under the influence of medicine, drug, alcohol, or other substance to the extent that the person's

consciousness or judgement is adversely affected;

e. mentally impaired; or

f. a child

The victim in this case was a child aged 3 years hence incapable of appreciating the nature of the act in question. She could not comprehend or understand what the appellant was up to. Thus the act in question is both *intentional* and *unlawful* within the meaning of section **43(1)** referred to above.

When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt to commit the offence.

In a commentary on the *Indian Penal Code (Act XLV of 1860),***[8]** the learned authors have authoritatively defined the essential ingredients of an *attempt to commit an offence* in the following words:-

> *"In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An 'attempt' is made punishable because every attempt, although it fails of success, must create alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded"*

Thus, for there to be an attempt to commit an offence by a person, that person must:-

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 fulfilment. 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,[9]

But in fact he does not commit the whole offence. For the offence of attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond reasonable doubt.

The act relied upon a constituting the attempt must be an act immediately, not merely remotely, connected with the contemplated offence. This was enunciated in the case of *Williams, Ex parte The Minister for Justice and A-G.*[10]What is done must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is necessary that the accused should have done his best or taken the last steps towards the intended offence. There can be an attempt to commit an offence where the failure to complete the commission of it is due to ineptitude, inefficiency or insufficient means on the part of the accused person. In fact, the fact that a person, having done something which amounts to an attempt, then voluntarily desists from continuing the attempt, does not relief him from criminal responsibility for the attempt which he made before desisting.

For the prosecution to prove the offence of attempted defilement, they must establish that the appellant had the intention to defile the complainant.[11] It must be shown that the appellant had put in motion his intention by making preparations to commit the offence. The prosecution must establish that the appellant made the attempt to put into effect his intention to defile the complainant. The question that calls for determination is whether or not the conduct of the appellant constituted an overt act sufficiently proximate to constitute an attempt to defile the complainant.

The High Court of Tanganyika grappled with the difficulties courts face in resolving cases of this nature

in the case of *Mussa s/o Saidi vs Republic*.[12] In the said case, **Spry J** (as he then was) stated:-

> *"The principles of law involved are very simple but it is their application that is difficult. If the appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence. 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"*

Asike-Makhandia J[13] (as he then was) put it more succinctly while dealing with a case of attempted rape when he said:-

> *"For an offence of attempted rape to be deemed to have been committed under the section, the prosecution must prove that the culprit acted in such a manner that there was no doubt at all as to what his intention was. The intention must be to rape. It must be shown that he was about to rape the victim but was stopped in tracks and or in the nick of time. The intention to rape must be manifest. Such intention can be manifested for instance by word of mouth or conduct of the culprit. If the culprit proclaims his intention to rape and directs his efforts towards that goal for instance, by holding the victim or pushing her to the ground, undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but for one reason or another something happens which compels him to stop, again that would be good evidence of attempted rape."*

Criminal law seeks to restore order, decency and social equilibrium in society. It is aimed at curtailing or reducing to the minimum grave incidents of anti-social conduct. Punishment of an offender lies at the root of criminal law. Where an offence is committed, the offender or wrong-doers is punished, however, the criminal law also seeks to punish those who intend to commit offences but could not successfully do so. That is, they merely attempted to commit an offence. The fact remains that they intended to commit an act which they know is unlawful and prohibited, but the completed offence was never accomplished. The offence remains inchoate because the accused could not accomplish his desires, or that the end result of his acts or omission is not what he envisaged. He has all the same, attempted to commit an offence. It is a criminal attempt and therefore an offence. Will an accused person be allowed to go scot-free because he could not finish his plans? No. He would be made to face some form of punishment even though he never completed the offence. In my view, any legal system would be defective if criminal liability only arose when substantive offences have actually been committed.

Turning to the grounds of appeal, I take the view that the appellant argues that there was insufficient evidence to sustain the conviction. In other words, did the prosecution prove the case of attempted defilement beyond reasonable doubt as required under the law?

Upon re-evaluating the evidence and considering the submissions by state and the appellant I am persuaded that the ingredients of the offence as discussed above were satisfied. The child narrated in a clear and consistent manner all what transpired. The appellant took her to bed. This satisfied the first element, the intend. He removed her trouser, and proceeded to "pour what the child described as milk from his penis on her private parts." He wiped her with a wet cloth. This satisfies the second and third elements discussed above.

The account given by the accused in his unsworn defence does not rebut the above evidence nor does it give a reasonable explanation of his intention as to why he behaved the way he did. He never bothered even to render a denial. Instead he said the child was told what to say by her mother and never went beyond that point to explain. His sworn defence is extremely brief and does not rebut the allegations. The child was a neighbour. Identification was not contested or doubted. The child showed the arresting officer the room and bed were the act took place. It was the appellants room. This was not contested.

The appellants conduct in totality amounts to an attempt to commit a crime. Such conduct can only be presumed reasonably to show that he had bad intentions. It's a conduct which a reasonable person properly exercising his mind to the facts and the law can safely construe as an attempt to commit a crime, hence the offence of attempted defilement was proved and the appellant was rightly convicted. I am persuaded that the acts attributed to the appellant in the circumstances was an overt act of such a character as to be incompatible with any other reasonable explanation.

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.*

The appellant argues that he was not given a fair trial. The record does not support this. He never raised any complaints during the trial, he was supplied with statements and was afforded the opportunity to cross-examine all the witness, and where he never cross-examined it was his choice. The record shows that the proceedings were conducted fairly. I find no basis in this ground and I reject it.

The appellant alleges that his defence was never considered. First, he never responded to the allegations against him. He only said the minor was couched what to say by her mother. No details were provided to support this.

The South African case of *Ricky Ganda vs The State*[14]provides useful guidance. In the said case it was held:-

> *"The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true……the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses….it is acceptable in totality in evaluating the evidence to consider the inherent probabilities….*
>
> *The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt"*

Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am persuaded that the conviction was justifiable. The explanation offered by the accused is in my view improbable and does not cast reasonable doubt on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[15]

After weighing the explanation offered by the accused and the prosecution evidence, I find that the prosecution evidence is truthful, credible and probable as opposed to the incredible and highly improbable defence offered by the appellant. The appellants defence did not raise any reasonable doubts on the prosecution case. Accordingly I find that the appellant was rightly convicted and I uphold the conviction.

On the sentence, Section **9 (2)** of the Sexual Offences Act provides that a person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years. The learned magistrate meted a sentence of **fifteen (15) years**.

In *Shadrack Kipchoge Kogovs Republic*,[16] the court of appeal stated:-

> *"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"*

The Supreme Court of India in *State of M.P. vs Bablu Natt*[17]stated that '*the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.'* Moreover, in *Alister Anthony Pareira vs State of Maharashtra*,**[18]**the court held that:-

> *"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"*

I have carefully considered the facts of this case, the nature of the offence and the above principles and the mitigating factors and I have also considered the purpose of sentencing and the principles of sentencing under the common law[19] and the sentencing policy guidelines. The appellant was jailed for 15 years. **I find that the said sentence is not excessive nor did the magistrate take into account extraneous matters while arriving at the said sentence.**

The upshot is that this appeal against both conviction and sentence fails and the same is hereby dismissed.

Right of appeal 14 days

Dated at **Nyeri** this **7th** day of **March** 2016

John M. Mativo

Judge

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[1] Act number **3** of 2006

[2] Ibid

[3]Shantilal M. Ruwala V. R (1957) E.A. 570

[4]see Peters V.Sunday Post (1958) E.A. 424

[5] {1972) E.A, 32at page 36

[6] Cap 75, Laws of Kenya

[7] Supra

[8]The Indian Penal Code (Act XLV OF 1860), by RatanlalRanchhoddas&DhirajlalKeshvalalThakore (26th Edition (Reprint 1991), at bpage 517

[9] See Barbeler {1977} QD 80

[10] {1965}Q B R 86

[11] See Kimar J. in Simon KandegeOndegoVs Republic, Nakuru High Court Criminal Appeal No. 142 of 2005

[12] {1962} E.A. 454

[13] Abraham Otienovs Republic, High Court Criminal Appeal no. 53 of 2009, Kisii

[14] {2012}ZAFSHC 59, Free State High Court, Bloemfontein

[15]Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary

[16]Criminal Appeal No. 253 of 2003(Eldoret), Omolo, O'kubasu&Onyango JJA)

[17] {2009}2S.C.C 272 Para 13

[18] {2012}2 S.C.C 648 Para 69

[19] Regina vs MA {2004}145A