



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 35 OF 2015

BETWEEN

STEPHEN ODHIAMBO NDERE APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 103 of 2015 at Chief Magistrates Court at Homa Bay, Hon. P. Mayova, SRM dated 29th September 2015)

JUDGMENT

1. In the subordinate court, the appellant, **STEPHEN ODHIAMBO NDERE** was charged with the offence of attempted rape contrary to **section 4** of the ***Sexual Offences Act, 2006***. The particulars of the charge were that on 6th February 2015 at ***[particulars withheld]*** Village, ***[particulars withheld]*** Sub-location, ***[particulars withheld]*** Location, Rangwe Division within Homa Bay County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of DAO without her consent. He also faced an alternative count of committing an indecent act with an adult contrary to **section 11A** of the ***Sexual Offences Act, 2006*** based on the same facts. The appellant faced a second count of assault causing actual bodily harm to the said DAO on the same date and at the same time and place contrary to **section 251** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***.
2. The appellant was convicted on the first and principal count and on the second count and was sentenced to serve 25 years imprisonment on the former and 4 years on the latter with both sentences running concurrently. The appellant appeals against conviction and sentence based on the grounds set out in the Petition of Appeal filed on 9th October 2015.
3. Mr Ongoso, Counsel for the appellant, submitted that the charge sheet was defective in that the alternative charge of indecent act did not name the victim. He contended that the complainant did not identify the assailant and that the evidence against the appellant was contradictory and that the prosecution did not call independent witnesses to prove the offence. Counsel also contended that the learned Magistrate did not consider the issue of the grudge between himself and the complainant's boyfriend (PW 2).
4. Mr Oluoch, counsel for the respondent, opposed the appeal and submitted that the prosecution proved that the appellant clearly expressed his intention to rape the complainant and that he took positive steps to realise his intention. He contended that the complainant identified the assailant who had specific injuries that were seen by other witnesses and that the learned magistrate warned

himself of the dangers of convicting the appellant on the testimony of the complainant but nevertheless proceeded to convict him. He contended that the appellant did not raise the issue of grudge in cross-examination of the witnesses hence it lacked merit.

5. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).
6. The complainant (PW 1) testified that she was a University student and that she had come to visit her boyfriend (PW 2) at **[particulars withheld]** Sub-location on 5th February 2015. She went to sleep at about 10.00pm while PW 2 left for a funeral. He locked the door from outside. At about 1.45 am, she thought PW 3 had come back and was in the house. She tried calling him but he did not respond. She switched on her mobile phone light and pointed it towards the door but he was still not responding. She testified that she saw the assailant who was wearing brown long trousers, leather shoes and a green shirt. He also had a black bag and a panga. The assailant shone a bright torch towards her thus blurring her vision.
7. PW 1 narrated how the assailant marched her out of the house under threat of violence as he had a panga aimed at her neck. She was taken to a nearby sugar cane plantation. She narrated her ordeal as follows;

He told me that they were in a group and they would kill me if I resisted. He took me to a sugar farm. At that point I asked what he wanted. He told me he wanted to sleep with me. He had condoms. He told me that if I was scared of HIV/AIDS or pregnancy, he would use protection. I declined. He slapped me and swept me on the ground. I told him if he wanted to have sex with me, then it won't be at the sugarcane. He showed me a house and told me we would go there. He led me away. I resisted but he placed the panga on the neck again. We got to a place where it appeared sugarcane was being prepared He told me what he wanted to do with me what I do with PW 2. I resisted. He cut me there on the left upper arm We struggled. He ordered me to pull down my trouser and pant. I did so leaving the bra and blouse on me. He placed his clothes aside. I told him to keep the panga away so that we can have sex. I lied down as directed and called him to have sex with me but I was just pretending. He came and lay on me. He had removed his clothes. As he was starting, I grabbed his penis and pulled it hard. He in return bit my breast We struggled. He bit me hard on the lip, left face and fingers, I also bit his upper lip and scratched his face. He told me we should stop fighting. I told him I wont since he started it. We rose and fought. I kicked his manhood. We were all naked. He then picked the panga and slapped me with it. I fell down

8. After she fell, PW 1 became unconscious and when she woke up she saw a spotlight. She got scared and hid in bush. She heard a lady saying that she had heard someone screaming. When she came out of hiding she saw PW 2 together with his father and his mother. She was given a lesa to cover herself. She narrated to them her ordeal and described the person who had assaulted her. She told them that the person had a scratch on the head and a bitten upper lip. She was taken to Nyatiko Dispensary where she was treated. As she was at the dispensary, a person was brought whom she identified as he had a scratch on his face and a bitten upper lip. She reported the matter to Rangwe Police Station and was issued with a P3 form. She identified a black trouser and green t-shirt which the assailant wore that night and which were produced in evidence.
9. PW 2 testified that when he came back from the funeral event he was attending, he did not find PW 1 in the house yet he had locked the door from outside. He started looking for her and asked his parents to assist. They started looking for her in the surrounding area including the sugarcane plantation. His mother told him that she had heard someone screaming from the sugarcane plantation. As they approached the sugarcane plantation, they saw a girl, who he recognized as PW 1, coming towards them. She narrated to him what had happened and described the man as a

tall brown man wearing a green t-shirt, brown trousers and black leather shoes. He suspected it was Stephen Odhiambo Ndere, who was nicknamed Duncan. PW 2 further testified that he knew him as a fellow villager and had met him a few hours before the incident.

10. PW 2 recalled that he called some villagers and they went to the appellant's house which was nearby and found him in the kitchen. He was wearing a green t-shirt, brown trousers and black leather shoes. He also noted a scratch mark on his face and a bite on his upper lip which PW 1 had described to him. They went to the health center where PW 1 identified the appellant as the person who had assaulted her. The appellant went to hide in a room until police officers came as people wanted to lynch him. PW 2 denied in cross-examination that he had a grudge with PW 2.
11. The clinical officer, PW 3, testified on behalf of another officer who was on his annual leave and produced the P3 form. He confirmed that from records, PW 1 was seen on 6th February 2015. She had torn clothes stained with blood. She also had a cut wound on her upper arm and a bite marks on the chin and left breast. He confirmed that there was no penetration.
12. The Assistant Chief of *[particulars withheld]* Sub-location, PW 4, testified that on 6th February 2015, he was called at about 3.30am and informed that someone had attempted to rape a lady and the public was threatening to lynch him. He went to the Otweyo center and called the Commanding Officer, Rangwe Police Station. He calmed the public and when the police came, they took the appellant and the complainant to the Police Station.
13. The investigating officer, PW 5, recalled that he went to Otweyo Center with other police officers after being called by PW 4. When they arrived there, they found a riotous mob which was threatening the Appellant. They managed to rescue the appellant and took him to Rangwe Police Station. Later in the day, PW 5 visited the scene where PW 1 had been assaulted and found black long trousers which were identified as the ones the assailant was wearing. PW 4 handed a panga over to him. He also recovered a torn and blood stained top and a panty belonging to PW 1. He also took a green t-shirt the appellant was wearing.
14. The appellant elected to give sworn testimony in his defence. He testified that he was the only person operating a kiosk at Nyaporo Centre and as a result, PW 2 started threatening him and telling him that he would ensure that his business would collapse and that he would be locked up for life. He testified that on 6th February 2015 at about 2.00am, he was asleep when his door was forced open. People came in, including PW 2, and started beating him. They frog marched him to the center and forced him to open the kiosk. They broke in but before they could do anything to him, officers who were on patrol came to rescue him and took him to Rangwe Police Station. He denied committing the offence and alleged that he was framed.
15. The appellant was charged under **section 4** of the **Sexual Offences Act, 2006** which states as follows;

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.

Section 2 of the **Act** defines "Penetration" as "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

16. **Section 388** of the **Penal Code (Chapter 63 of the Laws of Kenya)** defines an 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 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 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. In **Francis Mutuku Nzangi v Republic** NRB CA Crim. Appeal No. 358 of 2010 [2013] eKLR, the Court of Appeal recapitulated the provisions of **section 388** of the **Penal Code** as follows;

Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible.

18. Although the case was in respect of attempted defilement, the statement of principle stated by Kimondo J., in **Pius arap Maina v Republic** ELD HCCRA No. 247 of 2011 [2013]eKLR is equally applicable in a case of rape. He stated that;

[13] The evidence of the complainant did not disclose any element of the offence of attempted defilement. Attempted defilement is a failed defilement. That is why the intention to penetrate a minor is a key ingredient. In the complainant's words, all that the appellant did was to touch her on the waist and proclaim he loved her. She formed the impression that the appellant wanted to sleep with her. Neither the actus reus nor the mens rea for the offence were thus established. Even if one were to accept her version that the accused said he wanted to sleep with her, it would still be miles apart from an intention to penetrate a child. The ingredients of the offence were thus not proved beyond reasonable doubt.

19. The totality of the provisions and decisions I have cited is that for an act to constitute the offence of attempted rape the prosecution must prove the intention to rape and that intention must be manifested by facts that point to an act of penetration. In other words, an attempted rape is a failed rape. The testimony of PW 1 was detailed and credible and pointed to a clear attempted rape. The assailant expressed his clear intention to have sexual intercourse with PW 1. He had carried condoms, he inflicted violence on her to force her to have sexual intercourse, he removed his clothes and ordered her to undress then lay on her. He would have raped her but for the fact that PW 1 fought back. I therefore find and hold that the prosecution proved attempted rape and assault. Her own clothes produced in evidence were consistent with the fact that she had been assaulted. Likewise the testimony of PW 3 confirmed the assault.

20. The central issue in this appeal is whether the appellant was identified as the assailant. In this respect, I recall the guidance given by the Court of Appeal on the issue of identification in **Wamunga v Republic** [1989] KLR 424 at 426, that:

[I]t 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 a conviction.

21. PW 1 testified that she did not know the assailant. PW 1 did not see his face when he came into the house. His torch was too bright for her but she was able to see the manner he was dressed and

the fact that he was carrying a panga. She also described how she bit him on the upper lip and the head. She described how the assailant was dressed and the injuries sustained by the assailant to PW 2. PW 2 recognized the person described as the appellant whom he knew and who he had seen that night prior to the incident. He went to the appellant's house and found him there with injuries consistent with what PW 1 described and the clothes PW 1 described.

22. Counsel for the appellant submitted that the prosecution ought to have produced vital exhibits and called independent evidence. In this respect, I find that the testimony of the witnesses was consistent and credible and supported by material evidence connecting the appellant with the incident. The prosecution produced the green t-shirt (Exhibit No. 4) which was being worn by the appellant and which the PW 1 recalled that she saw when the assailant attacked her. The prosecution case is further bolstered by the fact that in his defence, the appellant confirmed that he knew PW 2 and that he was arrested at his home by, amongst other persons, PW 2.
23. In considering the appellant's defence of a grudge, I find the appellant did not put to PW 2 any questions to suggest that he had a rivalry over the kiosk and that PW 2 threatened him and framed him. I therefore agree with the learned magistrate that the defence was really an afterthought and was properly dismissed.
24. Counsel for the appellant drew the court's attention to some contradiction in the prosecution evidence. For example, PW 1 testified that the assailant wore brown trousers PW 5 testified that the trousers were brown in colour. Secondly, PW 2 testified that when he apprehended the appellant, he was wearing a pair of brown trousers. Thirdly, PW 5 stated that when he went to the place where PW 1 was assaulted he found a pair of muddy long trousers (Exhibit No. 3). In light of the critical evidence I have outlined identifying the appellant namely that he was wearing a green T-shirt at the time he assaulted PW 1 and at the time he was arrested, the fact of the description given by PW 1 to PW 2 which led to his arrest shortly after the incident and within the vicinity of the offence, I find that the apparent contradiction in the colour of pair of trousers is not material. The appellant probably wore dark trousers which he left at the scene of the incident and which were identified by PW 1 when shown to her. As noted by the Uganda Court of Appeal in *Twehangane Alfred v Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6* it is not very contradiction that warrants rejection of evidence. As the court put it:

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.

25. Having independently re-appraised the evidence on record, I affirm the conviction.
26. The minimum sentence for the offence of attempted rape under **section 4** of the **Sexual Offences Act** is 5 years which may be enhanced to life imprisonment. In sentencing the appellant to 25 years imprisonment, the learned magistrate considered the gravity of the offence and the circumstances under which it was committed. He felt that a long custodial sentence would be appropriate as the accused was a dangerous person.
27. Considering that offence was accompanied by violence, I find that there were aggravating factors. However, given the minimum sentence prescribed by the statute, I find that the sentence was harsh and excessive in the circumstances. I reduce the same to 10 years imprisonment.
28. The appeal is allowed to the extent that the sentence for the conviction for attempted rape contrary to **section 4** of the **Sexual Offences Act** is quashed and substituted with 8 years imprisonment.

DATED and DELIVERED at HOMA BAY this 4th day of April 2016.

D.S. MAJANJA

JUDGE

Mr Ongoso instructed by Ongoso Ayoma and Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.