



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL APPEAL NO. 8 OF 2015**

**BETWEEN**

**EVANS ODHIAMBO ANYANGA ..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 226 of 2013 at Chief Magistrates Court at Homa Bay, Hon. P. Mayova, Ag. SRM dated on 12<sup>th</sup> September 2015)***

**JUDGMENT**

1. The appellant, **EVANS ODHIAMBO ANYANGA** was charged and convicted of the offence of attempted rape contrary to **section 4** of the ***Sexual Offences Act, 2006***. He was sentenced to 20 years imprisonment and now appeals against the conviction and sentence. The particulars of the charge were that on the morning of 18<sup>th</sup> April 2013 within Homa Bay Court, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of BAO without her consent. He also faced an alternative charge of committing an indecent act with an adult contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts by touching her vagina with his penis against her vagina against her will.
2. At the hearing of this appeal, Mr Oluoch, learned counsel for the respondent, conceded that the appeal was merited to the extent only that the facts presented by the prosecution did not support the conviction for attempted rape but the lesser offence of assault.
3. Notwithstanding the concession by the respondent, I am obliged to review and evaluate the evidence afresh and reach an independent conclusion as whether to uphold the conviction. In so doing allowance should be made for the fact that I neither heard nor saw the witnesses testify (see ***Pandya v Republic [1957] EA 336*** and ***Kariuki Karanja v Republic [1986] KLR 190***).
4. The prosecution case was that PW 1 was asleep in the house on 18<sup>th</sup> April 2013. At about midnight when she was awoken by a loud bang on the door. She lit the lamp and asked who it was and the person replied, "I want to kill you." She started screaming while pushing the door in order to keep him from coming in. The appellant nevertheless forced his way in a menacing manner with a panga. She pushed him and the panga fell. He started beating her and hit her on the mouth. She testified that the appellant wanted to have sexual intercourse with her but she refused. He injured her on the thigh, hands and neck. He clothes including her panties were torn and soiled. She struggled with him and she fled screaming his name.

5. During that night, PW 1's two children were in the house. One of the children aged 10 years old, gave unsworn testimony. Pw 2 recalled how the appellant came into the house with the panga on the material night and how her mother struggled with the appellant. She also began screaming and ran out to call the neighbours.
6. PW 3, a businessman, testified that on 18<sup>th</sup> April 2013 at 10.30 am, while on the Rodi-Rangwe road, he met a mob of people beating the appellant who had been tied. They alleged that the appellant had gone into the home of a woman, broken the door and started beating her. The appellant was arrested by police officers on patrol who included the investigating officer, PW 5.
7. PW 4, the medical officer, examined PW 1 and confirmed that she had been treated after an assault on 18<sup>th</sup> April 2013. He examined her clothes and found that they were dirty and her pants torn. She had a bruise on her upper lip, severe tenderness on the skull, tenderness on the lateral thigh area. Her genitalia were normal and although there was no penetration, he concluded that there was an attempted rape. He assessed the injury as harm.
8. In his unsworn statement, the appellant stated that he used to stay in Kisumu and had come back home and was staying with his mother. He stated that a gang of the neighbours came to arrest him on suspicion of having stolen. They frog marched him to Rangwe and on the way he was arrested by the police. He denied that he attacked PW 1 on the material night.
9. Before I consider whether the facts disclose the offence of attempted rape or assault, I think it is important to consider whether the appellant was identified as the perpetrator. 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.*

10. In this instance, the PW 1 testified that she knew the appellant. When she was awoken, she lit the lamp and during the altercation, which took place for a while, she recognized him. PW 2, who was also in the house, recognized him as she also knew him from the neighbourhood. I therefore find that the appellant was recognized and that the possibility of mistaken identity was minimal in the circumstances.
11. I now turn to the issue raised by Mr Oluoch that is whether the facts disclose the offence of attempted rape. The appellant was charged under **section 4** of the **Sexual Offences Act** which provides:-

*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."

12. **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.*

13. In ***Francis Mutuku Nzangi v Republic*** NRB CA Crim. Appeal No. 358 of 2010 [2013]eKLR, the Court of Appeal recapitulated the provisions 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.*

14. 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.*

15. The totality of the provisions and decisions I have cited is that for attempted rape to constitute an offence, the prosecution must prove the intention to rape and that intention is manifested by facts that point to an act of penetration. The facts of this case do not disclose attempted rape for several reasons. The appellant clearly expressed his intent to kill PW 1 when he barged into her house with a panga and a struggle ensued between them. Although he tore her clothes including her panties and injured her thigh, there was no expression of the fact that he wanted to rape her. He did not remove his trouser or penis to further such an intention. Furthermore, PW 2 who was present, did not testify that the appellant attempted to rape PW 1. The people who arrested the appellant including PW 3 and to whom PW 1 made the first report stated that the appellant had entered PW 1's house and beaten her. There was no mention of attempted rape. I therefore find and hold that the offence of attempted rape was not proved to the required standard.

16. The facts proved are clear that the appellant proceeded to the complainant's house with intent to cause her injuries and he did cause her injury. In this instance the learned magistrate could have invoked the provisions of **section 179** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** which entitled the court to convict the appellant for an offence which he was not charged but which was proved and was a lesser offence than that charged. Asike-Makhandia J., in ***Kyalo Mwendwa v Republic*** [2012]eKLR, observed, in reference to **section 179** of the ***Criminal Procedure Act***, as follows;

*As it can be readily seen, the trial court has jurisdiction to impose a substituted conviction for a minor cognate offence only. In other words, for the trial court to invoke this section,*

*the substituted conviction must be for an offence which is both minor and cognate to the offence charged ..... Section 179 of the Criminal Procedure Code, as it appears operates downwards as opposed to upwards....*

17. In my view, assault is a lesser offence to attempted rape or indeed rape as both offences may be preceded by an assault. This view may be supported by **Black's Law Dictionary 9<sup>th</sup> Edition** page 1186 which defines a cognate offence as, "**A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.**"

18. Under **section 251** of the **Penal Code**, "*Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years*" I therefore find the appellant guilty of assault causing actual bodily harm and I convict him accordingly. As regards the sentence, the act was unprovoked, deliberate and inflicted with a panga and would have caused greater harm had the complainant not run away. I therefore sentence to the appellant to 4 years imprisonment.

19. The appeal is allowed to the extent that the conviction and sentence is quashed and substituted with a conviction for assault occasioning actual bodily harm contrary to **section 251** of the **Penal Code** and he is sentenced to 4 years imprisonment.

**DATED and DELIVERED at HOMA BAY this 4<sup>th</sup> day of September 2015**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

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