REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.30 OF 2013

STEPHEN NTOITI M' NGULI…….....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant **Stephen Ntoiti M' Nguli** was charged with the offence of attempted rape contrary to **Section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006.** The particulars of the offence were that on 26th December 2005 at (particulars withheld) he intentionally attempted to have carnal knowledge of **MK** without her consent.

In the alternative, the appellant was charged with the offence of indecent assault on a female contrary to **Section 11 (1) of the Sexual Offences Act No.3 of 2006**. The particulars of the offence were that on 26th December 2005 at (particulars withheld) he unlawfully and indecently assaulted MK by touching her private parts. The Appellant was tried, convicted of the main count and sentenced to 20 years imprisonment.

The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal setting out the following grounds of appeal:

1. **That the learned trial magistrate failed to consider that the appellant was a first offender;**

2. **That the learned trial magistrate failed to consider that there is no medical evidence connecting him to the offence;**

3. **That the sentence is too excessive and very harsh;**

4. **That the learned trial magistrate failed to consider the appellant's defence.**

5. **That PW2 failed attend court during the hearing of my case.**

6. **That the prosecution did not prove their case to the standard required in law.**

The appellant therefore, prays that this court do quash the conviction, set aside the sentence and set him

free. He relied on his written submissions and did not add to them.

When the appeal came up for hearing on 27th October 2015, Mr. Mulochi, Learned Counsel for the State, opposed the appeal and contended that that the appellant was charged with attempted rape contrary to **Section 9(1) of the Sexual Offences Act** which section deals with attempted defilement but that the same was not fatal to the prosecution's case; that the evidence on record supported the charge of attempted defilement.

This being the first appellate court, it is its duty to examine the evidence afresh, analyse it and arrive at its own conclusions and determination. **(See Okeno v Rep 1972 EA 32)**

Before I consider this appeal on its merits it is important to go to the genesis of this matter: Initially the appellant was charged with the offence of **attempted rape contrary to section 141 of the Penal Code CAP 63 of the Laws of Kenya.** On 15th November 2006, the prosecution made an application to amend the charges so as to conform with the Sexual Offences Act No.3 of 2006 which had repealed the provisions of the Penal Code that the appellant had been previously charged under. The said application was allowed whereupon the appellant was subsequently charged afresh with the offence of **attempted rape contrary to Section 9 (1) of the Sexual Offences Act No.3 of 2006**. Section 9 (1) of the Sexual Offences Act that the appellant was charged with provides for **attempted defilement** as opposed to **attempted rape**. Unfortunately, the trial court did not notice this error and neither was the issue raised by the appellant. This was probably because the appellant was acting in person. Mr. Mulochi Learned State Counsel in opposing the appeal stated inter alia that indeed the section that the appellant was charged with provided for **attempted defilement** as opposed to **attempted rape** and submitted that this was not fatal to the prosecution's case as the evidence tendered supported the charge of attempted defilement.

This offence was allegedly committed on 26/12/2005. This is **before the Sexual Offences Act No. 3 of 2006** came into force. **The Sexual Offences Act came into force on 21/7/2006** when the appellant was already charged under the Penal Code. He had been charged **under Section 141 of the Penal Code** which in my view was proper. The application to withdraw the charge to bring it under the Sexual Offences Act was irregular. In view of Section 48 the First Schedule on **Transitional Provisions under the Sexual Offences Act, Para. 3** provided that:

"1. Not withstanding the provisions of any other Act, the provisions of this Act shall apply with necessary modifications upon the commencement of this Act to all sexual offences;

2. ....

3. Any proceedings commenced under any written law or part thereof repealed by this Act, shall continue to their logical conclusion under those written laws."

Further, **Section 23(3)(e) of the Interpretation and General Provisions Act Cap. 2 Laws of Kenya** provides:

"where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege obligation, liability, penalty, forfeiture, or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be imposed, as if the repealed written law had not been made".

In light of the above provisions, the magistrate erred in accepting the amendment of the charge to conform with the Sexual Offences Act. When the offence was committed, the law dealing with sexual offences was the Penal Code. Neither the appellant nor the State raised this issue but this court is under a duty to address it because if the court were to allow the charge as it stands, it would mean that the Sexual Offences Act was allowed to operate retrospectively which is unconstitutional. No law is deemed to have a retroactive effect **(See Section 77(4) of the retired Constitution)**.

Briefly, the prosecution's case was as follows; On 26th December 2005 at around 2:00PM **MK (PW1)** was going to the *shamba*. While on the road, she saw the appellant ahead of her. On reaching a certain bush, the appellant held her by the neck from behind and told her that they divert into a nearby bush but PW1 refused. PW1 then managed to slip away but the appellant caught up with her, held her neck and threatened her with a pen knife, dragged her into the bush, removed her pants and petticoat and told her that she would not get out of the bush until she had sex with him. The appellant then started having sex with her and as PW1 had cried out before, she attracted people's attention. PW2 Julius Rukungu is one of the people who responded to PW1's cries; whereupon the appellant ran away when he saw people coming. The public then pursued him, arrested him and took him to Miathene Police Station. She was later taken to Miathene District Hospital where she was treated and issued with a P3 form.

PW2 Julius Rukungu testified that on 26th December he was at home when he heard cries for help. He rushed to the scene and also made cries for help to attract the attention of the members of public. The appellant then came out of the bush running and by then he had not seen PW2. He then got a stone and threatened to stone the appellant if he ran away. The complainant was then brought to where he was by members of the public and her clothes were soiled. PW1 then pointed out the appellant as the person who had raped her. He further testified that members of the public were furious but he requested them not to lynch the appellant and that it was him who saved the appellant from the wrath of the public. He then caused the appellant to be taken to Miathene Police Post where **PW3 PC Fedesio Munyi** rearrested him from members of the public. PW3 escorted PW1 to Miathene Sub District Hospital and issued her with a P3 form.

PW4 Stephen Guantai a registered Clinical Officer at Miathene Sub District Hospital, examined and treated PW1 for bruises on the right side of the neck, and slight tenderness on the lumber region. There was no injury to the genitalia and no spermatozoa. He concluded that the alleged rape was not confirmed.

The appellant in his unsworn statement in his defence stated that on the material day he had gone to the bush to get some sticks to put up a pig's tray whereupon he met a group of people who ordered him to put down the sticks he had and alleged that he was one of those people who attack people. They took him to Miathene Police Station where he was charged with the current offence.

One of the grounds, the appellant alleged that PW2 did not attend court during the trial but that does not make sense. PW2 is Rukunga who testified in open court.

The appellant also complained that his defence was not considered but I find the contrary. The trial court stated as follows:

"***It cannot be said that the accused person was just arrested and framed up with the case. I find no logical reason why PW1 and 2 would do that. The accused person never intimated that there is a grudge between her accused, PW1 and 2 to suggest any frame up".***

By the testimony of PW1 as corroborated by the testimony of PW2, this offence was committed in broad daylight. The appellant was a person known to PW1. PW2 saw appellant emerge, running from the bush where the screams were emanating from and he helped apprehend the appellant. PW1 knew the appellant very well. I am satisfied that PW1's evidence was clear, consistent and remained uncontroverted even in cross examination and was corroborated by PW2. The appellant's defence was a bare denial. There was no reason why PW1 and 2, people who knew him so well, make such a serious allegation against the appellant.

PW2, 3 and 4 confirmed PW1's testimony that her clothes were torn and soiled during the ordeal. PW4 also found that the complainant had bruises on the neck and body – consistent with what PW1 told the court that the appellant held her by the neck and threatened her with a knife. The injuries, torn and soiled clothes were evidence of force used on the complainant.

PW4 told the court that she was 13 years old. PW2 confirmed that he heard the distress cries of a child and PW4 who examined PW1 confirmed that she was indeed a child. However, age assessment was

never carried out.

Though PW1 told the court that the appellant engaged in a sexual act with her before the members of public showed up, she was examined the next day and there was no evidence that she took part in the sexual act. However, she had bruises and her clothes were torn and soiled. The Doctor stated that the allegation of rape could not be confirmed. Indeed that from her word, there was no other evidence to support PW1's allegation of defilement. However, from the force used on PW1, even if the appellant had not yet engaged in a sexual act with PW1, his intentions are clear, that he was attempting to defile her.

As observed earlier, there is evidence that complainant was a child. The offence that the appellant faced was under **Section 9(1) of Sexual Offences Act** which I have found to have been irregular as the law applicable then was the Penal Code. The corresponding section under the **Penal Code is Section 145(2) of the Penal Code** (as amended by Act 5 of 2003) which provides that, anybody who attempts to have carnal knowledge of a girl under the age of 16 years is guilty of a felony and liable to imprisonment for life. I am satisfied that the appellant committed the said offence and there was overwhelming evidence on record to that effect.

I am guided by the Court of Appeal decision in ***183/2004 Joshua Otieno Oginga v Rep*** where a similar issue arose where an accused was charged under the Sexual Offences Act when the offence had occurred before the said law came into force. The court found for a fact that an offence had been committed and proceeded to set aside the conviction under the Sexual Offences Act and instead convicted the appellant under the Penal Code.

In this case, I find that the appellant did commit the offence of attempted defilement under Section 145 (2) as amended by Act No. 5 of 2003 which was in existence at the time the offence was committed on 26/11/2005. I set aside the conviction under Section 9 (1) (2) of the Sexual Offences Act and substitute therefore with a conviction under Section 145 (2) of the Penal Code. The appellant was sentenced to 20 years imprisonment. The appellant complained that the sentence was harsh and in exercise of my discretion, I hereby set aside the 20 years imprisonment and instead sentence him to 15 years imprisonment.

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF DECEMBER, 2015.

R.P.V. WENDOH

JUDGE

3/12/2015

PRESENT

Mr. Mulochi for State

In Person, Appellant

Ibrahim/Peninah, Court Assistants