Case Number:	Criminal Appeal 88 of 2015
Date Delivered:	11 Oct 2016
Case Class:	Criminal
Court:	High Court at Nyeri
Case Action:	Judgment
Judge:	John Muting'a Mativo
Citation:	Moses Kabue Karuoya v Republic [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	J.Onyiego - C.M
County:	Nyeri
Docket Number:	-
History Docket Number:	Criminal Case 46 of 2015
Case Outcome:	Appeal Dismissed.
History County:	Nyeri
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 88 OF 2015

MOSES KABUE KARUOYA…….....……..……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Appeal against Judgement, Conviction and Sentence in Criminal Case Number 46 of 2015, R. vs Moses Kabue Karuoya at Nyeri, delivered by J.Onyiego, C.M. on 1.12.2015).

JUDGEMENT

The appellant herein seeks to quash the conviction and sentence imposed upon him by the Learned Chief Magistrate in Criminal case number **46** of **2015** where he appellant was tried and convicted for the offence of attempted rape contrary to section **4** of the Sexual Offences Act.[1] The particulars of the offence were that on the 21th day of November 2014 at [particulars withheld] area in Nyeri County within the Republic of Kenya, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **A W M** without her consent.

It is the basic principle that criminal liability may be imposed only if all the ingredients of an offence are fully proved beyond reasonable doubt. The offence the appellant faced falls under the category of offences described as **"inchoate"** meaning *"not completely formed or developed yet, not yet completed or fully developed; rudimentary."***[2]**

In the case of *Bernard K. Chege vs Republic*[3] this court had the occasion to address its mind and to define in detail ingredients of incomplete offences also described as *inchoate* offences. *Inchoate* crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of *inchoate* crimes are criminal conspiracy, criminal solicitation, and *attempt to commit a crime*, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime.

An i*nchoate* offense requires that the accused have the specific intent to commit the underlying crime. An *inchoate* crime may be found when the substantive crime failed due to arrest, impossibility, or an accident preventing the crime from taking place.

Strictly *inchoate* crimes are a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves. It can thus be appreciated that it could extend the criminal law too far to reach behind those acts and criminalize behaviour that precedes those acts.

Every *inchoate* crime or offense must have the mens rea of intent or of recklessness, but most typically intent. Specific intent may be inferred from circumstances.[4] It may be proven by the doctrine of "dangerous proximity", and the presence of a "substantial step in a course of conduct".[5] The dividing line between legal and illegal conduct is whether there is a *"substantial step"* towards committing a *specific* crime.

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 or to prepare to commit the offence.

The essential ingredients of an *attempt to commit an offence* have been laid down in the following words:-[6]

"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 an 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,***[7]**

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

The act relied upon as constituting the attempt to commit an offence 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*.[8] The act 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 preparation to commit a felony, they must establish that the accused had the intention to commit the offence.[9] 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 . The question that calls for determination is whether or not the conduct of the appellant constituted an overt act sufficiently proximate to constitute preparation to commit an offence.

Spry J[10] (as he then was) put it more authoritatively when he stated:-

"The principles of law involved are very simple but it is their application that is difficult.....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"

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.

I now turn to apply the above enumerated principles of the law to the facts of this case. The complainants' evidence was that she hired services of the appellant, a motor bike operator to take her to her home and while on the way she asked him to stop at Kingumo Teachers College for her to drop a document and he agreed to the request, but upon reaching the gate he sped off and ignored her requests why he passed the gate. She attempted to call the person she was to see at the college but he turned to stop her from calling but in the process he lost control and jumped off the bike and the bike fell and he removed her from the bike. She screamed, but he told her to stop screaming, and threatened to stab her with a knife, she was afraid and kept quiet. He held her neck, she pleaded that he takes everything but leave her alone, but he said he wanted her. He demanded to have sex with her, but she told him she was HIV positive, but he said he did not care. She told him she was ready if he had a condom.

The complainant further testified that her phone rang several times but he would pick it himself but refuse to answer. He told her he had been admiring her for long and could not let her go. They negotiated for two hours. He made promises to her among them offers to pay her rent. He knocked her down and lied on her stomach. He removed her pant down to the knees. There was a struggle and he pinned her down and managed to put his penis between her thighs. He forced her to open her legs. He ejaculated on her thighs. He felt relieved and released her and ran away. She wiped herself using leaves. He offered to pay her Ksh. 2,000/= the next day to compensate her for what he did to her.

She reported to the police the next day and at around 5pm she led brother to Gatitu and after spotting the appellant she approached him and told him she had come for the Ksh. 2,000/=. As they were talking, her brother who had maintained a safe distance called the police and the appellant was arrested. Her brother, who was PW2 collaborated this evidence. Upon being arrested he said he wanted to compensate the complainant. The appellants mother also attempted to settle the issue by paying the complainant Ksh. 40,000/=. She agreed, but the OCS refused and insisted on the case proceeding. PW3 a police officer visited the scene and noted the ground was disturbed an indication of evidence of a struggle.

In his defence, the appellant denied committing the offence and called his mother as a witness but in my view her evidence was not helpful to the defence case and did not rebut the allegations levelled against

the appellant.

Counsel for the appellant submitted that the learned magistrate misconstrued the evidence which he described as circumstantial. In my view, the evidence tendered was direct **and not** circumstantial and after carefully evaluating it, I hold the view that the learned magistrate was wrong when he classified the evidence as circumstantial yet it was direct evidence. The complainant gave direct evidence of what she personally experienced. Her evidence cannot fall under the category of evidence described as circumstantial evidence. But I must hasten to add that, the fact that the magistrate classified the said evidence as circumstantial and cited a leading authority[11] on circumstantial evidence does not taint or invalidate his findings on conviction and sentence nor can it form a basis to overturn the conviction and sentence.

The evidence used to prove guilt is classified as either direct or circumstantial. Direct evidence, is a statement about a fact constituting a disputed material proposition of a rule of law, while circumstantial evidence is testimony about a fact or facts from which the disputed material proposition may be inferred.[12] Thus, circumstantial evidence can be defined as relying on certain proved or provable circumstances from which a conclusion can be drawn that it was the accused person who committed the offence.[13] It is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly, typically when a witness testifies about something which that witness personally saw, or heard. Both direct and circumstantial evidence are to be considered, but to bring a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty. This follows from the requirement that guilt must be established.

Counsel for the DPP submitted that the offence was proved to the required standard while Counsel for the appellant Mr. Ombonge was of a different opinion. However, counsel for the Appellant did not submit on the key ingredients of the offence of attempted rape as enumerated in the above authorities and dwelt on lesser issues such as whether or not the clothes had a tear or mud stains and medical evidence and in particular absence of medical documents to confirm the complainant attended treatment.

Counsel also submitted that the complainant recorded two statements with the police. The record shows that the complainant was subjected to cross-examination in the lower court. Secondly, no serious inconsistencies in her testimony were pointed out during her evidence that can be said to be of such a nature as to warrant the court to disbelief her evidence.

At the risk of repeating the position laid down in the above cited authorities, I reiterate that the key ingredients of the offence before me can be summarized as follows, namely, **(a)** *Intend to commit the offence;* From the evidence tendered, I find that intent was established.

The second requirement is the accused must **(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.* Evidence tendered is that the appellant knocked her down, lied on her, lowered her panty & forcefully opened her legs. Lastly the accused must **(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.***[14]**It is said the appellant forced the complainant down, lied on her, lowered her under wear to knee level, forced her thighs open and ejaculated after which he felt relieved and let her go. These were overt acts which viewed in the

circumstances show a clear intention to commit the offence, but the appellant fell short of completing the offence owing to the circumstances explained.

Justice Asike-Makhandia[15] (as he then was) put it more succinctly 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."

Counsel for the appellant submitted that the complainant had gone to see a person at Kigumo college and that the said person was not called as a witness. Section **143** of the Evidence Act[16]provides as follows:-

"No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact"

As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.[17]

Perhaps the leading authority on this issue is the case of *Bukenya & Others vs Uganda*[18]where the East African Court of Appeal held that the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent, that the court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case and where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

But in the same vein the court was categorical to state that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. My re-evaluation and analysis of the evidence submitted in the lower court concludes that this is not a proper case for the court to make an adverse inference because as concluded below, the evidence tendered was sufficient to prove the facts in issue.

I hasten to support my above conclusion by reiterating that it should be made clear that the rule in *Jones vs Dunkel*[19] which outlines the circumstances under which an adverse inference may be drawn where a witness is not called is grounded on common sense. The prosecution has discretion to assess the importance that the testimony of a witness would play, or would likely have played in relation to the issue concerned. I find no reason to make adverse inference for failure by the prosecution to call the said witness. In any case he was not at the scene.

I have carefully evaluated the evidence tendered in the lower court, the requisite ingredients of the offence and I am persuaded that the offence of attempted rape was proved to the required standard.

Section **4** of the sexual offences Act[20] provides that a person commits the offence termed rape if:-

"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."

A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than **five years** but which may be enhanced to imprisonment for life. The appellant was sentenced to **five (5) years** imprisonment, the minimum provided under the law. I find that the said sentence is lawful and I find no reasons to interfere with it. The appellant will serve the full sentence.

The upshot is that this appeal fails and the same is dismissed.

Signed, Delivered at Dated at Nyeri this 11th day of October 2016

John M. Mativo

Judge

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

[2] http://www.dictionary.com/browse/inchoate

[3]Criminal Appeal No. 120 of 2011-Nyeri

[4]*See People v. Murphy, 235 A.D. 933, 654 N.Y.S. 2d 187 (N.Y. 3d Dep't 1997)*

[5] James W.H. McCord and Sandra L. McCord, Criminal Law and Procedure for the paralegal: a systems approach, pp. 189-190, (3d ed. Thomson Delmar Learning 2006).

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

[7] See Barbeler {1977} QD 80

[8] {1965}Q B R 86

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

[10]Mussa s/o Saidi vs Republic {1962} E.A. 454, High Court of Tanganyika

[11] Maitanyi vs Republic {1988-1992) 2 KLR 75

[12] Michael & Adler, The Trial of an Issue of Fact: 1, 34 colum. L. Rev 1224, at 1274 (1934)

[13] Criminal Appeal No. 122 of 2003, Court of Appeal Nairobi

[14] See Barbeler {1977} QD 80

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

[16]Cap 80, Laws of Kenya

[17] Julius Kalewa Mutunga vs Republic, Court of Appeal, Criminal Appeal No. 31 of 2005, Also see *Alex Lichodo vs Republic,* Criminal Appeal No. 11 of 2015-Visram A, Karanja W, and Mwilu P. JJJA.

[18] {1972}E.A.549

[19] {1859} HCA 8; {1859}101 CLR 298, 308, 312

[20] Ibid