



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NOS. 171 OF 2014 & 25 OF 2018

APPELLATE SIDE

(Coram: Odunga, J)

ALEX MWANIA MUEMA.....1ST APPELLANT

FRANCIS MUTHIANI MUTISYA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 1800 of 2010, **M L Simiyu, Ag. SRM** on 28th August, 2014)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

ALEX MWANIA MUEMA.....1ST ACCUSED

FRANCIS MUTHIANI MUTISYA.....2ND ACCUSED

JUDGEMENT

1. The appellants herein **Alex Mwanja Muema** and **Francis Muthiani Mutisya**, were charged with two counts of attempted robbery with violence contrary to section 297(2) of the **Penal Code**, the particulars being that on 15th June, 2013 and on 29th July, 2013 at Kilala sublocation, jointly while armed with dangerous weapons namely *panga* attempted to rob **MM** money. The 1st appellant was further charged with the offence of rape contrary to section 3(1)(a) of the **Sexual Offences Act**, the particulars being that on 15th June, 2013 he unlawfully and intentionally caused his penis to penetrate the vagina of **M** without her consent.

2. In support of its case the prosecution called 5 witnesses.

3. PW1, **MM**, PW1, aged 80 years old was on 15th June, 2013, at 4.00am asleep with her husband when someone ordered them to open the door or he would break in. Upon opening the door, a person entered and hit her with a *machete* on her thigh. The witness however corrected her evidence that she did not actually open the door and that it was broken and that in fact two men entered with a torch. It was her evidence that she recognised the two as the appellants, both of whom though not her relatives were men raised in her village. When the men demanded for money, the husband said that though they had sold a cow, the buyer had not paid them at which point the 1st appellant proceeded to rape her in the presence of her husband under threat to kill them if they shouted. By that time the 2nd appellant had gone out. After the ordeal, the 1st appellant threatened to return and kill them if they reported the incident.

4. According to PW1, on 29th July, 2013, she went for a function at Kisovo with her husband, PW2 aboard a public service vehicle and while at Kilala, the two appellants boarded and when PW1 and PW2 alighted at Motoki, the appellants similarly disembarked but PW1 and PW2 left them behind. Later at 9.00pm the appellants once again went knocking at their door and again threatened to break open the door if not opened. According to PW1, she recognised the appellants by their voices and in fear of being raped, she shouted for help. However by the time the villagers came, the appellants had fled. Upon explaining the incident to the villagers, the appellants were pursued and the appellant

was arrested on the road and taken to PW1's son's home. The same day the 2nd appellant was arrested and PW1 confirmed that they were her assailants. The appellants were later picked by police officers from Masii. On 30th July, 2013, PW1 recorded her statement, was issued with a P3 form and was attended to at Masii Hospital.

5. According to PW1, nothing was stolen from her but she was raped and assaulted. Further the appellants demanded from her Kshs 10,000/= which was the same amount she had sold her two cows for.

6. Though she did not see the appellant when she sold her cow, PW1 stated that it was easy for the villagers to know if one sold a bull. It was her evidence that she recognised the appellant when the appellant flashed the torch at her since it was bright enough. It was her evidence that she raised the appellant when the appellant was a child. She stated that she disclosed to the police the appellant's name and identity since the appellant was raised in the same village as her. It was her evidence that the appellant usually accessed a path closer to her home on his way home and she had seen him severally that year. A few days prior to the incident she had seen him and they even spoke.

7. According to PW1, she had seen the appellant in March, April and May till the time of his arrest though she did not think that it was him. She however confirmed that her husband, PW2, was old sick and blind.

8. PW2, **MN**, PW1's husband was on 29th July, 2013 at 9.00pm in bed when the appellant went to their house, demanded that they open the door or he would break in. When PW1 opened the door, the appellant demanded for Kshs 10,000.00 and upon being told that there was no money said that in that event he would rape PW1. According to him the appellant went to their home twice and that these events took place on 15th June, 2013. It was his evidence that the appellant went where he was sleeping and he saw him clearly. According to him, he recognised the appellant by voice but later saw him carrying a *machete* in his hand and threatened to hack him into pieces as he raped PW1, who was PW2's age mate, in his presence. After threatening to kill PW2, the appellant left.

9. It was his evidence that on 29th July, 2013 in the company of his wife they went to Kisoko. However the appellants also boarded the vehicle in which they were travelling and alighted at the same place where they did. Later that night when they were retiring to bed, they heard a knock on the door and heard the appellant demanding that they open the door. Upon PW1 shouting for help, the appellant and his accomplices fled but the appellants were arrested by civilians and were later picked up by the police. It was his evidence that the appellants did not steal from him but only threatened him. It was his evidence that the appellants had a small torch the size of a pen which the 1st appellant held on to as he raped PW1 and which he directed to PW2 from a distance of 2 metres and thereafter on PW1. According to him the appellants were known to him since their childhood and were younger than his sons. It was his evidence that he can recognise their voices even in the dark and had no dispute with them.

10. According to PW2, he did not report the incident to the police for fear of the appellant and would not have reported had the appellants not returned the second time. However disclosed the incident to his close friends. As for the 2nd appellant, he did not know where he was arrested since he did not ask anyone to pursue him.

11. PW3, **JNM**, a daughter in law to PW1 and PW2 was on 29th July, 2013 in her home sleeping when she heard someone shouting for help and when she got out, she realised that the shouting was coming from her in-laws house. She then woke up her son aged 16 years and they rushed towards PW1 and PW2's house but on the way detoured to call a neighbour, one **Ngombi**. They then rushed to the scene where PW1 was still screaming and told them that someone had tried to break into her house. After further interrogation, PW1 disclosed that the attacker was the appellant. Thereafter the crowd dispersed and she remained with her in-laws whom she requested to go and spend the night at her house. While at her house, they disclosed that the appellant, who was their neighbour, had broken into their house and raped PW1. According to her the appellants were apprehended by the villagers and taken to her home. Later the police went and took the appellants away. It was her evidence that she had known the appellant for 20 years and that when she got married the appellant was a young boy and that she had no dispute with the appellants.

12. PW4, **James Kilonzo**, a clinical officer filled in a P3 form for PW1 on 30th July, 2013. According to him, there were no injuries noted since the alleged rape had taken place one month before his examination.

13. PW5, **Cpl Moses Mathenge**, was on 29th July, 2013 at 11.00 pm on mobile patrol with **PC Bosire** and **PC Karioki** when they were called by the OCS and informed to rescue some suspects arrested by civilians at Ngomano. However their vehicle got stuck and they failed to reach the scene. After daybreak through the assistance of members of the public they reached the home of PW1 where they found two suspects tied with a rope and seriously injured. Upon interrogation, PW1 informed them that the suspects had threatened to break into their house at night and that earlier on 1st June, 2013 the two suspects had gone to their house demanding for money after which the appellant raped PW1 in the presence of PW2 but due to the age of PW1 and PW2, the incident was never reported. PW5 was shown the place of arrest which was 50 metres from PW1's house and closer to PW3's house. The two suspects were then arrested, taken to Masii health Centre where they were treated. PW1 was also referred to the same health facility where she was treated and a P3 form filled.

14. PW5 however testified that the members of the public declined to record statements and fled because the appellants were critically injured and they feared they would be charged with assault.

15. Upon being placed on his defence, the 1st appellant in his sworn testimony stated that on 29th he woke up and took livestock for grazing after which he returned home and upon finding his little brother who had been sent home from school due to lack of school fees, he took the boy back to school till 1.00pm. After lunch he went to water the livestock and took them for grazing till sunset. He then had super and went to sleep. While sleeping someone knocked on his door and upon opening it, four armed men entered with crude weapons, tied him up and told him that they would explain later but drove him away while assaulting him. He was then taken to the home of PW3 where they alleged that he had attempted to rob PW1. They also brought another man and after assaulting him, called police officers who arrested them. According to him he did not know anything about the offence hence was seriously injured and sustained a fracture for no reason.

16. In cross-examination the 1st appellant admitted that all the residents of his village knew him very well including PW2 and PW2 who were a very old couple. In his evidence the people who went for him were known to him as they were from his village though he had no grudges with them. He admitted that he knew PW1's home very well and that he used to use the path nearby. He admitted that the complainants had bullocks and conceded that he had not explained what happened on 15th.

17. As for the 2nd appellant, he opted to make an unsworn statement in which he stated that on 29th July, he woke up and went to the *shamba* where he stayed up to 1.00pm after which he had lunch and called a rider who took him to Kilala to buy building materials but found the hardware locked. He then waited for a *matatu* which came at 4.00pm and at Mutula Market he alighted, went to a pub where he drank until 7.00pm. On the road he found some people whom he named and who started beating assaulting him threatening to kill him. As a result a struggle ensued and in the process they snatched his phone and money which phone was later recovered from PW3 where the police arrested him. After being taken to the hospital he was arraigned in court. He however denied any knowledge of the offence. In his evidence the people who arrested him did not come to court because the circumstances of his arrest would have vindicated him.

18. After considering the evidence the Learned Trial Magistrate found the evidence of the complainants very clear and concise and that the appellant knew that the appellant knew that the complainants had bullocks and that the appellant even borrowed them to use them in ploughing. The Court found that the circumstances were optimal for positive identification and that the assailants were persons who were not strangers to the complainants and that they knew the appellants by appearance as young boys who had been raised in the village and were age mates of their grandsons. The Court therefore found that the case was that of recognition which is more reliable than identification. Though the crime was committed at night in the dark, the complainants spent some time with the assailants who were unmasked and had a torch which they used in rummaging for money before the appellant raped PW1. It was therefore found that the circumstances were conducive for positive identification.

19. As regards the ingredients of attempted robbery with violence, the Court relied on **Oluch vs. Republic [1985] KLR**. In this case the court found that since the item capable of being stolen was not in the house thus not capable of being stolen, the evidence disclosed breaking in with an intention to commit a felony. Accordingly, pursuant to the provisions of section 179 of the ***Criminal Procedure Code***, the court found the appellants guilty of the offence of preparation to commit a felony under section 308 of the ***Penal Code***. Based on the evidence of PW1, the Court having found the appellant of guilty of the offence of rape and convicted him accordingly. The Court then convicted the appellants and sentenced them in counts 1 and 4 to 4 years imprisonment which sentences were to run concurrently and further sentenced the appellant to 10 years imprisonment. All the sentences against the appellant were also to run concurrently.

20. Before this Court the 1st appellant has raised the following grounds of appeal:

- 1. THAT, the trial magistrate erred in both law and facts in convicting the appellant on defective charge sheet.**
- 2. THAT, the trial magistrate erred in both law and facts in convicting the appellant on rape yet the charges were not reported to the police**
- 3. THAT, the trial magistrate erred in both law and facts in convicting the appellant on rape yet medical evidence availed was not satisfactory.**
- 4. THAT, the trial magistrate erred in both law and facts in convicting the appellant on contradictory evidence.**
- 5. THAT, the trial magistrate erred in both law and facts in convicting the appellant yet the prosecution did not produce any exhibit to prove burglary charges.**
- 6. THAT, the trial magistrate erred in both law and facts by failing to consider that 18 years was excessive and harsh for a young person like him.**
- 7. THAT, the trial magistrate erred in both law and facts for failing to note that the case was not proved beyond reasonable doubt.**
- 8. That he was convicted on the sole evidence of a single identification witness.**
- 9. That the Court shifted the burden of proof on him.**
- 10. That vital witnesses were never called to adduce evidence in court.**
- 11. That the prosecution did not prove its case beyond reasonable doubt**
- 12. That the Court did not evaluate and analyse the entire evidence on record.**

21. As for the 2nd appellant the following were his grounds of appeal:

- 1. THAT THE Hon. Court erred in failing to find that the charge sheet was defective for being at variance with the evidence.**
- 2. That the Court erred in not finding that he was not properly identified at the scene.**

3. THAT the Trial Court erred in not finding that the evidence of arrest was contradictory hence incapable of sustaining a conviction.

4. The Court did not adequately consider his defence.

Determination.

22. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See Okeno vs. Republic [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

23. Similarly in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely 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, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

24. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court’s decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See Pandya vs. R [1957] EA. 336 and Coghlan vs. Cumberland (3) [1898] 1 Ch. 704.

25. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634, thus:

“The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:

‘I would accept Mr. Byenkya’s submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).’”

26. In Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC (as he then was) said:

“While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance.”

27. The offence of attempted robbery with violence with which the appellants were charged fall within the category of offences known as inchoate offences. These type of offences were dealt with by Mativo, J extensively in the case of Moses Kabue Karuoya vs. Republic [2016] eKLR where the learned Judge expressed himself as follows:

“In the case of Bernard K. Chege vs Republic 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 *inchoate* 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. It may be proven by the doctrine of "dangerous proximity", and the presence of a "substantial step in a course of conduct". 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:-

“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,*

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 relieve 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. 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 (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.”

28. In this case, it was submitted that the issue of identification by recognition ought not to be considered during the trial to sustain a conviction due to mistaken identity which could have been resolved by a properly conducted voice identification. It was further contended that the inconsistencies and lack of corroboration as well as the failure to call vital witnesses ought to have led to the acquittal.

29. In this case however the case for the complainants was that on 15th June, 2013, the appellants attacked them in their house and that apart from the voices of the appellants they recognised the appellants well. In particular the 1st appellant had a torch which he used in rummaging for money and also used in raping PW1. There was no evidence that the appellants camouflaged themselves or that they attempted to conceal their identity in any manner. In the premises as far as the event on 15th June was concerned, it was a case of recognition other than identification.

30. In Peter Musau Mwanzia vs. Republic [2008] eKLR, the Court of Appeal expressed itself as follows:

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.”

31. It is agreed by the parties that the complainants knew the appellants very well as they were from the same village. In fact the complainants knew the appellants since their childhood and they had even transacted business when the 1st appellant borrowed their bulls for ploughing. In this case not only was the complainants’ knowledge of the appellant for a long time but it was for such time that the complainants could, in seeing the suspect at the time of the offence, recall very well having seen them earlier on before the incident.

32. The case was not one of a single witness as the appellants contended since the appellants were identified by both PW1 and PW2 as their attackers on 15th June, 2013. However as was held in Anjononi & Others vs The Republic [1980] KLR 59:-

“This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

33. In Libambula vs. Republic Criminal Appeal No 140 of 2003 [2003] KLR 683, the issue of voice identification was dwelt on by the Court of Appeal in which it stated as follows:

“Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. See *Choge v Republic [1985] KLR 1*.”

34. In this case I have no reason to differ with the finding of the trial court on the recognition of the appellants. There is no reason why the complainants would out of the whole village fabricate a case against the appellants with whom it seemed there was no prior grudge existing between them.

35. As regards the failure to call the alleged vital witnesses, section 143 of the *Evidence Act* provides that:

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

36. I am guided by the case of Mwangi vs. R [1984] KLR 595 where this Court stated:

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

37. The prosecution is not duty bound to call all persons involved in the transaction and his failure to call them is not necessarily fatal unless the evidence adduced by him is barely sufficient to sustain the charge. In Keter vs. Republic [2007] 1EA135 the court was categorical that:-

“ The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

38. The Court of Appeal sitting in Mombasa in Sahali Omar vs. Republic [2017] eKLR held that:

The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. *Keter v Republic [2007] 1 EA 135*). In this case, the testimony and evidence adduced by the five prosecution witnesses was sufficient to prove that the complainants had been defiled by the appellant. As such, the situation hardly called for the drawing of an adverse inference with regard to the ‘missing’ witnesses.”

39. I reiterate what the Court of Appeal stated in Benjamin Mbugua Gitau vs. Republic [2011] eKLR that:

“It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below

accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see *section 143 Evidence Act*. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys.”

40. In this case the persons who are alleged to have been vital witness were not witnesses on 15th June, 2013 when the attempted robbery and the rape occurred. Their evidence, in my view would have been of no use even if they had been called and in any case their absence was satisfactorily explained.

41. As regards the variance between the charge sheet and the evidence I associate myself with the position adopted in the case of **Willie (William) Slaney vs. State of Madhya Pradesh**, [A.I.R. 1956 Madras Weekly Notes 391], where the Supreme Court of India held that:

“We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent...We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms that it must all be “explained to him”, so that he really understands ... but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality. ... The essence of the matter is not a technical formula of words, but the reality. Was he told" Was it explained to him" Did he understand" Was it done in a fair way...Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.”

42. Accordingly nothing turns on that issue.

43. As regards the issue whether or not the appellant’s defence was considered it is clear that the appellants only dwelt on the events of 29th July, 2013 as opposed to those of 15th June, 2013. Accordingly as regards the events of 15th June, 2013, their defence was a bare denial. As was held by the Court of Appeal in **Isaac Njogu Gichiri vs. Republic [2010] eKLR**:

‘With regard to failure by the superior court to give due consideration to the appellant’s defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: “I find that the defence of the 5th accused is not true.” We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: “The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances.” We agree with this confirmation.

44. Similarly as the appellants did not deal with the events relating to the day the offences were committed the Learned Trial Magistrate was nor expected to dwell too much on material which he was not called upon to deal with.

45. However for an offence of burglary to be committed, it must be proved that the accused either broke in and entered a building with intent to commit a felony or having entered the building, with intent to commit a felony therein or having committed a felony, breaks out. In this case while it was PW1’s evidence that when the appellants demanded to be opened the door, PW2 stated that the same was opened for them by PW1. In fact PW1 had initially said that she opened the door. I am therefore not satisfied that the appellants either broke the door to gain entry or did so to get out. Accordingly burglary was never proved.

46. As regards preparing to commit a felony contrary to section 308(1) of the *Penal Code*, section 308(1) and (2) of the *Penal Code* provides that:

(1) Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.

(2) Any person who, when not at his place of abode, has with him any article for use in the course of or in connexion with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.

47. It was the Complainants’ evidence that the appellants were armed with *machete*. In **Muiruri vs. Republic [1983] eKLR**, F. E. Abdullah, J stated as follows:

“The essential ingredients of the offence under the said subsection are:

- 1. The person was not at his place of abode.**
- 2. The person was found with an article.**
- 3. The article was for use in the course of or in connection with any burglary, theft or cheating.**

The subsection also provides that proof that the person had with him such article made or adopted for use in committing a burglary etc. shall be evidence that he had it with him for such use.”

48. Having considered the appeal as regards the appellants’ conviction on the offence of preparing to commit a felony and the 1st appellant conviction on rape, I find no merit in it.

49. With respect to the sentence, it is clear that the offences were committed in one transaction. In the case of **Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97**, the then Court of Appeal for Eastern Africa in a judgment read by **Sir Joseph Sheridan** stated that the practice is, where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

50. The Court of Appeal in **Peter Mbugua Kabui vs. Republic [2016] eKLR** expressed itself on the matter as hereunder:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totalling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful” We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same.”

51. In this case it is clear that the series of offences which the appellants faced were committed at the same time in a single act/transaction. Therefore the Learned Trial Magistrate ought to have imposed concurrent sentences.

52. It is therefore my view that the conviction of the appellants on the charge of burglary was unsafe. The same is hereby set aside. As regards the conviction of preparation to commit a felony I do uphold the same. However with respect to the sentences, the same will run concurrently.

53. Save for the foregoing, the appeals are otherwise dismissed.

54. Right of appeal within 14 days.

55. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 21st day of December, 2018.

G V ODUNGA

JUDGE

In the presence of:

Appellants in person

Miss Mogoi for the Respondent

CA Geoffrey