Awii v Republic (Criminal Appeal E008 of 2025)
[2025] KEHC 5626 (KLR) (6 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5626 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKADARA

CRIMINAL APPEAL E008 OF 2025

J WAKIAGA, J

MAY 6, 2025

BETWEEN

VICTOR OCHIENG' AWII ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. M Kivuti delivered at Makadara Chief Magistrates Court in SO Case No 173 of 2018 on 23rd May 2024)

JUDGMENT

1. The appellant was charged, tried and convicted and sentenced to serve an imprisonment term of five years for the offence of attempted rape contrary to section 4 of the *Sexual Offences Act* No 3 of 2006, having been acquitted on the alternative charge of committing an indecent act with an adult contrary to section 11(A) of the Act.

2. Being aggrieved by the said conviction and sentence, he filed this appeal and raised the following grounds of appeal:

    a. The trial court erred in law and fact in failing to find that the prosecution had not proved its case beyond reasonable doubt

    b. The court erred in failing to find that the evidence on record revealed

    c. The court erred in law and fact by convicting and sentencing the appellant and failing to critically and judiciously evaluate evidence adduced by the prosecution

    d. The court erred in law and fact in failing to take cognizance of the glaring contradictions, inconsistencies and discrepancies on the face of the prosecution case

e. The court relied fully on the incredible hearsay and framed up evidence orchestrated by the prosecution witnesses

f. The court erred in convicting the appellant against uncorroborated evidence of a single witness.

3. In response to the appeal, the prosecution filed grounds of appeal to wit:

a. The appeal lacks merit and is an abuse of the court process

b. The appeal is misconceived, unsubstantiated and bad in law

c. The appeal does not demonstrate sufficient proper reason for the grant of the orders sought

Submissions.

4. Directions were issued on the disposal of the appeal by way of written submissions and on behalf of the appellant it was submitted that the trail court failed to mention the testimony of the appellant in her decision but quoted extensively and analysed the complainant testimony and disregarded the appellant testimony on the complaints character thereby ignoring the appellants defence contrary to the decision in Okethi Okele & others v Republic [1965] EA 555 where the court stated that the accused defence must be considered and weighed against the prosecution case.

5. It was submitted further that the court failed to take into account that PW2 and PW3 testified to being in the compound with other construction workers in close proximity when the accident occurred and basing its belief that the complainant was telling the truth on assumption that the appellant saw an opportunity due to the time and minimal traffic which was a miscarriage of justice and breach of the provisions of section 124 of the *evidence Act* .

6. It was contended that the court failed to note the sour relationship between the parties prior to the date of the alleged incidence as testified to by the witnesses which would have cast doubt on the credibility of the complainant's testimony and the likelihood that she could be framing the appellant .In support of the submissions, reference was made to the cases of Mary Wanjiku Gichira v Republic to the effect that suspicion however strong cannot be a basis for inferring guilt and Baraka Kahindi v Republic [2019] e KLR that where the case is based on one direct evidence, the court ought to apply the cautionary provision of section 124 of the *Evidence Act* in convicting the appellant.

7. It was submitted that the appellants evidence cast doubt on the prosecution case as he provided an alternative explanation to the events that took place and that the evidence of PW2 and PW3 did not corroborate the complaints evidence as the evidence was that the appellant was buttoning his trouser while leaving the changing room which did not link him to an attempted rape and that their testimony clearly showed that they had a preconceived stance on the character of the appellant as being a violent man and their nickname "jaluo" discredited them as independent witnesses.

8. It was contended that the circumstantial evidence tendered did not meet the test of Sawe versus Republic [2003] KLR364 and therefore the case was not proved beyond reasonable doubt.

9. On behalf of the respondent, it was submitted that

Proceedings.

10. This being a first appeal, the court is under a duty to re-evaluate the proceedings before the trial court and to come to its own conclusion thereon, while giving allowance that unlike the trial court, it did not have the advantage of seeing and hearing witnesses as was stated in the old case of Pandya v republic [1957] EA 336

11. PW1 DBN stated that on the material day she reported to duty at the United Emirates Embassy in Muthaiga at 6.20 am and met the appellant walking towards the gate, it was her evidence that he had changed his clothes and taken tea. She went to the changing room and as she was dressing, having put on her trouser, shirt and name tag and while closing(sic) her shoe, she realises that the appellant had entered the room and was holding her trouser at the backing forcing to remove it. He was naked with an erect penis ready to penetrate. She was ab le to identify him through his new sharp shooter shoes, she then turned and show him. She pushed him to the wall as he held her by the neck and pulled her shirt causing the buttons to come out.

12. She pushed him out causing him to fall out attracting people who were in the servant quarter. It was her evidence that the appellant had lowered his trouser to is ankle and that it was her skin tights which made it impossible for the appellant who already had an erect penis from penetrating her and that her screams attracted construction workers who came to the scene who asked her what had happened to her and advised her to call their supervisor who came to the scene and asked them why they wanted to be dismissed .

13. She was thereafter advised to report the matter to the police and that her trouser was torn at the back with three buttons missing and two bottoms of her shirt were also missing. It was her evidence that she knew the appellant well having worked with him for six months.

14. In cross examination, it was her evidence that there were no CCTV at the place and that they used to come to work in civilian clothes and change into work uniform. It was her further evidence that the House was not occupied at the time and that they were only two at the changing room having seen the appellant open the door fast and held her]trouser as she bent down to tie her shoe laces. After the incidence she continued working and were later called to the office where it was reported that they had fought and both of them suspended over unbecoming behaviour .

15. PW2 Geoffery Musuko stated that he got to work at 60.30 am on the material day and heard noises in the changing room and when they went to check, they found a man who used to called Jaluo ,leaving the room, buttoning his trousers. The complainant told them that the man wanted to rape her and when they asked the man what had happened he kept quite and said that no action would be taken and that the said man had earlier beaten someone who had not flushed the toilet and that he decided to testify against him because he had said he would be taken nowhere .

16. In cross examination he stated that he had worked at the site for 28 days and that he knew the appellant as a violent man and that the changing room was on the upper side of the compound near the gate but had never r been there before the said date. It was his evidence that he was not testifying so as to fix the appellant.

17. PW3 Patrick Marigi stated that he was with PW2 when they heard wailing from the security guards place which was one hundred meters away and when they responded they found the compliant with a torn blouse and the belt of her trouser open, next to her was a man who was abusing her saying that she had lost her figure on account of prostitution, they advised her to report to the policed. He stated that he had worked at the site for 26 days and knew the appellant as a violent man who had earlier differed with another old man .

18. In cross examination he stated that he knew the appellant who used to harass people and they thought he should have been KDF and that he did a bad thing to the lady

19. PW4 Selina Nyambu produced the medical report on behalf of Milka Mwikali who had examined the complainant on an alleged attempted sexual violence which occurred on 3rd August 2018. The victim looked sad and annoyed with tenderness on the left thumb . genital and anal examination was not

carried out , her shirt had missing buttons and trouser had three plucked buttons. In cross examination she stated that from the documents there was no evidence of sexual assault and that the injuries could be obtained from a flight and were classified as harm. She confirmed that the complainant obtained the injuries as a result of a physical struggle with the appellant

20. PW5 PC James Anduku arrested the appellant from their offices at SGA on 16th August 2018having been told that there was a complaint against him of attempted rape.

21. PW6 John Nyamwea was assigned the investigation of the case. He recorded the statement from the witnesses where the complainant stated that the appellant who had reported on duty before her as a guard at the gate went into the changing room and demanded to have intercourse with her. They struggled and during the shuffle her trouser got torn, she raised an alarm attracting people from the construction site. He issued her with P3 form which was filed and produced in court .

22. In cross examination he stated that there were CCTV cameras but were not functioning , he stated further that the complainants blouse had no problem and that it was only the trouser flap which was torn.

23. When put on his defence the appellant stated that he was working with the complainant together with one John Kilonzi Muthengi and that the complainant reported to work twenty minutes late and placed her civilian uniform on the record book and proceeded to wash her other set of uniform and when he asked her to remove them she refused and walked towards him while clicking while the appellant walked toward the gate. She then called John Kilonzi who called their supervisor who told them to report to the office the following day and upon stating their sides of the story they were accused of verbal abuse and were suspended for one week.

24. He denied attempting to rape the complainant and that whereas the complainant had bad blood with fellow workers, including a time when she spat on a gardener's vegetables, there was no bad blood between the two of them. In July 2018, the complainant had made a complaint against the appellant, having chased her with a panga which was not true and that there were CCTV cameras at the compound which would have captured the incidence.

25. In cross examination he confirmed having worked with the complainant for six months and knew each other well and that he was with her at the changing room at 6.30am to pick the record book and that there were CCTV cameras in the room. He stated that PW2 and PW3 were not known to him since they were working at the construction.

26. DW2 Peter Kitali confirmed that on the material day he was called by one of the guards who informed him that there was a quarrel between the complainant and the appellant and that he needed to go to the scene and found both of them and having listened to them he recommended that a disciplinary action be taken against both of suspension for one week, after which they were to go for hearing, but only the appellant appeared. The complainant later appeared with police who arrested the appellant on allegation of rape which she had not mentioned during the internal investigations.

27. In convicting the appellant, the trial court had this to say "The scene was within residential area next to karura forest with minimal human traffic. It was 6.20 am and the accused did not envisage that any other person would be within the precincts of the residence. The fact that the accused held the complainant by the trouser, lowered his trouser and inner wear and exposed his penis is crystal clear indication of what he had pre-meditated to do: to rape the complainant save that she raised alarm and interrupted his mission'.

Determination.

28. From the proceedings herein, the only issue for determination is whether the prosecution case against the appellant was proved to the required standard? It was submitted by the appellant that the trial court failed to mention the appellant's testimony and made the decision based on the complainant's testimony and the uncorroborated evidenced of the same, it was further submitted that the court did not take into account the sour relationship between the appellant and the said witnesses as was stated in the case of Baraka Kahindi v Republic [2019] eKLR

29. It was further submitted that the court failed to take into account the fact that the prosecution case was based om mere suspicion and framed up evidence.

30. The respondent on the other hand submitted that that the appellant was positively identified and that the evidence that the appellant had removed his trousers and boxers to the ankle was proof of attempted offence as was stated in the case of Abdi Ali Bare versus Republic [2015] eKLR and that the complainant had not consented to engage in any sexual activities with the appellant.

31. In this matter save for the testimony of the compliant and the appellant, the case was purely based on circumstantial evidence. as submitted by the appellant the two other prosecution witnesses offered no corroboration to the complaint's testimony as they contradicted each other as to the distance where they were against the changing room and as whether there was noise coming from the said changing room or wailing by the complainant.

32. There is also the issue of the first report made by the complainant to their employer, where it was clearly indicated that there was a fight between the appellant and the complaint as confirmed by DW2 and the fact that when the complainant went for P3 form, it was only her finger which was in issue and not the sexual organs which were never examined, thereby leading to an inference that it was an assault.

33. I have also noted that one very important witness was not called to testify leading to an adverse inference that had he been called it would have adverse to the prosecution case this being John kilonzi who was on duty with the appellant and the complainant and whom the complainant first made a report to.

34. In convicting the appellant, the trail court based the same on speculation which was not supported with evidence on record to wit that the accused had not envisaged that any other person would be within the compound whereas the evidence on record was that there was on going construction and that there were three guards on duty in the compound all the time.

35. As submitted by the appellant the case was based on suspicion and mere suspicion however strong cannot be a basis for a conviction which must be proved beyond reasonable doubt and that the benefit of any doubt raised in the prosecution case must be given to the appellant

36. I find and hold that the prosecution case was not proved beyond reasonable doubt and therefore allow the appeal set aside the conviction and sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

SIGNED DATED AND DELIVERED THIS 6th DAY OF MAY 2025

J WAKIAGA

JUDGE