Ewoi & 2 others v Republic (Criminal Appeal E034 of 2023)
[2024] KEHC 3791 (KLR) (5 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3791 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL E034 OF 2023

RN NYAKUNDI, J

APRIL 5, 2024

BETWEEN

LOKARETO EWOI ..... 1ST APPELLANT

LOSINYEN NAKUA ..... 2ND APPELLANT

EWOI LOBOKI LOMUNYA ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction of 15th July, 2022 by the Principal Magistrate, the Honorable C.M Wekesa in Lodwar Law courts in Cr. No. E001 of 2019)

JUDGMENT

Representation:

Mr. Wasike for the state

1. The appellants were jointly charged with the offence of attempted murder contrary to section 220(a) of the penal code. The particulars were that on 31st December, 2018 in Turkana South sub-county within Turkana County they attempted unlawfully to cause the death of RI by firing live rounds of ammunition targeting her physical frame. In addition the Appellants were also charged with the following counts namely; Rape contrary to section 10 of the *Sexual offences Act* No. 3 of 2007. Particulars of the offence were that on 31st December, 2018 in Turkana sub-county within Turkana County in association with others not before court intentionally and unlawfully caused their penis to penetrate the vagina of RI.

2. Thirdly was the count of committing an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the day of 31.12.2018 in

Turkana South Sub- County within Turkana County, intentionally touched the buttocks and vagina of R a child aged 17 years with his penis.

3. The appellants were tried, found guilty and convicted as follows on the main charge of attempted murder and sentenced to 15 years imprisonment. Being dissatisfied with the said judgment the appellants lodged the present appeal relying on the following grounds: As for Lokareto Ewoi he deponed as follows;

    1. That the trial magistrate erred in law and in fact by failing to ensure that the appellant was supplied with statement and the prosecution exhibits throughout the trial.

    2. That the trial magistrate erred in law and in fact by failing to inform the appellant his right of representation by an advocate.

    3. That the trial magistrate erred in law and in fact by failing to observe that she was not clear in which charges the accused person was convicted.

    4. That the trial magistrate erred in law and in fact by failing to observe that no exhibits availed in the main charge the appellant was convicted with. i.e. guns used to shoot the victim.

Appellant's submission

4. The appellant submitted that his rights guaranteed in Article 50 (2) (g) were violated by the trial court as the record of the trial court does not indicate whether it informed him of his right to choose to be represented by an advocate. Secondly the trial magistrate failed to observe that appellant was a lay person and not well conversant with legal matters and ought to have been represented by an advocate or be informed of the right. He cited the case of Republic Versus Karissa Chengo & 2 other (2017).

5. It was the appellant's submission that the trial magistrate erred in law by convicting the appellant on the offence of attempted murder contrary to section 220(a) of the penal code, which was not proven by the prosecution as the main charge. That the trial court took advantage of the fact that the appellant was a layman who did not understand legal matters. Further that the allegation of spraying of bullets cannot stand for reasons that the victim had no sustained injuries. In essence it was his submission that he was not accorded a fair trial.

6. He finally submitted that there was no justification whatsoever for the trial to have been conducted in hurry and in the process infringing on his right to a fair trial. The appellant further relied on the principles in Joseph Kiema –vs – Republic [2019]eKLR, Pett –vs –Greyhound Racing Association [1968] (2) ALL ER545 and also AMR –vs – Republic [2021]eKLR.

7. The other appellant was Losinyen Nakwa who also based his appeal on the same grounds like Lokareto Ewoi. The grounds were also supported by the same submissions in word by word as premised in Lokareto submissions. Finally Ewoi Loboki Lomonyun also aggrieved with conviction and sentence borrowed a leaf from the submissions by his co-appellants all dated 8/7/2023. By the time of preparing this judgment it is clear that the Respondent was yet to share his perspective on the appeals filed by the appellants.

8. Analysis and determination

9. Having reviewed the trial Record, the grounds of appeal and the appellant's, the two main issues for determination are as follows: -

    i. Whether the conviction was proper and safe.

    ii. Whether the sentence was appropriate.

10. Whether the conviction was proper and safe.

11. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See Okeno vs R [1972]EA 32, Eric Onyango Odeng v R [2014]eKLR.

12. In evaluating the evidence afresh, the appeals court is to be guided by the threshold on the required standard of proof of beyond reasonable doubt set out in the well-known dictum in Woolmington – vs – DPP (1935) AC 462 and Miller – vs - Minister of Pensions [1947] 2 ALL ER 372 where Lord Denning J held that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt but the evidence should be as strong as to leave only remote possibility in the defendant's favor.

13. The case for the prosecution according to PW1 RE she recalled the events of 31st December, 2018 while she was asleep inside her house and at that moment she was in company of PW2 EE. Their evidence was to the effect that some three people emerged got hold of PW1 and started beating her. In response PW1 told the court she started screaming calling mum mum who was in another house. She could also hear her aunt crying out to the assailants 'please don't rape me I have a young child'. It did not take long before PW1 heard some gun shots as the assailants pulled her, tied her legs using a piece of cloth forcing her to accompany them towards the lagga near AGC School. That is the scene where she was raped in turns by the four men out of the six men at the same scene. When they were done with the ordeal of raping her, she was ordered to sit on top of a hill and being threatened by a man who spoke in Turkana language that they were going to spray her with bullets as they pointed the guns over her head. She however managed to take flight from the scene to a nearby house where she found a lady who was breastfeeding her child and on explaining the circumstances she was also shocked of the incident. It was also the case for prosecution from the testimony of PW2 that on the material day they were surrounded by some men armed with rifles who threatened their security and right to life. It was the testimony by PW2 that he was able to identify the attackers from the window being illuminated by the lights. That the lights were bright targeting both houses. Without confronting the attackers she witnessed PW1 crying out for help as she was being forced to accompany them towards the lagga. PW2 decided to walk to the police station so that he could report the incident which had put PW1 in danger. It was further the evidence by PW1 and 2 that they were to record the complaint to the police and thereafter went to the hospital for examination and treatment. In the course of the investigation PW1 and PW2 participated in an identification parade on 1st January, 2019 where they confirmed that to the police that Lokareto Ewoi, Losinyen Nakua and Ewoi Loboki Lomunya were part of the gang which terrorized them on the 31st December, 2018. The identification parade forms were produced as an exhibits by PW3 Inspector Sammy Otieno.

14. At the close of the prosecution case each of the accused person was placed on his defence and in rebuttal testified as follows;

15. The 1st appellant Lokareto Ewoi in a sworn statement denied the three (3) counts of being at the scene of the crime as alleged by the prosecution witnesses. He told the court that on 28th December, 2018 that he was at his home waiting for customers whom they trade together in buying and selling goats. He denied any knowledge of knowing the co-accused in this matter. As for Losinyen Nakua he also gave a sworn statement of defence denying any involvement with the offence of attempted murder or rape as fronted by PW1 and PW2. He denied being at the scene of crime on the material day as he recalled that on 31st December, 2018 he spent a night at Lopogo's place though he did not call him as a witness. As for Ewoi Loboki Lomonyo he told the court that on 29th December, 2018 he left his home in Kataruki

to go and visit a friend by the name Lorot on arrival at Lokichar he only found his brother and decided to spend a night at that homestead as Lorot had gone herding his livestock. The very material day of the arranged incident found him within Lokichar locality. That is where the Kenya police reservist in a vehicle effected an arrest and took him to the police station where he was to be investigated and later charged with the offences he did not commit.

16. The other witnesses who testified on behalf of the accused persons include Philip Ekine and Cecilia Ekai. The evidence was to the effect that the fourth appellant on 31st December, 2018 spend the night at Lokichar. Hence bringing into perspective another by defence. That is the evidence that only deals with the entire historical background of the indictment facing the appellants and their ultimate conviction and sentence. To start with the question of significance is what does law provide as the elements of attempted murder.

17. The offence of attempted murder under Section 220 (a) of the Penal Code provides as follows,

> " Section 220 -Attempt to murder
>
> Any person who—
>
> (a) Attempts unlawfully to cause the death of another; or
>
> (b) with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life."

18. I also make reference to section 388 of the Penal Code which states as follows: -

> (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill 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.

19. From the above legal provisions, the main ingredient of an attempted offence is the intention to commit the said offence, whether or not the same is actually carried out to fruition or not. This intention is what constitutes the criminal intent or mens rea of the offence while the actual execution of any act in an attempt to commit the crime is the actus reus. Thus, in the present case, the main ingredients for attempted murder would be the intention to cause the death of another and the actus reus would be the actual act that would likely to lead to the death, but which subsequently fails.

20. Lord Goddard C.J. in R. vs. Whybrow (1951) 35 (1951) 35 CR APP REP, 141, stated as follows on mens rea in respect of the offence of attempted murder:-

> " ..... But if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime."

21. Mens rea in attempted murder was also explained in Criminal Law, Butterworths (1998) 6th Edition at page 288 that, "Nothing less than an intention to kill will do."

22. It follows then that the acts of an accused person must be considered and determined as to whether they were intended for the death of a victim and a determination must be made on whether there was an intention to commit the act, which will all be a question of fact. The Court of Appeal explained this principle adequately in Abdi Ali Bare vs. Republic (2015) eKLR. Githinji, Mwilu J and M'Inoti JJA stated thus:-

> "…….The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence. In the work quoted above by Smith & Hogan (Butterworths), the authors give the following scenario at page 291 to illustrate the distinction:
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> > 'D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position, loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder...'
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> In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder. In Cross & Jones' Introduction To Criminal Law, Butterworths, 8th Edition (1976), P. Asterley Jones and R. I. E. Card state as follows at page 354:
>
> > '..[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted...'
>
> The learned authors add that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit murder or whether the accused had done more than mere preparatory acts."

23. In the present appeal, as noted at the trial court the intention to kill the victim was manifested in their conversation spoken in Turkana language and loosely translated to mean "lets kill this thing" and thereafter it was followed by firing of rounds of ammunition. She was not able to identify who did what act at a particular point in time.

24. I appreciate the fact that the court had the benefit of observing the demeanor of the accused but I am of the considered view that the prosecution should have gone a mile further in establishing the intention

to kill. The police should have conducted their investigations by even visiting the scene in an attempt to recover any cartridges from the alleged sprayed bullets. Purposely it is for the prosecution to establish that the appellants did something under the circumstances for a reasonable person to believe that an act or omission constituting a substantial step in a course of conduct planned to culminate in causing the death of the complainant. Whether the appellants were to cause the death of the complainant is a question of fact for the trial court to decide. Purpose is a condition of the mind which cannot be seen and can only be determined by inference from conduct, words or acts of the appellants to be proven by witnesses who saw the incident take place. Proof of purpose is within the power of the court to rule that the prosecution has furnished probative evidence of beyond reasonable doubt on the acts that occurred, the weapon used, the location, number and nature of wounds inflicted and all that was done or said by the appellants preceding. Connected with and immediately succeeding the events in actualizing attempted murder. The abandonment of the criminal effort must originate with the accused persons and not be forced upon him or her by some external circumstances such as police intervention. From the key pointers for the offence of attempted murder the prosecution case must therefore demonstrate under section 107(1), 108 and 109 of the *Evidence Act* that the Appellants with a common intention manifested malice aforethought as stipulated in section 206 as read with section 203 to commit the offence of murder as defined in the penal code. Secondly that at the time of committing the offence, the appellants had this intent, they performed an act which was calculated and designed to accomplish the crime under section 203 of the penal code but fell short of the completed crime. That the unlawful act by the appellants which came close to bringing it about that in the ordinary and likely course of things would have proximately resulted in the death of the victim had they not been stopped or prevented from completing their apparent course of action. Malice aforethought under section 206 of the penal code means not only ill will or spite or as it is ordinarily understood to be sure but it also means the condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in his or her death without just course, excuse or justification. In determining this offence in question the other rider is for the courts to evaluate better the instrument involved was a deadly weapon by its nature, the manner in which it was used, the size and the strength of the appellants as compared to the victim.

25. On scrutiny of the evidence by PW1 she gave a chronology of events as to what transpired on the night of 31st December, 2018 on or about 1.00A.M. She talked of having been asleep, hearing screams and heard her aunt crying that please don't rape me. That she was able to see the first accused in those circumstances and this was the reason he identified him during the identification parade conducted by PW3. It is also Crystal clear from the record that she was pulled out of the house and taken to a lagga where she was raped by the assailants. In the same transactional chain of events PW2 also alluded to the commission of the crime as against PW1.

26. I have had the advantage of reading the record on the prosecution case and the defence to appreciate as to what truly happened on the night of 31st December, 2018. The circumstances as they appear at a time were not sufficient to create such a belief in the mind of the session magistrate that all the elements of the offence of attempted murder were in place and proved beyond reasonable doubt. I find from the evidence that on or about the alleged date it is the case for the prosecution that the appellants were armed with rifles and ammunitions which they used against their victims. Interesting enough no evidence of an investigating officer visiting the scene and documenting it with regard to any cartridges or even live ammunitions which had fallen on the way side. The circumstances as explained by PW1 and PW2 in their evidence on oath are so mixed up that one cannot establish that all the ingredients of attempted murder were proved beyond reasonable doubt. I am alive to the position in law that a fact in issue in any criminal or civil proceedings can be proved by the testimony of a single witness. However when I weigh the evidence of PW1 and that of PW2 there are such contradictions

so material and fundamental to create a doubt in the mind of the court to such a degree to lessen the standard and burden of proof of beyond reasonable doubt vested with the state. The learned trial magistrate heavily relied on the evidence of PW1 and PW2 to convict the appellants but their certain pieces of evidence which do not add up for lack of corroboration. The trial court was supposed to be cautious with regard with the contradictions as between PW1 and PW2. The victim evidence touched on rape and committing an indecent act but as to what happened to the two counts the record is dead silent. The learned trial magistrate entirely focused freely on attempted murder but according to the testimony of PW1 and PW2 the flow of evidence is that it does go to the gist of the case and does affect the prosecution case.

27. What is more fundamental in this appeal is on the question of identification evidence as strongly presented by the prosecution relying on the identification parade forms duly executed by the witnesses and the parade officer PW3. It is trite law that identification evidence is well guided by the various decisions generated by the superior court. One such landmark case is that of R –vs- Turnbull & others [1973] 3 ALL ER 549 which decision stated as follows on identification.

> " ... The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be mad. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way ...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".

28. The court of appeal in the case of Wamunga –vs- Repbulic (1989) KLR 426 stated as under:

> " it is rite 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 form possibility of error before it can safely make it the basis of conviction."

29. From the evidence on record, it is very clear that the manner in which the identification parade was carried out by PW was contrary to the approved rules on identification. First and foremost, there are no accompanying notes by the parade officer on the physical description of each of the appellants to necessitate mounting of the identification parade. Secondly, the identification parade form governed by Chapter 46 of the force standing orders provides inter alia that the accused /suspected person or persons would be placed at least eight (8) persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused or suspected person or persons being suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent. Thirdly, the accused/suspected person must always be informed of the reason of the parade and that he may have a solicitor or friend present when the parade takes place. Fourth, the record shows that all the four identification forms are silent on the above clauses which clearly sets out the guidelines to ensure that the parade is conducted with scrupulous fairness, otherwise the value of the identification has evidence is considered listened or nullified. Fifth, we are not told before the police conducted the identification parade an inquiry as to the visual identification from the key witnesses had been found reliable in terms of the Appellants appearance or physical description.

30. I tend to think when I examine in detail the identification parade forms that the procedures undertaken by PW3 were mainly a formality to have the appellants face the respective indictments as stated in the charge sheet. From the legal perspective this was a dock identification where witnesses identified the appellants and any previously identification was usually not clear at all to give rise to the identification parade. An assertion by the witnesses base wholly or partly on what PW1 saw to the effect that the appellants were present at or near the scene of crime was never corroborated by any other direct or circumstantial evidence on the commission of the offence. The significance of the words to the effect is where this court finds that there was uncertainty as to the surrounding environment on the alleged intensity of the light available, the assistance between the witness and the suspect, the account on time taken to observe the physical appearance and features of the appellants to rule out any mistaken identity or error of persons seen for the first time at the scene of the crime. The admissibility of identification evidence is a question of law as opposed to a matter of discretion exercisable by the trial court. It was up to the learned trial magistrate to determine whether she can legitimately rely upon the identification parade forms given the doubts relating to the reliability of the witness testimonies. The absence of clear and concise reasons in the judgement of the learned trial magistrate is a testimony that the evidence on identification was unreliable and therefore inadmissible as against the appellant. The burden of proof on this element relates to the circumstances in which the identification was made by the prosecution witnesses. Thus in determining whether the prosecution had satisfied the burden of proof beyond reasonable doubt to affirm the judgment of the court below I take cognizance that the assessment of the internal witness factors, external factors, and the method of collecting the identification witness was wanting. There was a substantial risk of error because the incident happened in the night precisely at 1.00am and no clarity was given as to the nature of light used by the witnesses to positively identify the appellants. The prosecution successfully failed to testify the burden of proof of beyond reasonable doubt that there was good lighting on or before or after the alleged offence took place.

31. It is imperative to state that the appellants raised the defence of alibi that they were not at the scene as prompted by the prosecution witnesses. The court of Appeal in the case of Karanja –vs- Republic 1983 KLR made the following observations:

    1. In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the cases, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought.

    2. It is improper for the court to treat prosecution and defence cases in isolation. The judge in this case did not commit this impropriety as he properly summarized the prosecution's case in great detail.

    3. The burden of proving the falsity of the defense was wholly on the prosecution and the judge did not misdirect himself on this when he stated that: the rule about circumstantial evidence is that it must be such as to be explainable only upon the hypothesis of the accused's guilt and incompatible with any other innocence explanation."

    4. The summing up to the assessors ought to be read as a whole and not as a few sentences in isolation if the true interpretation is to be derived for it. The judge's notes of his summing up should have been clearer and they should in any case, have formed part of the record, However, it had been satisfied that, taken as a whole, the directions which the judge administered, both to himself, and to the assessors, showed that he considered and then rejected the defence case, and that he was satisfied of the appellant's guilt beyond all reasonable doubt.

32. I agree with the appellants that the alibi was in fact raised during the trial and the same was never discussed by the learned trial magistrate to have it rejected and in lieu accept the prosecution evidence as the one which has discharged the burden of proof of beyond reasonable doubt. In my own view the alibi deed raises some doubt on the evidence of the prosecution witnesses which had some contradictions and gaps as to whether the appellants were actually at this scene of the crime. In the case of Bogere Moses & Another v Uganda (SC) Criminal Appeal No 1 of 1997 the court stated inter alia that:

> "What the amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused was at the scene of crime, and the defense not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per the other version is unsustainable."

33. In my view, considering the evidence offered by the prosecution and on account of the issues discussed elsewhere in this judgement on identification and the alibi defence, I am satisfied that the burden of proof of beyond reasonable doubt which is of greater weight to have convinced the learned trial magistrate to convict the appellants for the offence of attempted murder contrary to Section 220 (a) of the Penal Code falls short of the required threshold to enforce the judgement of the court below. At its core it is about the right of each Kenyan citizen charged with a crime to have the state prove its case against him or her beyond a reasonable doubt. This great and noble right is at the very core of our criminal justice system of ordered liberty, it is also a great bulwark of our fundamental rights and freedoms as embedded in *the constitution* and indeed the bedrock aspect of criminal law.

34. All this points to the ultimate issue that the judgement of the Lower Court cannot be left to stand given the piercing of its legitimacy. The way forward is for the Appeal as filed by the appellants to be allowed to have them set free unless otherwise lawfully held. Given that is the position I have taken, I find no reason to indulge myself on the prudence of sentencing process and verdict of fifteen (15) years imprisonment for the offence of the attempted murder contrary to Section 220 of the Penal Code.

DATED AND SIGNED AT LODWAR THIS 5TH DAY OF APRIL, 2023

In the presence of;

Mr. Wasike for the state

Appellant present

.....

R. NYAKUNDI

JUDGE