



**Wamalwa v Republic (Criminal Appeal E023 of 2023)
[2024] KEHC 3388 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E023 OF 2023
AC MRIMA, J
APRIL 11, 2024**

BETWEEN

JOHN WAFULA WAMALWA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. C.M. Kesse (Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 194 of 2018 delivered on 24 th May, 2019)

JUDGMENT

Background:

1. John Wafula Wamalwa, the Appellant herein, was charged with two counts. The first one was on the offence of Attempted Rape contrary to Section 4 of the [Sexual Offences Act](#). The particulars of the offence were that on 4th November, 2018 at Trans Nzoia County, the Appellant intentionally and unlawfully attempted to cause his penis to penetrate into the vagina of RNN, without her consent.
2. The second count was the charge of Assault causing actual bodily harm contrary to Section 251 of the [Penal Code](#). The particulars of the offence were that on 4th November, 2018 at Trans Nzoia County, the Appellant unlawfully assaulted RNN thereby causing her actual bodily harm.
3. When the Appellant was arraigned before the trial Court, he pleaded not guilty to the offences. After full trial, the Appellant was convicted on both counts. He was sentenced to serve 10-years' imprisonment for the offence of attempted rape and to a sentence of 1-year imprisonment for the offence of assault.
4. The record was, however, silent on how the sentences were to run.



The Appeal:

5. The Appellant was aggrieved by the conviction and sentence, hence, this appeal. He mainly challenged the severity of the sentence. He also contended that his defence was not properly considered.
6. In the premises, therefore, the Appellant prayed that the appeal be allowed by quashing the conviction, the sentence be set aside and that he be forthwith set free.
7. Parties disposed of the appeal by way of written submissions. According to the Appellant's undated submissions, the Appellant expounded on the above grounds and referred to several decisions in support of the arguments. For these reasons, the Appellant prayed that the appeal be allowed.
8. The Respondent on its part relied on its written submissions dated 4th November, 2023. It submitted that all the ingredients of the offences that the Appellant had been convicted of were proved to the required standard of proof.
9. Learned Counsel for the State then submitted that the sentencing was proper. For these reasons, the prosecution urged this Court to dismiss the appeal, uphold the conviction and affirm the sentence.

Analysis:

10. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono vs. Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.
11. Having carefully perused the record, this Court is now called upon to determine whether the offences of attempted rape and assault were committed, and if so, whether by the Appellant.
12. It is established by law and settled judicial precedents that the offence of attempted rape carries four components. They are the age of the victim, whether there was an attempt to penetrate the sexual organ of the victim, whether there was consent and the identification of the assailant.
13. Before dealing with the said aspects of the offences, this Court will tender a brief summary of the evidence at trial.
14. The prosecution's case was rendered by five witnesses. The complainant, RNN, (testified as PW2) narrated how she was working in her farm with her two sons [who testified as PW3 and PW4] when the Appellant suddenly appeared from a nearby bush having already undressed his trousers to the knees, held PW2 who was bent and said that he would always try until he succeeded in raping her.
15. The Appellant had a sickle in one of his hands which he used to injure PW2 in the cause of the struggle. The attacker also tore PW2's underpants and her dress. PW1 raised alarm as PW4 ran to call their father who, on appearing, the Appellant ran away.
16. PW3 and PW4 affirmed the evidence of PW2 and also identified the assailant as the Appellant who was their neighbour.
17. The matter was reported to the police where PW2 was escorted to hospital. She was examined by PW1, a Clinical Officer, who confirmed some injuries on her thighs and stomach. The injuries had been caused by a sharp object.



18. PW5 was the investigating officer. She visited the scene and recorded statements and formed the opinion, and, eventually charged the Appellant with the present offences.
19. After close of the prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on his defence.
20. His unsworn testimony was that he was framed as he had disagreements with PW1's husband who had assaulted him.
21. He urged that the case be dismissed.
22. On the basis of the above evidence, the Appellant was convicted as charged with attempted rape and assault and sentenced accordingly.
23. This Court will now consider whether the offences of attempted rape and assault were proved. The starting point is whether the offence of attempted rape was proved.

Age of complainant:

24. There was no contest on the age of PW2. There is evidence that she was an adult woman, married and had children including PW3 [aged 16 years old] and PW4 [aged 11 years].
25. PW2 was, no doubt, an adult.

The assailant:

26. Was the Appellant positively identified?
27. The prosecution relied on the evidence of three witnesses on this aspect. It was that of PW2, PW3 and PW4.
28. They all testified that they knew the Appellant as their neighbour and described with precision how he attacked PW2 as he had already undressed his trousers to the knees. That, he was also armed with a sickle.
29. The incident occurred during the day when the three were working in their farm.
30. This was, therefore, a case of recognition as opposed to identification.
31. In *R -vs- Turnbull & Others* (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the evidence turns on, inter alia, the recognition. The Court stated thus: -

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. 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.



32. In *Wamunga vs Republic* (1989) KLR 426 the Court of Appeal, speaking in respect of a single witness, stated as under: -

.... It is trite 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 from possibility of error before it can safely make it the basis of conviction.

33. Likewise, in *Anil Phukan vs. State of Assam* (1993) AIR 1462 the Court held as follows: -

A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.

34. The trial Court had an opportunity of assessing the demeanor of the witnesses. No adverse findings or remarks were made in respect of the testimony of any witness. The trial Court believed all as truthful.
35. There seems to be nothing which was put forth likely to make this Court depart from that finding. But what of the Appellant's defence?
36. The issue of the grudge did not arise during the prosecution's case. It was only raised at the tail end of the proceedings. Be that as it may, even if the Appellant had an issue with PW2's husband [which was not proved], still that does not displace the corroborative evidence of PW3 and PW4. One, therefore, wonders why PW2 would take up the role of framing up the Appellant in such circumstances.
37. Looking at the evidence in totality, this Court finds that the defence did not dislodge the prosecution's case. This Court finds no reason to depart from the finding of the trial Court that it was the Appellant who had an encounter with PW2. It is, therefore, the finding of this Court that the Appellant was properly identified as the intruder.

Was there an attempt to rape?

38. Section 388 of the *Penal Code* defines "attempt" as follows: -

388 (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.

39. The above section brings out the two main ingredients of an attempted offence; the mens rea which constitutes the intention and the actus reus which constitutes the overt act towards the execution of the intention.



40. In *R vs. Whybrow* (1951) 35 CR App. Rep, 141, Lord Goddard C.J., had the following to say on mens rea when the Court dealt with the offence of attempted murder: -

..... But if the charge is one of attempted murder, the intent becomes the principal ingredients of the crime.

41. Eminent learned authors in criminal law, J. C. Smith and Brian Hogan in their book *Criminal Law*, Butterworths, 1998 (6th Edition) at page 288 while discussing the aspect of mens rea in an attempted murder had this to say: -

.... Nothing less than an intention to kill will do.

42. And in *Cheruiyot v Republic* (1976 - 1985) EA 47 Madan, JA, as he then was, while approving the holding in *R v. Gwempazi s/o Mukbonzo* (1943) 10 EACA 101, *R v. Luseru Wandera* (1948) EACA 105 and *Mustafa Daga s/o Andu vs. R* (1950) EACA 140, stated as follows on mens rea in an attempted murder charge: -

In order to constitute an offence contrary to Section 220, it must be shown that the accused had a positive intention unlawfully to cause death.... The essence of the offence is the intention to murder as it is presented by the prosecution.

43. The Court of Appeal had yet another occasion to look at the aspect of the actus reus in attempted offences. In *Abdi Ali Bare vs. Republic* (2015) eKLR, Learned Honourable Justices Githinji, Mwilu and M'Inoti, had the following to say as they considered the offence of attempted murder: -

..... 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, the authors give the following scenario at page 291 to illustrate the distinction:

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....

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 & Joines' *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.

44. From the foregoing, it is easily deducible that when a Court is faced with any charge of an attempted nature, care must be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved. Regardless of how strong the evidence is, if it only relates to acts in preparation to commit a certain crime, that evidence cannot justify a conviction on an attempted charge.
45. For clarity purposes, evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted.
46. With the above exposition of the applicable legal principles in relation to commission of attempted offences, this Court will now apply the said principles to this case.
47. According to the evidence, the Appellant had undressed his trousers to the knees. He then suddenly appeared from a nearby bush and held PW2 from the back vowing that he must succeed in raping her. PW2 was bent. The Appellant tore PW2's dress and underpants. As such, PW2 was rendered naked. Since both the Appellant and PW2 were naked, then the possibility of engaging into sex was apparent. The completion of the act was only interrupted by the husband to PW2 who appeared having been called by PW4.
48. There is no doubt that for the offence of rape to be committed, there has to be penetration. Section 2(1) of the [Sexual Offences Act](#) defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
49. This position was fortified in [Mark Oiruri Mose vs R](#) (2013) eKLR when the Court of Appeal stated thus: -

.... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).
50. Later, the Court of Appeal, then differently constituted, in [Erick Onyango Ondeng v. Republic](#) (2014) eKLR held as such on the aspect of penetration: -

In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.
51. From the definition of penetration and the guidance by the Court of Appeal, it is the position that penetration may only be 'slightest and to the surface' to suffice in law. It, therefore, means that there may be instances where the slight penetration, depending on other factors including passage of time, may not be possible to be ascertained by way of medical evidence. Therefore, the failure to prove penetration by medical evidence does not ipsa facto mean that there was no penetration. It all depends on the peculiar circumstances of a case and the extent to which the trial Court believes the victim. However, in such instances, the Court must exercise extreme caution as to weed out miscarriage of justice including instances where a victim is framed up for ulterior motives.



52. This Court has, with care and caution, reviewed the evidence on record. The Court finds that there was no penetration into any of the PW2's genital organs. However, the attacker had gone past all the preparatory acts into the arena of possible commission of the offence. Save for the emergence of PW2's husband, the attacker was prepared to rape the victim.

53. The attempt to rape was, hence, proved.

Consent?

54. It is evident from the evidence that PW2 did not consent with the attacker to engage into any sexual activity. Such lack of consent is evident from the way PW2 resisted the attacker, raised alarm, had her clothes torn and was injured in the process.

55. The circumstances in this case do not in any way accord to the definition of 'consent' in Section 42 of the *Sexual Offences Act* thus: -

For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

56. As such, the four ingredients of the offence of attempted rape were all proved in favour of the prosecution.

57. The Appellant was, therefore, rightly convicted of the offence of attempted rape.

58. Further, there is ample evidence in proof of the offence of assault. PW1 confirmed the injuries on PW2's thighs and stomach whose degree was assessed to be 'harm'.

59. There being no legal justification as to why the Appellant committed the said heinous acts, the trial Court correctly found him culpable as charged and convicted him on both counts.

60. Therefore, appeals against the twin convictions cannot stand and are hereby dismissed.

Sentence:

61. The Appellant was sentenced to 10 years' imprisonment for the offence of attempted rape and to 1-year imprisonment on the offence of assault.

62. It is imperative for parties to know that sentencing is a crucial part in the criminal process and the administration of justice and since sentencing Courts are called upon to exercise discretion, then parties are at liberty to even adduce evidence that may aid Courts reach most appropriate sentences (See the Supreme Court in Petition No. 15 of 2015 *Francis Karioko Muruatetu & another v Republic* [2017] eKLR).

63. In exercising its discretion, a sentencing Court is called upon to be guided by a raft of considerations. Such are discussed at length in the Sentencing Guidelines published on 29th April, 2016 vide Gazette Notice No. 2970 by the Hon. The Chief Justice of the Republic of Kenya who is also the Chairperson of the National Council on the Administration of Justice (NCAJ) and in case law including the Francis Karioko Muruatetu & another v Republic case (supra).

64. This Court is well abreast of the principles on sentencing and the 2016 Judiciary of Kenya Sentencing Policy Guidelines. As stated by the Supreme Court of Kenya in Francis Karioko Muruatetu & another



case (supra), despite their importance, the guidelines do not replace judicial discretion. This is what the Apex Court stated: -

(72) We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.

65. The purpose of sentencing is expounded in page 15, paragraph 4.1 of the Sentencing Policy Guidelines as follows: -

Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community's condemnation of the criminal conduct.

66. In sentencing, the Court considers various mitigating factors. Some include: -

- (a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

67. The Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.



68. In this matter, the Appellant did not establish the infringement of any of the above parameters by the sentencing Court.
69. The only issue which the sentencing Court did not address was the manner in which the two sentences were to run. Since the offences were committed in the same transaction, such resultant sentences can only run concurrently unless otherwise justified.
70. Resultingly, the appeals on the sentences will only succeed to the extent that the sentences will run concurrently.

Disposition:

71. Having said as much, the appeal is now determined as follows: -
 - a. The appeals against the convictions are hereby dismissed.
 - b. The appeals against the sentences only succeed to the extent that the sentences shall run concurrently.
 - c. The sentences shall run as from 6th November, 2018 when the Appellant was charged.
 - d. The file is marked as closed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 11TH DAY OF APRIL, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

John Wafula Wamalwa, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.

