



REPUBLIC OF KENYA



KENYA LAW
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**Abwola v Republic (Criminal Appeal E126 of 2019)
[2024] KEHC 6532 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6532 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E126 OF 2019
RN NYAKUNDI, J
JUNE 5, 2024**

BETWEEN

HUMPHREY ADUNDO ABWOLA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the judgment of Hon. Wairimu
in Eldoret law Court cr. SO. No. 285 of 2016)*

JUDGMENT

1. The appellant was charged with three counts. The first was the offence of gang rape contrary to section 10 of the [sexual offences Act](#) No. 3 of 2006. The particulars of the offence were that on the 6th day of November, 2016 at [Particulars withheld] Sub-County within Uasin Gishu County, the appellant in association with another not before court intentionally and unlawfully caused his penis to penetrate the vagina of CM without her consent.
2. In the alternative, he was charged with the offence of committing an indecent act with an adult contrary to section 11(A) of the [Sexual Offences Act](#). The particulars were more or less similar to those in the first charge.
3. The appellant was equally charged with the second count of Attempted murder contrary to section 220(a) of the penal code. It is alleged that on the 6th day of November, 2016 at [Particulars withheld] in Kesses Sub-County within Uasin Gishu County, the appellant attempted to unlawfully cause the death of CM by cutting her on the head, hands and cheeks with a sharp object.
4. The appellant faces a third count of grievous harm contrary to section 234 of the penal code. It is alleged that on the 6th November, 2016 at [Particulars withheld] in Kesses Sub-County within Uasin County, the appellant caused grievous harm to CM.



5. The appellant was convicted on two charges and he was sentenced to serve five years imprisonment on the alternative count in the first charge and life imprisonment on the second count
6. Being dissatisfied with the said judgment the appellant lodged the present appeal relying on the following grounds:
 - i. That the learned trial magistrate erred in law and facts by failing to observe that the appellant was not accorded a fair trial as enshrined under Article 50(2) of *the Constitution*.
 - ii. That the learned trial magistrate erred in both law and fact by convicting the appellant while relying on uncorroborated prosecution witnesses.
 - iii. That the learned trial magistrate erred in both law and facts by convicting the appellant while not observing that no material linked the appellant to the case.
7. The prosecution in support of its case called 6 witnesses.
8. PW1 was the complainant. She testified and gave events leading to the ordeal. She stated that on the material day, she was sleeping in a hostel room when the accused who had been her boyfriend knocked on the door and she opened since she was expecting him to return her property which had been left with after their disagreement. When she opened the door, the accused who was in the company of another man put a bag at the door and she greeted them then went out and started talking. She testified that the man who was with the accused put a cloth on her mouth and they carried her to the field about 20 meters from the hostel and the accused was angry and started threatening her asking her how many boyfriends she had.
9. The witness further stated that she started feeling pain but did not know what had been used to hit her after which she testified that she fainted and when she came to her senses, she realized that her hands, mouth and neck had been cut and she was bleeding.
10. The witness stated that she screamed and a guard who was at the gate went to her and called an ambulance and the students assisted her to the school dispensary after which she was referred to Moi teaching and Referral Hospital where she stayed for three weeks and the incident was reported at Kesses Police station. The witness testified that she was later issued with a P3 form together with admission and discharge forms which indicated that she had been discharged on the 15/11/2016.
11. On cross examination, she stated that before the incident herein the accused was a friend but the relationship ended and that her roommate saw her leave with the accused and recorded her statement and reiterated that it was the accused who was injured and raped her since she woke up and found herself in the state. The witness further stated that she did not know if the appellant had any weapons on him at the time because he had a bag but she did not see the weapon used to injure her although the doctor told her she had been raped and she felt pain.
12. PW2 testified that she is a medical practitioner based at MTRH. She stated that the complainant was examined by her colleague who had since gone away for further studies and a P3 had been filled after the examination on 7/11/2016. The witness testified that the complainant was very sick, sad and low in mood at the time of examination and had a cut on her scalp and both sides of her mouth, 2 teeth were broken, both hands had extensive cut wounds, tenderness on both thighs, she had injuries on the labia minora, fresh tear on the posterior foetus and that the fresh injuries on her genitalia was highly suggestive of forced penetration.
13. It was the witness's testimony that the complainant's injuries were sutured and she was taken to theatre where the fracture to her left hand was pinned, tendons repaired and the hand splinted.



14. The witness further testified that the complainant had to be transfused with 4 units of blood and was put on supportive management occupational therapy and pain killers.
15. Upon cross examination, the witness stated that she did not know if the complainant's clothes were taken to the hospital since this is not indicated on the P3 form and that the accused was not examined and the P3 was issued on 18/11/2016 after the complainant was discharged and confirmed that the complainant was treated on 7/11/2016 the witness stated that the complainant said she had been injured by her ex-boyfriend.
16. PW3 was a security officer at Moi University who stated that he was on night shift on 6/11/2016 when at 11PM he was at the main gate going to upper hill hostel when he heard a lady shouting and he put on his light and saw someone running towards where he was and she told him she had been injured by two people. The witness stated that since she was bleeding profusely and was in pain he called the university ambulance and took her to the university dispensary where they were given a referral note and the complainant was taken to MTRH and on the way she said she had been injured by "Edu" whose phone number she gave out.
17. Upon cross examination the witness stated that he did not know the appellant before and reiterated that he found the complainant after she had been injured but did not see the appellant go to the Complainant's house. The witness stated that he was given the suspect's number as 0713787026 and that the university has many gates and he is in charge of supervising the guards but he did not know where the accused had come from and had not been informed that the accused was going to visit the complainant.
18. PW4 the Investigating officer stated that he was on duty at the Kesses Police Station on 7/11/2016 when he found the case herein had been assigned to him and informed by police officers stationed at Moi University including Sgt. Kipyegon who was in charge, that the Complainant was in bad condition and was at MTRH. The witness stated that after the complainant was discharged, he interviewed her and learnt that the accused had visited the Complainant in the company of another man and had convinced her to leave her room after which they took her to a field where she was assaulted and raped. The witness further stated that the complainant reported that when she regained consciousness, she was taken to MTRH and that they tried to find the man but did not succeed until they sought the assistance of officers from Lumakanda Police Station who assisted in arresting the accused and he was charged.
19. Upon cross examination, the witness stated that he investigated the suspect's name but did not write it in his statement but it is in the investigation diary that according to the report the incident occurred on the night of 7th and 8th November but he was not at the scene. The witness further stated that a P3 was issued on the 18th November, 2016 10 days after the incident and that the complainant reported that she had been injured by Humphrey and his friend.
20. The witness stated that he went to the hospital 3 days after the incident and several other times to check on the girl's condition and he visited the scene of the incident but did not find the suspect and that the doctor's report and the complainant's statement connects the accused to the incident although he had no weapon before court and he did not take the accused to hospital for examination. The witness further stated that he was satisfied with his investigation and therefore the accused was charged because he was identified by the complainant although he was not aware if Sgt. Kibyego was the informer.
21. He finally testified that they do not write the suspects statement and denied that he was in court to give a false statement. The witness stated that the accused was arrested at Lumakanda and that it was the complainant who wrote the phone number of her relatives at the back of her statement.



22. PW5 an officer from Lumakanda police station stated that on the 29/11/2016 at 8:30pm, he was at the report office on night shift when the OCS informed him that officers from Kesses police station required their assistance to arrest a suspect who was at Shinyalu. The witness further stated that they were with a lady who was giving them directions and they went to the home where they found 3 young men sitting on a sofa watching TV and the Complainant pointed out the accused whom they arrested and escorted to Lumakanda Police Station where he was put in the cell and the following day, officer from Kesses police station went and took the appellant.
23. Upon cross examination, the witness stated that when he arrested the appellant, he had nothing and that the incident did not occur at Lumakanda and he was not given the suspect's name. The witness stated that they were just giving reinforcement to the officers from Kesses and he did not know if the accused was the one who committed the offence or what offence he was charged with. The witness stated that they did not take any photos with the complainant to show that he was with her.
24. PW6 a 2nd year at Moi University stated that the Complainant was her roommate when they were in 1st year at the university between September, 2016 and December 2016 and she had seen the accused go to their dormitory several times and the complainant introduced him as her cousin. The witness stated that on 6/11/2016 at about 11pm, she was sleeping in the hostel when she heard a knock at the door and the complainant went out and spoke to the person in low tones so she did not know what they were saying or whom the complainant was talking to. The witness further stated that the complainant had put on the light and after 30 minutes, she put them off and noticed that the complainant's bed was empty but she did not lock the door because she knew the complainant would be back.
25. According to the witness, when she woke up in the morning, there was a phone ringing on the complainant's bed and she answered, the person asked her where the complainant was and she informed the person that the complainant had left at night and had not come back. The witness stated that she was asked if she knew the complainant and had been assaulted and she informed the janitor what she had been told and the Janitor informed her she had heard about the incident but did not have the full information. The witness stated that she went back to her room and police officers later went there and asked her where her roommate was and informed her that she had been assaulted and taken to hospital after which she was told she could go and see the complainant whom she found at Moi teaching and referral Hospital.
26. It was her testimony that the phone she found on the complainant's bed did not belong to her and that there was a bag on the complainant's bed which she had seen about 1 week before with the appellant. The witness stated that the accused went to their room during the day but did not stay for long because she left him there and when she returned, he was not there and when she called the complainant, the complainant informed her she had gone with the man to Kitale. She further stated that when she went to see the complainant in hospital, the complainant told her that the man who had gone to the room was the one who had injured her.
27. Upon cross examination, the witness stated that she did not see the accused on the night of the incident and the complainant did not tell her she was expecting the accused. The witness stated that the bag she found in the room was the same one she had seen the appellant with before although she had not seen the bag in court and did not know if the number the complainant's relative had been called from belonged to the accused. The witness stated that she did not know where the accused comes from and that when she booked a room in the university hostel, she did not know whom she was to share it with and just found herself in the same room with the complainant.
28. The accused person was placed on his defence during which he gave sworn testimony and stated that on 28/11/2016 at 9:08am he was at work with 4 other people when 2 police officers went to the site



and identified themselves then arrested them and asked for approval documents for the building. He stated that they were arrested and taken to Lumakanda police station and the following morning those who were arrested with him paid Kshs. 10,000/= and he was left alone at the station.

29. Further, the appellant stated that on the morning of 30/11/2016 at 8:30am, he was taken from the police station to court and when he got there, he was surprised when the charges were read to him as he knew nothing about them so he denied the charges.
30. Upon cross examination, he stated that he was living at Lumakanda boys area and admitted and admitted that he and the complainant knew each other as she was his wife from January to June 2016 but he did not know that she was a student at [Particulars withheld] and that one time he went back home from work and found that the complainant had moved away. The witness further stated that he did not know where the complainant was living and when he called her phone, it was answered by the complainant's sister who told him the complainant had gone to Vihiga and although he did not understand why the complainant had left.
31. The appellant stated that he did not know anything about 6th November, 2016 because he was at work although he did not have any witness to confirm this.

Analysis and Determination

32. I have considered the appeal and the evidence adduced at the trial court. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 32.
33. I have taken note of the three counts the appellant faced at the trial court and equally appreciated the trial magistrate's analysis of the three and her arrival at convicting the accused of the charge of attempted murder, committing an indecent act and grievous harm. Having read through the analysis at length, I am satisfied with the trial court's conviction on the offence of committing an indecent act. I shall only examine whether the conviction on attempted murder was proper.
34. The issues therefore that arise for determination in this appeal are;
 - i. Whether the prosecution proved its case to the desired threshold for the offence of attempted murder;
 - ii. Whether the sentence meted upon the appellants was lawful.
35. The offence of attempted murder under section 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.”
36. 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.
37. 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.
38. 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.”
39. 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.”
40. 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:
- ‘D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoitres 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.”

41. In the present appeal, as noted at the trial court the intention to kill the victim was manifested in the extent of the injuries sustained by the complainant and the fact that according to PW2 the complainant had to be transfused with 4 pints of blood, which supported the testimony of PW3 that the complainant was bleeding profusely. Had it not been for the security, the perpetrator's acts could have claimed the complainant's life. To this end, I have no doubt that there was an attempted murder.
42. Turning to the question of identification, it is only the complainant's testimony that placed the accused person in the picture. The accused person admitted during cross examination that the complainant was known to him since she had been his wife between January and June 2016. It also came out clear that the two were at loggerheads and as such the accused is said to have visited the complainant on the night of 6/11/2016 to return some of her belongings. PW6 equally testified that on that night the complainant was left with a bag and she had seen the accused person with a similar bag a week earlier.
43. The trial court noted that considering the hour when the incident herein occurred it would be safe to conclude that it is highly unlikely that anyone other than the complainant saw the perpetrators. The court further did analyze the question of single witness testimony and I am in agreement with the said analysis.
44. Having read the trial court analysis on the said charge, I am inclined to concur that the conviction was proper and safe.

On sentence

45. The offence of attempted murder Contrary to Section 220 of the Penal Code is a felony and attracts a maximum sentence of life imprisonment.
46. In the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

- “(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.”

47. On sentencing at the lower court, the court indicated that the accused person’s mitigation was considered but still imprisoned him to life. In my considered view, the accused mitigation ought to count in sentencing. The objectives of sentencing should be considered in totality.
48. Further, the sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -
- 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/her 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.
 - 5) Community protection: to protect the community by incapacitating the offender.
 - 6) Denunciation: to communicate the community’s condemnation of the criminal conduct.
 - 7) Reconciliation: To mend the relationship between the offender, the victim and the community.
 - 8) Reintegration: To facilitate the re-entry of the offender into the society.
49. Therefore, mandatory minimum sentences place a bar on the trial court’s ability to set a sentence lower than the one prescribed by the statute. It kind of stripes the Judge or magistrate’s power to exercise judicial discretion on a case-to-case specifics. Sometimes I consider it as an intrusion by the legislature with regards to the sentencing discretion of Judges and Magistrates. The courts merely become rubber stamps.
50. I find life imprisonment sentence to be a derogation from the right to life as underpinned in our Constitution under Art. 26. Judicial discretion should be exercised when sentencing an accused person depending on the aggravating factors and the circumstances of the case. For this reason, I take the position the mitigation factors ought to count and the objectives of sentencing ought to be considered in totality. Therefore, I believe a determinable period in this case would meet all the objectives of sentencing.
51. In the upshot, the life imprisonment sentence be and is hereby interfered with a lesser sentence of thirty (30) years’ imprisonment for both counts. The court in arriving at this decision, has taken into account the age of the victim, mitigation, that the appellant is a 1st offender and the objectives of sentencing.



52. The other significant factor in sentencing is in line with the provisions of Section 333(2) on Pre-trial detention and the terminology and scope of computation of credit for the period spent in custody prior to the conclusion of the Criminal Proceedings. It widely recognized that the doctrine of presumption of innocence until the contrary is proved is a constitutional imperative that can't be wished away. The period is considered to be an sentenced prisoner who is held in custody pending the resolution of his or her criminal proceedings. In the *Rwabugande Moses v Uganda*(2017) UGSC 8 the Supreme Court of Uganda profoundly held as follows on a constitutional provision with similar provisions with our section 333(2) of the CPC as follows:

15. What is material in that decision is that spent in lawful custody prior to the trial and sentencing of the convict must be taken into account and according to the case of *Rwabugande* that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This court used the words to deduct and in an arithmetical way as a guide for the sentencing courts but those metaphors are not derived from *the constitution*

20. Where a sentencing court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict the sentence would not be interfered with by the appellate Court only because the sentencing judge or justice used different words in the judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower court would not be faulted when in effect the court has complied with the constitutional obligation in Article 23(8) of *the Constitution*

53. In the instant Appeal the record shows that the spent 3 years in a pre- trial detention which ought to be calculated as a credit in his favour. The committal warrant to prison shall take cognizance that the Appellant has been sentenced to 30 years imprisonment for both counts but the sentences to run concurrently with a 3 year discounted period.

In the upshot, the appeal partially succeeds on sentence whereas the order on conviction is affirmed.

DATED SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF JUNE, 2024

In the Presence of

Mr. Mugun for the State

Applicant

.....

R. NYAKUNDI

JUDGE

