BWW v Republic (Criminal Appeal E002 of 2021)
[2024] KEHC 10638 (KLR) (11 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10638 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E002 OF 2021

RC RUTTO, J

SEPTEMBER 11, 2024

BETWEEN

BWW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. Nelly W. Kariuki (SRM) at Nyeri Chief Magistrate's Court Sexual Offence Case No. 25 of 2018 delivered on 19th July, 2019)

JUDGMENT

A. Introduction

1. The Appellant being aggrieved by the trial court's decision that convicted him for the offence of attempted defilement contrary to section 9(1) and 9(2) of the *Sexual Offences Act* Cap 63A has lodged this appeal. He seeks that his conviction be quashed and the 9 years imprisonment sentence set aside.

2. The appeal is premised on the following grounds, that:

    i. That the learned trail magistrate erred in both fact and law by failing to find that the elements of the offence of Attempted defilement were not proved beyond reasonable doubt as required by law.

    ii. That the learned trail magistrate erred in both fact and law in failing to find that the prosecution's case had discrepancies, was contradictory and inconsistent.

    iii. That the learned trail magistrate erred in both fact and law by failing to find that PW1 was not a credible witness worth of belief.

    iv. That the learned trail magistrate erred in both fact and law when he failed to note that no DNA was availed to prove the prosecution allegations.

v. That the learned trail magistrate erred in both fact and law when he failed to properly evaluate the evidence on record and relied on insufficient, uncorroborated and incredible evidence and came to the wrong decision that the appellant had defiled the two minors.

vi. That the learned trail magistrate erred in law by failing to note that the burden and standard of proof by the prosecution was not discharged and thus the prosecution case was not proved beyond reasonable doubt as provided for under the law.

3. Before the trial court, the Appellant was charged with the offence of attempted defilement contrary to section 9(1) as read with 9(2) of the *Sexual Offences Act*. The particulars of the offence were that on 17th day of July 2018 at [Particulars Withheld] of Nyeri County within the Republic of Kenya, he intentionally and unlawfully attempted to caused his genital organ namely penis to penetrate the genital organ namely vagina of IWW a child aged 14 years. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on 17th day of July 2018 at [Particulars Withheld] of Nyeri County within the Republic of Kenya, he intentionally and unlawfully caused his genital organ, namely penis to touch the genital organ, namely vagina of IWW. a child aged 14 years.

4. The Appellant pleaded not guilty and to prove its case, the prosecution called 6 witnesses. In his defence the Appellant gave sworn evidence and called no witness.

B. Prosecution case

5. The trial court undertook a voire dire examination on the complainant, PW1, and upon examining the victim found that she had the ability to appreciate the concept of oath and the consequence of perjury. The trial court directed that she gives sworn testimony.

6. PW1, IWW stated that she was 14 years old and that on 17th July 2018 at about 5pm she went home but did not think anyone was there. She saw the accused who was a shamba boy employed by her father calling her mother. She then went out and told him that her mother was not in and she was by herself. That the appellant then grabbed her to his room, closed the door, and leaned against her. He then pushed her to bed and sat on her back. She could not move and was screaming at the time. The appellant then started to remove her clothes that is the school uniform and underwear. He tore her clothes: a panty Exhibit 3A and a biker Exhibit 3B and she told him to leave her alone.

7. PW1 further stated that her mother heard and asked why she was screaming she told her that W had locked her in his room. Her mother then came to her rescue by opening the door. That when the appellant heard her mother, got up from her back and sat on the seat. Her mum found her standing up on the seat. Her mum then called her dad from work, the police from Kiawara Policce Station came over. IWW was then taken to Nyeri Provincial General Hospital where she was examined and found to be okay.

8. It was PW1 evidence that the appellant did not do anything save for trying to remove her clothes and sitting on her back. She then pointed to the appellant as the accused person in the dock

9. PW2 MW stated that on 17th July 2018 at about 5pm on her way home she heard her daughter IWW screaming. She then asked her what she was doing and she stated in Kikuyu that W wants to rape her. That she noticed that the employee, BW, door was closed from the inside, she knocked it open and found W sitting on the bed. His trouser zipper was open. IWW was on top of the bed wearing her panty. She then asked the appellant what he was doing to her daughter. She then screamed called her husband and father in law. Further other people came, the appellant zipper was still open and he did not run away. At around 8pm her husband arrived with policemen from Kiawara police station. They

went to the station and Bellevue Hospital the next day they took IWW to Nyeri Provincial General Hospital for medical attention and to have the P3 Form filled.

10. PW3 DW stated that on the 17th July 2018 at about 5.20pm he was at the shamba checking on his plants when he heard screams from a place about 40m from where he was, that is, at the homestead of his son FW. That he ran there to check what was happening. He found the employee W in the house while PW2 was at the door. The boy's trouser zip was open, and his granddaughter PW1 was in the same house. The appellant sat on the bed while PW1 was standing next to the bed and her inner wear was on the bed.

11. PW4 FW stated that on 17th July 2018 at about 5.20pm he got a call from his wife PW2 telling him that she found his employee BW had defiled their daughter. That the Appellant whom he identifies on the dock was in his employment for about 3 years and lived in a room in the homestead. He decided to go home, and on his way he stopped at Kiawara police station to report. On reaching home he found him seated on the ground, he was taken to Kiawara police station, and PW1 was taken to Bellevue Health Centre for treatment and was later referred to Nyeri Provincial General Hospital.

12. PW5 PC Bernard Simiyu the investigating officer stated that at around 7.30pm he got a report of defilement by an employee of one FW of Kabati area. That he accompanied him home where he found the suspect apprehended by the public, he identified the Appellant at the dock. They then escorted the child to Bellevue Health Centre for treatment, took her clothes as exhibits, recorded statement and charged the Appellant with the offence of attempted defilement and in the alternative with committing an indecent act with a child. PW5 produced the victim's birth certificate as Exhibit 1, which indicated her date of birth as 23rd September 2004.

13. PW6, Dr. Willian Muriuki, a medical doctor stated that the patient was examined by Dr. Marvin Nderitu who was his colleague and had been transferred to Karatina sub-county hospital. He confirmed being familiar with her handwriting and signature. He produced the P3 Form as Exhibit 2 and the PRC Form for IWW as Exhibit 4. PW6 also stated that the patient had a complaint of attempted defilement. The attacker wore a condom and attempted to penetrate her but she struggled and he was unable to. The hymen was found intact, no discharge was noted, and a black spotted discharge on her panty with a foul smell. She was treated with P.E.P emergency contraceptive and antibiotics

14. After the close of the prosecution case the court held that a prima facie case had been established and the appellant was placed on his defence. The Appellant chose to give a sworn evidence and did not call any witness.

C. The defence case

15. The appellant stated that he used to work for the complainant's parents as a shamba boy. That on 17th July 2028 both the employer and himself were at home. That the employer owed him wages which he had promised to pay on that day but later told him that he had no money.

16. That in the evening at around 5pm he took the livestock to the pen and locked it, went to the toilet then he heard the door of the main house being knocked, he then called out but heard no response. He then got out and saw the complainant in their house and asked why she did not respond when he called out her mother. The complainant then told him to cut grass which he refused because he was tired, an argument ensured. That the complainant's mother then came and found them arguing, she then started screaming that he was disturbing her daughter. That the victim uncle who lived near came to the homestead and the mother of the complainant told him that he was defiling her daughter. Other villagers responded to the screams and she told them not to beat him but to call the police.

17. DW1 further stated that the investigating officer talked to the complainant and the mother and the complainant told her that they had a quarrel and that he did not touch her, that he only touched her shoulder. That the investigating officer noted that the complainant clothes were not torn on the shoulder. He denied the offence and stated that he had lived with the child for three years and had never harassed her, and that he had never done that before and was incapable of doing it.

18. Upon hearing all parties, the trial court delineated the following issues for determination: whether PW1 was a minor and whether the subject attempted an act of penetration with PW1.

19. On the issue of age the court held that the complainant was a child, that the birth certificate was conclusive proof that PW1 is a person under the age of 18 years old. On the second issue, the trial court found that the prosecution had proved their case against the accused beyond reasonable doubt and found him guilty of the offence of attempted defilement contrary to section 9(1) as read together with section 9(2) of the *Sexual Offences Act*. The Court was persuaded that the evidence of PW3 and PW2 sufficiently corroborated that of the complainant.

20. Ultimately, the appellant was convicted and sentenced to 9 years imprisonment. He was aggrieved by this finding hence, this appeal before this Court.

D. Appellant Submissions before this Court

21. In urging his appeal before this Court, the appellant submitted that the elements of the offence of attempted defilement were not proved. That the two main ingredients of an attempt offence that is the mens rea and the actus reus were not proved. That the court should ensure that the attempt as opposed to mere acts of preparation is proved. Reference was made to the case of Sekitoliko v Uganda (1967)EA 53.

22. To support his argument the appellant stated that first there is nowhere that PW1 testified that the appellant removed her inner clothes but according to her, he only tried to. Secondly, that PW1 testified that the appellant was sitting on her back, this cannot lead to the inference that she was trying to defile her. Thirdly, that they had lived together with PW1 for three years and he had never tried to do such an act. Fourth, that they had an altercation when he tried to assault PW1 for failing to answer when he called her mother. Fifth that the events of the day might have been blown out of proportion as he had no intention of defiling the minor.

23. It was further submitted that there was no evidence that corroborated the complainant's evidence that the accused attempted to defile her. That sleeping on her back and trying to remove her innerwear cannot by itself alone be said to constitute an act which would cause penetration to a child for it to amount to attempted defilement.

24. The appellant faults the trial court for finding that the appellant had locked PW1 in his room and removed her panty and biker. He states that nowhere in the evidence of PW1 was it stated that he removed her panty and biker. That this was an exaggeration of issues at hand. He urges the court to find that the defence does not have to prove anything, the burden is on the prosecution to prove its case beyond reasonable doubt. Reference was made to the cases of Dorcas Jemutai Sang V Republic (2018) eKLR; R V Kilbourne (1973) 2 WLR 254,267; and GNK v Republic CR. App *No 65 of 2019*.

25. The appellant submitted that the prosecution's case is riddled with material contradictions, discrepancies and inconsistencies that go to the root of this case as they concern material facts relating to the case. He stated that the contradictions, discrepancies and inconsistencies are as follows that; at page 12 of the Record "the accused did not do anything save for trying to remove my clothes" this is

contradicted by PW2 at page 18 "by the time the father in law came, Irene's biker was still on the bed. She had not worn it.

26. Also that nowhere in her testimony did PW1 testified that the appellant at any point wore the condom nor had he reached the point of trying to penetrate her, however at the hospital as recorded verbatim on the PRC form, the doctor testified that the attacker wore a condom and attempted to penetrate her a bit. She struggled and was unable to. The attacker ejaculated on her groin.

27. Further it was submitted that PW1 was not a credible witness since her evidence at the hospital with what she testified in court were inconsistent. To support their argument reference was made to the cases of *John Mutua Musyoki v Republic (2017) CR. App No. 11 of 2016*; Philip Nzaka Watu v Republic (2016)eKLR and Mohamed Swale Kaeze Criminal Appeal No. 445 of 2003.

28. The Appellant submitted that the court swabs were collected for DNA analysis however there was no report that was availed in court on the DNA analysis and yet the same would have exonerate the appellant. Reference was made to the case of Amos Kinyua Kugi v R(2015) eKLR.

29. While relying on the case of R v Lifchus (1997) 3 SCR 320 the Appellant urges the court to find that the trial court failed to faithfully, impartially, objectively, dispassionately and rationally analyse the evidence tendered at the trial as a whole to determine his criminal culpability. He urges this court to allow the appeal, the conviction be quashed and sentence set aside.

E. Respondent Submissions

30. The respondent sets out the following issues for determination:

    i. Whether the charges were proved beyond reasonable doubt;

    ii. Whether DNA evidence was necessary to prove the case against the Appellant;

    iii. Whether there were contradictions and inconsistencies in the prosecution case; and

    iv. Whether the sentenced imposed upon the Appellant was harsh excessive.

31. On the first issue, the respondent relied upon the case of Moses Kabue Karuoya vs Republic (2016) eKLR where the court addressed itself on ingredients of incomplete offences also described as inchoate offences. Further, that even if the Appellant did not complete the offence of defilement, he was caught red handed and hence he is guilty for attempting to commit the offence. That he was identified as a person well known to the victim and that he was found at the scene of the crime.

32. It was further submitted that the Appellant defence that the charges had been framed up by the victim's father who owed him wages did not hold and were never substantiated. That the same was an afterthought since there were other independent witnesses who found the Appellant at the scene with his zip open.

33. The Respondent also submitted that the age of the victim was proved beyond reasonable doubt by way of a birth certificate. They urged the court to find that the trial court was right to arrive at the finding that the age of the victim had been proved.

34. On the second issue, it was submitted that the prosecution did not need DNA evidence to prove their case since sexual offences are proved by way of evidence and not necessarily by way of DNA evidence. Reference was made to the Court of Appeal case of Fappyton Mutuku Ngui v Republic (2014)eKLR.

35. On the third issue it was submitted that the there were no contradictions and inconsistencies and if they were, they are minor and do not go to the root of the prosecution case.

36. On the fourth issue the Respondent submitted that the appellant is a suitable candidate for review of sentence since his trial was conducted when he was in remand. Further that he was convicted to 9 years imprisonment and the trial court considered the period spent in remand when sentencing. They base this argument on the jurisprudence in the cases Mombasa Constitutional & Judicial Review Division Petition *No 97 of 2021* Edwin W & 9 others v Republic; Machakos Petition *No E017 of 2021* Philip Mueke Maingi & 4 Others vs Director of Public Prosecutions & the Attorney General and the Court of Appeal decision in Joshua Gichuki Mwangi v Republic .

37. They urged the court to find that the record was enough to sustain a conviction for the offence of attempted defilement, that the prosecution witness were very consistent and did not contradict each other and that the Appellant was rightfully convicted by the trial court.

F. Analysis and Determination

38. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of Pandya v R {1957} EA 336; Ruwalla v R {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR where the Court of Appeal held that:

> " the duty of the first appellate court is to analyse and re- evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

39. Having considered the record of appeal as well as the submissions by parties, I discern the following as the main issues for determination:

    a. Whether the offence of attempted defilement was proved;

    b. Whether there were contradictions and inconsistencies; and

    c. Whether the sentence was harsh and excessive

Whether the offence of attempted defilement was proved

40. Section 9(1) of the *Sexual Offences Act* provides that "a person who attempts to commits an act which causes penetration with a child is guilty of an offence termed attempted defilement". While Section 9(2) states: a person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

41. In the case of Moses Kabue Karuoya v Republic [2016] eKLR The essential ingredients of an attempt to commit an offence have were laid down in the following words:-

> " In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An 'attempt' is made

punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded"

Thus, for there to be an attempt to commit an offence by a person, that person must:-

a. Intend to commit the offence;

b. Begin to put his intention to commit the offence into execution by means which are adapted to its fulfillment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;

c. Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,

42. The facts of this case as set out by the complainant PW1 is that the Appellant was calling out the complainant's mother, the complainant went out to respond to him where upon he dragged her into his room, closed the door, and leaned against her. He then pushed her onto the bed and sat on her back. That the appellant then started to remove her clothes that is the school uniform and underwear. And tore her clothes, a panty. All this time PW1 was screaming. The screams attracted PW2 who was on her way and close to the home. PW2 informed the Court that she found PW1 in the Appellant's room and the room had been closed from the inside, that the Appellant whom she identified as W, was sitting on the bed. His trouser zipper was open. IWW was on top of the bed wearing her panty. She then asked the appellant what he was doing to her daughter. She then screamed which attracted more people including PW3.

43. PW3 also testified that he heard screams from his son's home and when he went to check, he found the employee W and his granddaughter in the house while PW2 was at the door. The Appellant sat on the bed and his trouser zip was open, while his granddaughter PW1 was standing next to the bed and her inner wear was on the bed.

44. In his defence the Appellant stated that they had an altercation with PW1 because he refused to cut grass as he had been directed by PW1. That PW2 came and found them arguing and she then started screaming that he was disturbing her daughter. That PW1's uncle who lived nearby came to the homestead and PW2 told him that he was defiling her daughter. He also stated that other villagers responded to he screams and she told them not to beat him, but to call the police. According to him, this whole incident was overrated and a ploy not to give him his dues which he had been promised to be paid on the eventful day.

45. From the above analysis of events as stated by the prosecution and the defence, this court deduce that indeed on that fateful evening, the PW1 and the Appellant were home by themselves; the Appellant called out PW2's name and PW1 came out to respond to the call. The question then is what transpired after PW1 came to respond to the call by the Appellant?

46. The evidence of PW1 that the Appellant dragged him to his house is collaborated by that of PW2 and PW3 all of whom testified that PW1 was in the room of the Appellant, the appellant trouser zipper was open and PW1 inner panty was on the bed. More curial, PW2 heard PW1 scream and found her inside the appellant's room with the door locked from inside. This court finds that the explanation given by the Appellant does not rebut the strong evidence given by PW1 who was found to be a reliable and credible witness. The Court also find it unbeliavable that PW1, would have gone to the appellant to ask to cut grass at 5.00pm after, in the appellant's own words, he had already taken the cattle in the pen and locked them up! Further the evidence of PW1 was corroborated by two independent witnesses while the Appellant never mentioned how PW1 got to his room and how the panty too was found on his bed.

47. All this put together, the only logical conclusion align with the finding of the trial court that the appellant had locked PW1 in his room and removed her panty and biker with the express intention of penetrating her vagina, but his acts were foiled by PW1's screams and PW2 who arrived on the scene at the nick of time.

48. On the argument that no DNA was availed to prove the prosecution allegations, I draw reference to the case of IMA v Republic [2019] eKLR it was stated that:

> "
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> "32. It is well established principle of law that a DNA test is not necessary to establish the offence of defilement or rape. In AML v Republic [2012] eKLR the Court of Appeal succinctly held that:-
> "The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

49. Be that as it may, this court notes that the appellant was charged with attempting to defile the complainant. As with all inchoate offences, this is an incomplete offence. There was no penetration, hence the DNA analysis result would have a lesser value to court as there is no evidence that there was penetration and or any fluids were deposited.

50. In the circumstance I find that the prosecution proved all the ingredients of attempted defilement. I find no reason to disturb the finding of the trial court. This ground must fail as it surely does.

Whether there were contradictions and inconsistencies

51. It is trite law that not all discrepancies and inconsistencies are fatal to the prosecution case. The discrepancies must be of such gravity that they prejudice the accused. In Mwangi v Republic [2021] KECA 345 (KLR) it was held:

> "
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> "34. On the alleged failure of the first appellate court to address inconsistencies, glaring gaps and extenuating gaps, the position in law and which we fully adopt is as was stated, inter alia by the court in Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993, that:
> "In any trial, there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences..."

52. Consequently, the issue is whether in this matter, there were indeed contradictions and inconsistencies and whether the said inconsistencies and contradictions were of such a degree that they prejudiced the appellant.

53. The appellant alleges that the contradictions arise at page 12 of the Record, to wit, that "the accused did not do anything save for trying to remove my clothes". That this is contradicted by PW2 at page 18: "by the time the father in law came, Irene's biker was still on the bed. She had not worn it. Also that nowhere in her testimony did PW1 testified that the appellant at any point wore the condom nor had he reached the point of trying to penetrate her, however at the hospital as recorded verbatim on the PRC form the doctor testified that the attacker wore a condom and attempted to penetrate her a bit. She struggled and was unable to. The attacker ejaculated on her groin.

54. In a decision of the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the appellate court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6, it was held that:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

55. Guided by the above, this court has noted the above allegations of inconsistencies and contradictions do not go into the substratum of the matter. The issue at hand is one where the Appellant has been charged with the offence of attempted defilement whose ingredients have been well spelt out in the earlier paragraphs of this judgment. The contradiction referred to by the appellant is not material. In her evidence in chief, PW1 was emphatic on the events of the day. The alleged contradictions in PRC form, do not in anyway give a different version of what PW1 stated. The alleged variation in the account as told to the doctor does not negate the fact that the appellant had the intent to defile the PW1 and that he tried to remove the clothes of PW1 and sat on his back.

56. Looking at the evidence adduced holistically, against the alleged contradictions and inconsistencies, I find the contradictions remote and not prejudicial to the appellant. They do not go to the substratum of the case. The alleged contradictions do not in any way cloud the fact that the victim, PW1 was found in the appellant's house/room with the door locked and with her pant on bed. The contradictions do not cloud the fact that PW1 screamed and PW2 heard her. Consequently, this ground of Appeal fails.

c). Whether the sentence was harsh and excessive

57. Section 9 (2) of the *Sexual Offences Act* provides that "A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."

58. In this case, the Appellant seeks that this Court sets aside the sentence. The Respondent on its part submitted that the appellant is a suitable candidate for review of sentence since his trial was conducted when he was in remand.

59. I noted that in sentencing the appellant, the trial court noted that the appellant was a first offender, but that however he was not remorseful of the offence. The court further considered that he has served 7 years in custody during trial and as such should serve 9 years imprisonment. Notably this sentence is below the minimum set sentence under section 9(2) of the Sexual Offence Act which caps the sentence at a lower of 10 years.

60. Consequently, bound by the Supreme Court recent decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) it follows that the 9 years sentence is an illegal sentence that ought to be set aside and the proper sentence imposed.

61. Ordinarily I am supposed to enhance the sentence to at least the 10 years provided in statute. However, since the Appellant was never given notice of a possible enhancement of his sentence I will not interfere with the sentence. The upshot of the above is that this appeal fails in its entirety.

62. Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 11TH DAY OF SEPTEMBER 2024.

For Appellants:

For Respondent:

Court Assistant: