



REPUBLIC OF KENYA



**JKC v Republic (Criminal Appeal E078 of 2019)
[2023] KEHC 2224 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E078 OF 2019
SM MOHOCHI, J
MARCH 17, 2023**

BETWEEN

JKC APPELLANT

AND

REPUBLIC RESPONDENT

(Arising from judgment/conviction given on 29/6/2022 and sentence meted out on 30/6/2022 by the Senior Principal Magistrate, Hon. Charles Kutwa, in the Criminal Case NO.32 of 2020 at Iten)

JUDGMENT

Introduction

1. The Appellant was charged with 'Attempted rape', contrary to Section 4 of the [Sexual Offences Act](#) No 3 of 2006 and an alternative charge of 'committing an indecent act with an adult', contrary to Section 11(a) of the [Sexual Offences Act](#) No 2 of 2006. He was found guilty of the 1st charge, convicted and sentenced to imprisonment for five (5) years.
2. Being aggrieved of the conviction and sentence the Appellant preferred this Appeal.
3. The duty of this first Appellate Court in criminal cases was restated in the case of [Charles Mwita v Republic, CA Criminal Appeal No 248 of 2003 \(Eldoret\) \(unreported\)](#) where the Court of Appeal, at page 5, recalled that: -

' In [Okeno v R](#) [1972] EA 32 at page 36 the predecessor of this Court stated: - 'An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ([Pandya v R](#) [1957] EA 336) and to the appellate court's own decision on the evidence'.



4. Being a 1st Appeal Court, I must, weigh conflicting evidence and draw conclusions, (*Shantilal M Ruwalla v R [1957]EA 570*) it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post, [1958] EA 424.*
5. While the Appeal is framed and grounded on twenty-one (21) grounds and sub-grounds, the scrutiny of the same by the court reveals that the said grounds are not strictly grounds but rather detailed and textual affirmation of findings and persuasion by the trial court in admitting prosecution evidence.
6. The Court Nonetheless refines the Grounds of Appeal as follows;
 - a) Convicting the Appellant based on admitted evidence from PW1-PW5 that was insufficient, unbelievable and not beyond reasonable doubt.
 - b) Failure by the trial court to consider the Appellant's Defense case.
 - c) Biased consideration and evaluation of evidence by the trial court.
 - d) Failure by the Prosecution to establish and satisfy the ingredients of the offence.
7. In his written submissions and oral highlighting on three (3) parts the Appellant through his learned counsel refines the Appeal to a single issue that the inchoate offence was not formed, that the ingredients of the offence were not proved beyond reasonable doubt and that the Appellant in his defense gave his 'intent' on the material day which was to purchase eggs and chicken and further that PW2's relative a Mr K who called the Appellant from the home of JC to go back to the house of PW2 where he was assaulted, forced to sit down and subsequently arrested.
8. That PW6 produced an innerwear PEXH2 that was not identified by PW1, PW2 or PW3 and that the prosecution is a fabrication intent to cover-up on the assault on the Appellant.

Trial Court Proceedings

9. PW1 gave sworn evidence recalling the incident June 25, 2020 while at home the Appellant who was well known to her, came grabbed her by the neck, pushed her on to a seat and started removing her clothes and her mother walked in, screamed forcing the Appellant to flee.
10. On Cross-Examination the witness recalled that the Appellant purpose of visiting the homestead was to purchase eggs. That she had told the Appellant that there was no eggs or chicken.
11. PW2 CK from Kapkoi and PW1's mother gave sworn evidence detailing that PW1 is over 18 years old born on February 5, 2002. That the complainant PW1 has a mental problem and the Appellant is her neighbor.
12. That on June 25, 2020 she had gone to buy maize at 9.am leaving the complainant alone at home. She bought maize and came back and upon entering the house she saw the Appellant and raised alarm screaming and her son PW3 C came and the Appellant ran away.
13. That complainant PW1 told her the Appellant tried to rape her by grabbing her and pushed her to the seat, a report was made at Tambach Police Station and it is PW3 C who arrested the Appellant when he tried to ran away.



14. The witness further stated that the complainant was treated and a P3 filled, identifying the Treatment Notes marked as – MFI 1.
15. On cross-examination she restated that she found the Appellant in the house and he tried to run away. That the complainant was alone at home.
16. PW3 CK from Kapkoi gave evidence on oath that, on June 25, 2020 while at home he heard screams from my mother's house and rushed to the scene and found the Appellant, his mother and sister and the mother told him the Appellant had tried to rape his sister.
17. That the Appellant had grabbed PW1-complainant's neck and pushed her on the seat. It was him who immediately called the Chief and Police Officers were sent and arrested the Appellant and took him to Kabulwo Police Post.
18. On cross-examination the witness restated finding the Appellant in his mother's house. That he was arrested and taken to Kabulwo Police Post.
19. The Appellant instructed defense counsel at this juncture who successfully applied for the recall of PW1, PW2 and PW3 for cross-examination.
20. PW1 recalled for purposes of cross-examination restated her name confirming that she testified on August 16, 2020, her age and that she attends Kabulwo Special School. She identified the Appellant stating that he was in Court and that he lives at Kabulwo Centre. That from the Appellant house to her place is far. At 7 am the Appellant was at [Particulars Withheld] Centre while she was at home. She never knew JC, that the Secondary School is near her home than the Centre. That they rear chicken and also sell eggs, she never knew Mr K or his children. That PW1's house is on the right facing them and school is on the left.
21. She never knew if the Appellant was sent by the owner of the guest house to go and buy cement. Her father is called SC and was not at home. Her mother is CK, and was not at home having gone to bring maize and beans. A person came to buy eggs. She saw the person. She was outside the house. The person called her mother. She greeted the person. She told the person there were no eggs and chicken. She knew S. He is deceased.
22. The Appellant is an elder in SDA and told her the deceased will be buried on Friday. At the time the Appellant was near their home. Mr CC is her brother and was at home in his house and not present when the Appellant came. Her mother came after the Appellant had left. she told her mother the Appellant had come for eggs and chicken. Her mother was angry and said that the Appellant is a witch.
23. She knew K sold goats that died, to her father. She admitted that there is a person constructing a house called JC who had a hardware shop at Kabulwo. The Appellant was not going to the hardware. she did not go to JC's house. She knows K. A form 2 student at Kibulwa and son of J, she knows K her cousin who is not married. She did not know if he (K) met the Appellant. He came with the Appellant to our home. My mother was wailing. The Appellant was armed with a panga and rungu. He also had bags of cement.
24. At her home the Appellant was told by K to sit down and that it was K who beat the Appellant. He was assaulted by my family. Later the police came and arrested the Appellant. She was taken to hospital for examination. The Appellant defiled her. She has a mental problem. The Appellant entered her mother's house. She was given a P3 form. It is the Appellant who defiled me.
25. On Re-Examination, she stated that her mother found the Appellant at home and wailed because the Appellant had defiled her. She knew the Appellant JC very well and has no dispute with him.



26. PW2: was recalled for cross examination and she confirmed that she had previously testified, the complainant is her daughter and CC is her son. She has known the Appellant for a long time. C is her husband and other children are C, C, C, K. It is her niece who did a wedding that she attended this year. That she did not know JC. She knew KB her neighbor. Kabulwo Centre is far from her home about 1km away. Kabulwo Secondary School is near her home. She does not have eggs and chicken.
27. PW2 recalled that on the June 25, 2020 PW1 was home alone after she went to look for maize and beans. That PW1 has a mental problem since birth is almost 17 years old. She has documents to show her age. She did not give the police the papers. When she came back she found the Appellant with PW1 who told her that the Appellant had defiled her. The Appellant did not come to look for eggs and chicken. She was angry because the Appellant knows she does not have eggs and chicken. She denied calling the Appellant a witch.
28. She knows K's who was not at home. She did not buy the goats from Kamara and their goats have never died. She did not call the Appellant a witch. The Appellant was with PW1 in the house, she raised alarm when I saw the Appellant and Chirchir was the first to come after her alarm.
29. There is a house being constructed near her house belonging to J their neighbor. That K is her son. They are the ones who told the Appellant to sit down. She found the Appellant at home. She and others did not beat and injure the Appellant. It is the police who arrested the Appellant.
30. Mama C is her neighbor but was unsure if she called the police. She did not assault the Appellant. M is the PW1's teacher. He has a car. She did not know if he took the Appellant to hospital. Appellant is an SDA Elder. T is deceased. It is the Appellant who had a panga and stick. PW1 was examined and a P3 form was filled. She has no dispute with the Appellant.
31. PW4 John Mewa a clinical officer at Keiyo Health Centre recalled that on June 26, 2021 he received PW1 that had been treated at their facility and examined her. That the Appellant was well known to PW1. The nature of offence was attempted rape. There was no injury or bruise seen on the genitalia. There was no presence of sperms. There was no penetration. She did not have injuries on the body.
32. On Cross-Examination, he stated that the Appellant came to hospital but could not remember the outpatient number. He the Appellant was assaulted by persons known to him and had injuries. He referred him to Iten County Hospital. There was no penetration from his examination. The discharge (whitish) is from PW1 not as a result of penetration. From the P3 there was nothing to show there was attempted rape. A police officer came with PW1.
33. On Re-Examination, He stated that Appellant was assaulted in the house of PW1 who had no injuries.
34. PW5 Philemon Kipkoech an Assistant Chief recalled that on June 25, 2020 at 9.30 am he was called on phone by PW3 and informed that the Appellant had tried to rape PW3's sister. He rushed to the scene and found many people. The Appellant had been arrested by members of the public band he was taken to the station. He knows the Appellant person.
35. On Cross-Examination he admitted not witnessing the incident. That he was called by C PW3. He admitted that the Appellant had been assaulted by members of the public and he did not take the Appellant to hospital.
36. PW6 CPL. Moses Chelimo the Investigating Officer from Tambach Police Station recalled how on June 25, 2021 while at Kabulwo Police Post, a boy called C made a report of defilement against the Appellant. He went to the scene with PC Wekesa and found many people at the scene. The Appellant had been arrested. The Appellant was found defiling a girl who showed them where they were with the Appellant.



37. He re-arrested the Appellant and took him to the station. He took PW1 to hospital at Cheliget. For examination that revealed she was not defiled and that the Appellant attempted to rape PW1. He collected pants that were torn from behind which he produced as– PEXH.2
38. On Cross-Examination PW6 stated that he been at Kabalwa for four (4) years, from 2017 and knew the Appellant as a resident. That the Appellant has a wife and children. The report was made at 10.35 am and he did not arrest the Appellant or know when he was arrested. He did not know at what time the offence was committed. That K is a brother to PW1. The complainant’s father was not around. The home is about 500 metres from the police station. He found many people at the scene. Chief Kipkoech was there. He did not know the person who called the chief.
39. At the scene he found PW1’s mother. He did not know the PW1 well. I am the investigating officer he did not know if the Appellant was assaulted. He was given a panga and bags of cement. He knew J as a business lady. He did not know if the bags of cement were from Jane’s place. The Appellant was not assaulted. He did not know if the Appellant was taken to Chegilet Dispensary. It is M who treated PW1.
40. He did not record the Appellant statement. There is nothing to show the short (PEXH.2) belongs to PW1. He relates well with the Appellant. He never heard about eggs and/or chicken. He did not know of any dispute between the Appellant and complainant’s family. He knew K. He did not know if he sold a goat to the Appellant. He never received an assault report. He went to the Appellant’s home to see how he was feeling. An arrest was made after he got healed.
41. On Re-Examination PW6 stated that the Appellant was at the scene. He just took the girl. He was not present when the Appellant was arrested. The Appellant tried to rape the girl.

Defense Case

42. DW1 the Appellant testified that on June 25, 2020 he woke up and went to work, he wanted to go and pick cement from J’s house, from J’s place he passed K’s house to pick kuku, mbuzi and eggs. He did not find K only his children, he left them and decided to go to J’s. He left a report with the children.
43. On the way he met a lady, he entered the compound saw the door open started a conversation with her. The lady came out and started to shout the Appellant, who told her he was looking for chicken, from the compound, he went to J’s compound where there was ongoing construction works. While in the compound K came asked him why his mother shouted at him and ordered the Appellant to go with him back to their compound. In the compound they assaulted him occasioning on him injuries all over the body. That it is K and his mother who assaulted him.
44. The screams attracted members of the public, police and elders were called and Appellant was rescued by the Assistant Chief and taken to the Kabulwo Police Station. The child was also taken to the police. From the station he was admitted at Iten hospital for four days and was issued with a P3 and treatment chits which he produced as; P3 –DEXH. 1, Discharge Summary – DEXH.2, Treatment notes – DEXH.3.
45. After treatment while at his home three police officers came arrested him and charged him with attempt to rape the girl. He denied attempting to rape PW1 stating that he just waved at the girl and was framed by PW2.
46. In cross-examination the Appellant stated that went to PW1’s compound talked to her asking for chicken and eggs and was outside the house while PW1 was at the door. PW2 found him talking to PW1. He denied attempting to rape PW1 claiming he had issues with PW1’s parents. That PW1’s



brother told him there was an issue at their home summoned him there and ordered him to sit down after which he was assaulted and that during the assault PW1 was not there. That the people who assaulted him were not arrested and the said J did not come to the scene. He admitted being with PW1 at the hospital where she had gone for examination.

47. On re-examination the Appellant claimed that it was alleged that he had bewitched a goat as the basis of the assault. He indicated having no dispute with PW1.

Determination

48. All in all, the sole issue for consideration emerging is, was the conviction of the Appellant safe and sound beyond reasonable doubt?
49. I have considered the trial court analysis of evidence, finding and judgement which rightfully appreciated that all the ingredients of the offence must be proved beyond reasonable doubt.
50. The Trial Court soundly and rightfully found the offence subject to this appeal, to have been an 'inchoate' meaning 'not completely formed or developed yet, not yet completed or fully developed; rudimentary.' In reliance to case of *Bernard K. Chege vs Republic, Nyeri CR Appeal No 20 of 2011*, citing Mativo J to address its mind and to define in detail ingredients of incomplete offences also described as inchoate offences. Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of inchoate crimes are criminal conspiracy, criminal solicitation, and attempt to commit a crime, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime. An inchoate offence requires that the Appellant have the specific intent to commit the underlying crime. An inchoate crime may be found when the substantive crime failed due to arrest, impossibility, or an accident preventing the crime from taking place.
51. The Trial Court misdirected itself hereby by failing to consider the two essential and primary elements to sustain a conviction for crime: -
- a. The intention to commit the unlawful act (the mental element)
 - b. The unlawful act committed (the physical element).
52. Mens rea is a Latin phrase for 'guilty mind' basically, the state of mind. In a case, the prosecution must prove that the defendant had the mental element or 'guilty mind' while committing a crime to secure a conviction. This is according to the Black's Law Dictionary. Let's take an example of theft, the mens rea for this crime is the intention to deprive the rightful owner of the property. If someone was involved in an act but without the intention to commit a crime, they may not be convicted for the said crime.
53. Actus reus is a Latin phrase for 'guilty act'. Actus reus is the wrongful deed that comprises the physical components of a crime that must be coupled with mens rea for one to be held criminally liable. The 'guilty act' in theft is the actual taking of or unlawful control over property without the owner's consent.
54. This court finds fault in the manner in which the trial court considered and found satisfaction of proof of intent, against the Appellant. The court did analyse and consider that the complainant's evidence was that the Appellant found her in the house. The Appellant grabbed her neck and pushed her on the seat. As he was trying to rape her the complainant's mother entered the house. It's her screams that made the Appellant ran away. Her evidence was corroborated by her mother, the investigating officer who produced the torn pants and her brother. The court thus proceeded to find the first ingredient 'intent' by the Appellant is satisfied.



55. For a better appreciation of the law and precedent in this regard it is important we consider the offence its definition, and standards of proof applicable. Section 4 of the [Sexual offences Act](#) no 3 of 2006 provides that;
- ' Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life'.
56. [Blacks Law Dictionary 1968 Eds](#) pg 162 Defines 'Attempt in Criminal Law' as: -
- ' An effort or endeavor to accomplish a crime, amounting to more than mere preparation or planning for it, which, if not prevented, would have resulted in the full consummation of the act attempted, but which, in fact, does not bring to pass the party's ultimate design.'
57. [Dooley v State, 27 Ala App. 261, 170 So 96, 98.](#) Acts amounting to mere preparation for commission of crime, if unaccompanied by some overt act toward actual commission, do not amount to an 'attempt' and cannot be punished as such. To constitute an act of attempt, the act must possess four (4) characteristics: -
- a. It must be a step toward a punishable offense;
 - b. It must be apparently (but not necessarily in reality) adapted to the purpose intended;
 - c. It must come dangerously near to success;
 - d. It must not succeed.
58. The trial court correctly applied the standard established in case of [Abraham Otieno v Republic, High Court Criminal Appeal No 53 of 2009](#), Kisii Justice Asike – Makhandia (as he then was) when he said: -
- ' That for an offence of attempted rape to be deemed to have been committed under the section, the prosecution must prove that the culprit acted in such a manner that there was no doubt at all as to what his intention was. The intention must be to rape. It must be shown that he was about to rape the victim but was stopped in tracks and or in the nick of time. The intention to rape must be manifest. Such intention can be manifested for instance by word of mouth or conduct of the culprit. If the culprit proclaims his intention to rape and directs his efforts towards that goal for instance, by holding the victim or pushing her to the ground, undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but for one reason or another something happens which compels him to stop, again that would be good evidence of attempted rape.'
59. My analysis and scrutiny reveal that; the complainant PW1, PW2 and PW3 never gave any direct evidence of the Appellants intent, while the Complainant PW1 graphically described the alleged attempt rape the entire evidence revolved on the complainant being grabbed by the neck and forcefully pushed on to the chair and removal of her clothes before alarm was raised, the mother PW2 evidence was limited to seeing the Appellant with her daughter(PW1) raising alarm and being told by the complainant what had transpired.



60. This court has identified flaws in the evidence while attempting to determine the intention of the Appellant: -

- i. 'PW1 stated that the Applicant was armed with a Rungu and a Panga, no evidence was tendered on what happened to the weapons during the alleged attempt? when the Appellant allegedly fled the scene? how he managed to undress the complainant while armed? and during the arrest.'
- ii. PW1 did not testify of any apparel that she surrendered to the police as an exhibit and never identified the torn underpants produced in evidence by the IO PW6, the court finds that the evidence of a torn pant remains uncorroborated.
- iii. PW2 did not corroborate PW1's evidence of an attempt by the Appellant to remove PW1's clothes.
- iv. PW3 who responded and was instrumental in the arrest of the Appellant equally did not offer any evidence of apparel or clothing that was surrendered to the police.
- v. PW6 surprisingly produced a torn underpart PEXH.2 that he claimed he collected at the scene and belonged to the complainant in cross examination he admitted that there was nothing to demonstrate the panties belonged to the complainant.
- vi. PW6 in his evidence admits to receiving a 'panga' and empty bags of cement but the same was never tendered in evidence.

61. The Court is equally bound by the Section 124 of the *Evidence Act* Cap 80 which provides for corroboration required in criminal cases as follows:-

' Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.'

62. In the absence of corroboration, the trial court was expected to record its finding or reasons of truthfulness with regard to the complainant as a basis of reliance of only the complainant's testimony. No finding or reasons of truthfulness was entered by the trial court.

63. This court concludes that the sum effect of the prosecution evidence falls short of satisfying in proof the two ingredients of the offence namely intention of the Appellant and the doing of some overt act which manifest the Appellant's intention.

64. I have carefully evaluated the evidence tendered in the court, the requisite ingredients of the offence and I am persuaded that the offence of attempted rape was not proved to the required standard I find



that the conviction by the trial court was unsafe and that the evidence as presented was not beyond reasonable doubt.

65. I am thus inclined to allow the Appeal, set aside the conviction and sentence and the Appellant shall forthwith be set free from prison custody unless he is otherwise lawfully held.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 17TH MARCH, 2023

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MOHOCHI S.M

JUDGE

17.3.2023

In the Presence of

Appellant in Person

Mr. Mugun for the Republic

Mr. Kenei C.A

