Mwania v Republic (Criminal Appeal E009 of 2022)
[2023] KEHC 22691 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22691 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E009 OF 2022

TM MATHEKA, J

SEPTEMBER 22, 2023

BETWEEN

BENSON MUTINDA MWANIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Judgment (conviction and sentence by Hon. G. Sagero (SRM) in Makueni Senior Resident Magistrate's Court Criminal Case No. 272 of 2021 delivered on 25th November, 2021)

JUDGMENT

1. The respondent was charged with the offence of Breaking into a building with intent to commit a felony contrary to section 307 of the *Penal Code*. The particulars of the offence were that on the 3rd day of September 2021 at around 0400 am in Kathonzweni Sub-County within Makueni County, the appellant and another jointly broke and entered a house belonging to ENM with intent to defile one JMM aged 13 years.

2. Count II was attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the 3rd day of September 2021 at around 0400 am in Kathonzweni Sub-County within Makueni County, the appellant and another jointly and unlawfully attempted to cause their penis to penetrate the vagina of JMM a child aged 13 years.

3. Through an amended charge sheet, an alternative charge to count II was introduced. It was the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the 3rd day of September 2021 at around 0400 am in Kathonzweni Sub-County within Makueni County, the appellant and another jointly, intentionally and unlawfully touched the breasts of JMM, a child aged 13 years.

4. The appellant pleaded not guilty and after a full trial, the learned trial magistrate convicted him and his co-accused on count I and sentenced each to 5 years imprisonment.

5. The appellant was also convicted on count II and sentenced to10 years imprisonment. His sentences were to run concurrently.

The Appeal

6. Aggrieved by that decision, the appellant filed this appeal and raised 4 grounds as follows;

    a. The trial court erred in law and fact when he convicted the appellant yet failed to find that vital items to be used as exhibits were not procured in evidence.

    b. The prosecution case is replete with monumental inconsistencies and contradictions which would have attracted acquittal verdict.

    c. The trial court erred in both law and fact by failing to conduct a holistic scrutiny of the whole evidence on record to base its conviction and sentence.

    d. The trial court erred in law and fact by drawing inference of guilty verdict from extraneous matters and calling extrinsic evidence not tendered

7. From the evidence tendered, the complainant (PW1), her aunt (PW2) and PW3 were sleeping on the same bed in their house on the night of 03/09/2021. They had closed the door and secured it with a nail. The appellant and his co-accused (Alexander Mulei Muasya)-herein after 'Muaysa', entered the house and threatened to kill the three ladies if they dared to stand. PW1 directed the torchlight to their faces. The torch was taken by the men.

8. The appellant lifted the complainant and tore her panty. The complainant managed to escape to her uncle's house (PW4) who chased the two men and arrested Muasya. PW4 also arrested the appellant after Muasya disclosed that he had been with him. They had knives and a metal rod during the attack. The two men were handed over to police and taken to Kathonzweni Police Station.

9. The prosecution called 5 witnesses to wit; the complainant (PW1), the complainant's aunt (PW2), ENM (PW3), the complainant's uncle (PW4) and the investigating officer (PW5). The following exhibits were produced; Black panty with white strip (P.Ex 1), kitchen knife (P.Ex 2) and metal rod (P.Ex 3).

10. The appellant gave a sworn statement and gave an account of how he had spent his day (02/09/2021) from 8.00am to the time he slept. That on 03/09/2021, he was preparing to go to work at 8.00am when he was confronted by two men. They took him to the complainant's home where it was alleged that he had entered the house with unknown intention. He denied having been found at the scene.

11. Muasya also gave a sworn statement and denied being at the complainant's home on the material night.

12. Directions were given that the appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

The Appellant's Submissions

13. The appellant has identified the following as the issues for determination;

    a. Whether the trial court erred in law and in fact by failing to establish that the prosecution's case was replete with monumental inconsistencies and contradictions which would have attracted an acquittal verdict.

b. Whether the trial court erred in law and in fact by failing to conduct a holistic scrutiny of the whole evidence on record to base its conviction and sentence yet the prosecution did not prove its case beyond reasonable doubt.

14. On issue (a), the appellant submits that there are monumental inconsistencies and contradictions on the issue of his identification. That there is a contradiction as to whether it was PW1 or PW2 who lighted the torch in order to identify the intruders. He contends that the trial court failed to establish that such contradiction ought not to exist in a criminal proceeding as it casts doubt on the credibility of the witnesses to have seen and accurately identified their attackers.

15. Further, he submits that the trial court ought to have been alive to the fact that the lighting of the torch was a crucial piece of evidence that the prosecution relied upon to prove his identification and that of his co-accused. That, since the alleged incidence took place at 4:00 am when the prosecution witnesses were asleep and visibility was obviously poor in a house that did not have electricity, the contradiction as to who actually lit the torch goes to the root of the matter. He contends that the inconsistencies and contradictions heavily point to a fabrication of evidence by the prosecution witnesses.

16. With regard to his arrest, the appellant submits that it is clear that they were never arrested at the scene of crime. That whereas PW1 and 2 are clear that he escaped together with his co-accused, PW4 alleged that he made a chase and managed to arrest the co-accused who then gave his (appellant's) identity. It is possible, he submits, that wrong assailants were picked if at all a crime had been committed. Further, he submits that there is a sharp contradiction in the evidence regarding recognition and identification. That according to PW3, it was the co-accused who gave his name and on the other hand, PW4 stated that he saw the two escaping.

17. The appellant further submitted that PW1, 2 and 3 claimed to have escaped and reported their assailants to PW4. That after receiving the report from PW1, he (PW4) immediately went after the assailants. The appellant contends that if that was the position, PW2 and 3 did not get an opportunity to talk to PW4 yet they claim to have done it. He submits that such inconsistencies and contradictions can only point to the fact that the prosecution witnesses were not credible and they gave fabricated testimonies that had been choreographed to implicate him. He relies on *Dickson Elia Nsamba Shapwata & another v the Republic*, Cr. App. No. 92 of 2007 cited in *James Ochieng Ogogo v R* (2018) eKLR where the Court of Appeal of Tanzania addressed the issue of discrepancies as follows:

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

18. He has also cited *Wamunga v R* (1989) KLR where the court stated that stated 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 a conviction."

19. On issue (b), the appellant submits that attempted defilement is an inchoate offence which requires sufficient evidence to prove mens rea and actus reus. He relies on *Benson Musumbi v R* (2019) eKLR where the court stated:

> " The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age of the complainant, positive identification of the assailant, and then prove steps taken by the assailant to execute the defilement which did not succeed. Attempted defilement is as if it were a failed defilement, because there was no penetration."

20. Consequently, he submits that the court has to establish the following ingredients:

    a. The age of the complainant

    b. The overt act committed

    c. Positive identification of the assailant.

21. With regard to the age of the complainant, he submits that the prosecution did not tender any evidence to ascertain that the complainant was indeed 13 years old as alleged. That neither a birth certificate nor age assessment report was produced in evidence to support the allegations. He contends that in the absence of such crucial evidence, it was not possible for the trial court to ascertain the age of the complainant to sustain a conviction for attempted defilement.

22. With regard to the overt act committed, he submits that before a court of law convicts an accused person for an inchoate offence, the prosecution must prove that sufficiently proximate acts were committed. That in this case, the prosecution did not adduce sufficient evidence to prove that the overt acts committed met the threshold to convict for the offence of attempted defilement. He refers to page 354 of Cross & Joines' *Introduction To Criminal Law*, Butterworth's, 8th Edition (1976), P. Asterley Jones and R.I.E Card which states

> " ..An act is sufficiently proximate when the accused has done the last act which is necessary for him to do in order for him to commit the specific offence attempted..."

23. He has also relied on *Keteta v R*, (1972) EA 532, 534 where Madan Ag. CJ (as he then was) opined that;

> " A mere intention to commit an offence which is in fact not committed cannot constitute an attempt to commit it. There must also be an overt act which is immediately and remotely connected with the offence intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do."

24. He has also cited *Stephen Mungai Maina v R* (2020) eKLR where the court concluded;

> " From the foregone, it is easily deducible that when a court is faced with any charge on an attempted nature, care must be taken to ensure that the attempt as opposed to mere acts of preparation is proved. However strong the evidence is, if it only relates to actions in preparation to commit a certain crime, that evidence cannot justify a conviction on an attempted charge."
>
> 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. Likewise, the intention to commit the crime must also be proved."

25. He submits that the prosecution's evidence did not meet the threshold that could sustain a charge of attempted defilement. That the last acts necessary to commit attempted defilement is when a person takes off his clothes and actually attempts to insert his genital organs into the genitals of the complainant. He relies inter alia on *Peter Ndoli Adisa v R* (2018) eKLR where the court stated;

> "For the appellant to have been .....the prosecution ought to have proved that he committed an act which would cause penetration which is defined as a partial or complete insertion of the genital organ of a person into the genital organs of another person. For these reasons I am satisfied that the evidence before the trial court did not prove an offence of attempted defilement. I consequently quash the conviction of the appellant Peter Ndoli Adisa and set aside the sentence of ten (10) years imprisonment imposed."

26. He submits that according to PW2 and 3, both saw the torn panties in the morning evidence that they did not see him tearing the complainant's panties. It is possible, he contends, that the panties were already torn as it is common for people to wear torn panties.

27. Further, he submits that an inlays of the prosecution witnesses' evidence of how he attempted to defile the complainant demonstrates its incredibility. That PW1, PW2, PW3 testified that the two assailants were armed with knives and torches, that he the appellant took the torch which PW-1 had hence making it two torches. That he also had as an iron rod. It is his contention that it is not logical or possible that he would while holding these items in his hands, to lift up the victim and tear her pants in an attempted defilement.

28. With regard to positive identification of the assailant, he submits that the facts surrounding this case on his identification and that of his co-accused cast doubt as to whether the rightful assailants were picked up. That he was arrested solely on the statement of the alleged accomplice. . He argues that it is trite law, that accomplice evidence not only the weakest but the worst form of evidence upon which a trial court can convict an accused person. He relies on *Choge v R 1985*[KLR] l where the Court of Appeal stated :

> "A confession by one accused person which involves the guilt of another accused person is of itself, if unsupported by other testimony, evidence of the weakest possible kind against that other accused person. It is accomplice evidence which needs independent corroboration and this need is the greater when its maker has sought to retract it. An extra judicial confession by one accused person cannot be corroborated by a similar confession of that person's co-accused."

29. He submits that PW1, 2 and 3 testified that the alleged intrusion occurred at 4.00am in a house that had no electricity. He contends that they were all deep asleep hence making it impossible for them to accurately identify their assailants.

30. He submits that before a court of law delves into issues of identification, it is important to recall that the quality of a witness' memory may have as much to do with the absence of other distractions as with duration. He relies on *Mungania & 2 others v R & 2 others* (Criminal Appeal 21 of 2020 & E003 & E068 of 2021 (Consolidated)) [2022] KEHC 167 (KLR), where the court observed that;

> "48. Human memory is not foolproof. It is not like a video recording that a witness needs only to replay to remember what happened. Memory is far more complex. Memory has been described as consisting of three stages: acquisition:

> "the perception of the original event"; retention - "the period of time that passes between the event and the eventual recollection of a particular piece of information"; and retrieval – the "stage during which a person recalls stored information."

31. Further, the appellant has cited *S v Henderson* 27 A 3d 872 (NJ 2011) for the submission that memory can be affected by a variety of factors including:

    i. Whether the witness was under a high level of stress. Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification.

    ii. Whether a weapon was used, especially if the crime was of short duration. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of the subsequent identification if the crime is of short duration.

    iii. How much time the witness had to observe the event. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by a witness may not always be accurate because witnesses tend to think events lasted longer than they actually did.

    iv. Whether or not the lighting was adequate during the observation. Inadequate lighting can reduce the reliability of identification.

32. He submits that in the prevailing circumstances his identification cannot have been positive and accurate. That PW-1, 2, & 3 were under a high level of stress since as they had just been woken up by intruders armed with dangerous weapons, and according to their testimonies the duration of time spent with the intruders was also very short, that visibility must have been poor at 4.00am as the victims' house had no electricity, that the time frame within which the torch is alleged to have been switched was also short as PW-1 testified that he (appellant) snatched the torch from her, and that PW-1, 2, & 3 did not disclose the identity of their attackers to PW4 if indeed they identified them during the attack.

33. Hence in light of the highlighted gaps, inconsistencies and contradictions, the trial court abdicated its duty to carefully interrogate the credibility of prosecution witnesses. He relies inter alia on *Humphrey Mutethia & another v R* (2012) eKLR, where the court stated;

> " Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.....Even though the complainant said that she recognized both Appellants, and even though she said she knew them by name, her statement to the police nowhere stated the names of the Appellants."

34. It is largely suspicious, he submits, that when PW-1 woke up PW-4 at 4:00 am and reported the incident, he ran after them but failed to arrest them and they did not report the matter to the police immediately. That they went for a man hunt later only to come back with his co-accused, who upon interrogation gave his (appellant's) identity. That he was arrested at about 7:00 or 8:00 am but a police report was made at 2:00 pm. He questions why it took more than 6 hours for them to report the

matter to the police. He contends that 6 hours was sufficient time for the prosecution witnesses to fabricate their story and give to the police a narrative that implicates him. Further, he submits that the investigating officer (PW-5) did not conduct any investigations and his testimony is entirely a re-statement of what PW-1-4 reported.

Submissions by the Respondent

35. The State, through Prosecution Counsel Vincent Maina, submits that PW1, 2 and 3 saw the faces of the assailants n the light of PW1's lit torch. That thereafter, the appellant attempted to defile PW1 by raising her legs and tearing her pants. That the appellant was also identified by PW4 when he went to rescue the victims. He submits that the trial magistrate's reasoning to convict the appellant was sound and rightly informed by evidence.

36. With regard to the offence of attempted defilement, Mr. Maina submits that the essential ingredients of the offence were laid down in *Moses Kabue Karuoya v R* (2016) eKLR as follows;

    a. Intent 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.

37. He submits that the appellant's intentions of defiling the complainant were manifested when he raised her legs and tore her inner wear. That the evidence was corroborated by PW2 and 3.

38. With regard to the complainant's age, he submits that the same was proved by the oral evidence of the minor which was not challenged. That since the minor was before court, her age could be proved by observance and common sense. He relies on *Mwalango Chichoro Mwanjembe v R* (2016) eKLR where the Court of Appeal stated that;

> " The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense."

39. With regard to inconsistencies and contradictions, he submits that there were none and if at all they were there, then they were not material in any way. He contends that the important thing is that there was a torch which the appellant and his accomplice were spotted with and identified. That they were well known to PW1, 2, 3 and 4. Further, he submits that the weapons which they had during the incidence were recovered from them on arrest. He relies on *Richard Munene v R* (2018) eKLR where the Court of Appeal stated that;

> "It is a settled principle of law however that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main

issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

40. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

41. Having looked at the grounds of appeal, the entire record and the rival submissions, the key issue for determination is Whether the charges against the appellant were proved beyond reasonable doubt. This will come out as we answer the sub questions;

    a. Whether the case for the prosecution was replete with monumental inconsistencies and contradictions.

    b. Whether the appellant was positively recognized/identified.

42. As to whether the case for the case for the prosecution was full on inconsistencies and contradictions, PW1 testified that she was the one who took the torch and spotted the two assailants on their faces. She also said that the appellant took the torch away from her. On her part, PW2 said that she was the one who lit the torch in the faces of the two assailants, she said that the appellant had a torch and PW1 had a torch as well. On the other hand, PW3 testified that she saw the assailants when PW1 directed the lit torch in their faces. There is a contradiction as to whether it was PW1 or PW2 who shone the torch on the assailants' faces. This paints a situation where the victims may have been in panic and no one could remember who did what at that time of the intrusion.

43. This is seen further in the evidence with respect to the weapons the assailants allegedly had. PW1 testified that each of the assailants had a knife. She then changed and said that the appellant had an iron rod and Muasya had a knife. On cross examination by the appellant, she told him that he was the one with a knife. On re-examination, she said that the knife was in the possession of Muasya while the metal rod was in the possession of Mutinda (appellant). On her part, PW2 testified that the appellant had an iron rod and a knife while Muasya had a knife. PW3 said that the appellant had a knife which was not recovered and a metal rod. Further, she said that Muasya had the knife which was produced in court. PW1's account is that the knife was with one of the assailants and did not seem to be sure about the exact assailant that had the knife. He account contradicts that of PW2 and 3 who said that each of the assailants had a knife.

44. The evidence on the manner in which the appellant was arrested is also not consistent. PW1's account was that after reporting the attack to her uncle, PW4, he chased the assailants, managed to arrest Muasya and returned with him to their house. According to PW2, their uncle (PW4) chased the assailants but failed to get them. She said that they were arrested later at around 6am and tied with a rope. On her part, PW3 said that after reporting the attack to PW4, he ran after them and managed to arrest Muasya. PW4 said that after getting the report from PW1, he saw the two escaping and managed to arrest Muasya. The account given by PW2 contradicts that of PW1, 3 and 4 as to whether Muasya was arrested as he attempted to flee from the crime scene.

45. The evidence on record shows that the three ladies, PW1, 2 and 3, were sleeping in the same house and on the same bed when the assailants accessed their house. It is trite that not every contradiction will be fatal to the prosecution's case but as can be seen from the foregoing the contradictions and inconsistencies point to the fact that the learned trial magistrate applied some scrutiny to the evidence he would have found serious issues with the credibility of the witnesses.

46. As to whether the appellant was positively recognized/identified the prosecution's position is that the appellant and his co-accused were recognized because they were well known by the victims. The victims claimed to have recognized them when torch light was shone on their faces. According to PW1, 3 and 4, the appellant escaped from the scene but was arrested after his co-accused, who had been arrested earlier, said that they were together. On the other hand, PW2 said that both assailants managed to escape and were arrested in the morning by PW4. On cross examination by the appellant, she stated as follows;

> " The clan elder came home and found us. You had not been arrested. The chief ordered that those who had done the wrong be looked for and be brought to the scene. You were brought at 7.00am."

47. On cross examination by the appellant, PW3 stated as follows;

> " You were brought after accused 2 had been arrested. It was accused 2 who gave your name after which Junior (PW4) went looking for you...." (emphasis added)

48. It is evident that the witnesses who said they recognized the assailants did not do so otherwise they would have told PW4 the name of the appellant and would not have needed the co accused to identify him.

49. In addition, the evidence is such that the circumstances of the offence; light, time etc. we're not conducive to a proper identification or even recognition of the assailants. *Simiyu & another v Republic* [2005] 1 KLR 192 the Court of Appeal stated:-

> " In the present case, neither of the two courts below demonstrated any caution. Further, there was no inquiry as to the nature of the alleged moonlight or is brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any inquiry, evidence of recognition may not be held to be free from error."

50. There is also the evidence of the victims to the effect that they got to know the assailants well at dawn. On cross examination by the appellant, PW1 stated; "I knew you well at dawn." With regard to the co-accused, PW2 stated; "I knew him in the morning." PW3 stated; "He spotted Mutinda on the face. Muasya was standing on the door. I did not see him properly. I came to know him in the morning." These statements are a clear indication that the victims did not recognize their attackers. Coupled with the fact that the assailants were not arrested at the scene of crime and the distressing circumstances prevailing at the time, it is evident that the appellant was not positively identified.

51. As to whether the charges against the appellant were proved beyond reasonable doubt, I have already settled the question as to whether the appellant was properly identified as one of the assailants. The charge of attempted defilement is an Inchoate or incomplete offence for which intent must be established. The evidence from PW1 was that the appellant lifted her up and tore her panty. PW2 said that the appellant was pulling PW1's dress and lifting her legs at the same time. That he tore her under pant but she saw the torn inner wear in the morning. PW3 said that the appellant sat on the bed, raised PW1's legs and tore her panty. There is no evidence that the appellant undressed and attempted to insert his genital organ into that of PW1 see Stephen Mungai (supra) that; 'care must be taken to ensure that the attempt as opposed to mere acts of preparation is proved. However strong the evidence is, if it only relates to actions in preparation to commit a certain crime, that evidence cannot justify a conviction on an attempted charge.'

52. The alleged act of lifting the legs or lifting the complainant up did not establish the exclusive intention to commit an act of defilement . There is nothing in the case for the prosecution to show that the alleged break was with the sole intention of committing defilement. These actions are capable of different interpretations in the context of an attack, and in the circumstances of this case, the torn panty is not per se proof that the appellant is the one who tore it.

53. From the foregoing, I do agree with the appellant that the trial court did not conduct a holistic scrutiny of the evidence on record thus arrived at an erroneous decision.

Determination

54. I find that the appeal has merit. I allow the appeal. The conviction on each count is quashed and the sentences meted against the appellant. 5 years' imprisonment. And 10 years' imprisonment on each count respectively, be and is hereby set aside. The appellant is to be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF SEPTEMBER 2023

.....

MUMBUA T MATHEKA

JUDGE

CA - Nellima

State - Ms Omollo

Appellant - present in person