Waithira v Republic (Criminal Appeal E021 of 2022)
[2023] KEHC 3691 (KLR) (25 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3691 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E021 OF 2022

SC CHIRCHIR, J

APRIL 25, 2023

BETWEEN

EVANS MWANIKI WAITHIRA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being An Appeal against the Judgment of Hon. Gichobi PM in Kangema MCSO.6/2019 delivered on 17th march 2021 at Kangema Chief Magistrate's court in Sexual offences case No. 6 of 2019)

JUDGMENT

1. The Appellant herein seeks to quash the conviction and sentenced in Kangema MCSO 6/2019 delivered on the March 17, 2021 whereof he was convicted for the offence of rape of a 17 years old girl contrary to Section 3(1) (a)(b)(3) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of the offence were that on the 8th day of February, 2019 at [Particulars Withheld] location within Muranga County he unlawfully and intentionally caused his penis to penetrate the vagina of CNN without her consent.
3. He pleaded not guilty to the charge and after a full trial he was convicted and sentenced to 40 years in prison
4. Being aggrieved by the judgment he has proffered this appeal against both the conviction and sentence.

Grounds of Appeal

5. In his petition of Appeal dated June 29, 2022 he has set out several grounds which I have paraphrased as follows:
   a. That the prosecution evidence was full of contradictions, discrepancies and inconsistencies.

b. That the learned trial magistrate erred in law and in fact by convicting him on the basis of evidence that was uncorroborated and scanty

c. That the charge sheet was defective

d. That the learned magistrate erred on both law and in fact by meting an excessive sentence that was against the provision of the law and without considering the mitigating facts of the accused.

e. That the ingredients of the offence were not established.

f. That the trial magistrate erred on both law and facts by shifting the burden of proof to the accused and ignored his plausible defence.

g. That the court relied on evidence obtained through shoddy investigation and failure to adduce crucial exhibits.

h. That there was no nexus established between him and the offence

i. That the learned trail magistrate erred in both law and facts by failing to scrutinize clinical officer report that was red herring and cogent.

j. That the learned trial magistrate erred both in law and facts by failing to comply with the provision of the law under section 36 of the *sexual offences Act* No 3 of 2006 and section 122 of the penal code.

The Appellant's submission

6. On the defective charge the appellant states that to the extent that the complainant was found to suffer from mental disability then the charges against him should have been brought under section 146 of the *penal code* and not section 3(1) of the *sexual offences Act*.

   He relied on the case of *Isaac Omambia vs Republic* (1995) eKLR and the court of Appeal in *Peter Ngure Mwangi vs Republic* (2014) eKLR to buttress his submissions in this regard.

7. He further submits that the mental status of the complainant was not properly ascertained, thus the confusion on which section of the law he ought to have been charged.

8. It is further submitted that the ingredients of rape as set out under section 3(1) and (3) of the *sexual offences Act* were not proved. That the court proceeded with the wrong assumption that the complainant suffered from mental retardation and was therefore vulnerable.

9. He further contends that in the event that it is established that he was charged under the wrong provisions of law, then the prosecution should not be given the benefit of a retrial. He relied on the case of *Nicholas Munge Kasuku Vs Republic* (2020) eKLR Gw Ngenye Macharia J (as she was then).

10. The appellant further contends that the testimony of PW2, the complainant did not establish the offence of rape; that PW3 the complainant's grandmother did not tell the court the complainant's condition save for noticing blood flowing from her private parts.; that PW4 did not state how old or fresh the breaking of the hymen was. He concludes that penetration was therefore not proved.

11. On consent, it is the Appellant submission that the prosecution did not prove absence of consent; that there is no evidence that the complainant screamt or resisted .He further contends that the concept of consent in sexual relations is fluid. He faults the court for proceeding on the presumption that the

complainant was mentally incapacitated and therefore was not capable of consenting to the sex. He further submits that nowhere did the complainant told the court that she was under threat.

12. On contradictions and inconsistencies, the Appellant submits that the evidence of PW4 is contradictory to the findings of the Psychiatric report by Dr Mburu from muranga level 5 hospital as regards the mental capabilities of the complainant.

13. On the sentence, the appellant submitted that the sentence of 40 years was too excessive and there were no aggravating factors to warrant it. He urges the court to be guided by the high court decisions in the case of *Philip muenge & 5 others vs Repulic* (petition No 017 of 2021 and *Edwin Wachira & others vs Republic* (petition No97 of 2021 in this regard.

The Respondent's submissions

14. On whether there were inconsistencies, contradictions and lack of corroboration, the prosecution argues that the witnesses were clear, consistent and corroborated. That PW1, PW2 & PW3 all testified as to the events leading to the rape and they all gave consistent account of what transpired.

15. On the sentence, it is submitted that the sentence meted against the appellant was legal and it was not harsh considering that he took advantage of a mentally incapacitated girl, who was defenceless and vulnerable.

16. On identification, the respondent argues that the witness positively identified the accused as the two were neighbours.

17. On penetration, it is submitted that stated that the complainant testified that the accused "did things to her" and that she bled from her genital area.

18. On consent, it is the Respondent Submission That complainant was mentally incapacitated and therefore she was not capable of consenting.

19. On the Appellant's allegation that the court did not consider his defence, the prosecution contends that both parties' testimonies were considered.

20. On whether the case was proved beyond reasonable doubt, the Respondent argues that the prosecution was able to prove all the ingredients of the offence.

22. On sentencing, it is contended that sentencing was at the discretion of the trial court and that it was exercised judiciously and not capriciously. That the aggravating factors called for such a sentence. The respondent relied on the case of *Wanjema vs Republic* (1971) EA 493.

23. The following issues lend themselves for determination:

    a. Whether the charge was defective

    b. Whether the prosecution's case was full of contradictions, discrepancies and inconsistencies

    c. Whether the prosecution's case was proved beyond reasonable doubt

    d. Whether a nexus was established between the offence and the accused.

Whether the Charge Was Defective

24. The Appellant was charged with rape contrary to section 3(1) (a) (b)(3) of the *sexual offences Act*, with the particulars as set out earlier in this Judgment. The record shows that on February 11, 2019, upon the taking of the plea, the prosecutor applied for mental assessment of the complainant to ascertain

her mental status. On March 18, 2019, the prosecution submitted a mental assessment report done by Dr Mburu JM, a consultant psychiatrist from Muranga level 5 hospital. The report (PEXB3) indicated that the complainant suffered from neuropsychiatric condition (mental retardation with psychosis). On her cognitive functions the report reads: "her higher mental functioning including memory, judgment, concentration and intellectual capacity is profoundly impaired." Another medical report from Kangema medical services (PEXB3) indicates that suffered from severe mental retardation.

25. Thus right from the commencement of the trial, the prosecution was aware that the complainant suffered from some mental incapacity. It is also evident that the trial court was also alive to this fact as in her judgment the trial magistrate concluded that being mentally incapacitated the complainant could not have consented to sex. This was also part of the prosecution's submission- that mental incapacity negated any form of consent.

26. In view of the aforegoing , I agree with the Appellant that he was charged under the wrong provisions of law. Curiously the Respondent has not addressed this ground of appeal

27. The correct charge wold have been one of defilement of idiots and imbeciles under section 146 of the *penal code*. Section 146 of the penal code provides as follows: " Any person who knowing a person to be an idiot or imbecile., has or attempts to have carnal connection with him or her under circumstances not amounting to rape , but which prove that the offender knew at the time of commission of the offence that the person was an idiot or imbecile is guilty of a felony and is liable to imprisonment with hard labour for 14 years.".

28. The *penal code* does not define who an imbecile is, but *Black's law dictionary* defines an imbecile as " a person inflicted with severe mental retardation" (9th Edition , page 816). Both psychiatric reports submitted to court captures the said definition .Thus the complainant was indeed an imbecile and it follows that the Appellant should have been charged under section 146 of the *penal code*. The duty was on the prosecution to seek for the amendment of the charge sheet the moment they obtained the psychiatric reports.

What is the effect of a defective charge?

29. The *Criminal Procedure Code* at section 382 provides as follows-

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings before or during the trial or in any inquiry or other proceedings under this Code , unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings".

30. There is nothing on record showing that the Appellant complained about the defective charge. I also take note of the fact that the Appellant was represented during trial and hence failure to raise this issue cannot be said to be for want of legal representation.

31. Nevertheless, the defect on the charge sheet ended up in the accused being handed more severe sentence than he would have been faced with had he been charged under the right provisions of law. Under the *sexual offences Act* the minimum sentence is 10 years and the court can enhance it to life imprisonment. In this case the court handed down a sentence of 40 years yet had the Appellant been charged under

section 146 of the *penal code*, he was liable to a maximum of 14 years. This has not only occasioned prejudice to the Appellant but has resulted in great injustice that cannot be cured under section 382 of the *criminal procedure code*.

What then should be the way forward?

32. It is the Appellant submission that the court should not order for a retrial as the blame lies squarely with the prosecution who failed to amend the charge sheet. In the case of *Ahmed Sumar vs Republic* (1964) EALR 483the Court of Appeal held: "in general , a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where conviction is set aside because of insufficiency of evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not necessarily follow that a retrial should be ordered"

33, In *Muiruri vs Republic* (2003) KLR552The court held "It (order of retrial) will only be made where the interest of justice require it and if it is unlikely to cause an injustice to the Appellant. Some factors to consider would include, but are not limited to illegalities or defects in the original trial (see *Zedekiah Ojuondo vs Republic*- CR. Appeal No 57 of 1980), the length of time which has lapsed since the arrest and arraignment of the Appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution or the courts."

34, In *Mwangi vs Republic* (1983) KLR 522, the court of Appeal held: "we are aware that a retrial should not be ordered unless the Appellate court is of the opinion that on proper consideration of the admissible or potentially admissible evidence a conviction might result. In our view there was evidence which might support a conviction"

35. Finally in *Ekimat vs Republic* CR Appeal No 151 of 2004(unreported) the court Stated " … the principle that has been accepted is that each case must depend on the particular facts and circumstances of each case but an order of retrial should only be made where interest of justice require."

36. The above decisions provide the guidelines, and having considered the circumstances of this case am persuaded that the entire trial was a nullity and I order for a retrial

37. In ordering for a retrial I have considered that failure to amend the charge sheet was the mistake of the prosecution. However the court, having noted the psychiatric report which was brought to her attention also had the mandate to order for amendment pursuant to the provisions of section 24 of the *criminal procedure code*. Thus the mistake was not exclusively that of the prosecution.

38. On the length of trial, the Appellant was arraigned on February 11, 2019 and convicted on March 24, 2021, he was however out on bond during trial. Upon conviction he has been in prison for the last two years. These two years will be have to be taken into Account if the Appellant will be convicted

39. Also, on careful consideration of potentially admissible evidence, am of the view that a conviction my result.

40. Finally in ordering for a retrial I bear in mind the fact that both the Appellant and the victim of the crime are equally entitled to justice.

41. Having come to the conclusion that the charge was defective, and the subsequent trial a nullity, there is no need to delve into the other issues identified

In conclusion:

a). The conviction arising in Kangema sexual offences case No 6 of 2019 is hereby quashed and sentence set aside and order for the retrial of the Appellant

b). The Appellant be produced in court and the retrial to be conducted by a court of competent jurisdiction other than the trial court.

c). The Appellant should be produced before court for plea taking within 14 days from the date of this Judgment.

d). In the interim the Appellant to be released and held within the nearest police station awaiting an arraignment in court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 25TH DAY OF APRIL 2023.

S. CHIRCHIR

JUDGE

In the presence of:

Susan- Court Assistant

Appellant – present

Ms. Muriu for the Respondent.