REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. E005 OF 2021

EDWIN ODONGO AOL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. The appellant **EDWIN ODONGO AOL** was charged with the offence of rape contrary to section 7 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on the 18th of November 2019 at Barding sub-location Siaya County, he intentionally caused his penis to penetrate the anus of L.A.O., a person with mental disabilities without his consent. The appellant also faced the alternative charge of committing an indecent act with an adult contrary to Section 11(a) of the Sexual Offences Act No. 3 of 2006.

2. The appellant pleaded not guilty to both the main and alternative charge and the matter proceeded to full hearing.

3. The trial magistrate Hon. L. Simiyu after considering the evidence of the four prosecution witnesses against the sworn statement of the appellant herein found that the prosecution had proved their case against the appellant beyond reasonable doubt and found him guilty of rape contrary to section 3 of the Sexual Offences Act No. 3 of 2006 and sentenced the appellant to serve ten (10) years imprisonment.

4. Aggrieved by the said conviction and sentence, the appellant filed a petition of appeal setting out the following grounds of appeal:

> ***a) That the learned magistrate erred in law and fact in convicting the appellant when the evidence on record was manifestly insufficient, inconsistent and had glaring gaps hence incapable of sustaining a conviction.***
>
> ***b) That the learned magistrate erred in law and fact in convicting the appellant against the weight of evidence on record.***
>
> ***c) That the learned magistrate erred in law in failing to give due and/or adequate consideration to the appellant's defence.***
>
> ***d) That the learned magistrate erred in law and fact by passing a sentence which was manifestly harsh and excessive in the circumstances, in any event.***

Appellant's Submissions

5. In his written submissions, the appellant argued that the evidence relied upon by the trial magistrate in arriving at her decision did not meet the threshold set out in the case **Miller v Minister of Pensions (1947) ALL ER 373** to warrant a conviction for the offence of rape as firstly the court relied on the evidence of the complainant, a mentally an unstable person. Reliance was further placed on the case of **Augustus Mugo Kamunya v Republic [2017] eKLR** where the court considered the power of a magistrate to take evidence in a case where the magistrate ordered that the complainant would not testify as he had been deemed to lack mental capacity. On appeal, the Court stated that the law allowed a magistrate to make an appropriate order to enable the court receive evidence material in the case and protect the rights of the victim considered to be vulnerable.

6. The appellant further relied on the case of **Republic v Patrick Mutisya Muthiani [2015] eKLR** where the court similarly considered the competency of a witness with a mental disorder to give evidence, and submitted that the complainant witness ought to have testified using an intermediary as envisioned in section 31 of the Sexual Offences Act and thus the evidence adduced by the complainant witness ought to have been inadmissible.

7. The appellant further submitted that the competency of the complainant witness ought to have been done in line with the provisions of section 125 of the Evidence Act failure to which as was in this case, the court ought not to have considered the testimony of the complainant.

8. The appellant submitted that the evidence relied on by the trial court was pure hearsay as no one apart from the complainant, who is mentally unstable, was present at the scene when the offence took place and thus the appellant was not properly identified and the court also failed to consider the evidence of identification properly so as to satisfy itself that the same was enough to warrant conviction as was held in the case of **Wamunga v Republic (1989) KLR 424.**

9. It was submitted that the court ignored the evidence tendered by the appellant as is evidenced by the fact that the appellant testified and raised the fact that the complainant's clothing was found in a neighbour's compound and further that the parties herein had never got along, facts which were not investigated by the police or interrogated further by the court. The appellant in this regard relied on the cases of **Kavuvu Muli v Republic [2012] eKLR** and the Malawian case of **Chanya 7 Another v Republic Criminal Appeal No. 9 of 2007** where the court in both instances emphasised the need to consider the defences raised by accused persons.

10. The prosecution did not file any submissions.

Analysis & Determination

11. This is the first appeal and therefore this Court is under a duty to analyse the evidence as a whole and arrive at its own independent findings and conclusions bearing in mind that the trial magistrate had the opportunity to see and assess the demeanour of witnesses, unlike this court, and leave room for that. This is what was held in the case of **Okeno v R 1972 E.A. 32** and reiterated by this court in several cases including the case of **Benson Ouma Oudia v Republic [2020] eKLR.**

12. Revisiting the evidence as adduced before the trial court, the prosecution evidence was as follows: PW1 Kennedy Opiyo Omondi a clinical officer attached to Siaya County Referral Hospital testified that the complainant was treated at the hospital on the 27.1.2019 for injuries arising from assault and sodomy by a person who was well known to him.

13. It was his testimony that examination of the complainant revealed that he suffered stiffness of the neck and dry laceration on the neck, tenderness on the anterior chest whereas his penis was swollen with an open septic wound at the base that produced a foul smelling discharge. PW1 also noted that the complainant's penis was reddish, swollen with urine retention. PW1 further testified that the complainant's anus was swollen with multiple lacerations with stool on the exterior orifices and further that there was a passive discharge from the anus that produced a foul smell. PW1 produced the P3 form as P. Exhibit 1.

14. On cross-examination PW1 stated that the complainant was taken to the hospital on the 27.11.2019 and that the sodomy was committed on the 18.11.2019. He further stated that he inquired about the perpetrator and was informed that he had not been arrested. It was his evidence that he was not aware whether the appellant and the complainant were related.

15. PW2, the complainant's mother and the appellant's sister-in-law testified that on 19.11.2019 the complainant, who slept alone in the house had not returned home by 0800hrs having spent the night at his grandmother's house where he usually slept and so she went to check on him. She testified that she found the complainant in the house naked seated on a mat with injuries to his neck where skin had peeled a bit. She testified further that the complainant's penis was reddish and injured so she rushed home and took a trouser for the complainant to put on.

16. It was PW2's testimony that the complainant informed her that the accused had taken him to the river and inserted his penis in his anus. She testified that as she was unwell, she reported the incident to the Assistant Chief the following day who told her to take the complainant for treatment. It was her testimony that she took the complainant to the hospital on the 21st then to Siaya General Hospital where the doctor informed her to make a report of the incident to the police as the complainant had been raped which she did at Siaya Police Station.

17. PW2 testified that the complainant was mentally retarded as he fell ill when he was young. She further testified that when the complainant informed her about the assault, he stated that Odongo was the one who assaulted him. PW2 identified O as the appellant herein before court.

18. In cross-examination, PW2 stated that when she spoke to the complainant, he stated that the appellant grabbed his neck and strangled him as he dragged the complainant to the river where he raped him. She further stated that the complainant could not recall what time the incident occurred as he was berserk though he had retired to bed at 9.00pm the previous night.

19. PW2 admitted that she did not go to the scene but only informed the assistant chief. She further admitted that she was aware of the complainant's mental incapacity but that she used to send the complainant to fetch water which he did and that the complainant was able to carry out some duties unsupervised. PW2 stated that the complainant informed her that the appellant returned with him back to the house and told him to go back to bed.

20. It was her testimony that the complainant slept in a house next to the appellant's mother but failed to wake up the appellant's mum as he had no mental ability to reason and report. She further refused to give evidence of the appellant's conduct on account of his long absence from home and stated that the appellant only moved back home in May 2019. It was her testimony that the appellant visited her home during which time the complainant became apprehensive and muted. She further stated that the appellant failed to inform her that the chief required them to go to the hospital. PW2 testified that she did not ask the appellant about people who shared the house with the complainant and further that neither the appellant nor his family went to see the complainant in hospital.

21. The complainant testified as PW3. During his testimony in chief, the trial magistrate noted that he looked disturbed but appeared to

remember some events though not with precision. She further noted that it was difficult to extract evidence from him. It was his testimony that he knew the appellant. He testified that on the material date the appellant found him at his door where he had gone to urinate after returning from the market and told him to go with him to the river. PW3 specifically stated that it was the appellant who told him to accompany him to the river.

22. PW3 further testified that the appellant took him to a vegetable garden where he had planted kales and asked him to lie down, withdrew his penis and inserted it into PW3's anus. He further stated that the appellant pulled his penis and it got hurt. He reiterated that it was the appellant who violated him because the appellant spoke to him and he saw his face. PW3 further stated that he knew the appellant well and that the appellant lived with his mother in a house close to where PW3 slept. PW3 further admitted that when his mother found him he was not dressed as he had no trouser which he did not find.

23. At the end of the examination in chief of PW3, the trial magistrate noted that the witness looked disturbed but appeared to remember some events though not with precision. She further noted that it had been difficult to extract evidence from PW3 as examination in chief had taken 1 hour 20 minutes.

24. PW4 No. 66068 Corporal Alfred Kiprop testified that on the 27.11.2019 he perused the O.B. at Siaya Police Station and found a case of rape made by the complainant PW3, who was accompanied by his mother, PW2 whose statements he recorded. He testified that he issued the P3 form which was filled identifying the nature of injury as grievous harm and showed evidence of rape.

25. PW4 further testified that when he saw the complainant, he walked with extreme difficulty. He stated that he issued the warrant of arrest for the appellant and who was arrested. In cross-examination, Corporal Kiprop reiterated that he recorded the statement of the complainant and his mum and that the complainant gave out the appellant's name as his assailant. He further stated that nothing was recovered in connection with the offence. The prosecution subsequently closed its case.

26. Placed on his defence, the appellant elected to give unsworn evidence. It was his testimony that he did not commit the offence. He stated that when PW2 reported the matter to the chief, the chief told them to take the complainant to hospital and that he offered to take the complainant to hospital but PW2 refused.

27. The appellant further testified that his own investigations on the matter revealed that the complainant was raped by another man, their neighbour, who had attempted to rape a woman but failed when the woman screamed prompting him to run into the appellant's home where he found the complainant and raped him. It was his statement that the chief was aware of these rumours and summoned him but PW2 refused to attend the meeting.

28. The appellant submitted that the complainant's clothes were found at a neighbour's home, the same man who had fled into the appellant's home. He stated that the charges against him had been fabricated and that the case was instigated as a result of his progress in life and his projects that were promising. It was his testimony that his family members had asked PW2 to withdraw the case and that PW2 believed that the case had been finalized.

Analysis and determination

29. As a preliminary issue, I observe that the appellant was charged with and convicted of rape contrary to section 7 of the Sexual Offences Act. I also observe that the offence of rape is created both under the Sexual Offences Act and the Penal Code. Section 7 of the Sexual Offences Act provides as follows:

> ***"7. A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years."***

30. The Section 7 of the Sexual Offences Act offence is not an offence for the rape of a person with mental disabilities. The latter is the subject of an offence under section 146 of the Penal Code. Section 7 of the Sexual Offences Act proscribes the rape or committing an indecent act ***with another within the view of a family member, a child or a person with mental disability.*** In the section 7 of the SOA offence, the person with mental disability is the spectator while in section 146 of the Penal Code offence, the person with mental disability, therein called an idiot or imbecile, is the victim. It therefore follows that the appellant was charged with an offence that falls under a different statute-the Penal Code instead of under the Sexual Offences Act.

31. The question to be resolved by the court is the impact of a defective charge upon which the appellant was convicted and sentenced by the trial court. The remedy for defective proceedings is retrial. The court must however consider the facts and circumstances of the case to determine whether the proceedings were defective and whether there should be an order for a retrial or whether the court should quash the conviction and set aside the sentence without more.

32. From the trial court record, it is clear that the trial magistrate thought that the matter before her was really a case of defilement of an imbecile and that an offence under section 146 of the Penal Code was the correct charge. This is evidenced at page 3 of the trial magistrate's judgement where she detailed the ingredients of the offence that the appellant was charged with as follows:

> ***"The ingredients of the offence therefore are firstly that the victim is an idiot or imbecile, secondly, that the accused had knowledge of this fact at the time of commission of the offence, and thirdly that the accused had or attempted to have carnal knowledge with the victim while so knowing..."***

33. Section 146 of the Penal Code provides:

> **"146**. A***ny person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the 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 fourteen years."***

34. Factually, upon conviction of the offence under section 146 of the Penal Code , one can be sentenced to a prison term of up to fourteen years. That being the case, the trial court ought to have directed an amendment of the charge under section 214 of the Criminal Procedure Code before the Prosecution closed its case. This did not happen and the trial court proceeded to convict on the offence of rape contrary to section 7 of the Sexual Offences Act.

35.

36. Failure to direct an amendment under section 214 of the Criminal Procedure Code to reflect the correct offence as rape or indecent act with a person with mental disability under section 146 of the Penal Code is a defect which led to the conviction of the appellant on an offence that existed under a different statute.

37. Regarding the offence actually charged, the Prosecution needed to prove in addition to the sexual act that causes penetration that it was ***within the view of a family member, a child or person with mental disability.***

38. On the alternative charge of indecent act, I note that the alternative charge was properly laid against the appellant, however the trial court did not convict the appellant on it. The evidence that could support the offence of indecent act charged in the alternative charge is that of the complainant in respect of whom the trial court found in the Judgment that –

> ***"….in this matter it was critical that the state proves that the complainant was a person abled differently, other that the testimony of his mother that that her son labored under some form of retardation there was no medical proof of such. This limb of the charge is not fulfilled."***

39. However, the trial magistrate while taking down the evidence of the complainant noted that:

> ***…. he looked disturbed but appeared to remember some events though not with precision. It was difficult to extract evidence from him…***
>
> ***the witness looked disturbed but appeared to remember some events though not with precision. It had been difficult to extract evidence from PW3 as examination in chief had taken 1 hour 20 minutes."***

40. It is therefore clear that the trial magistrate acknowledged that the complainant had some mental incapacity and as such, she ought to have made a finding as to his competency to testify as a witness to justify reception of his testimony in terms of section 125 of the Evidence Act. In **David Ndumba v. R, Court of Appeal at Nyeri Criminal Appeal No. 272 of 2012, [2013] eKLR**, the Court of Appeal considered the competency of a mental patient and held as follows:

> ***15. " Mr. Kariuki urged us to find that the evidence adduced by F was not credible by virtue of the fact that she was a medical patient and no voire dire was conducted by the trial court to establish her competency as witnesses. Section 125 of the Evidence Act provides:-***
>
> ***"125(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether body or mind) or any similar cause.***
>
> ***2) A mentally disordered person or lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them."***
>
> ***Based on the foregoing we concur with the following findings by the High Court:-***
>
> ***"At page 2 of the judgment of the learned trial magistrate who took the evidence of the two witnesses, and therefore had the occasion to determine the level of the understanding of these two witnesses observed:***
>
> ***'The complainant testified before me. The court could not gauge the extent of her mental illness. But she was fairly comprehensible.'***
>
> ***From the foregoing statement, the learned trial magistrate after observing the complainant, and considering the answers she gave to the questions put to her at the trial, formed the opinion that she understood the questions and gave rational answers to those questions, and therefore she was comprehensible. I am satisfied that the complainant was a competent witness and that her evidence was comprehensible and therefore should be considered."***
>
> ***We therefore, find no reason to interfere with the concurrent finding of facts by the two lower courts on the competency of F."***

[Underlining mine]"

41. In the present case, there was no evidence that the trial court considered the matter and made a specific finding on the competency of the complainant, PW3 to testify. Where the trial court is satisfied that the complainant is not competent to testify, an appropriate order can be made including an order that the complainant should not testify or testify through the assistance of an intermediary. See **Section 31 (1)** and **(2)** of the **Sexual Offences Act** which provides:

> ***"A Court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is-***
>
> ***(a) the alleged victim in the proceedings pending before the court;***
>
> ***(b) a child; or***
>
> ***(c) a person with mental disabilities.***
>
> ***The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1) declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of:-***
>
> ***(a) age;***
>
> ***(b) intellectual, psychological or physical impairment;***
>
> ***(c) trauma;***
>
> ***(d) cultural differences;***
>
> ***(e) the possibility of intimidation;***
>
> ***(f) race;***
>
> ***(g) religion***
>
> ***(h) language;***
>
> ***(i) the relationship of the witness to any party to the proceedings;***
>
> ***(j) the nature of the subject matter of the evidence; or***
>
> ***(k) any other factor the court considers relevant***

42. **Section 31 (4)** makes provision for protection to be given to vulnerable witnesses who have been declared so by the Court. **Sub-Section (4) (e)** provides:

> ***"Upon declaration of a witness as vulnerable***
>
> ***(a) …***
>
> ***(b) …..***
>
> ***(c)…..***
>
> ***(d) Any other measure which the court deems just and appropriate.***

43. The above section would be applicable as the offence of rape is established both under the Sexual Offences Act and the Penal Code.

44. What then should the court do? This same issue arose in **Musa Kiprotich Kitilit vs. Republic [2012] e KLR** where the appellant had been charged with an offence under section 7 of the Sexual Offences Act with an alternative under section 11(1) of the Sexual Offences Act. The court noted that the victim had mental disability and therefore the charge should have been brought under section 146 of the Penal Code. The court held that the charge was fatally defective as the particulars of the charged offence were at variance with section 7 of the Sexual Offences Act. The court quashed the conviction and set the appellant at liberty.

45. In the instant case, the appellant had been charged with the offence of raping an imbecile under provisions which create a different offence. The charge was defective and the trial of the appellant was therefore a nullity ab initio. The trial court and the prosecution ought to

have seen to it that the charge was amended before completion of the trial. Otherwise, taking the appellant through a trial under those circumstances was improper.

46. It is for that reason that I find that the trial court fell into error when it convicted the appellant on the basis of a charge that was fatally defective. That conviction cannot stand. The remedy for defective proceedings is an order for retrial, where appropriate. The Court of Appeal in **Muiruri v. R (2003) KLR** 552, 556 held:

> ***"Generally, whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case. It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial (See Zededkiah Ojuondo Manyala v. Republic (Criminal 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's making or the Court's."***

47. In **Opicho v. Republic (2009) KLR 369, 375**, the Court of Appeal considered the issue of retrial in that case and held:

> ***"The prosecution had nothing to do with the omissions made in this trial. On the Contrary it was the prosecutor who drew the attention of the court to the required procedure [of conducting a voire dire on a child of tender years] but the trial court was entirely to blame for what followed. The allegations made against the appellant are extremely serious and of public interest as they relate to child abuse, a phenomenon now topical on the world stage, and in the country, due to its prevalence. It is in the interest of justice that the appellant receives a fair trial and if he is to be acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law. We are inclined in all the circumstances of this case to order a retrial."***

48. The errors herein were by both the prosecution who ought to have known the charge and its ingredients before bringing it against the appellant, and the trial court should have examined that charge upon hearing the evidence and directed for amendment of the same to reflect the correct offence. A person with mental disability is a vulnerable victim who deserves protection by the court. The prosecution, knowing very well that the complainant was a person with mental disability should have availed the doctor to testify on the mental capacities of the complainant to give way for the protection of the victim of sexual offence who was mentally unsound. The crime of rape of a mentally challenged person which was improperly brought against the appellant as an offence under section 7 of the Sexual Offences Act and the alternative charge of indecent act are extremely serious matters as to warrant a retrial.

49. In my view, the circumstances of this case require that the matter be remitted back to the trial court for retrial as no prejudice shall be occasioned on the appellant who shall be afforded a fair trial, and it is in the interest of justice that a retrial be had in view of the serious nature of the alleged offence. In addition, this court has fast tracked the hearing and determination of the appeal herein which has been determined with expedition. The appellant has not substantially served the sentence imposed. This is so because a criminal justice system must be measured by how it protects the most vulnerable members of the society, of which, persons with mental disabilities are an obvious part. A person who takes advantage of a person with disability is deserving of severe punishment as a deterrence to himself and others of like-mind in order to protect persons who are incapable of fully protecting themselves by reason of diminished mental acuity. It was not enough that the trial court observes that the complainant was not stable in his giving of evidence in chief which took 1 hour and 20 minutes. That in itself should have raised her antennae to question the competency of the complainant to testify on his own without being assisted in any way as required by law.

50. Accordingly, I quash the conviction of the appellant, set aside the sentence imposed on him and order that the appellant shall appear before the Principal Magistrate's Court at Siaya for a retrial with the correct offence/ charge to be filed by the prosecution. The exhibits produced by the prosecution to be preserved with care and to be returned to the prosecution upon signing for the same.

51. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 26TH DAY OF OCTOBER, 2021

R.E. ABURILI

JUDGE