REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 83 OF 2019

BETWEEN

DAVID KIMANI WANYOIKE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 21st June 2018

in Criminal Case (SO) No. 435 of 2017 at the Magistrate's Court

at Thika before Hon V. Kachuodho, SRM)

JUDGMENT

1. The main charge against the appellant **DAVID KIMANI WANYOIKE** was purportedly under **section 17** of the ***Sexual Offence Act*** ("the ***Act***") and it read as follows:

> *DAVID KIMANI WANYOIKE: On the 3rd day of February 2015 at [particulars withheld]Location in Murang'a County, intentionally caused his penis to penetrate the vagina of MW without her consent within the view of MW being a person with mental disability.*

2. The appellant also faced an alternative charge of committing an indecent act with an adult contrary to **section 11A** of the ***Act*** as follows:

> *DAVID KIMANI WANYOIKE: On 3rd day of February 2015 at [particulars withheld] Location in Murang'a County, intentionally touched the vagina of MW against her will.*

3. Before I deal with the issues raised in this appeal, I propose to set out the facts as they emerged before the trial court. This is because I am enjoined to review all the evidence independently and come to my own conclusion as to whether to uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify.

4. The complainant (PW 1) testified that on 3rd February 2016, the appellant met her carrying firewood, caught her and started abusing her. As she screamed he strangled her with his jacket. She stated that, *"he*

slept on me when I was lying on my stomach." She added that, *"he removed my clothes. He slept on me. He started raping me."* PW 2, came and she was taken to report to the police station and thereafter for examination and treatment at the hospital.

5. PW 2 testified that she came home on that evening at about 5.30pm and started looking for PW 1. As they were looking for her, they met the appellant who asked her where she was going. After he left, they heard PW 1 screaming for help. They found PW 1 without clothes. She was bleeding from the nose and had the appellant's jacket.

6. The clinical officer, PW 3, examined and treated PW 1 on 4th February 2015 when she was brought, accompanied by PW 2. He produced the P3 medical form. When he examined her, she had a bruise on the face and nose. She complained of pains in the neck. Her private parts had bruises and had a discharge. He reported that PW 1 had a mental disability.

7. The Investigating Officer, PW 4 confirmed the incident of rape was reported on 4th February 2015 at 10.15am. She took the statements and issued the P3 medical form to be filled by the doctor. She was also given a jacket which was identified as that of the appellant.

8. When the appellant was put on his defence he denied the offence. In his sworn testimony he stated that he was married to the elder sister of the complainant and they separated and this case was a grudge against him by PW 2. The appellant stated that on the material day he was at Kenol where he was working. He did not see PW 1 on that day.

9. Before I deal with the grounds of appeal set out in the case, it is important to note the charges the appellant was charged with and which I have set out in the opening paragraphs. The charge sheet referred to **section 7** of the ***Act*** which provides as follows, *"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 disability is guilty of an offence …"*

10. Obviously the offence under **section 7** of the ***Act*** was not proved and the facts as I have outlined could not support such a charge as the appellant and PW 1 were not family members and the offence was not committed in the presence of a third party who is a family member, child or person with mental disability. The nature of the offence under **section 7** of the ***Act*** is intended to protect vulnerable third parties and does not apply to the complainant herself. The appellant ought to have been charged with rape under **section 3** of the ***Act***.

11. The importance of the charge facing the accused is fundamental to the fair trial of an accused person. **Section 134** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** which provides as follows:

> *134. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.*

12. It is on the basis of the charge that an accused is able to know the offence facing him and prepare his defence accordingly. In ***Sigilani vs Republic*** [2004] 2 KLR 480, it was held that:

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused to prepare his defence.

13. In this case, the charge referred to a different offence other than the one he was convicted of. The Court of Appeal in ***Jason Akumu Yongo v Republic*** [1983] KLR 319 held that:

In our opinion a charge is defective under Section 214 (1) of the criminal procedure code where:

a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses: or

b. It does not, for such reasons, accord with the evidence given at the trial: or

c. It gives a misdescription of the alleged offence in it particulars.

14. In the judgment, the trial magistrate did not deal with this error instead went ahead to consider the case as of rape under **section 3** of the ***Act*** yet that was not the charge the appellant was facing. This was not merely an error since the appellant faced substantial prejudice as he was facing a different offence which, on the evidence was not proved. It is for this reason I also find that this error being in relation to the substantive offence was not curable under **section 382** of the ***Criminal Procedure Code*** which states that:

382. Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be revised 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 proceeding 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.

15. The only other offence that was available to the prosecution was that of committing an indecent act with an adult. **Section 2** of the ***Act*** defines *"Indecent act"* to mean *"any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration"*

16. In his grounds of appeal, supplementary grounds of appeal and written submissions, the appellant contested the conviction on the basis that the prosecution did not prove the offence beyond reasonable doubt. That the appellant was not identified as the perpetrator and that the complainant was a person lacking in mental capacity and that she was coached to testify by her mother.

17. Although PW 1 was a person with mental disability, her testimony was clear as to how the appellant caused an act of penetration. The incident took place during the day thus excluding the possibility of mistaken identity. The parties were known to each other. The appellant admitted that PW 1 was his sister in law. Although no one witnessed the act, when PW 2 went to look for her she met PW 1 at the vicinity of the incidence and also found PW 1 with a jacket belonging to the appellant. This evidence put the appellant at the scene of the incidence and corroborated the testimony of PW 1. Further corroboration of PW 1 testimony is found in the medical evidence of PW 4. In light of the overwhelming evidence, I reject the appellant's defence that he was not around on the date the offence took place.

18. For the reasons I stated earlier, I find the prosecution proved the offence of committing an indecent act with an adult contrary to **section 11A** of the ***Act*** and I convict him accordingly.

19. Under **section 11A** aforesaid the maximum sentence for the proved offence is 5 years' imprisonment or a fine of Kshs. 50,000/- or both. Since the appellant was a first offender and in light of the facts of the case, I sentence the appellant to **four (4) years imprisonment** which shall run from **14th February 2018**.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KIAMBU this 29th day of JANUARY 2020.

J. N. ONYIEGO

JUDGE

Appellant in person.

Mr Kasyoka, instructed by the Office of the Director of Public Prosecutions for the respondent.