



**Haggai v Republic (Criminal Appeal 38 of 2024)
[2025] KEHC 1968 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1968 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 38 OF 2024
DR KAVEDZA, J
FEBRUARY 11, 2025**

BETWEEN

ISAAC OCHODI HAGGAI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. I. M. Kabuya (SPM) delivered in Chief Magistrates' court
(Kibera) S.O. Case No. 95 of 2023 on the 11th day of June 2024)*

JUDGMENT

1. The Appellant was initially charged with the Subordinate Court of the offence of rape contrary to section 7 of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 20th August 2023 in Kibera, he intentionally caused his penis to penetrate the anus of RO, a person with mental disabilities. After a full trial, the appellant was convicted on the charge of committing an indecent Act with a person with mental disability contrary to section 7 of SOA. The particulars were that on 20th August 2023 in Kibera, he intentionally touched the anus of RO with his penis against his will. He was sentenced to serve fifteen (15) years' imprisonment. He appeals against conviction and sentence in line with his petition of appeal received on 4th July 2024.
2. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
3. With the above, I now proceed to determine the substance of the appeal. In his grounds and submissions, the Appellant has raised three grounds of appeal. He complains that the trial magistrate failed to appreciate that the prosecution did not prove its case against the appellant beyond reasonable



doubt. He further complains that there was no corroborative evidence to support the prosecutions case. He further states that the prosecution case was marred with contradictions and inconsistencies which were enough to displace the whole case. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt.

4. Section 7 of the *Sexual Offences Act* No 3 of 2006 provides “A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or person with mental disability is guilty of an offence and liable on conviction to imprisonment for a term which shall not be less than 10 years.”
5. At the onset, I note a mistake in the charge and conviction. The appellant was erroneously charged under Section 7 of the *Sexual Offences Act*, with an alternative charge under Section 11(1) of the same Act. It is important to note that the offence of indecent act is covered under both the *Sexual Offences Act* and the *Penal Code*. Section 7 of the *Sexual Offences Act* states:

“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 commits an offence and, upon conviction, is liable to imprisonment for a term of not less than ten years.”
6. This provision does not address indecent acts with persons with mental disabilities, which is specifically criminalized under Section 146 of the *Penal Code*. Section 7 of the *Sexual Offences Act* applies where a person with mental disabilities, a child, or a family member is a witness to the act, whereas Section 146 of the *Penal Code* criminalizes the indecent acts with a person with mental disabilities, referred to in the provision as an “idiot or imbecile.” This distinction means that the appellant was charged under an incorrect legal provision, as the appropriate statute for the offence falls under the *Penal Code* rather than the *Sexual Offences Act*.
7. What then should the court do? A similar issue arose in *Musa Kiprotich Kitilit v. Republic* [2012] eKLR, where the appellant was charged under Section 7 of the *Sexual Offences Act*, with an alternative charge under Section 11(1) of the same Act. However, since the victim had a mental disability, the correct provision should have been Section 146 of the *Penal Code*. The court found that the charge was fundamentally defective as its particulars did not align with Section 7 of the *Sexual Offences Act*.
8. In the present case, the appellant was charged with raping a person with a mental disability under an incorrect legal provision. This rendered the charge defective. In this case, the appellant understood the charge against him, and the particulars of the charge thereto and participated in the hearing by cross-examining the witnesses. He did not raise any complaint before the trial court and before this court and in the circumstance, I find that there was no miscarriage of justice. This court has considered it a curable defect under the law.
9. The complainant PW2 initially encountered difficulties in testifying arising from his special needs. However, on 17th October 2023 while accompanied by his teacher in court he was able to give his evidence. In court, he unequivocally identified the appellant whom he referred to as ‘Ochodi’ and confirmed that his friend ‘Lama’ was also familiar with him. He told the court that the appellant had indecently touched him twice on his buttocks at their friend Lorna’s residence in Lindi. He further recalled that the appellant had threatened him with a knife to prevent him from reporting the incident.
10. PW2 stated that the appellant later took him to his residence in Lindi where he observed a black music woofer. He also recalled seeing a black knife in the appellant’s possession which was used to intimidate him. PW2 further stated that during the assault the appellant removed his trousers and underwear, placed him on his bed and the appellant inserted his penis into the complainant’s buttocks. PW2 told his friends Isma and Dhama and the appellant chased them with a knife.



11. PW2 further stated that the second incident occurred at Mama Halima's residence when Isma had left for the mosque, leaving him behind to guard the house.
12. During cross-examination, PW2 clarified that the appellant was not his friend but someone he would occasionally see around. He further testified that during the second incident, he had been tied up with a cloth. When questioned about the timing, he stated that the assault took place at approximately 1:00 PM, and later, at around 4:00 PM, the appellant chased him and others while brandishing a knife.
13. PW2 demonstrated familiarity with the appellant, identifying him by name and confirming prior interactions. Despite his mental challenges, he recalled taking his friends to the appellant's residence. Additionally, the appellant was well-known to other prosecution witnesses, including PW4, PW5, and PW6, who had previously seen him participating in demonstrations.
14. PW4, IN, testified that on 21st August 2023, PW2 arrived at the Madrasa appearing physically distressed, walking slowly as if injured. Although PW2 initially remained silent about the incident, he later disclosed that the appellant, Ochodi, had sexually assaulted him. PW4 confirmed that at around 1:00 PM, after prayers, he approached Ochodi, informing him that his mother was calling him. Later, at approximately 5:00 PM, Ochodi chased them with a knife. During cross-examination, PW4 confirmed that PW2 had arrived at the Madrasa around 8:00 AM, and they had to persuade him to reveal what had happened.
15. PW5, RS, corroborated PW4's account, stating that PW2 appeared unable to sit properly at the Madrasa. After persistent questioning, PW2 disclosed that Ochodi had assaulted him and threatened to stab him if he spoke out. PW5 also witnessed the appellant chasing them with a knife at 5:00 PM after Madrasa. Upon cross-examination, PW5 confirmed knowing the appellant but was unaware of the exact time or date of the sexual assault. During re-examination, he admitted pressing PW2's hand to encourage him to speak.
16. PW6, a friend of the complainant from Madrasa, testified that at around 6:00 PM at Mama Halima's house, he saw Ochodi interacting with PW2, who was visibly uncomfortable, holding his buttocks and struggling to walk. PW6 confirmed that they later went to Ochodi's residence, where he chased them with a knife. During cross-examination, he stated that about five individuals had accompanied him to Ochodi's place.
17. PW7, Doris Ateyo, a community policing officer, testified that on 21st August 2023 at approximately 7:00 PM, she received a call requesting assistance at Lindi Mosque, where a man was being attacked by a mob. She and her colleagues intervened, rescuing the appellant and escorting him to Kibra Police Station. She corroborated PW2's claim that the appellant had threatened him with death should he disclose the incident. During cross-examination, PW7 stated that when the minor was taken to the hospital, the doctor confirmed that he had an infection. She further clarified that her involvement began when she received the distress call regarding the mob attack on the appellant.
18. PW1, DW, recounted that on 21st August 2023 at around 6:10 PM, while cleaning, his younger sister L, in a state of panic, informed him that (PW2) had been assaulted. He immediately rushed to the police station, where he found both the appellant and the complainant. He noted that PW2 appeared visibly afraid. The complainant then disclosed that these incidents had occurred on previous occasions, with the appellant threatening him and subjecting him to sodomy. PW1 proceeded to take PW2 to the hospital. He also noted that PW2 had mental retardation. Under cross-examination, he stated that PW2 lived with their mother about a kilometre away and that he did not know where the appellant resided.



19. PW3, John Njuguna, a medical officer from Nairobi Women's Hospital, produced the medical report for PW2, who had attended the facility on 21st August 2023, reporting sodomy by a known individual on both 20th August 2023 and 21st May 2023. During the medical examination, there were no visible injuries on PW2's back, front, feet, or anal region. However, a notably painful external mass, classified as a grade 4 hemorrhage, was detected. He explained that grade 4 is severe on the medical scale and noted muscle weakness. PW3 stated that the presence of pain around the anal region was consistent with anal penetration.
20. PW8, the Investigating Officer, testified that the incident was reported on 22nd August 2023. He presented the knife allegedly used by the appellant and confirmed that PW2 had mental disabilities, producing a supporting letter marked as Exhibit 4. He also submitted the complainant's immunisation card (Exhibit 6), confirming his date of birth as 10th December 2002.
21. Under cross-examination, he affirmed that PW2 was 18 years old at the time of the offence, as evidenced by the immunisation card. He stated that the complainant was accompanied to the police station by community policing members and that his brother assisted in interpreting his statements. He further admitted that the appellant was not taken to the hospital due to a lack of transport and that no forensic analysis was conducted on the knife.
22. The trial court reviewed the immunisation card and concluded that PW2 was an adult at the time of the alleged offence. At the close of the prosecution's case, the court found a prima facie case had been established, requiring the appellant to present his defence.
23. DW1, Isaac Haggai Ochodi, testified that on 21st August 2023, he planned to go to work at 6:30 AM. He typically left work between 3:30 and 4:00 PM, depending on workload. On 20th August 2023, he left work at 3:50 PM, attended church on Mombasa Road, and left around 9:30 PM due to traffic.
24. On 21st August, he left work at 3:30 PM, as confirmed by biometric logins, took a staff van to town, and then a matatu home. He stated that he did not know the complainant and first saw him at the police station. Later, his neighbors informed him that a group had come looking for him, which was unusual since his friends typically visited on Tuesdays. That evening, three individuals, including Ibrahim, knocked on his door, stating that Mama Halima was calling him. He refused to go, requesting that she come instead. Shortly after, they returned with three more individuals, one carrying a hammer. He followed them to Mama Halima's house but found she was not there.
25. While waiting on the balcony, seven more people arrived, causing a commotion. He stated that Ali and Hamisi, a mosque sheikh, assisted him and took him to the police station at 6:50 PM. He denied that Doris Atemo escorted him. He further alleged that the complainant's mother later arrived at the station with a knife, claiming it belonged to him. He asserted that the allegations were motivated by a grudge, as Mama Halima's child believed he was boastful about his job.
26. During cross-examination, he denied knowing the complainant or his mother and maintained that the case was based on a personal vendetta. When re-examined, he categorically denied any sexual contact with the complainant, insisting that the charges were false.
27. DW2, Madam Esther, stated that she lived with Ochodi and informed the men who came that he was not there. She said the group demanded Ksh. 200 and later returned at 5:00 PM as a larger, rowdy group with the same demand. She also stated that they were not allowed into the hospital during the victim's examination.



28. DW3, a neighbor, testified that the appellant had never assaulted or insulted anyone. She learned of the incident from a woman at her workplace and contacted DW2, who narrated the events. She confirmed that the appellant was never taken to the hospital.
29. DW4, Beatrice Amyoti, a former teacher, expressed shock at the allegations, stating that she raised the appellant in a Christian manner.
30. DW5, the appellant's brother, stated that he was at the hospital and overheard Dorcas insisting that "these people must give them money." She allegedly told him to agree with the report. He was denied entry into the hospital. He claimed that a doctor suggested the issue might have been caused by a disease from animals, but Dorcas rejected this explanation and sought another report. Under cross-examination, he admitted that he did not report the alleged extortion attempt to the police.
31. DW6, a doctor from Mama Lucy Hospital, reviewed the P3 form from Nairobi Women's Hospital. He noted a painful anal mass and a growth, which he described as a pathological condition common in the general population. He stated that standard medical reporting on anal injuries should include details of gapping, bruising, bleeding, and fractures—none of which were recorded in the complainant's medical report.
32. He also examined Part 4(b) of the report, where the author mentioned features of hemorrhoids but did not specify evidence of anal penetration. He stated that the report was vague and did not support allegations of sexual abuse. Additionally, he reviewed the PRC form and concluded that the findings did not indicate sexual assault. Under cross-examination, he explained that the presence of epithelial cells in urine was a normal occurrence and noted that the standard procedure for filling PRC and P3 forms had not been followed correctly.
33. Having re-evaluated the evidence, the issue for determination was whether the offence was proved beyond reasonable doubt. Section 146 of the [Penal Code](#) provides that:

Defilement of idiots or imbeciles

Any 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. The prosecution's evidence adduced in support of the alleged defilement of the complainant, an individual with mental impairment, is primarily derived from the testimony of PW2 and corroborated by other prosecution witnesses. PW2 unequivocally identified the appellant and provided a detailed account of the alleged sexual assault, stating that the appellant removed his trousers and underwear, placed him on a bed, and engaged in anal penetration. He further testified that the appellant brandished a knife to silence him and later chased him and his friends with the weapon.
35. PW2's testimony was corroborated by PW4, PW5, and PW6, who attested to his distressed physical state, difficulty in walking, and visible discomfort following the alleged incidents. PW5 specifically noted that PW2 appeared unable to sit properly and, upon persistent inquiry, disclosed the alleged defilement. PW6 further testified that he observed PW2 in the company of the appellant shortly before the appellant allegedly chased them with a knife.
36. Medical evidence presented by PW3 confirmed that PW2 exhibited a painful external anal mass classified as a grade 4 haemorrhage. The medical officer opined that the pain in the anal region was consistent with anal penetration, though no visible injuries or bruising were noted. The prosecution



also relied on PW7's testimony, who stated that the complainant had reported threats from the appellant and that a medical examination revealed an infection.

37. The prosecution further presented PW8, the investigating officer, who confirmed that PW2 suffered from mental impairment, as evidenced by a supporting letter admitted into evidence. Additionally, the complainant's immunisation card was produced, verifying his date of birth.
38. The trial court found a prima facie case against the appellant based on the totality of the evidence presented.
39. Section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The question is whether the special circumstances contemplated by section 179 were in existence to enable this court to convict the appellant of an offence with which he was not charged.
40. In this case, the proper charge should have been section 146 of the Penal Code. In my view, this is a special circumstance within which this court can convict the appellant. In the premises, the conviction for the offence of charge of committing an indecent Act with a person with mental disability contrary to section 7 of the Sexual Offences Act is substituted with the offence of defilement of idiots and imbeciles under section 146 of the Penal Code.
41. The appellant was sentenced to fifteen (15) years' imprisonment. However, Section 149 of the Penal Code prescribes a term of fourteen (14) years. Considering the appellant's mitigation, the pre-sentence report on record, and the fact that he is a first-time offender, I hereby substitute the sentence of fifteen (15) years with a term of ten (10) years' imprisonment. The sentence shall run from 21st August 2023 the date of the appellant's arrest pursuant to section 333(2) of the Criminal Procedure Code, Cap 75 Laws of Kenya.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 11TH FEBRUARY 2025

D. KAVEDZA

JUDGE

In the presence of:

Mr. Mutuma for the respondent.

Appellant - present

Achode – court assistant

