Kandie v Republic (Criminal Appeal E007 of 2024)
[2025] KEHC 1870 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1870 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E007 OF 2024

JRA WANANDA, J

FEBRUARY 7, 2025

BETWEEN

LEONARD KIPKORIR KANDIE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the conviction and imprisonment of the Appellant in Iten Senior Principal Magistrates' Criminal Case No. E032 of 2023 wherein the Appellant was charged with the offence of rape, stated to be contrary to Section 7 of the *Sexual Offences Act*.

2. The particulars of the offence were that on 12/09/2020 at around 1700 hours within Elgeyo Marakwet, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of one CK without her consent "within the view of" the said CK, a person with mental illness.

3. He was also charged with the alternative offence of committing an indecent act with an adult contrary to Section 11(a) of the *Sexual Offences Act*. The particulars of the offence were that on the same date, at the same time and place as above, he intentionally and unlawfully touched the vagina of the said CK with his penis against her will.

4. The Appellant pleaded not guilty to the charge. Before the trial commenced, the Prosecution informed the trial Court that the complainant was a "vulnerable witness" as she was mentally challenged and could not express herself or talk. The Prosecution thus prayed that the complainant's mother be allowed to testify on her behalf. This request was allowed and the complainant was thus declared a "vulnerable witness" in accordance with the provisions of Section 31 of the *Sexual Offences Act*, for purposes of the proceedings. Thereafter, the case proceeded to trial in which the Prosecution called 5 witnesses.

5. At the close of the Prosecution's case, the Court found that the Appellant had a case to answer and placed him on his defence. The Appellant opted to give sworn testimony and called no other witnesses. By the Judgement delivered on 09/04/2024, he was convicted of the main charge and sentenced to serve 10 years imprisonment.

6. Being dissatisfied with the decision, the Appellant filed this Appeal vide the Petition filed on 19/04/2024. He did not however list any substantive Grounds of Appeal, and simply stated that he had pleaded not guilty, and that he is a poor man with no money for legal fees.

Prosecution evidence before trial Court

7. PW1 was JT, who stated that she was the complainant's mother. She stated that on 12/09/2020, the Appellant came to her house in the evening, that at some point, she left the complainant sleeping inside the house and went out to chase away an animal that had strayed into her land, and that on returning, she found the Appellant on top of the complainant. She stated that the Appellant had removed his trousers and was having sex with the complainant, that she pulled the Appellant's leg and hit him with a stick on the back, and that the Appellant was not wearing any protection. She testified that after she hit the Appellant, he stood up, pulled his trousers and ran away and that she later took the complainant to hospital. It was also her testimony that the complainant was born in 1993. She testified further that she later reported the matter to the police and was issued with a P3 Form and afterwards, the Appellant was arrested and charged. In cross-examination, she stated that she screamed but the neighbours were far, and that she took the complainant to hospital after 4 days because she did not have money for transport. She denied that she had any land dispute with the Appellant.

8. PW2 was AK, who stated that he was a brother to the complainant. He testified that on 19/07/2020, he received the report of the rape and that he took the complainant to the hospital with the complainant's mother and members of the public, where the complainant was examined and referred to the police station where they went and were issued with a P3 Form. He further testified that the Appellant disappeared for 3 years after the act and that his family came to PW2's home to try and settle the matter but he declined. In cross examination, he stated that he did not know the Appellant before the act, that it is the Appellant's mother who informed him of the rape as he lives far and that he took the complainant to hospital on 20/09/2020. In re-examination, he stated that the further reason why PW1 delayed to take the complainant was because the complainant was unable to walk on her own.

9. PW3 was RK, who stated that he is the Assistant Chief of the area. He testified that on 21/07/2023, he was on normal duties when he met the Appellant who was suspected of having raped the complainant and had disappeared. He stated that for this reason, he arrested and took the Appellant to the police station. In cross-examination, he testified that the rape incident occurred on 12/09/2020.

10. PW4 was Police Constable Mercy Kirwa, the Investigating Officer in the case. She testified that incident was reported at the station on 20/09/2020. She stated that she escorted the complainant to hospital where the complainant was examined and confirmed to have been raped and was issued with a P3 Form. As regards what she gathered from her investigations, she recounted a similar narrative to that already given above by the other witnesses. She also stated that the complainant was aged 27 years. In cross-examination, she stated that the Appellant disappeared. She then denied any knowledge of a land dispute involved. In re-examination, she stated that the Appellant disappeared for 3 years after the incident.

11. PW5 was Dickson Kibet Kimeli, a clinical officer attached to Biretwo Health Center. He testified that the complainant came to the Centre, on 21/07/2021, with a history of having been raped, that on examination, he did not find anything significant in the vagina as there were no tears or discharge and

the lab results did not show anything significant. He alluded that this may have been so because the complainant was brough 8 days after the alleged incident. He testified that he found the complainant to be mentally challenged. He then produced the P3 Form.

12. At the close of the prosecution case, as aforesaid, the trial Magistrate found that a case to answer had been established against the Appellant and placed him on his defence.

Defence evidence at the trial Court

13. In his defence, the Appellant, testifying as DW1, stated that on 12//09/2020 he was involved in a land survey exercise together the elders from the clan, that the survey touched the complainant's land who screamed and a large crowd gathered causing the survey to be stopped to allow for further discussions. He stated that in 2023 he was arrested when the survey was to commence, that the survey was conducted and after he fenced the land, the same was later uprooted. He stated he took the posts to his compound but later saw the Chief and Assistant Chief patrolling, they asked him to accompany them and they took him to the police station and he was charged with him the offence of rape. He insisted that the case was about a land dispute, that he did not understand how he was charged with the offence and he contended that there was no independent witness as all the witnesses were family members.

Hearing of the Appeal

14. Directions were taken on 1/10/2024, on which date the Appeal was directed to be canvassed by way of written Submissions. However, the Appellant indicated that he did not intend to file any Submissions. On his part, Counsel for the State, Mr Kirui, stated that he had filed his Submissions but sought to withdraw the same as he intended to file a fresh set. Perusing through the Judiciary Case Tracking System (CTS), what I have come across is the Submissions filed by him, dated 14/10/2024 and filed on 16/10/2024. This, I believe, is the replacement Submissions he referred to and which I will treat as such.

Respondent's Submissions

15. In the said Submissions, Prosecution Counsel appreciated that the Appellant was charged under Section 7 of the *Sexual Offences Act*, which refers to acts which cause penetration or indecent acts committed "within the view of a family member, child or person with mental disabilities". He cited the case of Edwin Odongo Aol v Republic [2021] eKLR which, he submitted, restated that for the said offence, the Prosecution needed to prove, in addition to the sexual act, that the same was committed "within the view" of the persons listed above. Regarding the elements of the offence of rape, he cited the case of Makau v Republic (Criminal Appeal E055 of 2021) [2022] KEHC 9798 (KLR). He observed that in this case, the complainant did not testify as she was mentally challenged and was declared a "vulnerable witness" in accordance with Section 31 of the *Sexual Offences Act* and her mother allowed to testify on her behalf.

16. After recounting the testimony of the witnesses, Counsel submitted that it is apparent that the trial Court proceeded as though the Appellant was charged with the offence of rape of an imbecile under Section 146 of the *Penal Code*. He conceded therefore that the facts of the case were at variance with the main charge. He cited the case of Musa Kiprotich Kitilit vs Republic [2012] eKLR and conceded that the charge was fatally defective. He however contended that from the evidence on record, it was proved beyond reasonable doubt that the Appellant committed an offence and that it is tacit law that the remedy for defective proceedings is retrial of the case. He cited the case of Muiruri v R (2003) KLR 552 and submitted that the errors herein were by both the trial Court and the Prosecution for failing

to utilize the provisions of Section 214 of the *Criminal Procedure Code* to amend the charge sheet. He urged that the crime of rape of a mentally challenged person and the alternative charge of indecent act on such person are extremely serious matters that warrant a retrial.

Determination

17. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32)

18. The issues for determination are evidently the following:

    a. Whether the charge, as framed, was defective, and the consequence thereof.

    b. Whether the charge was proved beyond reasonable doubt against the Appellant.

    c. Whether the sentence of 10 years imprisonment was justified and/or proper.

19. On the first issue of whether the charge sheet was defective, I observe that the Appellant was charged with an offence contrary to Section 7 of the *Sexual Offences Act*. That Section 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 disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years."

20. It is obvious that there is a variance between the offence committed and the offence that the Appellant was charged with since the offence of rape is not created by Section 7 of the *Sexual Offences Act* aforesaid. Although the complainant was said to be mentally challenged, the charge sheet, as drawn. does not disclose the offence recognized under Section 7 since it does not disclose the commission of rape or an indecent act "within the view of ..... a person with mental disabilities". In this case, it is the person with "mental disabilities" who is alleged to have herself been the victim of the crime, not that the crime was committed on a third party within her view as contemplated under Section 7.

21. Regarding having carnal knowledge of a mentally challenged person under circumstances that do not amount to rape, the provision that comes to mind is possibly be Section 146 of the *Penal Code* which provides as follows:

> "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."

22. However, since in this case, the carnal knowledge is said to have amounted to rape, Section 146 may not apply.

23. A reading of the record of the trial Court reveals that in fact the case was handled as if it was a charge of rape brought under Section 146 of the *Penal Code* referred to above, when it was not. It follows therefore that the Appellant was convicted on the basis of a defective charge.

24. Alternatively, the Prosecution could have outrightly opted for the charge of rape in accordance with Section 3(1) of the *Sexual Offences Act* which provides as follows:

> "(1) A person commits the offence termed rape if—

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) the other person does not consent to the penetration; or

(c) the consent is obtained by force or by means of threats or intimidation of any kind."

25. Having found as above, determination of the two remaining issues, namely, whether the case was proved beyond reasonable doubt, and whether the sentence imposed was proper, are no longer necessary.

26. Be that as it may, the question that now arises is what remedy should arise in light of the defect in the charge, as pointed out above? Should the Appellant be set free or should the case be remitted back to the trial Court for retrial?

27. In respect to this question, the Court of Appeal in the case of Muiruri v. R (2003) KLR 552, 556 guided as follows:

> " 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 Zedekiah 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."

28. In the instant case, it is true that the error was to some extent attributable to both the Prosecution which ought to have known the charge and its ingredients before laying it against the Appellant, and the trial Court, which may not have carefully examined the charge. Had there been some due diligence, the defect could have been spotted early and the charge sheet perhaps amended to reflect the correct provision of the law. To this extent, the Appellant, being a layperson and underrepresented, cannot be blamed for not raising an objection. However, it is also true that a person with mental disability is placed in the category of "vulnerable persons" requiring and deserving of protection by the law and, by extension, the Courts. The allegation of rape against such a vulnerable person is a serious one and utmost care must be taken ensure that a perpetrator of such a crime does not escape retribution for his evil action simply because of a legal technicality. In respect to this situation, the Court of Appeal, again, in the case of Ekimat V. Republic (2005) 1 KLR 182 held as follows:

> " ..... Where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not follow that a retrial should be ordered; that a retrial should not be ordered unless the court is of the opinion that on the consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interest of justice require it and should not be made where it is likely to cause an injustice to an accused person."

29. From the foregoing, it is evident that generally, a retrial will only be ordered where the interest of justice so requires and only where no prejudice will be occasioned to the accused. This principle was restated in the case of Fatehali Manji vs Republic [1966] EA 343 where the Court of Appeal stated as follows:

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its 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; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it." .....

30. Similarly, in the case of Mwangi –versus- Republic [1983] KLR 522, the Court of Appeal stated that:

> " We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

31. Further, in the case of Pius Olima & another v Republic [1993] eKLR, the Court of Appeal again stated as follows:

> " Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar v Republic, (1964) EA 481; Manji v The Republic, (1966) EA 343; Mujimba v Uganda, (1969); and Merali and Others v Republic, (1971) 221. The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."

32. Applying the above principles to the facts of this case, as aforesaid, my finding is that the offence that the Appellant is alleged to have committed, rape, particularly of a mentally challenged person, is a serious offence. The complainant, if indeed she was so raped as alleged, must have suffered serious trauma which will no doubt negatively affect her psychologically for the rest of her life. She clearly needs to obtain closure on the case and the only way, in my view, through which she may achieve such closure is for the trial to proceed to its logical conclusion and be determined on merits.

33. The offence is stated to have been committed around September 2020, about 4 ½ years. This, granted, may be deemed to be a long time but there is no indication that the witnesses are no longer available or unwilling to testify. Balancing the interests of the Appellant and that of the complainant, I believe that the interests of justice will be served by ordering for a retrial. I do not discern any irreparable prejudice that will be occasioned to the Appellant if such retrial is ordered. The mistake that occurred being only as regards the provision of the law cited, I do not think that ordering for a retrial would amount to giving the Prosecution a second bite at the cherry by enabling it to restructure or fill gaps in the case.

Final Order

34. The upshot of the above is that I order as follows:

    i. This Appeal is allowed and the conviction is quashed and the sentence set aside.

ii. The Appellant shall be retried before a Magistrate of competent jurisdiction other than Hon. V. Karanja (PM) .

iii. The Appellant shall be escorted to the relevant Police Station for purposes of preparing a fresh charge sheet and he should then be presented before the relevant Magistrate's Court at the Iten Law Courts not later than the 13th day of February 2025 for purposes of taking a fresh plea.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7 TH DAY OF FEBRUARY 2025

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Appellant present virtually from Eldoret Main Prison

Mr. Okaka h/b for Ms. Mwangi for the State

C/A: Brian Kimathi