DOW v Republic (Criminal Appeal E083 of 2024)
[2025] KEHC 11045 (KLR) (25 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11045 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E083 OF 2024

A MABEYA, J

JULY 25, 2025

BETWEEN

DOW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment & conviction of Hon. J. Kimetto PM delivered on the 26/8/2024 and sentence passed on the 16/9/2024 in Maseno SPMC in SO Case No. E034 of 2021, R. vs DOW)

JUDGMENT

1. The appellant was charged with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that, on the 28/6/2021 at [Particulars Withheld], East Othany sub-location in Seme sub-county within Kisumu County the appellant, being a male person intentionally caused his penis to penetrate the vagina of SAO a female child aged 8 years and whom he knew to be his daughter.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The appellant pleaded not guilty and a full trial ensued. The prosecution case was founded on the evidence of three (3) witnesses. The defence evidence was based on the appellant's sworn testimony.

3. In in its judgment dated 26/8/2024, the trial court found the appellant guilty of the main charge, convicted and sentenced him to serve life imprisonment.

4. Dissatisfied with that decision, the appellant filed his petition of appeal dated 19/9/2024 raising four (4) grounds which can be summarized as; 'That the trial court erred in law and fact by failing to consider that the ingredients forming the offence were not proved to the required standard.'

5. The appeal was canvassed by way of submissions. The appellant submitted that his conviction was based on a purported amended charge sheet on the 2/11/2023 which amendment he objected to but the court allowed it with the rider that he had to plead afresh to the amended charge but this did not happen as he was put on his defence.

6. That the appellant's conviction was flawed as the state failed to present an amended charge sheet thus he was being charged with an offence not cognizable in court as provided for in section 134 of the *Criminal Procedure Code*. That the appellant was not informed of his right to a counsel as required by Article 50 (2) (g) of the *Constitution*.

7. The state submitted that it was only the date that was being amended from 28/6/2021 to 25/6/2021 but that all the other particulars remained the same and the appellant proceeded to cross-examine the witnesses. That all ingredients of the offence of incest were proved beyond reasonable doubt. That the inconsistencies were minor and did not affect the main substance of the prosecution case.

8. This being the first appellate Court, its duty is well spelt out, namely, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion and findings but at all times bearing in mind that it did not see the witnesses testify. (See *Okeno v Republic* [1972] EA 32.)

9. Before the trial court, the prosecution's case was supported by the evidence of three (3) witnesses. PW1, the complainant, gave unsworn testimony that, the appellant, her father, took her from her bed and placed her on her mother's bed and did "tabia mbaya" by taking out his penis and inserting it into her vagina.

10. PW2 Dr. Ombok Lucy, produced the P3 and PRC forms which she filled after examining the minor. She testified that the examination revealed that the complainant's vagina was sore and irritable. That her hymen was broken and that there was redness and inflammation on the outer part of the genitalia which revealed penetration.

11. PW3 No. 20/xxx PC Cynthia Muhatia testified that a report was made on the 29/6/2021 that a child had been defiled on the 28/6/2021 by her father. That on the 28/6/2021, the appellant had attempted to but did not manage to defile the complainant but that the complainant stated that the appellant had defiled her on the 25/6/2021. She produced an age assessment report dated 12/7/2021 that showed that the complainant was 8 years old.

12. When placed on his defence, the appellant denied defiling the complainant stating that on the material day, he quarreled with the complainant's mother over missing chicken and the complainant's mother left home that evening threatening him. That the following day, he realized the complainant's mother had taken the complainant to the shopping centre and he later followed them to his wife's home where he was arrested.

13. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him accordingly.

14. Section 20 (1) of the *Sexual Offences Act* provides: -

> "Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

15. From the provisions of this section, the ingredients for incest are as follows:

    a. The accused must be a male;

    b. The victim must be a female;

    c. A daughter, granddaughter, sister, mother, niece, aunt or grandmother;

    d. He must be aware of the relationship; and

    e. There must be penetration.

16. In the present case, the appellant's and complainant's gender are uncontested. It is also uncontested that the complainant is the appellant's daughter and that this relationship was well known to the appellant.

17. It was proved that the complainant was under the age of eighteen years being 8 years old. Penetration was also proved through the unsworn testimony of the complainant that was corroborated by the medical evidence adduced by PW2, Dr. Ombok who examined the complainant.

18. The appellant impugned the trail court's conviction on grounds that the same was based on an amended charged sheet that he did not plead to and further that the charge against him failed to disclose a cognizable offence as provided in section 134 of the *Criminal Procedure Code*.

19. The record shows that on the 2/11/2023, the state applied to amend the charge sheet particulars on the date of the offence to read 25/6/2021 on both the main and alternative charge instead of the 28/6/2021 stated.

20. The appellant objected to the amendment on grounds that he did not know anything about the date 25/6/2021. The court allowed the amendment but stated that the prosecution had to avail the amended charge sheet for the same to be read to the accused to plead again under section 214 of the *Criminal Procedure Code*.

21. The state has argued that the amendment related to the date being changed from 28/6/2021 to 25/6/2021 but that all the other particulars remained the same. I am mindful of the provisions of section 134 of the *Criminal Procedure Code* which provides as follows: -

> " 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".

22. In *Isaac Omambia v Republic* (1995) eKLR, the Court of Appeal stated as follows: -

> " In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the *Criminal Procedure Code* which makes particulars of a charge an integral part of the charge: 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."

23. The amendment made by the prosecution was in my view paramount as it sought to disclose the date when the alleged offence occurred. This would be crucial in enabling the appellant aptly prepare his defence as was evident from his objection before the trial court.

24. Section 214 of the *Criminal Procedure Code* empowers a trial court to allow amendment or substitution of a charge when in the course of a hearing, it emerges that there was a variance between the evidence and the charges facing an accused person. The provision stipulates the steps which the court ought to take after allowing an amendment or substitution of the charge.

25. It provides that after the charge sheet is amended or substituted, the court shall call upon the accused to plead to the altered charge. An accused has the right to elect whether or not to recall witnesses who had previously testified to either give their evidence afresh or for further cross examination.

26. In *David Abdalla Osma v Republic*, [2010] eKLR, it was held as follows: -

> " .... upon the amendment of the charge sheet after some witnesses have testified, the Court has a duty to, first, take plea afresh and, second, inform the Accused Person that he has a choice whether to recall the witnesses who had already testified. This is a fundamental right to fair trial which, if not adhered to, fatally taints the entire trial."

27. As the appellant in the above case was not informed of his right to recall the witnesses after the charge sheet was amended, the High Court proceeded to quash the appellant's conviction and set aside the sentence.

28. In *Joseph Kamau Gichuki v Republic*, [2013] eKLR, the Court of Appeal followed its earlier decision in *Harrison Mirungu Njuguna v Republic*, Cr A. No. 90 of 2004 where the Court had expressed itself as follows: -

> " The Code requires that once a charge is amended, the accused person should be called upon to plead to the amended charge and further entitles him to demand the recall of witnesses who have already testified to give their evidence afresh or to be further cross examined. In that case the charge was amended but the accused person was not called upon to plead to the amended charge. This Court held, correctly in our view, that the trial was substantially defective. The effect of amending the charge was to alter the case that the accused person had to meet. Hence, he had to plead to the amended charge afresh and had to be informed of the right to re-call witnesses to testify on the charge as amended and to be cross-examined. [emphasis added]
>
> ...
>
> The failure to inform an accused person of rights given to him by law is not a procedural irregularity which can be cured under the provisions of Section 382 of the *Criminal Procedure Code*."

29. In the present case, despite the trial court having allowed the amendment to the charge, there is no evidence that there was compliance with section 214 of the *Criminal Procedure Code*. The Court therefore makes a finding that said omission by the trial court made the proceedings fatally defective and any conviction resulting therefrom was unsafe and cannot be allowed to stand.

30. The second issue is the failure to inform the appellant of his right to legal representation. There is no evidence of the trial court having informed the appellant of this right. This is a right under Article 50(2)(h) of *the Constitution*. To that extent, there was a mistrial.

31. Having made the foregoing conclusion, what should be the orders to follow as a consequence. In *Muiruri V Republic*, [2003] KLR 522 and *Mwangi V Republic*, [1983] KLR 522, it was held that a retrial should be ordered if doing so would be in the interest of justice taking into account, all the circumstances of the case, including the nature of the offence charged and the evidence on record.

32. In *Francis Ndungu Wanjau v Republic* [2011] eKLR, the Court of Appeal stated: -

> " Whether or not there ought to be a retrial in any particular case is a matter for discretion of the court depending on the circumstances of the case".

33. In the case, taking into consideration the nature of the offence and the evidence presented before the trial court, this Court is persuaded to find that this is a suitable case to order a retrial.

34. Accordingly, the appellants conviction is quashed and the sentence set aside. The interests of justice will be better served by remitting the appellant's case to the magistrates' court for retrial by another magistrate other than the one who previously handled it. The appellant to be presented in Maseno Law Courts on 5/8/2025 to take plea afresh.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE