



**IOO v Republic (Criminal Appeal E001 of 2023)  
[2024] KEHC 1974 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 1974 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL APPEAL E001 OF 2023  
HI ONG'UDI, J  
MARCH 1, 2024**

**BETWEEN**

**IOO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment by Hon C. A. Ocharo in Kisii  
Chief Magistrate's Court Criminal (S.O) Case No. 72 of 2019)*

**JUDGMENT**

1. Issa Onsono Orina the appellant herein was charged with the offence of rape contrary to section 7 of the *Sexual Offences Act* No. 3 of 2016. The particulars being that the appellant on 21<sup>st</sup> January, 2019 at [particulars withheld] in Marami Sub-County within Kisii County intentionally and unlawfully caused his penis to penetrate the vagina of LMA a person with a mental disability without her consent. He faced an alternative count of committing an indecent act with a mentally disabled person contrary to section 7 of the *Sexual Offences Act*. The particulars being that on 21<sup>st</sup> January, 2019 at [particulars withheld] in Marani Sub-County within Kisii County, intentionally and unlawfully touched the vagina of LMA with his penis.
2. He denied the charges and the case proceeded to full hearing with the prosecution calling four (4) witnesses. The appellant gave a sworn statement of defence without calling any witness. Thereafter he was found guilty and convicted on the main count of rape and sentenced to twenty (20) years imprisonment.
3. Being dissatisfied the appellant filed a petition of appeal on 5<sup>th</sup> October, 2022 citing four (4) grounds. He later on 2<sup>nd</sup> November, 2023 filed the following amended grounds of appeal:



- i. That the learned trial Magistrate erred in law and fact by not appreciating that, the star witness/ victim of this case was not availed to testify thus the appellant was disadvantaged in that he could not cross examine the victim on relevant questions a fact that infringed on his right to a fair trial guaranteed under article 50(2) of the Constitution including the right to challenge the prosecution evidence.
  - ii. That the learned trial Magistrate erred in law and facts by convicting and sentencing the appellant to serve 20 years imprisonment but failed to note the provisions of section 3 (3) of the Sexual Offences Act on sentence, the provisions of Article 50 (2)(p) and (q) of the Constitution and the Policy Guidelines on Sentencing 2016 and recent law developments followed by superior courts on sentencing.
  - iii. That the learned trial Magistrate erred in law and fact by convicting and sentencing the appellant in a prosecution case but failed to note that, the elements of the offence of Rape were not fully proved.
  - iv. The appellants defence was not considered.
4. Before I get into analyzing any evidence herein I will address some issues I have noted from the record. The appellant was charged with the offence of rape contrary to section 7 of the Sexual Offences Act No. 3 of 2016. This citation is in itself an error as there is no Sexual Offences Act No 3 of 2016. The prosecution must have meant section 7 of the Sexual Offences Act No. 3 of 2006. Assuming that is what was the position then I will move to the said section to see what it provides:

Section 7 of the Sexual Offences Act No. 3 of 2006.

7. Acts which cause penetration or indecent acts committed within the view of a family member, child or person with mental disabilities

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.

5. The learned trial magistrate in the process of writing the judgment correctly observed at pg 33 line 29-34 continued to pg 34 lines 1-5 as follows:

“With regard to whether rape happened within the view of a family member, child or person with mental disability, the burden of proof lies within the prosecution to prove beyond reasonable doubt. This rule was set out in the case of *Woolmington v DPP* [1935]25 Cr App 1271. From the evidence produced by the prosecution and the witnesses brought to court, none of them were in the room when the incident happened. PW1 heard a scream from the room and ran to it only to find the door closed. When the door was opened, the rape had already taken place. The prosecution could not prove beyond reasonable doubt that the rape happened within the view of the victim’s family or any children thus the second issue was not satisfied. The accused can therefore not be found guilty of an offence under section 7 of the Sexual Offences Act”

6. Upon making the above observation the trial Magistrate went ahead and substituted the charge with Rape contrary to section 3 of the Sexual Offences Act No. 3 of 2006. The said section 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
2. A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life
7. He further relied on section 184 of the [Criminal Procedure Code](#) to back his decision. The said section provides thus:

“When a person is charged with rape and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections of the [Sexual Offences Act](#), he may be convicted of that offence although he was not charged with it”.

8. The claim by the prosecution was that the complainant was a person with a mental disability and so could not give consent for a sexual act to take place. The offence of rape under section 3 of the [Sexual Offences Act](#) concerns two adults with sound mind. What must be proved is the lack of consent. There is no element of disability involved in the said section. It was therefore an error for the learned trial magistrate to use section 184 of the [Criminal Procedure Code](#) to substitute the charge. The offence of rape of a person with a mental disability is not under the [Sexual Offences Act](#).

9. It is catered for under the [Penal Code](#) as

“Defilement of idiots and imbeciles”

Section 146 of the [Penal Code](#) provides

“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.”

10. Further the alternative count that the appellant faced was said to be an offence committed contrary to Section 7 of the [Sexual Offences Act](#). For sure there is no offence of commission of an indecent act with a mentally disabled person under the said section and/or [Act](#).

The charge sheet was therefore defective from the word go and no steps were taken to correct the position until the time of writing the Judgment.

11. Lastly the complainant in this case was never availed in court as a witness. It was important for her to be presented for the court to make its own observation and finding on her ability or lack of it to testify. In the case of [David Ndumba v Republic](#), the Court of Appeal at Nyeri in Criminal Appeal No. 272 of 2012 [2013] eKLR 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 the competency as a witness”. 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 of 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”.

Also see John Maundu Mutetei v Republic [2020] eKLR

12. In the present case the trial court did not comply with the provisions of section 31(1) and (2) of the Sexual Offences Act where it could have determined whether the witness could not testify or testify through assistance of an intermediary. Section 31(4) of the Sexual Offences Act makes provision for protection to be given to vulnerable witnesses who have been declared so by the court. This provision would be applicable as the offence of rape is established both under the Sexual Offences Act and the Penal Code.
13. In view of all the above what then should the court do? First of all, the appellant was charged under the wrong provisions of the law. Secondly in the process of trying to correct the error the trial court convicted the appellant still under another wrong provision of the law. Lastly and as far as this court is concerned no complainant was presented to the court as is expected under the law. None of the witnesses who testified was affected by the offence as LMA was and so they could not speak on her behalf.
14. LMA ought to have been presented to the court for the court to make its finding on her state. Had that been done this court would have considered a re-trial. However, in the present circumstances ordering for a retrial would amount to giving the prosecution another bite at its own errors which would be an injustice to the appellant who has been behind bars since his date of arrest (26/06/2019).
15. The upshot is that the Appeal has merit and is allowed. The conviction is quashed and the sentence set aside. The appellant shall be released unless otherwise lawfully held under a separate warrant.
16. Orders accordingly

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1<sup>ST</sup> DAY MARCH, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG’UDI**

**JUDGE**

