Okumu v Republic (Criminal Appeal E025 of 2023) [2024] KEHC 2618 (KLR) (11 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2618 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E025 OF 2023

SC CHIRCHIR, J

MARCH 11, 2024

BETWEEN

DENNIS OKUMU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the Judgment of Hon. T.A. OBUTU delivered on 27.4.2023 in S O no. E015 of 2023 at Mumias)

JUDGMENT

1. The Appellant, Denis Okumu was charged with the offence of rape contrary to Section 3(1) (a) (b) (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence were that on the 25th day of April 2023 at around 2100 hours in Matungu sub-county within Kakamega County intentionally and unlawfully caused his penis to penetrate the vagina of FA without her consent.
3. The Accused was presented to court on 27th April 2023, the charge was read out to him and he pleaded guilty. The facts were read out to him and he stated that they were correct.
4. The court convicted him on his own plea and was sentenced to four years in prison.

Petition of Appeal

5. Aggrieved by the conviction and sentence, the accused filed this petition of Appeal and set out the following grounds:
    1. That the learned Trial Magistrate erred in law in having the charge read to the Appellant in English; a language the appellant did not understand.

2. That the learned trial magistrate erred in law and in fact in having the particulars of the offence read in English; a language the appellant did not understand.

3. That the learned trial magistrate erred in law and in fact in conducting a trial on 27/4/2003 based on a charge sheet that was generated the following day that is on 28/04/2023.

4. That the trial court erred in law and in fact in convicting the appellant on a plea of guilt when the same was equivocal.

5. That the trial court erred in law and in fact in convicting and sentencing the appellant on evidence that did not prove the charge.

6. That the trial court erred in law and in fact in convicting the appellant based on evidence that did not prove the case beyond reasonable doubt.

7. That the trial magistrate erred in law and fact in convicting the appellant based on medical evidence that did not prove the charge.

8. That the trial magistrate erred in law and in fact in convicting and sentencing the appellant based on a post rape care report that did not belong to the complainant.

9. That the trial magistrate erred in law and in fact in conducting a trial that did not meet the required standard as set by the law.

10. That the trial magistrate erred in law and in fact, in failing to find that the appellant had been coerced into pleading guilty due to police brutality upon arrest.

6. The appellant urged the court to allow the appeal, quash the conviction, set aside the sentence and send the matter back for Trial.

Appellant's submissions

7. The Appellant submits that the charges were read out to him in English , a language he does not understand; that he only understands Kiswahili and Luhya; that the record simply show English/ Kiswahili , without specifying which of the languages was used.

8. In this regard he has relied in the case of Willy Kipchirchir vs. Republic (Eldoret HCCRA No. 58 of 2015) and Titus Okumu Tito vs. Republic Siaya (HCCRA No. 57 of 2015) to emphasize the need for clarity on plea- taking.

9. It is further submitted that the charge sheet which contained the charge was generated a day after the plea had been taken. He points out that while the charge sheet was dated 28/04/2023, the appellant took his plea on 27/04/2023. He submits that it is tantamount to taking a plea without a charge sheet. He therefore argues that the plea taken on 27.4.2023 did not meet the constitutional threshold of a fair trial.

10. He further stated that the treatment notes from Matungu sub-county Hospital as well as the P3 form indicated the offence as attempted rape and consequently , he should have been charged with the offence of attempted rape and not rape.

11. He submitted that the age of the complainant was uncertain. He points out that whereas the treatment notes from Matungu sub-county hospital indicated that the complainant was 16 years , the P3 showed that she was 18 years.

12. He finally submitted that the post- care rape report produced as exhibit 3 did not bear the names of the complaint. He pointed out that the whereas on the treatment notes and P3 form the name appeared as FA the post rape care form indicated the complainant as FMM.

Respondent's submissions

13. The respondent submits that although the charge sheet indicated that it was signed on 28th April 2023, the appellant was arrested on 27th April 2023 and that the court proceedings indicated 27th January 2023; that the conflicting dates was a case of typographical error.

14. On the first count of rape contrary to section 3 (1) (a) (b) (c) of the *sexual offences act*, he avers that the appellant pleaded guilty and that the treatment notes indicated the nature of the injuries sustained by the complainant.

15. According to the prosecution the facts were clearly read to the accused who understood without having to indulge deeper into a detailed account of how the rape occurred which was corroborated by the medical evidence produced in court in any event.

16. The prosecution further submitted that since the accused had pleaded guilty, the facts as read out by the prosecutor described the offence of rape; that finally, having been convicted on his own plea, the Appellant can only appeal against the sentence.

17. He further states that the sentence was inordinately low given the nature of the offence.

Determination.

18. The main issue in this Appeal is whether the plea taken was unequivocal

19. The Appellant's first contention is that the language used was English , a language he was not acquainted with. A perusal of the trial court record show that the language preferred by the accused was not indicated. He did however responded to the charge by stating in Kiswahili : "ni ukweli"(It is True)

20. Section 207 of the Criminal Procedure Code provides guidelines on plea taking. It states as follows;

> Accused to be called upon to plead:
>
> (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.
>
> (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:
>
> > Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.
>
> (3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.
>
> (4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

20. In the case of Adan vs Republic [1973] EA 445 the following principles were set out for purposes of plea- taking :-

> " (i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.
>
> (ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
>
> (iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.
>
> (iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.
>
> (v) <u>If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded." (Emphasis added.)</u>

21. Where the accused is unrepresented, like it was in this case, it is the duty of the court is to ensure that a plea of guilt is unequivocal. The trial court therefore should have taken the trouble to ascertain whether the Appellant understood the charges he faced.

22. In the case of Farahat Ibrahim Ahmed & 2 others. Vs. republic High court at Kisumu criminal Appeal No. 68 of 2016 the court while citing Aden vs. Republic (supra) the court held that "the danger of a conviction on an equivocal plea is obviously grievous where the accused is unrepresented, is of limited education and does not speak the language of the court".

23. The import of the decision in Adan's case (supra) is that the court need to establish what language an Accused person is familiar with

24. In this case the language used was not indicated . When the charges were read to the Appellant, he responded: 'Ni Ukweli', which means 'it is true'. Much as the response was in Kiswahili language, the record does not indicate whether the charges were read and explained to him in the same language. This court cannot presume that the language that was used to read the charges was also Kiswahili.

25. In the case of Elijah Njihia Wakianda –vs- Republic [2016] eKLR the Court of Appeal had this to say about failure to indicate the language used during plea: "We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language.........." (Emphasis added)

26. The Appellant has told this court that the charges were read in English, a language that he says he is not acquainted with. The respondent has not addressed this allegation. I will therefore take the Appellant's evidence as uncontroverted.

27. Am not satisfied that the manner in which the plea was taken in this case was free from ambiguity. It was not safe to base a conviction on it.

28. On the issue of the date of the plea, I agree with the prosecution that this was possibly a typological error. To state that there was no charge sheet on the day of the plea is to stretch imagination. The

proceedings show that their specific date, specific people and specific crime. It cannot possibly be that these particulars were plucked from the Air and not from a charge sheet. The discrepancy of dates in my view do not invalidate the charge sheet.

29. This argument equally follows on the issue of names. This was a case where the Accused pleaded guilty. Perhaps if the matter had gone to full trial the prosecution would have seen the need to marry or explain the discrepancy in the names. In any event save where the plea is unequivocal an Accused person has no right of Appeal on conviction.

30. Nevertheless, I have held that the plea was unequivocal, and hence the conviction cannot stand. The same is hereby set aside.

31. The Appellant's plea is that he wants a retrial. The Prosecution's submission is silent on this aspect. I also take into consideration the fact that the mistake in this case was not the prosecution's but the court. The Appellant was charged less than a year ago. In the circumstances I consider a retrial an appropriate order.

32. In conclusion, I hereby proceed to make the following orders:

    a). The Appellant's conviction is hereby quashed and sentence set aside

    b). The Appellant shall be retried at the chief magistrate's court in Mumias

    c). The Appellant shall be presented for plea- taking before any Magistrate in Mumias law courts within 14 days from the date of this Ruling.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 11TH DAY OF MARCH 2024.

S. CHIRCHIR

JUDGE

In the presence of :

Godwin- Court Assistant

Mr. Wandallah for the Appellant

The Appellant.