Akolon v Republic (Criminal Appeal E010 of 2024) [2024] KEHC 7987 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7987 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E010 OF 2024

JN NJAGI, J

JUNE 21, 2024

BETWEEN

LOPUA NYEUSI AKOLON .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. S. K. Arome, Principal Magistrate, in Marsabit CM`s Court Sexual Offence Case No. E005 of 2023 delivered on 16/2/2024)

JUDGMENT

1. The appellant was convicted for the offence of rape contrary to section 4 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 13th day of March 2023 at (Particulars withheld) well in (Particulars withheld) sub county within Marsabit County he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of NL (herein in referred to as the complainant) without her consent.

2. The appellant was sentenced to serve 15 years imprisonment. He was dissatisfied with the conviction and the sentence and filed the instant appeal.

3. The grounds of appeal as per the amended supplementary grounds of appeal dated 4th April 2024 are that:

    (1) The learned trial magistrate erred in matters of law and facts by failing to note that the appellant was not cautioned on the consequences of pleading guilty to the charge.

    (2) The learned trial magistrate erred in matters of law and facts by failing to note that the prosecution gave two different set of facts in the case.

(3) The learned trial magistrate erred in law by failing to note that the sentences under the *Sexual Offences Act* are not mandatory.

4. The respondent/prosecution conceded the appeal on the ground that the appellant was initially charged with attempted rape. He pleaded guilty to the charge. That the facts which were read to him disclosed an offence of attempted rape. He however denied the facts and the court entered a plea of not guilty. That later on, the appellant told the court that he was admitting the charge. The charge that was read to him that time was one of rape but the particulars of the charge remained that of attempted defilement. The facts that were read to him disclosed an offence of rape. The appellant admitted the facts as read to him. He was convicted for the offence of rape and sentenced to serve 15 years imprisonment.

5. In this appeal, the respondent submitted that the plea was not unequivocal as the particulars of the charge indicated an offence of attempted defilement. That the particulars of the charge were not amended to indicate a charge of rape. The respondent asked the court to order a retrial. They submitted that the appellant will not be prejudiced by a retrial.

6. The appellant on his part submitted that the prosecution gave two different set of facts, with the initial facts indicating attempted rape and the facts given on the second occasion indicating an offence of rape.

7. On sentence, the appellant submitted that the trial court failed to consider the appellant`s mitigation. That the sentence is harsh and excessive. It was submitted that a court has discretion to impose lesser sentences other than those prescribed under the *Sexual Offences Act*. The case of *Maingi & 5 others v Director of Public Prosecutions & another)* Petition No.E017 of 2021 (2021) eKLR was cited in this respect.

8. The appellant submitted that a retrial can only be ordered where the trial was illegal or defective. That insufficiency of evidence is not a reason for ordering a retrial and neither should a retrial be ordered to enable the prosecution improve their case, as was held in *Joseph Lekulayal Lelantile & another v Republic* (2002) eKLR. The appellant urged that he be acquitted.

Analysis and Determination

9. This being a first appeal, the duty of the court is as was set out by the Court of Appeal in *Okeno v Republic* [1972] EA 32 that:

> “ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

10. It is not in dispute that the appellant in this case was convicted for the offence of rape but the particulars of the charge indicated that he was facing a charge of attempted rape. The facts that were read to him after admitting the charge of rape disclosed an offence of rape though the particulars that remained in the charge were that of attempted rape. The question is whether the charge was defective and whether the appellant understood the charge that he was facing.

11. Section 134 of the *Criminal Procedure Code* provides for what the components of the charge sheet constitute 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".

12. The manner in which pleas ought to be taken was summarized by the Court of Appeal in *Adan v R* [1973] EA, 443 as follows:

> " When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own word, and then formally enter a plea of guilt. The magistrate should next ask the prosecutor to state the facts of the alleged offence and when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statements of facts or asserts additional facts which, if true might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."

13. In determining whether a charge sheet is defective or not, the Court of Appeal in *Sigilani v Republic* (2004) 2 KLR, 480 held as follows:-

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence".

14. In *Alexander Lukoye Malika v Republic* (2015) eKLR) the Court of Appeal identified situations in which a conviction based on a plea of guilty can be interfered with in the follows situations:

> " A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged."

15. In the present case, the facts that were read to the appellant when he initially admitted the charge disclosed an offence of attempted rape. When the charge was read to him on the second occasion, the facts related to an offence of rape. Which offence then was the appellant facing, rape or attempted rape?

16. The Court of Appeal in *Yongo v Republic* [1983] KLR, 319 held that a charge is defective when it gives a misdescription of the alleged offence in its particulars. Said the court:

> "In our opinion a charge is defective under Section 214(1) of the *Criminal Procedure Code* where:
>
> (a) It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or
>
> (b) It does not, for such reasons, accord with the evidence given at the trial; or
>
> (c) It gives a misdescription of the alleged offence in its particulars."

17. The particulars of the charge when the appellant was convicted for the offence of rape indicated that the appellant had attempted to rape the complainant. There was therefore a misdescription of the offence in the particulars of the charge. In this kind of confusion, it cannot be discerned whether the appellant admitted an offence of rape as appeared in the charge or attempted rape as appeared in the particulars of the offence.

18. The question then is whether the charge is fatally defective or the defect is one that is curable under section 382 of the *Criminal Procedure Code*. The section provides that:

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

19. In view of the fact that the court cannot know the offence that the appellant pleaded guilty to, the defect cannot be cured by the provisions of section 382 of the *CPC*. It is my finding that the charge is fatally defective and the plea was not unequivocal. The conviction based on the defective charge occasioned a miscarriage of justice resulting in prejudice to the appellant. For that reason, I quash the conviction entered against the appellant and set aside the sentence.

20. Having quashed the conviction and set aside the sentence, the issue to be considered is whether I should order a retrial. The principles governing whether or not a retrial should be ordered were stated in *Fatehali Manji v Republic* (1966) EA 343 by the East Africa Court of Appeal as follows:

> "In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes 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 particular facts and circumstances and an order for retrial should only be made

where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person."

21. In *Mwangi v Republic* (1983) KLR 522 the Court of Appeal also held thus:

> " 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."

22. From the above authorities, it is pertinent that a trial will only be ordered where the interests of justice so require. Each case must depend on its particular facts and circumstances. In this case the initial facts given by the prosecution were that the appellant attempted to rape the complainant and that when she resisted and raised alarm, the appellant ran away. The facts given in the same case on the second occasion when the appellant was convicted over the offence are that he held the complainant and squeezed her throat. He dropped her to the ground and lifted up her dress. He parted her legs and inserted his penis into her vagina. He left her and went away. It is clear that the two sets of facts on the same incident are contradictory. Which of these two conflicting set of facts is the prosecution going to rely on if the court orders a retrial? I do not think that there is any likelihood of a conviction in face of the conflicting evidence shown by the prosecution. I do not see any need of a retrial. The option is to acquit the appellant.

23. The upshot is that the appellant is acquitted and sentence set aside. I order that the appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 21ST JUNE 2024

J. N. NJAGI

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Otieno for Respondent

Appellant present in person

Court Assistant – Jarso