



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CRIMINAL APPEAL CASE 25 OF 2020

GIDEON MUSYOKA MUTHUI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G E M E N T

1. Gideon Musyoka Muthui, the appellant herein was charged with the offence of rape in the view of a family member with mental disability Contrary to **Section 7 of Sexual Offence Act No. 3 of 2006**. The particulars of the offence as per the charge sheet were that on the 6th September, 2019 at [Particulars Withheld] Village Kyuso sub-county within Kitui County he intentionally coursed his penis to penetrate the vagina of LMM without her consent within the view of MMM a person with mental disability.
2. The appellant denied committing the offence but upon trial he was found guilty convicted and sentenced to serve 8 years' imprisonment.
3. The appellant felt aggrieved and lodged this appeal raising 6 grounds but before I consider the grounds I will look at the brief summary of the case at the trial court.
4. The complainant at the trial was a person with mental retardation. She testified through an intermediary and the trial court noted her disability. The evidence PW2 regarding the mental state of the complainant was confirmed by Dr. Rachel Wanjiku (PW6) a doctor who testified and tendered a medical report (P Ex 4) showing that the victim was mentally retarded.
5. On the question of rape, the prosecution's case hinged on the evidence of the complainant (PW1) who testified through an intermediary and stated that she was raped by the appellant. The evidence was corroborated by the evidence of MM (PW2) who gave a moving account on how she found the appellant on the act and how the appellant pleaded with her not to report the incident to anyone. The pleas fell on deaf ears as the witness informed a village elder and the victim's father (PW3).
6. The material evidence tendered by Paul Muthui (PW5) in terms of treatment notes (P Exh 1) and P3 for (P Ex 2) which though not conclusive showed that there were some whitish discharge and presence of spermatozoa on the victim's genitalia.
7. The appellant in his defence denied committing the offence and blamed PW2 for framing him because of a grudge.
8. The trial court evaluated the evidence and concluded that the prosecution's case had been proved to the required standard. The trial court noted that though there was a defect in the manner the charge sheet was framed, but found the defect was curable as it did not prejudice the accused person.
9. The appellant felt aggrieved and filed this appeal raising the following grounds in his position namely;
 - i. ***That the learned magistrate misdirected herself in law by not appreciating that section 7 of the Sexual Offences Act is not an offence for the rape of a person with mental disabilities but prescribes the rape of or indecent act with another within the view of a family member, a child or person with mental disability***
 - ii. ***The learned magistrate misdirected herself in fact and law by convicting the Appellant on a defective charge sheet.***
 - iii. ***The learned magistrate misdirected herself in fact and law by not appreciating that the evidence of prosecution witnesses was inconsistent with the particulars of the charge read to the Appellant.***

iv. The learned magistrate misdirected herself in fact and law by ignoring the Appellant's defence that he was framed by the victim's aunt.

10. The appellant in his written submissions reiterates that he was convicted on the basis of a defective charge. He submits that the evidence was inconsistent with the charge read over to him.

11. He points out that under **Section 7 of the Sexual Offence Act** it was mandatory for the prosecution to prove the act of rape or indecent act and that it was committed within the view of a child, a family member or a person with mental disability. According to him the charge was not clear and he was not sure what he was being accused of. He has relied on the decision in the case of **John Maindu Muteti versus Republic [2020] eKLR** where the court found that the appellant was convicted on a defective charge as he was charged under a wrong provision of the law. On that basis the accused was then acquitted.

12. He contends that the prosecution ought to have amended the charge sheet under **Section 214 of the Criminal Procedure Code** in view of the evidence tendered and that failure to amend the charge rendered the charge defective and that the same could not support the conviction that the court could not resort to **Section 179 of Criminal Procedure Code** to save the prosecution's case because **Section 179a of Criminal Procedure Code** applies only where the offence disclosed is a minor offence.

13. He further submits that there was no evidence tendered to show that the victim was mentally retarded.

14. The Respondent has conceded that there was an error or defect on the charge sheet because the statement of the offence and the particulars were at variance with the evidence tendered.

15. The Respondent however contends that although there was an error, the same was not fatal to their case against the appellant because according to it the appellant understood the charge preferred against him clearly and proceeded to put up a defence during trial. It further submits that the appellant proceeded in asking relevant questions relating to the offence during trial.

The prosecution has relied on the case of **Bernard Ombuna V Republic (2019) eKLR** where the court of appeal discussed the test of determining when a charge is fatally defective so as to render any conviction a nullity. The court held that the test is substantive and the consideration should be whether the defect prejudiced an accused/ appellant to the extent that they were confused with respect to the nature of the charges preferred against him and as a result they were not able to put up an appropriate defense.

16. On the sentence, the prosecution submits that the same was not harsh and should that it should be enhanced as it was lower than what is prescribed under **Section 7 of the Sexual Offences Act**.

17. This court has considered this appeal and the response made by the State. The main issue in this appeal is basically whether the charge upon which the appellant was charged and convicted was defective and whether the conviction on the basis of the same was safe.

18. There is no doubt on perusal of the judgement from the trial court that the issue cropped up and the trial court the trial court grappled with it.

19. The appellant faced the following charge as framed in the charge sheet verbatim,

“Rape in the view of a family member person with mental disability Contrary to Section 7 of the Sexual Offence Act No. 3 of 2006.”

20. The particulars of the charge are as follows: -

“Gedion Musyoka Muthui: on the 6th day of September 2019 at about 1600 hours at [Particulars Withheld] village of Ngomeni location in Kyuso sub-county within Kitui County intentionally courses (sic) his penis to penetrate the vagina of LMM without her consent within the view of MMM a person with mental disability.”

There is a grammatical or spelling error of the word “course” instead of correct word “cause” which is minor error but what is glaringly erroneous given the evidence adduced is that it is the victim LM who was the one mentally retarded and not MMM.

21. That is not the only glaring error because a closer look at the evidence tendered is that the person who witnessed the incident is MMK (PW2) MM (PW3) is the father of the victim and was not anywhere near the scene when the act of rape was committed. What is more is that the said MM is not mentally retarded or at least no evidence was tendered to show that he suffered from mental infirmity or illness. The particulars contained in the charge sheet in whichever way one looks at it were certainly not in tandem with the charge. The particulars did not disclose the offence for which the accused was charged with and convicted.

22. The provisions of **Section 7 of the Sexual Offence Act** 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 10 years.”

The proper interpretation of the above provisions shows that there are two elements/ingredients which should be established and proved for

the charge to be sustained.

(i) Rape or indecent act and rape is defined under **Section 3(1) of Sexual Offence Act** as unlawful act that causes penetration with his or her genital organs where the other person does not consent to the penetration or the consent to the penetration or the consent is obtained by force or by means of threat or intimidation of any kind.

(ii) The act of rape or indecent act is committed in the presence or view of a family member, a child or a person with mental disability. This means that if the act is committed in the view of either a family member, a child or a mentally retarded person then an offence under **Section 7 of the Sexual Offence Act** is committed.

23. In this instance, the evidence presented indicated that the victim was the one who suffered mental retardation. The particulars on the charge sheet were therefore incorrect and misleading.

24. As I have observed above the trial court for good measure noted the defect when it observed in its judgement as follows: -

“I do note that the accused is charged with the offence of “Rape in the view of a family member person with disabilities” instead of “Rape within the view of a family member” the particulars of the charge also state that the complainant was raped within the view of MM instead of MM. Consequently, an issue arises as to whether the charge is fatally defective...”

From the evidence on record, the accused in this case clearly understood the charge against him. The evidence on record shows that the complainant was raped within the view of her aunt MM. The Complainant and her said aunt both testified on the issue and were cross examined by the accused. There is no indication that the accused suffered any prejudice. In my view aforesaid defect in the charge sheet does not render the charge sheet herein fatally defective. I find that the complainant was raped within the view of a family member...”

The trial apparently noted the defect to some extent but evidently missed out on the magnitude of the defects. It only noted the fact that the person who witnessed the act was MM (PW2) and not MM. But as I have observed above the defects were much more. MMM is described as a person with mental disability in the particulars of the charge which of course was erroneous.

25. The evidence adduced at the trial court shows that the appellant was being accused for raping someone with mental disability. That act also constitutes an offence under **Section 146 of the Penal Code** which states 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.”

26. It is therefore an offence coded in the penal code for one to have carnal knowledge of person knowing that the person is an imbecile or idiot but the provision has rider which poses a problem. The Section states that a person who has carnal knowledge in circumstances “*not amounting to rape*” but which prove that the person knew at the time of commission of the offence that the person was an idiot or imbecile of course under **Sexual Offence Act** an imbecile or a person with mental retardation is incapable of giving consent. **Section 3(1)** as read with **Section 43 (4) (e) of the Sexual Offence Act** is clear on that. **Section 146 of the Penal Code** on the hand appears to be still reeling from the decisions of the past where rape was taken to have a limited meaning of committing an act causing penetration by force coercion or threats and without consent. The meaning of rape was expanded with the enactment of **Sexual Offence Act No. 3 of 2006**.

27. As I have noted above **Section 3(1) and Section 43** gives definition of rape to include a situation where a person intentionally and unlawfully commits an act which causes penetration with his/her genital organ.

Section 43 of Sexual Offence Act provides that;

“An act is intentional and unlawful if it is committed;

a) In respect of a person who is incapable of appreciating the nature of an act which causes the offence.....”

The provision under subsection 4 is even more clearer it states: -

“The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in sub-section (1) include circumstances where such a person is, at the time of the commission of such act.....”

(c) Mentally impaired or a child

28. The above provisions show that the appellant herein should have been charged under the provisions of **Section 3(1) & 2 as read with Section 43 (a) of the Sexual Offence Act**. The offence of committing rape against a mentally retarded person is fully covered under the above Sections as I have elucidated above.

29. The Particulars of the offence contained in the charge were in my view defective and the trial court fell into error to find that the defects did not occasioned the appellant prejudice. It is a legal imperative and indeed a constitutional one at that, that a charge facing an accused

person should be clear of any ambiguity to enable accused know that he is pleaded to.

Section 134 of the Criminal Procedure Code provides;

“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.”

Besides the above *Article 50 (2) (b)* provides that one of the tenets of a fair trial is to be **“informed of the charge with sufficient detail to answer it.”**

30. Looking at all the defects noted from the charge sheet which I have highlighted above it is obvious that the charge sheet presented to the trial court in this instance failed to meet both statutory and constitutional threshold.

31. The charge and the particulars as contained in the charge sheet was riddled with ambiguities that made it really difficult for it appellant to know what he was pleading to. It is difficult to see how the defects could be cured under *Section 382 of the Criminal Procedure Code* because for one, the evidence tendered were not consistence with the charge as I have elaborated above. The offence was witnessed by PW2 who testified that he caught the appellant in the act after arriving home from fetching water from a river. She was a witness to the act. *Section 7 of Sexual Offence Act* presupposes a situation where rape is intentionally committed in full view of a family member, a child or a person with mental disability. That was not the situation here.

Secondly, as I have also noted above, the particulars were very confusing or misleading because what is captured is erroneous. The details were insufficient to support the charge and in my view the same could not sustain the charge for which the appellant faced.

The long and short of this is that this court finds merit in this appeal. The charge upon which the accused was charged and convicted upon was erroneous besides the fact that the evidence tendered was at variance with the evidence tendered as readily conceded by the respondent.

This appeal is therefore allowed. The conviction is quashed and the sentence is reversed. I would have ordered for a retrial but given the length of time the offence took place and the extensive findings and views regarding the case expressed by this court, a retrial would obviously not be fair. The appellant is therefore acquitted and shall be **set free** forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KITUI THIS 14TH DAY OF FEBRUARY, 2022.

HON. JUSTICE R. K. LIMO

JUDGE