REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 104 OF 2017

(From Original Conviction and Sentence in Sexual Offence Case No. 75 of 2015

by the Chief Magistrate's Court at Kakamega)

CHRISTOPHER AUKA...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGEMENT

1. Christopher Auka, the appellant, was convicted by Hon Hazel Wandere, Principal Magistrate, of rape of an imbecile contrary to Section 146 of the Penal Code, Cap 63, Laws of Kenya, and was accordingly sentenced to fourteen years' imprisonment with hard labour.

2. The appellant had been charged on an information dated 7th October 2015 of the offence of defilement of an imbecile contrary to section 146 of the Penal Code. Particulars of the charge against the appellant were that on the 4th day of October 2015 in Bukhungu Location, Lurambi North Division Kakamega Central District of Kakamega County he unlawfully and intentionally caused his penis to penetrate the anus of GI a child aged 16 years knowing that at the time of the commission of the offence that he was an imbecile. The main charge was amended through an order made on 22nd May 2017 to read rape under section 146 of the Penal Code. The amended charge was read to the appellant and he pleaded not guilty to it.

3. He had 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 particulars of the alternative charge were that on the same date and at the same place stated in the main count, he had intentionally touched the anus of the subject child with his penis.

4. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called four (4) witnesses.

5. BL, the complainant's mother, testified as PW1. She said that he was an imbecile since birth and she acted as his intermediary for the purpose of the trial. She stated that he informed her on 4th October 2015 at 6.00 PM that the appellant had defiled him through the anus. She identified the appellant as Toper Auka. The child was feeling pain and could not sit, so she sought the advice of a church elder. She was advised to take him to hospital. The appellant was arrested the next day. She went with him to the police station and he was detained and later charged. PW2, GI, the complainant, testified next. Part of his testimony was given on 9th November 2016, and the other on 20th February 2015. He met the appellant on a path as he was walking home. The appellant sodomised him and he felt pain. He took him into Kakamega Forest, took his penis and inserted it inside his buttocks. He reported the incident to his mother, PW1. He said the incident happened at a place called Shidodo. He was treated and recorded a statement with the police. He identified his assailant by pointing at the appellant on the dock. He described him as a neighbour who lived across the road. On cross-examination, he informed the court that what he was telling it was what he had recorded in his statement. He said it was raining when the appellant sodomised him, that he gave him Kshs. 20.00 after he was finished with him. He said that the appellant hurt him and blood even oozed from his anus. He asserted that his mother did not tell him what to come and tell the court.

6. PW3 was PC Warren Sara Andekha from Kakamega Police Station, the investigating officer, having taken over from the previous investigator. He stated that the matter was reported to the police on 4th October 2015, a police P3 form was issued to PW2 and he was taken to hospital. The appellant was subsequently arrested. PW4, Dr Mambili, was the medical doctor who presented the Police Form 3 which was put in evidence. He stated that PW2 was brought to hospital with a history of having been taken to a forest and sodomised on 4th October 2015. He had fresh injuries, being bruises and lacerations, in the anal area. He said his attacker was a family member aged about forty years. He described the victim as retarded. The P3 form was prepared and signed by Dr. Akhonya. . He stated that the appellant was not subjected

to medical examination.

7. At the close of the prosecution's case, the court found that the appellant had a case to answer and put him on his defence. He gave a sworn statement 26th July 2017. He said that his name was Mathews Ilolo Liruma and not Christopher Auka alias Tufa. He protested that although he had surrendered his identity card to court over the issue of his name, the court did not rule on the matter. He said that on 5 th August 2015 he had come into Kakamega town to buy iron sheets when he was arrested and taken to the police station. He said that those who arrested him took his money. He said that all the state witnesses had told lies. At cross-examination he said that his arrest was on 5 th November 2015. He said that he did not stay at Shitao but elsewhere.

8. After reviewing the evidence, the trial court convicted him of the amended main charge, and sentenced him as stated in paragraph 1 of this judgement.

9. Being dissatisfied with the conviction and sentence the appellant appealed to this court and raised several grounds of appeal. He averred that the court convicted him of rape when the evidence adduced did not disclose such offence, that the judicial officer who tried him had not heard the entire case having taken over from another and therefore she did not appreciate the facts, that the court did not consider that the medical evidence was not conclusive as both parties were not tested, that the trial was unfair in the light of Article 50(2)(g)(h) and (j) of the Constitution, that the court erroneously assumed that the appellant was sexually potent without any medical proof, that the court relied on malicious fabricated and doubtful evidence, and that the court had shifted the burden of proof to him by rejecting his defence.

10. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> "*An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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.*"

11. The appeal was canvassed on 31st January 2018. The appellant relied on written submissions that he had placed before me, while Mr. Ng'etich, Senior Prosecution Counsel, made oral submissions. The appellant's written submissions dwelt on such issues as the main offence not being non-existent in the Penal Code, variance between the particulars of the charge and the evidence, reliance of an intermediary at the trial, non-disclosure of evidence, and lack of corroboration of PW2's witness. I shall consider all the issues raised in both the petition of appeal and in the submissions.

12. Mr. Ng'etich submitted that the offence of rape was proved beyond doubt. He submitted that the identity of the assailant had been established as PW2 had identified the appellant by recognition for they were neighbours. On penetration, he said that there was medical evidence of the same from PW4. He urged me to uphold the conviction and confirm the sentence.

13. The first issue raised in the petition is on the offence charged. The appellant faced a charge of rape of an imbecile contrary to section146 of the Penal Code. He argues that there is no such offence under the Penal Code. Section 146 states as follows:

> "*146. 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.*"

14. The marginal notes to section 146 of the Penal Code describe the offence created in that section as "defilement of idiots or imbeciles." The body of the provision indicates that the conduct targeted is "unlawful carnal connection with" the victim "under circumstances not amounting to rape." Clearly, the offence created under section 146 is not that of rape, and, according to the marginal notes, it is defilement. I therefore agree with the appellant that section 146 of the Penal Code does not create the offence of rape, and therefore the charge was erroneous. Curiously, when the appellant took plea on 7th October 2015 the charge read to him was the correct one, of defilement of an imbecile. It is not clear what informed the amendment of 22nd May 2017, which rendered an otherwise proper charge defective.

15. The issue for me to determine is whether the trial court had properly conducted a trial founded on such a charge that was obviously flawed. The court in *Njoroge Mungai vs. Republic* [2017] eKLR faced a more or less similar case. The appellant had been charged with rape of a woman with mental disabilities contrary to section 7 of the Sexual Offences Act, with an alternative count of committing an indecent act with an adult contrary to section 11A of the same Act. The court found that the facts of the charge revealed an offence under section 146 of the Penal Code and not section 7 of the Sexual Offences Act., the appellant in that case then should have been charged under section 146. The court found that the appellant had been convicted on a nonexistent offence in count I and that the proceedings were defective and a nullity, and proceeded to quash the same and order a retrial. The same challenge faced the court in *Musa Kiprotich Kitilit vs. Republic* [2012] eKLR. The appellant had been charged of an offence under section 7 of the Sexual Offences Act with an alternative under section 11(1) of the Sexual Offences Act. The court noted that the victim had mental disability and therefore the charge should have been brought under section 146. The court held that the charge was defective fatally as the particulars of the charged offence were at variance with section 7 of the Sexual Offences Act. The court quashed the conviction and set the appellant at liberty.

16. The appellant had been charged with the offence of raping an imbecile under provisions which create a different offence. The charge was defective and the trial of the appellant was therefore unfair. The trial court and the prosecution ought to have seen to it that the charge was amended before completion of the trial. Otherwise, taking the appellant through a trial under those circumstances was improper.

17. On the issue that the judicial officer who completed the trial and delivered judgment had not heard the case from the beginning, is true that the prosecution witnesses were heard by Hon. J. Ongondo PM, while Hon. Wandere heard the defence. The record indicates that section 200 of the Criminal Procedure Code was complied with. The record is, however, silent on whether the appellant expressed his preference as required by that provision, whether to the matter ought to proceed from where the previous trial magistrate left off or whether as to matter should start *de novo*. Section 200(3) of the Criminal Procedure Code states:

> "*(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right."*

18. The record of 22nd May 2017 reads as follows:

> "Before Hazel Wadere, PM
>
> PC Rotich Fridah court clerk
>
> Accused person present in person
>
> Court – trial magistrate proceeded on transfer
>
> Order – Provisions of section 200(3) C. P. C. duly complied with and explained to the accused in Kiswahili he understands replies.
>
> Case to proceed from where it had reached."

19. Section 200(3) imposes a duty on the incoming trial magistrate to inform the accused person of his rights in circumstances where the trial is being taken over by another magistrate. Upon the rights being explained the accused person may ask for recall of witnesses if need be. The duty of the magistrate does not go beyond explaining the rights. It should be noted that the provision is fundamental for it has something to do with fair trial rights, and failure to comply with it may have profound effect on the integrity on the proceedings conducted thereafter. The record before me appears to suggest that there was full compliance with that provision. The appellant has not stated that he made any request for recall of witnesses and it was not acceded to. See *Wycliffe Angwenyi Momanyi vs. Republic* [2018] eKLR and *Mercy Mugure vs. Republic* [2018] eKLR.

20. He appears to complain that that the incoming magistrate did not apprehend the testimonies of the witnesses who were handled by the outgoing magistrate. He has not pointed at any instances where there was any such misapprehension. In any event he had opportunity on 22nd May 2017 to ask for a recall of the witnesses, but it would appear that he did not avail himself of that opportunity.

21. The other issue he raises is that the court did not consider that only PW2 was medically examined to determine whether he had had any sexual activity. He appears to suggest that he should have also been examined, and that the failure to examine him was fatal to the prosecution's case. He did not point me to any statutory provisions or case law that requires that. The available case law states that penetration can be established by alternative evidence. It was held by the Court of Appeal in *Robert Mutungi Muumbi vs. Republic* (2015) eKLR and *Williamson Sowa Mbwanga vs. Republic* (2016) eKLR, that section 36 of the Sexual Offences Act allowed the court to order samples to be taken from an accused person for forensic examination or deoxynucleic acid (DNA) testing, but then that provision was not mandatory, and the penetration or sexual intercourse could be proved by alternative evidence.it was emphasized that medical or DNA evidence was not the only evidence by which commission of a sexual offence could be proved.

22. He complains that the fair trial provisions in Article 50 of the Constitution were not complied with, in particular Article 50(2)(g)(h) and (j). He did not point to any particular provisions of the Constitution that had been violated, with particularization of the instances of violation of the constitutional provisions referred to. I shall therefore not address my mind to the same.

23. He submits that the court proceeded on the presumption that he was sexually potent, suggesting that tests ought to have been done to determine whether or not he could rise to the occasion and commit the offences alleged. The fact of penetration can be established by alternative evidence. Persons who suffer disability or a condition of one kind or another tend to be the minority in society, a court would therefore be entitled to presume that an accused person is normal. It should be up to the accused person to bring facts to the contrary. It is a defence available to the accused. The trial court cannot be faulted for making that presumption in the instant case.

24. He complains that the court relied on discredited and fabricated evidence. He did not point to any aspects of the evidence that can be said to be fabricated. I have carefully gone through the entire record. The witnesses, including PW2, gave evidence in a very straightforward and clear manner. The evidence was consistent, flowing and believable.

25. On the claim that the court shifted the burden of proof to him and disregarded his evidence in defense. I have read and reread the entire record, and I have not come across any record suggesting that the trial court ever shifted the burden of proof to the appellant. As stated in paragraph 24 above the testimonies of the prosecution witnesses were fairly consistent, and the defence testimony did not in any way displace the case presented by the prosecution.

26. However, in view of what I have stated here above, it is clear that the trial court fell into error with regard to convicting on the basis a charge that was fatally defective. That conviction cannot possibly stand. The circumstances may require that the matter be send back to the lower court for retrial. I note that the appellant was treated as a first offender. I trust that he has learnt his lessons. I shall in the circumstances quash the conviction of the appellant of rape of an imbecile contrary to section 146 of the Penal Code and set aside the sentence imposed.

The appellant shall be set free from prison custody unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF June, 2019

W MUSYOKA

JUDGE