



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL APPEAL NO. 1 OF 2019**

**EZEKIEL KIMWANGI NJAGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in Mwingi Senior Principal Magistrate's Court Criminal Case No. 596 of 2015 by Hon. G.W. Kirugumi (Senior Resident Magistrate) on 17/12/18)*

**JUDGMENT**

1. The Appellant was charged with 1<sup>st</sup> charge of **Rape** contrary to **Section 3(1) (a) and (b)** as read with **Section 3(3)** of the Sexual offences Act Cap 62A Laws of Kenya. There was a second charge of **"Indecent act with an adult contrary to Section 11 A of the Sexual Offences Act No. 3 of 2007"**.

2. The first charge was dismissed but on count of indecent Act with an adult succeeded thus he was convicted and sentenced to serve **10 years imprisonment**.

3. This triggered the lodging of the instant appeal where the Appellant has set 7 grounds of appeal vide Amended petition of Appeal on page 1-2 of the records of the appeal. These are:

*a. The Learned Trial Magistrate erred in Law and in fact in convicting the appellant on the offence charged without finding all three grounds required to find one guilty proved beyond reasonable doubt by the prosecution.*

*b. The Learned trial Magistrate erred in law and in fact in convicting the appellant on the offence charged in the face of no supporting medical evidence linking him to the offence.*

*c. The learned trial Magistrate erred in law and in fact in holding the evidence of the complainant as credible when the totality of the evidence clearly pointed out that the complainant's testimony was to save face and/or backlash from his parents and/or the public.*

*d. The learned trial Magistrate erred in law and in fact in disbelieving the defense testimony without any candid and/or cogent reasons.*

*e. The learned trial Magistrate misdirected herself on the burden and incidence of proof and consequently arrived at a judgment in supportive of facts, evidence and law.*

*f. The Learned trial Magistrate did not address her mind judiciously to the evidence in totality and ended up descending into the arena by canvassing theories not supported by the evidence on the record.*

*g. The learned trial Magistrate erred in law in convicting the Appellant on a defective charge sheet.*

4. The directions were given and parties filed submissions to canvass the Appeal.

5. The state conceded the appeal.

**6. SUBMISSIONS**

7. The Appellant contends that the said charges were defective as: *There was no such law in the Kenyan statutes. Even if the law existed, the*

first charge was defective for failure to include the word “**unlawful**” in the particulars of the charge.

8. It was submitted that the Act that the Appellant was alleged to have contravened was not provided for in our statutes. This is so because looking at the charge it states **section offences** and secondly even if it was a typo the said offence is not captured in Chapter 62 A laws of Kenya.

9. Also on the 2<sup>nd</sup> charge it is submitted that the Appellant was charged with a nonexistent law as there is no Sexual Offence Act No. 3 of 2007 in our statutes. The Constitution, various statutes and precedence have stated and held time and again that an accused person cannot be charged with an offence and found guilty for an act that is not known in law.

10. Its clear from the foregoing that by charging the Appellant, and the lower court finding him guilty on a non-existent law, the Appellant’s trial at the lower court was unfair and prejudicial to him and as such this Honorable court should acquit the Appellant.

11. Even if the law existed, the first charge was defective for failure to include the word “**unlawful**” in the particulars of the offence.

12. On the charge of rape, the charge sheet reads as follows on the particulars:

**“EZEKIEL KIMWANGI NJAGI - On diverse dates between 5<sup>th</sup> October and 30<sup>th</sup> October 2015 at Mwingi Township within [particulars withheld] County, intentionally caused your penis to penetrate the anus of JMK, without his consent. (Page 12).**

13. It was submitted that it has been held in **Yosefa Vs. Uganda (1969) E.A. 236 Sigliani Vs. Republic (2014) 2 KLR 480** and **HCC, Machakos, Criminal Appeal No. 237 of 2013, Isack Kimeu Mutuku** (Attached) that a charge sheet is totally defective if it doesnot allege as essential ingredient of an offence.

14. Particularly and relevant to instance case is **Daniel Nyarera Achoki Vs. Republic (2000) Eklr and HCCC Criminal Appeal NO. 100 of 2007. Pete Sifuna Barasa vs R.** (Attached) where it was held that a Charge of Rape to be sustainable, it must include the following particulars:

***That the act of sexual intercourse was unlawful, that the act of sexual intercourse was without consent.***

15. The judgment firmly stated that the omission of any one of them renders the charge incurable defective and a conviction cannot lie however strong the rest of the evidence might be.

16. Having clearly shown that the Prosecution clearly emitted these crucial particulars in the first charge, a conviction can therefore not stand and the Appellant should be released forthwith.

17. On the second charge, it is important to note that the lower court acquitted the Appellant on the same (Page 57) and the state did not counter appeal on his acquittal of the said Charge and as such as it is, he stands acquitted on the alleged charge and offence.

18. Be that as it may the court having gone through the proceedings and looked at the documentary exhibits that were produced in the lower court appellant believe it would come out clearly that it was not safe to convict the Appellant for there were no proof beyond reasonable doubt as required to do so in law, the testimony of the alleged complainant was not trustworthy at best and there was no independent witness to substantiate the claims of the complainant.

#### **Prosecution Respondent submissions:**

19. **On whether the prosecution case was not proved beyond reasonable doubt:** It was submitted that indeed the prosecution case was not proved beyond reasonable doubt.

20. The complainant states that he was called by the appellant who then went ahead to sodomize him in the first instance but failed to report to the Police and chose to stay with the appellant and even prepared lunch for them before he embarked on his journey to Garissa where he purportedly reported to Garissa Police Station and midway reconciled with the appellant and voluntarily returned to him.

21. **Whether medical evidence linked the appellant to the offence.**

22. The Doctor stated that all the tests done on the appellant were normal but those carried upon the complainant showed infection in his urine and spermatozoa were found. There is no record that links the appellant as being the person whose spermatozoa were found of the complainant. All the medical test done to the two persons, none links the appellant as being the person behind the complaint’s allegation.

23. **Whether the complainant wanted to save face and backlash.** It was submitted that the testimony of the complainant is full of inconsistencies that raise doubt about his character and practice.

#### **FIRST APPELLATE COURT DUTY**

25. This being the first appeal, the court is under duty to re-evaluate and reconsider the evidence and materials that was presented and recorded in the lower court and reach its own independent conclusion as held in **Okeno vs. Republic (1972) E.A**

26. In doing so the court will have to look at the amended charge sheet that was read to the Appellant (Page 12 and 13).
27. Testimony of witnesses.
28. **PW1 – JMK** testified that being a student of **[particulars withheld]** Secondary School in form three then, recalled well on the **5<sup>th</sup>** of October **2015** he was called by the appellant **Ezekiel Njagi** who then worked at a dispensary and together they left to a place called **Kanzui** Trading Centre where he also owned a bar and a barber shop.
29. He stated that they started drinking alcohol at a popular club christened **Legend** until midnight when they all retired at the appellant's house. That just after about 30 minutes, the appellant took a syringe and injected him on his right hand and picked his middle finger to test HIV stating that he wanted to know his status.
30. It was his evidence that the appellant then went ahead to convince him to sleep with him since his bed was big enough to accommodate two people and that once on the bed he lost consciousness and fell asleep.
31. That gaining consciousness at about 2pm, he found the appellant in the act of sodomizing him and when he tried to resist, he stopped but he fell asleep and woke up at 4am and found him still in the act. That he escaped to the toilet where he stayed until 6a.m. and noticed his friend Alfred who slept with him in the same house did not suffer the same fate.
32. He recalled being given Kshs. 30 for breakfast and he testified that he stayed in the house where he prepared lunch for them and when the appellant returned, he gave him Kshs. 1000 and added him another Kshs. 1000 which he used to travel to Mwingi town and took another vehicle to Garissa where he told his aunt what had transpired.
33. It was his evidence that he first made a report to Garissa police station but opted to reconcile with the appellant. That on **30<sup>th</sup> October 2015**, he was at the appellant's house in Mwingi when the police busted them and were all taken to Mwingi Police Station where they were booked before being taken to Mwingi Level four Hospital for medical checkup.
34. He identified a lab request form for himself as MFI-1. Lab request form for the appellant as MFI-2, P3 Form MFI-3 and his black Trouser as MFI-4.
35. During cross-examination, he stated that he did not have a National identification Card but got it on **5<sup>th</sup> August 2015** before he met up with the appellant and that the OB in Garissa did not bear his ID number and did not also indicate him as an adult.
36. It was his testimony that he had **joined illuminate cult** in the year **2014** but did not recruit anyone else but could not tell if he was a member of the cult since their website could not show his name.
37. **PW2- CKK** testified that being the mother of the complainant, she recalled he left home between **September** and **October 2015** and she didn't know where he went until the complainant's aunt who lived in **Garissa** told her that the complainant was there.
38. She testified that since it was during school term, his father warned him to go back to school or he will have him arrested. She recalled that the father indeed went to Garissa and brought him home and after interrogating him, he revealed that he had been in Mwingi putting up with the appellant who raped him.
39. That the father took him back to school only for her to learn that he was arrested together with the appellant and taken to the Police.
40. **PW4 PMM** testified that being a teacher at **[particulars withheld]** Secondary School noticed the complainant missing sometime in **September 2015** for the better part of the second term.
41. That before he left, he had noticed him with an earring which upon interrogating him, the complainant informed him that he had joined illuminate and that the powers of the cult were **concentrated in the earring.**
42. That he told him that he had subscribed to the cult through its website using his card and had opted to transfer school that made him disappear from the school for two terms and had surfaced in the last term.
43. He testified that the complainant told him he was linked to the appellant by his friend and that the appellant would occasionally defile him. He stated that it was then that he conducted the parents and told them to report to the police.
44. During cross-examination, he said that he did not involve the Police and only told the Principal and could not produce a register indicating the complainant was not in the school.
45. **PW5 NO. xxxxx xx WN** stated that he received a tip off from member of the Public on the **30<sup>th</sup> October 2015** that the appellant **Ezekiel Kimwangi** had been spotted together with the complainant (**JM**) and were headed to the appellant's house with the complainant looking intoxicated.
46. He testified that he went to the appellant's house and ordering him to open the door, he first resisted but when he eventually opened, he found the complainant naked while still in bed.

47. That they took them to **Mwingi** Police Station before subjecting them to medical checkups at Mwingi level four Hospital where the doctor's report indicated that the complainant's rectum had spermatozoa. He identified the P3 FORM mfi-3, Lab request from MFI -I and 2 respectively.

48. **PW6 DR. NDIGANGU JORAM** testified that he did not examine the complainant but his colleague Dr. Wakholi was on transfer did but being that they worked together, he understood his handwriting and signature.

49. That the test done to the appellant indicated everything on him was normal but the test done on the complainant revealed that his urine had infection and spermatozoa were noted.

50. He produced the lab request form for the complainant as Exhibit-1 and that of the Appellant as Exhibit 2 and that the injuries noted on the complainant were about four weeks old.

51. During cross examination, he remained firm that nothing abnormal was noted or found on the appellant after examination. That his urine had no spermatozoa but that the spermatozoa were found on the anus of the complainant. (no sample to show they belonged to the appellant).

52. After going through proceedings and the submissions, if the issues are; whether prosecution proved its case beyond reasonable doubt?

53. **Issues analysis and determination**

54. After going through the evidence on record and the submissions by parties, I find the issues are; **whether the offence of indecent act with an adult was proved beyond reasonable doubt?**

55. An indecent act with an adult contrary to section 11(A) of the Sexual Offences Act is to the effect as follows:

*“Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both.”*

*An indecent act is defined in section 2 of the said Act as an unlawful intentional act which causes—*

*(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;*

*(b) Exposure or display of any pornographic material to any person against his or her will;*

56. From the record, it is clear that the complaint is about actual penetration. Nowhere in the record is there a complaint that PW1's ....., buttocks or ..... were touched. There is no basis for making a finding that there was an indecent act committed.

57. **A.C. Mrima J** considered similar facts in Criminal Appeal No. 3 of 2019. He held as follows:

*“As to whether there was any contact between any body part of the appellant with the genital organ,..... of the complainant which act however did not cause any penetration, I must say that I have re-read the proceedings severally and did not see anywhere where the complainant alleged that the appellant touched her genital organ, breast or buttocks. The complainant talked of the appellant having had sex with her twice, an allegation which the trial court rejected for lack of proof and no appeal was lodged against the finding. The complainant was not lead to describe how the sexual act unfolded and which part of her body was touched by which part of the body of the appellant. With such state of evidence, I do not see how the offence of committing an indecent act ..... was proved. A trial court should not assume that once it finds no evidence of commission of the principal charge .....then the lesser charge of committing an indecent act .....must have been committed. Every offence has the .....threshold of being proved beyond any reasonable doubt.”*

56. The court is in agreement with the prosecution that this was not a conviction it could support. The court finds that the prosecution never proved its case beyond reasonable doubt and thus the appeal succeeds and it is allowed. The court makes the following orders;

**i. The conviction is quashed and the sentence set aside and the appellant is to be released forthwith unless otherwise lawfully held.**

**ii. It is so ordered.**

**DATED, SIGNED AND DELIVERED AT KITUI THIS 18TH DAY OF OCTOBER, 2019**

**C. KARIUKI**

**JUDGE**