REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO 103 OF 2017

NJOROGE MUNGAI.....APELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the original conviction and sentence on 4th August 2015 in Eldama Ravine Principal Magistrate's Court criminal case no. 1171 of 2014 by Hon, M. Kasera, PM)

JUDGMENT

1. The appellant was convicted for an offence stated as **"rape of a woman with mental disabilities contrary to section 7 of the Sexual Offences Act No. 3 of 2006"** and for the alternative count of **"committing an indecent act with an adult contrary to section 11A of the Sexual Offences Act No. 3 of 2006"**. The particulars for the offence of rape were that he *"on the 14th day of November 2014 at [particulars withheld]village Koibatek within Baringo County intentionally and unlawfully committed an act which caused penetration of his penis into the vagina of S.J.* ***a person with mental disabilities."*** The particulars for the alternative count of indecent act with an adult were that he *"on the 14th day of November at [particulars withheld] village in Koibatek Sub-County within Baringo County intentionally and unlawfully caused his penis to come in contact with the vagina of S.J. a woman with mental disabilities."*

2. Upon convicting the appellant on both the main count and the alternative count, the trial Court sentenced the appellant to imprisonment for 10 years in each count, the sentencing running concurrently. In his judgment the learned trial magistrate ruled as follows:

"The issue before the court is:

(1) Whether accused raped complainant

(2) Whether she is mentally disabled

(3) Whether offence was done in the presence of a child

(4) Whether he committed an indecent act with an adult

Whether the accused raped complainant, complainant narrated to the court how accused took her to the bed and without uttering any word he removed her inner wear and raped her. This offence falls under

Section 146 of the Penal Code which was not charged on the charge sheet.

The offence charged is under section 7 of the Sexual Offences Act No. 3 of 2006 under this offence. It is the offence of having sexual intercourse in the presence of a family member, child or person with mental disabilities.

This offence is committed against the person watching as well as the person involved in the intercourse. ***Granted this offence was done in the presence of complainant's child who was suckling before accused pulled her mother to the bed to rape her, the act in Section 7 does not put any age limit to the child or family members or person with mental disability.*** *I have looked at HCCRA No. 240/2008 page 3, I find count 1 is proved as the offence was committed in the presence of the complainant's child. I therefore convict accused accordingly contrary to section 215 of the CPC on count 1.*

The offence proved by the [facts] is that accused raped the complainant who is mentally challenged. The treatment note from Esageri Health Centre Indicate that complainant was mentally challenged. The accused ought to have been charged under Section 146 of the Penal Code which was not charged.

There is no doubt that complainant was mentally challenged as exhibit 1(a) from Esageri confirm the same.

Whether accused committed indecent act with an adult Contrary to Section 11(A) of the Sexual Offfence Act. Complainant is said to be 21 years old as per the P3 form produced in court as Exhibit – 2. She therefore qualify to be an adult. The accused intentionally and unlawfully caused his peni0s to come into contact with the vagina of the complainant. I find alternative charge is proved. I convict accused under Section 215 of the CPC.

The incident was at Muserech Centre the accused and complainant the issues as to where they were in a house in Muserech. PW 3 also said he found complainant outside the house in Muserech. The investigating officer wrote Kabimoi in her charge sheet the place of the offence is not disputed therefore, it is not an issue. The accused is convicted accordingly on count 1 and alternative charge Contrary to Section 215 of the CPC."

The appellant appealed.

3. In his amended Petition of Appeal, the appellant urged 5 Grounds of Appeal as follows:

1. That the trial Magistrate erred in law and in fact by convicting me in the present case yet failed to find that the prosecution witness were incredible and unreliable and as such their evidence could not safely sustain a conviction.

2. That the trial Magistrate erred in law and in fact by relying on the medical evidence as a basis to corroborate and support the complainants evidence yet failed to find that the same was not cogent enough to support the charge.

3. That the learned trial magistrate erred in law and in fact by relying on the evidence adduced as a basis for my conviction yet failed to find that the prosecution had not proved its case to the required thresh and beyond reasonable doubt.

4. That the trial magistrate erred in law and in fact by dismissing my defense with no reason at all yet

failed to find that the same was not cogent and raised incredible doubt against prosecution's case

5. That the trial magistrate erred in law and in fact by not adhering to the guidelines of Section 169 CPC in relation to judgment writing.

4. The appellant urged his appeal by way of written submissions, as follows:

1. Reliable and Unreliable witnesses

The witness evidence is incredible and can barely be relied on and be used as a basis for conviction. The court affirmed the witness in readiness to take her evidence I however contend that the charge sheet clearly states that the complainant was a person with mental disabilities. However the court does not state by what means as through which reasons it was it was able to deduce that the complainant was indeed mentally challenged.

The court ought to have order a psychiatric test to evaluate that the complainant was a mentally challenged individual

The complainant should have given sufficient details of the illegal act perpetrated upon her.

Section 124 of the Evidence Act to convict on the evidence of a sexual offence victim is truthful and after recording the reasons as to why in the record of the proceedings. Details given in the present appeal are quite shallow it also points out to the present of eye witnesses at the scene however these mentioned witness were never called to testify.

In ***Bukenya and another v Uganda*** **(1972) E.A 549** the court of appeal held that; "the prosecution is duty bound to make available all witnesses necessary to establish the truth, even is their evidence may be inconsistent to its case, otherwise failure to do so many in an appropriate case lead to an inference that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution's case."

In ***John Kenga v Republic*** **Cr App 1126 of 1984** the court of appeal acquitted the appellant due to the fact that some of the mentioned witnesses were not summoned to clear doubts. It may be argued through the case of ***Mwangi v Republic*** **(1984) eKLR 595** in which the court of appeal held inter alia that; "*whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with the discretion unless it may be shown that the prosecution was influenced by some oblique motive."*

Section 150 CPC has a duty to ensure that it has collected enough evidence that will enable it make a fair decision. The power of the court to compel attendance of witnesses whose evidence seems crucial to the just decision of the matter before it.

2. Medical Evidence

It is a matter of practice that once a patient is accepted at any medical facility for treatment he/she is either accorded an in-patient or out-patient number. This number is used to refer to the patient in all manner of dealings. That the p3 lacks a stamp from the police station that issued it this creates doubt to its authenticity of the form. The information contained in the p3 form, in Section B, the author states no abnormalities defected, the approximate date of injury indicated as three days in comparison with section C part 2(a) where the doctor id supposed to describe in detail the physicals state of and any injuries to genitalia with special reference to labia minora, vagina and cervix, the doctor stated vagina with no

bruises and some discharge" Semen, if the doctor did not find the bruises where did she find the bruises that he approximated to be three days"

The doctor records that the probable type of weapon was rape. Is the term rape used to describe a sexual offense as is a weapon that can be used to inflict injuries; lastly the doctor did note the complainant had some form of discharge which he suspected to be semen.

The lab report is dated 14.11.2014 and tests were conducted the same day so was the alleged offense committed on the same day.

The absence of the author of the p3 form would have been explained to the court, the prosecution made an application in court applying Section 77 of Evidence Act that the investigating officer provided the P3 and the medical report. The appellant submitted that the provision was incorrectly applied as it was not shown that the maker of the document was not available as per the provision of Section 33 Evidence Act. The prosecution ought to have invoked section 58 and 50 of the Evidence Act.

3. Ground 4 and 5 merged

The trial Magistrate did not comment on the defense case in his judgment. If the investigating knew the appellant, his appearance and his working place why would they wait a month to arrest him" The arresting officer stated appellant was arrested on 27.11.2014 while charge sheet states he was arrested on the 29.11.2014 and presented to court on the same day however the record of proceedings states appellant took his plea on the 11.12.2014. Records show the trial Magistrate failed to comply with the provisions of Section 169(1) of the CPC. In his judgment there is no evidence to show that the trial Magistrate read the judgment in open court it also fails to state the Coram of the Court at the time of pronouncing the judgment. The highlighted inconsistencies are against the provisions of Article 50 of the Constitution of Kenya 2010.

Submissions for the Respondent

5. For the DPP, Ms. Macharia submitted as follows:

“Appeal is opposed. Appellant charged with rape of a woman with mental disability contrary to section 7 of Sexual Offences Act which is defective. The trial Magistrate convicted appellant under section 7 of Sexual Offences Act.

Trial Magistrate concluded that PW1 was raped in the presence of her child which was not proved. PW 1 only said that she was sucking her child when appellant called her into the house and raped her. There is no evidence to show that the child was present during the ordeal of rape and there is no evidence that the complainant was indeed raped.

PW 1 only said she was raped by appellant without showing what happened. There is no evidence that she was raped by the prosecution, PW 5 Investigating Officer produced P 3 form stating that the vagina had no bruises and there was no discharge.

Part of P 3 an injury shows that there were no injuries. Treatment Note shows that complainant was mentally retarded. There was no evidence to show she was raped.

PW 3 testified that the complainant informed him that she had been raped by the appellant and on entering the house; he found the appellant sleeping on the bed while all his clothes were on ground and

his shoes. He looked drunk.

The learned Trial Magistrate erred in convicting the appellant without sufficient evidence and we urge the court to quash the conviction and sentence. That is all."

Issue for determination

6. The question for determination by the court is the impact of a defective charge upon which the appellant is convicted and sentenced by the trial court. The remedy for defective proceedings is retrial. The court must consider the facts and circumstances of the case to determine whether the proceedings were defective and whether there should be an order for a retrial or whether the court should quash the conviction and set aside the sentence without more, as urged by the DPP.

Determination

7. The Prosecution's case was presented by five witnesses who testified substantively as follows:

(PW1) *SJ.* the Complainant testified that -

"On 14.11.2014 at 5.00pm, I was alone in the house in the sitting room having a child who was suckling, accused pulled me to the bed and raped me after he removed my inner clothes. I know him as Njoroge (accused identified by pointing out). I went outside and met my **neighbour Kipkosgei**, he found the accused in bed and called Baba Eliza and Mama Eliza and they called Chief Esageri. The Chief and Baba Sharon took me to Esageri to be examined and treated."

On Cross-examination by the accused, she said "*You just took me to bed Mercy saw you rape me. You did not request me to have sex with you."*

(PW2), S R the complainant's father testified that:

"On 14.11.2014 at 6.00 pm I was at home, Kipkosgei called me by phone and told me S was raped by Njoroge. He told me Njoroge was still there, I went to the Center and found a group of people Assistant Chief Michael Kipkoech was there. I was told S was taken to by Kipkosgei to Esageri Health Center. I followed them to Esageri Dispensary the nurse took her for checkup at 8.00 pm. We went to APs Esageri. We had treatment notes. On Saturday the following day I come to E/Ravine made a report, I was told to take the P3 form. Kipkosgei and S were told to write statement. On 17.11.2014 they went to E/Ravine to fill P3 form."

On cross-examination by the accused he confirmed that he had only been told by Kosgei about the rape."

(PW3) Felix Kipkogei Toniok testified that –

"I was at Muserech on 14.11.2014 at 5.30 pm. I found the complainant (PW1) outside the house she told me Njoroge did something bad to her and that he was sleeping in the house. I found the accused lying in bed the door was opened. Accused was dressed up but he had removed his shoes, I went outside and called neighbors who come. We were told accused boarded a lorry and went to his home. I called PW2 S father, he told me to take PW1 to the Hospital; we went to Esageri Dispensary. We made a report to the APs in Esageri, we were told to go to Ravine the following day on 13th which was on a Saturday. On 17th I went to E/Ravine with S. We went to the police station; we were given P3 form which was filled at

the District Hospital we took it back to the police station. Police filled warrant of arrest for us. Mr. R took the warrant of arrest. I was not present when accused was arrested and I do not know where Njoroge lives.

On Cross-examination by accused he said-

“I found you sleeping in the house, I called neighbors the **two children** told me you raped S. You are lying I did not rape the complainant, I found you sleeping on the bed. You took advantage of the fact that she was I the house alone. You told me you want to ask for forgiveness so that you repay what we had used in her treatment, I told you to ask her parents.”

(PW4) NO. 85004615 APC Joseph Kipnoo testified that-

“I am stationed at Esager Division. On **27.12.2015** at 6.00am Corporal Jonah Borer told me to accompany him to the house of Njoroge Mungai. We went there and found Njoroge asleep; we arrested him and told him why he was arrested. I had known Njoroge for two years he works at a slaughter house. We took him to E/Ravine Police Station and booked him.”

On Cross-Examination by the accused he said-

“We got arrest warrant in November 2014. We did not arrest you as you were aware that there was warrant of arrest and you were avoiding arrest. We were told the day you slept in your house by the informer.”

(PW5) NO. 69168 Corporal Esther Mokami attached at E/Ravine Police Station crime branch office testified that -

“I am the investigating officer. On 15.11.2014 I was at the police station, the father of the complainant made a report of the incident which took place on 14.11.2014 **that on 14.11.2014 at 5.00pm accused went to the house and found complainant breastfeeding her child and held her took her to the bed after placing the child on the seat. He undressed her and raped her twice. He told her to dress up and he went to sleep on the bed.** Complainant’s **uncle** found her outside the house she told him accused had raped her uncle called people who helped him arrest accused. Complainant was escorted to Esageri Health Center she was treated and discharged. The following day the complainant’s father made a report to the police. On 17.11.2014 I wrote P3 for him it was then filled by the doctor. I wrote a letter to the Chief of Kabimoi to effect the arrest of the accused. On 27.11.2014 accused was arrested by AP’s from Esageri.”

8. When put on his defence the accused gave evidence and called one witness for the Defence as follows:

DW1 Njoroge Mungai testified that –

“I live in Esageri; I work in a slaughter house in Muserech. I woke up in Esageri; I took a matatu to Muserech Center. I took my gum boots and went to slaughter house till 3.00pm and went to W house and found S she was there with a young child. She gave me one bottle of chang’aa, [which] cost Ksh. 30/=

She sat home waiting for the Chief or the Police. Kipkosgei come he said you remember you wronged me. He left and I left for home. I reached Esageri Center at 3.00 pm. The following day, I went to duty

on the third day, and W, the complainant's Mother, came with Kogen Jomba to the slaughter house. On 27th AP come for me early morning. They told me I was under arrest."

On Cross-Examination by the prosecutor the accused said-

"I work at a slaughter house. I am not employed by anybody you just slaughter for anyone at the slaughter house. On 14.11.2014 I was at Museresh at 7.00 pm I went to complainant's house in the morning and in the evening I always take to them "matumbo" and "maini" it is Kipkosgei who caused me to be charged."

(DW2) **Daisy Jepkoech Bonde,** the accused's wife testified for the defence and said -

"[The] accused he is my husband. It was November 2014. On 27.12.2014 police come they took him and told me to follow him. **They said he raped S; I was surprised he had never gone underground. He was arrested after a month."**

On **Cross-examination by the prosecutor,** the witness said that the appellant works at a slaughter house; he goes to work at 6.00 am and returns at 4.00 pm but she did not know what he does in day time. She said that the appellant was arrested on 27.12.2014."

9. Section 11A of the Sexual Offences act provides as follows:

11A**. 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."

10. The learned trial magistrate fell into obvious error when she convicted the appellant for the offence of indecent act and sentenced him to imprisonment for **10 years.**

The findings of the trial Court

11. The trial magistrate thought that the matter before him was really a case of defilement of an imbecile and that an offence under section 146 of the Penal Code was the correct charge. Section 146 of the Penal Code is in terms 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."

12. If it were so, the trial court ought to have directed an amendment of the charge under section 214 of the CPC before the Prosecution closed its case. This did not happen and the trial court proceeded to convict on the offence rape in the presence of a family member contrary to section 7 of the Sexual Offences Act. With respect, ***the trial magistrate correctly observed the particulars of eh offence charged fell under section 146 of the Penal Code. The trial Court did not however take any remedial measure.***

13. Section 7 offence [of the Sexual Offences Act] is not an offence for the rape of a person with mental disabilities, which is the subject of an offence under section 146 of the Penal Code. Section 7 of the

Sexual Offences Act proscribes the rape of or indecent act with another within the view of a family member, a child or a person with mental disability. In section 7 offence, the person with mental disability is the spectator while in section 146 offence the person with mental disability, therein called an idiot or imbecile, is the victim.

14. Section 7 of the Sexual Offence Act provides as follows:

*"**7**. 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 ten years."*

15. Failure to direct an amendment under section 214 of the CPC to reflect the correct offence as rape or indecent act with a person with mental disability under section 146 of the Penal Code is a defect which led to the conviction of the appellant on an offence that does not exist. As regards the offence actually charged, the Prosecution needed to prove in addition to the sexual act that causes penetration that it was ***within the view of a family member, a child or person with mental disability.***

16. There is no offence called **"rape of a woman with mental disabilities contrary to section 7 of the Sexual Offences Act No. 3 of 2006". That conviction for a non-existent offence must be quashed as being a nullity.**

Conviction and sentence for both main count and alternative count

17. As regards the alternative charge of indecent act, although the alternative charge was properly laid against the appellant, the trial court was not entitled to convict the appellant on both the main count and the alternative charge. There is clearly a breach of the double jeopardy rule in convicting an accused who has been convicted of rape, for the additional offence of indecent act which forms part of the same transaction. In ***David Ndumba v. R,*** Court of Appeal at Nyeri Criminal Appeal No. 272 of 2012, [2013] eKLR, the Court of Appeal at Nyeri said the following regarding alternative counts:

"On the issue of the alternative charge we find nothing turns on the fact that the trial court did not make a pronouncement on the same. In M. B. O. v. Republic Criminal Appeal NO. 342 of 2008, this Court held:

'The practice of charging offences in the alternative is of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge.'"

See also *Obanda v. R* (1983)KLR 507.

18. Moreover, the evidence that could support the offence of indecent act charged in the alternative charge is that of the complainant in respect of whom the trial court found in the Judgment that –

"*There is no doubt that complainant was mentally challenged as exhibit 1(a) from Esageri confirm the same.*"

19. If the complainant PW1 was "mentally challenged" as held by the trial Court, the Court should have made a finding as to her competency as a witness to justify reception of her testimony in terms of section 125 of the Evidence Act. In ***David Ndumba*** case, supra, the Court of Appeal considered the competency of a mental patient and held as follows:

15. " Mr. Kariuki urged us to find that the evidence adduced by F was not credible by virtue of the fact that she was a medical patient and no vior dire was conducted by the trial court to establish her competency as witnesses. ***Section 125*** *of the* ***Evidence Act*** *provides:-*

"125(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether body or mind) or any similar cause.

2) A mentally disordered person or lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them."

Based on the foregoing we concur with the following findings by the High Court:-

"At page 2 of the judgment of the learned trial magistrate who took the evidence of the two witnesses, and therefore had the occasion to determine the level of the understanding of these two witnesses observed:

'The complainant testified before me. The court could not gauge the extent of her mental illness. But she was fairly comprehensible.'

From the foregoing statement, the learned trial magistrate after observing the complainant, and considering the answers she gave to the questions put to her at the trial, formed the opinion that she understood the questions and gave rational answers to those questions, and therefore she was comprehensible. I am satisfied that the complainant was a competent witness and that her evidence was comprehensible and therefore should be considered."

We therefore, find no reason to interfere with the concurrent finding of facts by the two lower courts on the competency of F."

[Underlining mine]

20. In the present case, there was no evidence that the trial court considered the matter and made a specific finding on the competency of the complainant, PW1.

Whether to order retrial

21. The appellant was convicted on a non-existent offence in Count I and both on the main count and the alternative count. These were clearly defective proceedings which as a nullity must be quashed. However, the remedy for defective proceedings is an order for retrial, where appropriate. As held by the Court of Appeal in ***Muiruri v. R*** (2003) KLR 552, 556:

"Generally, whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case. It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial (See Zededkiah Ojuondo Manyala v. Republic (Criminal Appeal No. 57 of 1980)); the length of time which has lapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the Court's."

22. In ***Opicho v. Republic*** (2009) KLR 369, 375, the Court of appeal considered the issue of retrial in that case and held as follows:

"The prosecution had nothing to do with the omissions made in this trial. On the Contrary it was the prosecutor who drew the attention of the court to the required procedure [of conducting a voir dire on a child of tender years] but the trial court was entirely to blame for what followed. The allegations made against the appellant are extremely serious and of public interest as they relate to child abuse, a phenomenon now topical on the world stage, and in the country, due to its prevalence. ***It is in the interests of justice that the appellant receives a fair trial and if he is to be acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law.*** *We are inclined in all the circumstances of this case to order a retrial."*

23. The errors for which the proceedings have been quashed were not the prosecutions but the court's and the crime of rape of a mentally challenged person which was improperly charged here as an offence under section 7 of the Sexual Offences Act and the alternative charge of indecent act are an extremely serious a matter as to warrant a retrial. Had the charge of rape of the mentally challenged person herein be properly framed, the Court would have directed a retrial of that charge as well. But since it is the charge of indecent act properly before the court, there should be an order for retrial on that charge only.

24. The appellant in this case has been in custody for over two years. However, no prejudice shall be occasioned on the appellant as he shall be afforded a fair trial, and it is in the interests of justice that a retrial be had in view of the serious nature of the alleged offences. A criminal justice system must be measured by how it protects its most vulnerable of which persons with mental disability are an obvious part. A person who takes advantage of a person with disability is deserving of severe punishment as a deterrence to himself and others of like-mind in order to protect persons who are incapable of fully protecting themselves by reason of diminished mental acuity.

25. In order not to prejudice, the retrial of the case, this Court does not analyze the evidence presented by the prosecution and the defence, save to observe that on a proper consideration of admissible evidence or potentially admissible evidence, a conviction might result from a retrial.

Orders

26. Accordingly, for the reasons set out above, I quash the convictions of the appellant for the offence stated as of rape of a woman with mental disability contrary to section 7 of the Sexual Offences Act No. 3 of 2006 and the offence of committing an indecent act with an adult contrary to section 11A of the Sexual Offences Act No. 3 of 2006, and set aside the sentences of imprisonment for 10 years imposed on the appellant for each count.

27. The Court directs that the appellant be retried for the offence in the alternative charge of indecent act with an adult contrary to section 11A of the Sexual Offences Ac t NO. 3 of 2006 as set out in Count II of the Charge sheet dated 29th December 2014.

28. The appellant has been in custody since 4th August 2015 when he was sentenced and as in ***Opicho***, supra, this Court must direct that the retrial be concluded expeditiously and for that purpose direct that the appellant be produced before the Principal Magistrate at Eldama Ravine Law Court within seven (7) days of this order, for necessary directions as to retrial.

DATED AND DELIVERED THIS 16TH DAY OF NOVEMBER 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Assistant Director of Public Prosecutions for DPP.