REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 142 OF 2017

BETWEEN

STEPHEN BIKETI..APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence of twenty years imprisonment

for the offence of Defilement of an imbecile contrary to Section 146 of the Penal Code,

Cap 63 Laws of Kenya in a judgment delivered by Hon. S. Chitubi, Chief Magistrate

on 15th January 2015 in Kakamega Chief Magistrate's Court

Criminal Case No.7 of 2014)

CORAM: HON. LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant was charged with the offence of ***defilement of an imbecile contrary to Section 146 of the Penal Code, Cap 63, Laws of Kenya*** and an alternative charge of committing an ***indecent act with an adult contrary to section 11A of the Sexual Offences Act No. 3 of 2006***. The particulars were that the appellant on the 12th and 13th January 2014 in [particulars withheld] township, Bukhungu location, Municipality division within Kakamega County, intentionally and unlawfully had carnal connection with a person named CN, a person he knew at the commission of the offence to be an imbecile.

2. At the conclusion of the trial, the learned trial magistrate found the appellant guilty on the main count of ***defilement of an imbecile contrary to section 146 of the Penal Code, Cap 63, Laws of Kenya*** and sentenced him to twenty years imprisonment.

The Appeal

3. This appeal was filed by the appellant on 5th December 2017 by which he prays that the conviction be quashed and sentence set aside on grounds:-

> ***i. THAT the trial magistrate erred in law by not considering that the prosecution failed to comply with provisions of Article 50(2)(j) of the Constitution.***
>
> ***ii. THAT the trial magistrate erred in law and facts by relying on the prosecution's evidence which was marred with inconsistencies and contradictions.***
>
> ***iii. THAT the trial magistrate erred in law by convicting and sentencing the appellant based on medical evidence that was insufficient.***

iv. THAT the trial magistrate erred in law by admitting the evidence of an imbecile as the truth without warning himself on the dangers of such evidence.

v. THAT the learned trial magistrate erred in law and facts by dismissing the appellant's defense which was cogent enough to result into an acquittal.

4. This is the first appellate court and as such it is guided by the principles set out in the case of ***David Njuguna Wairimu V – Republic [2010] eKLR*** where the Court of Appeal stated:-

"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

5. In the case of Okeno ***vs. Republic [1972] EA 32,*** the Court of Appeal stated that in exercising its jurisdiction, the first appellate court should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Also see ***Pandya vs Rex [1957] EA 336; Ruwala versus Rex [1957] EA 570*** and ***Peters vs Sunday Post [1958] EA 424.***

Issues for Determination

6. From the evidence on record, the law and the submissions, the following issues arise for determination: -

a) Whether the appellant's rights under Article 50(2)(j) of the Constitution were violated.

b) Whether CN was an imbecile.

c) Whether the appellant had knowledge that CN was an imbecile at the time of the alleged carnal connection with her.

a) Whether the appellant's rights under Article 50(2)(j) of the Constitution were violated

7. The appellant submitted that he was ambushed by the respondent's evidence hence he was unable to respond or answer promptly or challenge the entire evidence. In reply, the respondent submitted that before commencement of the hearing, both parties confirmed that they were ready to proceed and that had the appellant not been supplied with the witness statements, he would have raised the issue. The respondent also submitted that there was nothing on record to show this concern. The respondent added that the appellant even cross-examined witnesses thus showing that he was prepared for the case.

8. ***Article 50(2)(j) the Constitution*** provides that: -

"50. Fair hearing

(2) Every accused person has the right to a fair trial, which includes the right—

…………………

(j) "….to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

9. In the case of **Joseph Ndungu Kagiri v Republic [2016] eKLR,** Mativo J held that, *inter alia:*

"In the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balanced role in the trial of an accused person. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 50 of the Constitution of Kenya 2010. The Right to a Fair Trial is one of the cornerstones of a just society."

10. In the same case of ***Joseph Ndungu Kagiri***, Mativo J said the following: -

"In Thomas Patrick Gilbert Cholmondeley Vs. Republic, (decided before the promulgation of the 2010 constitution) the Court of Appeal stated categorically that:-

"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under……. our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items." In arriving at this holding, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda: respectively R. V. Ward [1993] 2 ALL ER 557; R. V. Stinchcombe [1992] LRC (Cri) 68; Olum & Another V Attorney General [2002] 2 E.A. 508; and, the Kenyan Case of George Ngodhe Juma & two others Vs. The Attorney General Nairobi High Court, (Misc. Criminal Application No. 345 of 2001)."

Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-Article 2(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facilities to prepare a defence."

11. The record in this case indicates that on 16th January 2014, the trial court ordered that:

"the accused is to be supplied with witness statements at his own cost"

12. On 27th February 2014, the appellant prayed for copies of witness statements and the trial court ordered that the same were to be supplied to him by the respondent. There is no mention that the statements would be supplied at appellant's costs. Thereafter, there is no other complaint raised by the appellant raising a presumption that the statements were supplied as per the order issued by the Court on 27.2.2014.

13. It is thus my finding that from the evidence on record, an inference can be drawn that the appellant was supplied with the witness statements and related documents the respondent intended to rely on during the trial. The appellant's rights under ***Article 50(2)(j) of the Constitution of Kenya*** were therefore not violated in way. I find this ground of appeal lacking in merit and the same is accordingly dismissed.

b) Whether CN was an imbecile

14. One of the ingredients necessary to satisfy the charge of defilement of an imbecile is establishing whether the victim was indeed an imbecile. (See **P. *Nyamweya J*** *in* ***Nzioka Kilonzo v Republic [2017] eKLR*** and **C. Mwita J** in ***Patrick Barasa Wawire v Republic [2016] eKLR*).**

15. "**Imbecile**" is defined in the **Black's Law Dictionary, Tenth Edition** at page 865 as *"**a person afflicted with severe mental retardation**."*

16. CN testified as PW1 and stated that she was a patient at *Ward 9.* **Roselyne Mafoli Mideva**, testified as PW2 and stated that she was a nurse at Kakamega County Referral Hospital and worked in *Ward 9* which housed mentally challenged patients. PW2 added that CN was one of the patients in the said ward. This was corroborated by the evidence of **Mary Mabachi Aluku**, who testified as PW3 and stated that she was the nursing officer in charge of Kakamega County Referral Hospital while **Margaret Ngarai Walunywa,** who testified as PW4 also confirmed she was nurse at Kakamega County General Hospital working in *Ward 9*. **Patrick Mambili** testified as PW6 and stated that he was a Senior Clinical Officer, Kakamega County Hospital and that psychiatric tests were done on CN by one Dr. Kwobah and a report(*PExhibit 5*) prepared which concluded that CN was mentally ill. PW6 added that the complainant was not fit to make informed decisions on sexual matters though CN had been discharged on 10th January 2014 and was healing. **Corporal Phoebe Oluoch**, testified as PW7 and stated that she was the investigating officer and that she took CN to a psychiatrist (Dr. Kwobah) who confirmed that at the time of the offence, CN was not mentally fit to make the decision to have sex with whoever.

17. Going by the definition of an *'imbecile'* and the evidence on record, I find that CN was clinically proven to be mentally retarded, and therefore an imbecile.

c) Whether the appellant had knowledge that CN was an imbecile at the time of having carnal connection with her.

18. Another ingredient necessary to prove the charge of defilement of an imbecile is establishing the fact that the assailant was aware that the victim was an imbecile at the time of having carnal knowledge/connection with the victim.

19. "**Carnal knowledge**" is defined in the **Black's Law Dictionary, Tenth Edition** at page 256 as *"**sexual intercourse, especially with an underage female.**"*

20. CN testified that she had sexual intercourse with the appellant at his house and that "**they were in love**". PW6 testified that the medical examination on the complainant indicated that there was no injury on CN's body but spermatozoa was seen in her urine (*PExhibit 4 a), PExhibit 1b i, ii*). PW7 testified that she interrogated CN who informed her that she was taken by the appellant and that they **"slept together"**. **Ndalamia Josephat Kuloni** testified as PW5 and stated that he was also a security guard at the hospital and that on 13th January 2014 at around 5 am he spotted the appellant walking side by side with a woman the appellant referred to as **'his wife'**. PW5 added that he heard the woman saying how the appellant "**had done her well**". The appellant in his defence admitted that he was a security guard at the hospital and was aware that *Ward 9* was for mental patients who he said were "**usually violent.**"

21. In his defence, the appellant stated that he simply took CN to ward 9 because she appeared to have wandered off from the hospital. He denied having taken CN out of the hospital compound on the material date. However, the evidence of PW5 is to the effect that as the

appellant walked in on 13.1.2014 at about 5.00am, he was accompanied by someone with whom he walked to ward 9. When PW5 confronted the appellant to tell him who the woman was, the appellant told PW5 that the woman was his wife whose name was **Nasambu.** That name is actually CN's second name. CN was not the appellant's wife but a patient at ward 9 where she had not slept the previous night. In spite of the knowledge that CN was a mentally retarded person, the appellant went ahead and had carnal knowledge of her. I find his allegation of bad blood with some of the medical staff at the hospital as a reason for this case against him to be an afterthought.

22. It is clear therefore that the appellant was aware that CN was one of the mentally retarded patients in ward 9 facility and thus any sexual activity with her fell within the ambit of ***defilement of an imbecile contrary to Section 146 of the Penal Code, Cap 63, Laws of Kenya.*** The only question is whether CN's evidence is sufficient to nail the appellant to the commission of the alleged offence.

23. ***Section 124 of the Evidence Act*** provides that:-

> ***"124.Corroboration required in criminal cases***
>
> ***Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

24. There is nothing on record that appears to impeach the credibility of the testimony of CN. On reconsideration of the evidence, I find that her testimony was truthful, consistent and firm even during cross-examination by the appellant. Her evidence was also corroborated by that of PW6 which proved sexual activity with the presence of spermatozoa in CN's urine. The appellant knowingly exploited CN's mental state to cultivate an unhealthy relationship for his own sexual gratification. The appellant even introduced CN to PW5 as his "**wife"** knowing too well that that was not case and that CN was actually a mental patient at the hospital. As the Bible says, what is done in darkness will be known in the light. What the appellant did under cover of darkness eventually came out in the light.

25. From the foregoing, I find that the trial court's conviction of the appellant was safe and I uphold the same.

d) Sentencing

26. On sentencing, I note that ***section 146 of the Penal Code Cap 63, Laws of Kenya*** provides as follows:-

> ***"146. Defilement of idiots or imbeciles***
>
> ***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."***

27. Though the appellant did not raise any issue with the length of sentence, I feel duty bound to deal with the issue because of the above stated provision of the law vis-a-vis the sentence imposed by the trial court.

28. In the instant case, the learned trial magistrate sentenced the appellant to twenty years imprisonment while the law provides for a maximum sentence of fourteen years. There is no doubt that the learned trial magistrate erred in sentencing the appellant to twenty years imprisonment which was over and above what is provided for by law.

29. The Court of Appeal, in the case of ***Peter Mbugua Kabui v Republic [2016] eKLR*** held as follows:-

> ***"The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court are now settled. The predecessor of this Court, in the case of Ogolla s/o Owuor vs Republic, [1954] EACA 270, pronounced itself on this issue as follows:-***
>
> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors".***
>
> ***To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."***
>
> ***See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-***
>
> ***"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of***

these, the sentence itself is so excessive and therefore as an error of principle must be interfered with (see also <u>Sayeka –vs- R.</u> (1989 KLR 306)"

In the more recent case of <u>Kenneth Kimani Kamunyu -vs- R.</u> (2006) eKLR, this Court reiterated this principle and stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful."

30. Clearly the sentence in this case was illegal since it was much higher than the prescribed maximum sentence. For this reason, this court has the requisite mandate to interfere with it. I also note that the appellant who was said to be a first offender has been in prison since 29th January 2016. Weighing the aggravating circumstances alongside the mitigating circumstances, I am convinced that the appellant has learnt his lesson, that every action has a consequence, and that it does not pay to take advantage of those who are vulnerable. On the basis of the above, I would find that the sentence already served is adequate.

<u>Conclusion</u>

31. In light of all the above, I now make the following orders:-

a. The appellant's appeal on conviction has no merit and is accordingly dismissed.

b. The sentence of twenty (20) years imprisonment is quashed and in lieu thereof I sentence the appellant to the period already served, that is to say from 29th January, 2016 to the date of this judgment.

c. If there is no other reason to keep the appellant in prison custody, he shall be released therefrom upon delivery of this judgment.

32. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 29th November, 2019

WILLIAM M. MUSYOKA

JUDGE

<u>In the presence of:-</u>

Appellant present in person

Ms. Omondi for respondent

Erick – Court assistant