



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CRIMINAL APPEAL NO.128 OF 2014**

**DAVID KISALI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant David Kisali was charged with the offence of defilement of an imbecile contrary to section 146 of the Penal Code. He also face an alternative Count of indecent Act contrary to Section 11A of the Sexual Offences Act No.3 of 2006. The appellant pleaded not guilty to both charges and the matter proceeded to full trial. He was placed on defence but failed to defend himself. He was convicted on the main Count and sentenced to a jail term of 10 years.

2. Being dissatisfied with the conviction and sentence he appealed to this Court on grounds that; the trial Court did not analyse the evidence, appellant was not issued with witness statements, the decision of the trial Court was against weight of evidence, the burden of proof was shifted, the trial Court rejected the defence without adducing reasons, the Prosecution Evidence was insufficient, contradictory, unreliable, fabricated, speculative and inconsistent – material particulars and the sentence meted out was harsh and excessive.

3. At the hearing the appellant relied on both written and oral submissions summarized as follows;

The allegations of the Complainant’s state of mind was not proven, the evidence of PW1 was unsupported as witnesses were not called to support the same; The trial Court dismissed request for independent witness.

4. In opposing the appeal the State urged that there was sufficient evidence to prove that the appellant raped the Complainant who is an imbecile. Further that the appellant was found at the scene of crime by the village elder. The Complainant confirmed she was raped and this was corroborated by medical evidence.

The sentence was lenient.

5. This being the 1<sup>st</sup> appellate Court it has the duty to consider the evidence afresh, analyse and evaluate the same in order to arrive at an independent opinion. See ***Kiilu & Another versus R 2005 IKLR at 174.***

6. The Prosecution case is that the appellant raped the Complainant an imbecile without her consent on the 29<sup>th</sup> of August 2013 and defence that the appellant opted not to say anything about at the hearing.

7. The evidence of the Prosecution witnesses in summary is as follows;

**PW1 M N N**

Mother to the Complainant

On 29/8/2013 at about 4p.m. while the Complainant and her sister S were herding S returned as she followed a stray cow and left the Complainant behind.

She got concerned due to the Complainant's state of mind and followed to check on her.

She heard screams from a neighbour's house that was vacant, went and knocked and the screams stopped.

She knocked again and the door was opened and the Complainant pushed out and the same locked.

A neighbour came and gave her a phone. She called the village elder as she suspected that her daughter and the person in the house may have had sexual intercourse.

2 village Elders came, the person refused to open, he was later persuaded on enquiring if the witness was out and on assurance that she had left he opened the door.

The person was the accused he denied the allegation.

The Complainant was brought to the scene and she informed them that she had sex with the appellant.

They took appellant to Brigadier Police Station.

**PW2 P N M**

Father to the Complainant.

His wife called and informed him that their daughter had been defiled. He was away. He later took his daughter to Naitiri hospital.

**PW3 Michael Okumaruti Otubakwa**

A Clinical Officer at Nairiti hospital

Produced the P3 form on behalf of a colleague.

P3 form was filled on 30/8/2013.

Incident complained of happened on 29/8/2013.

Complainant estimated to be 18 years

Had discharge

Hymen was ruptured

Urinalysis result showed pus cells.

**PW4 P.C. Ann Waiguna of Kimilili police station.**

On 31/8/2013 her O.C.S. informed her of a report on rape of an imbecile aged 19 years. Complainant had a mental problem and could not explain herself.

The mother heard the daughter screaming and on searching found the daughter and accused in a house and suspected she had been defiled.

She took the girl for mental assessment and treatment.

8. At the close of the Prosecution the appellant was found to have a case to answer. The Court explained Section 211 Criminal Procedure Act. Accused declined to indicate which option he would use for his defence. The matter was placed aside he was later reminded of section 211 of the Criminal Procedure Act and he requested that the matter starts de novo as in his opinion the matter was not conducted properly.

9. The Court declined and made several observations, including the participation of the appellant by way of cross examination of the Prosecution witnesses, the age of the matter and proceeded to give its judgement.

10. None of those who testified witnessed the appellant defiling the Complainant an imbecile. PW1 heard screams and went to where the scream was coming from knocked severally before her daughter was pushed out.

She called the village Elder who came and convinced the accused to come out. This evidence remains uncorroborated.

11. According to PW1 her daughter was able to say that she had had sexual intercourse with the Appellant. On examination the Complainant was found with brown stains on her part, potent hymen (old) and whitish mucoid, she had pus cells and no spermatozoa.

12. Section 146 of the Penal Code provides for the punishment of defilement of idiots and imbeciles 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  
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 14 years”.***

13. The ingredients to be considered are;

***i. Whether the appellant knew that the Complainant was an imbecile.***

***ii. Whether he attempted or had unlawful carnal knowledge of the Complainant under circumstances amounting to rape.***

14. The Prosecution produced a mental assessment report from Kitale District hospital on the Complainant indicating that she was mentally retarded, had poor speech, poor memory, no insight and or poor intellectual ability.

**PW1** used to see the accused in the village. **PW2** also knew him. He was a person seen in the village. From the description of the girl he ought to have known that she was retarded he appears to have taken advantage of her and lured her to the house which he locked. What attracted **PW1** were screams meaning that all was not well.

The Appellant pushed the Complainant out and locked himself in the house this certainly draws an inference of guilt. He was immediately apprehended on opening the door and taken to the police which in which view gives credence to the evidence of **PW1**.

15. The above notwithstanding the medical notes and the P3 form indicate that the ruptured hymen was (old) yet the examination was 24 hours after the incident, secondly no injuries were found on the victim nor any spermatozoa and therefore it is highly unlikely that the appellant defiled the Complainant.

I will resolve this doubt in favour of the accused.

16. The alternative Count facing the appellant was indecent Act contrary to section 11A of the sexual offences Act.

Section 11A provides as follows;

***i. Any person who commits an indecent Act with an adult is guilty of the offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty Thousand shillings or to both.***

17. The accused locked the Complainant in a house where she screamed attracting the attention of the **PW1**.

The Complainant communicated to her mother that the appellant had carnal knowledge of her. In her state of mind she may not exactly be able to explain what happened but she communicated, she had screamed, and in my view the circumstances surrounding the incident draw the inference of indecent assault on the person or the Complainant and for that reason the accused must be convicted.

I find him guilty of the alternative Count and convict him accordingly.

18. The offence attracts imprisonment for 5 years and I accordingly therefore convict him to serve a jail term for 5 years from date of 1<sup>st</sup> conviction.

**DATED and DELIVERED at BUNGOMA this 13<sup>th</sup> day of April, 2017**

**ALI-ARONI**

**JUDGE**