



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 161 OF 2011**

**DANSON MWAKAZI ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From original Conviction and Sentence in Criminal Case No. 145 of 2008 of the Senior Resident Magistrate's Court at Wundanyi – Hon. F. Munyi - RM)**

**JUDGMENT**

**DANSON MWAKAZI** hereinafter referred to as the Appellant was Convicted and Sentenced to twenty one (21) years imprisonment for the offence of rape of an imbecile contrary to Section 7 of the sexual offences Act.

The particulars of the charge are that:-

***“On the 21st day of April, 2008 at [particulars withheld] Village – [particulars withheld] Location Taita Taveta County he had unlawful carnal knowledge of P M without her consent a person he knew was mentally disturbed”.***

In his amended grounds of appeal the appellant maintains that the plea was un-equivocal.

That the Complainant was not availed before the Court to testify and that no medical evidence was availed in Court.

Further that Section 36(1) of the Sexual offences Act was not complied with and that the Sentence of twenty one (21) years imprisonment is harsh and excessive.

On the first ground of the plea being un-equivocal, what I understand the appellant to be stating is that he was not given ample time to reflect on the charges facing him and that the consequences of pleading guilty were not explained to him.

A perusal of the record of the proceedings do indicate that the Appellant was arrested on 24th April, 2008 and was arraigned in Court on 25th April, 2008 wherein he pleaded guilty to the charge and he was Convicted on his own plea of guilty and he was Sentenced to twenty one (21) years imprisonment.

In the case of ***Adan – Vs- Republic 1973 EA 445*** the Court of Appeal held,

***“The charge and all essential infringements of the offence should be explained to the Accused in his language or in a language he understands”.***

- ii. ***The Accused own words should be recorded and if they are an admission, a plea of guilty should be recorded.***
- iii. ***The prosecution should then immediately state the facts and the Accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.***
- iv. ***If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***
- v. ***If there is no change of plea a Conviction should be recorded and a statement of facts relevant to Sentence together with the Accused's reply should be recorded”.***

This decision has found favour with our Constitution.

Article 50(2) (b) of the Constitution provides,

***“ Every Accused person has the right to a fair trial which includes, the right to be informed of the charge with sufficient detail to answer it”.***

A perusal of the statement of facts at page 2 at line 5 does indicate that when he was asked whether the facts were correct he said, ***“Ni ya Kweli, lakini alitaka kunikata kwa panga ndipo nilikimbia”***. This was not translated into English language but which would read thus, ***“It is true but when he attempted to cut me with a panga I fled”***.

This appears to be his explanation for fleeing the scene and leaving behind his clothings. He was therefore not admitting all the facts and a Conviction should not have been entered.

Secondly, all the ingredients of the charge were not explained to the Accused. He was charged with raping an imbecile. There is no evidence to the effect that the Complainant was an imbecile. There is no medical evidence documentary or otherwise to the effect that the Complainant was such. This part of evidence is crucial element of consent which is essential in all cases of rape. Without that crucial evidence the Conviction for the offence of rape of an imbecile cannot stand.

It is ordered that the finding and Sentence are hereby reversed and the Appellant to be retried before a Court of competent jurisdiction. Matter to be mentioned before the

In charge Wundanyi Court for plea taking and further orders on **30th September, 2014.**

Judgment delivered dated and signed in open Court this **16th** day of **September, 2014.**

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**M. MUYA**

**JUDGE**

**16TH SEPTEMBER, 2014**

**In the presence of:-**

Mr. Jami for the State

Court clerk Musundi

