

(From original conviction and sentence in Criminal Case No. 520 of 2004 of the Principal Magistrate's Court at Kapsabet - S. M. Shitubi, SRM)

HENRY KIPKASI TARUS.....
.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Henry Kipkasi Tarus was charged with the offence of defilement of an imbecile contrary to Section 146 of the Penal Code (*Cap. 63, Laws of Kenya*). He pleaded guilty to the charge, and was convicted on his own plea. He also accepted the facts when read to him by the prosecution.

In his original appeal, the appellant raised five grounds of appeal, the most important of which was that the charge was defective. However at the hearing of the appeal on 6th March 2012 the appellant in his oral submissions abandoned all those grounds. Instead, the appellant asked the court to exercise leniency on him. He suffers from both Tuberculosis and cancer of the rectum and has had four operations and was scheduled for another on 17th April 2012. He is not sure whether he will survive. If he survives, he will like to go home, and try alternative medicine for his treatment.

There were no records of treatment of the appellant for either of the diseases he mentioned. However, taking the appellant at his word, under Section 348 of the Criminal Procedure Code, (*Cap. 75, Laws of Kenya*), an appeal on a conviction upon a plea of guilty is only permissible on the grounds of legality and extent of the sentence.

The punishment for the offence of defilement of an idiot or imbecile is imprisonment with hard labour for fourteen (14) years. That term is not the minimum but the maximum. The Appellant was convicted and sentenced on 15th March 2004, that is just 8 years. The appellant has another 6 years or so to serve unless he has earned remission under the Prison Act, (*Cap. 90, Laws of Kenya*).

The term of imprisonment was within the lower courts' discretion, and was quite proper in light of the victim of the offence, an imbecile, a person who is incapable of consenting to the act, even she were not a minor. This was a case of a minor who was 12 years of age. After the assault she came out of the forest carrying pants in her hands, followed by the Appellant. The Appellant mumbled words to the effect that she had agreed. An imbecile or an idiotic person is by definition a person who is mentally retarded, and does not have the capacity to consent to anything. This makes the appellant's crime the more heinous.

The appellant did however appear remorseful. His infection with both Tuberculosis and cancer of the rectum are painful experiences. He has had four surgical operations. He is apprehensive about his survival in the next 5th operation. He asked for a reduction of his term.

Whereas I agree with Miss Idagwa's learned State Counsel's submission that the appellant was properly convicted and sentenced, in light of his plea for leniency and mercy by this court, I would reduce the appellant's term of imprisonment of 14 years to twelve (12) years to run from the date of the conviction and sentence.

There shall be an order accordingly.

Dated, signed and delivered at Nakuru this 30th day of March, 2012

M. J. ANYARA EMUKULE
JUDGE