



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 164 of 2008**

**JULIUS SAITOTI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The Appellant **JULIUS SAITOTI** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Taveta Law Courts. The Appellant had been arraigned in court on 16<sup>th</sup> January 2008 and charged with the offence of **RAPE OF AN INBECILE CONTRARY TO SECTION 146 OF THE PENAL CODE**. The particulars of the charge were that

*“On the 10<sup>th</sup> day of January, 2008 at around 10.00 A.M. in Taveta District had carnal knowledge of M.M., a woman who is an imbecile”*

The Appellant denied the charge and his trial commenced on 12<sup>th</sup> February 2008. The prosecution called a total of seven (7) witnesses in support of their case. The brief facts were that on 10<sup>th</sup> January 2008 the complainant a mentally challenged woman aged 34 years was washing her clothes by the river. The Appellant came and pulled her into some nearby bushes. He then proceeded to rape her. After he released her the complainant went home and reported the incident to her relatives. The Appellant was thereafter arrested and charged.

At the close of the prosecution case the Appellant was placed on his defence. He gave an unsworn defence in which he denied the charges. On 25<sup>th</sup> March 2008 the learned trial magistrate delivered his judgement by which he convicted the Appellant and after listening to his mitigation sentenced him to fourteen (14) years imprisonment. The Appellant being dissatisfied with both his conviction and sentence filed this appeal.

The Appellant who was unrepresented at the hearing of his appeal chose to rely entirely upon his written submissions which he had duly filed before the court. **MR. MUTETI**, the learned State Counsel who appeared for the Respondent State gave oral submissions in opposition to the appeal.

Before going into the merits or otherwise of the appeal I did carefully peruse the charge sheet. The Appellant was charged under the provisions of S. 146 of the Penal Code. The particulars of the charge indicate that the Appellant

*“had carnal knowledge of M.M., a woman who is an imbecile”*

I note with consternation that the word **“unlawful”** was not included before the words **“carnal knowledge”**. I am surprised that Mr. Muteti did not raise this issue. I can only assume that it slipped his notice. It has been severally held that in charges of sexual offences brought under the Penal Code it is mandatory that the term **“unlawful”** be included in the particulars of the charge. In the case of **NGENO –VS- REPUBLIC [2002] 1 KLR 457** the Court held

*“A charge under S. 145(1) of the Penal Code must in its particulars include the word **“unlawful”** failure to state in the particulars that the carnal knowledge was unlawful renders the charge fatally defective”*

Although the learned Judge in this case was referring to S. 145(1) of the Penal Code it is my opinion that the same reasoning can be extended to S. 146 under which the Appellant has been charged. By excluding the word **‘unlawful’**, it is left open to the accused to argue that the victim was his **‘wife’** or that the sexual intercourse was otherwise lawful. As such I find that the omission of the word unlawful renders this charge fatally defective as no offence is disclosed. Any conviction based on a defective charge such as the present one is null and void and

cannot be upheld. For these reasons I do allow this appeal and quash the Appellants conviction. The resultant sentence also has no basis in law and is hereby set aside. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 20<sup>th</sup> day of July 2010.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:

Appellant in person

Mr. Onserio for State

**M. ODERO**

**JUDGE**

**20/08/2010**