



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

*(Coram: Ojwang, J.)*

**CRIMINAL APPEAL NO.527 OF 2006**

**BETWEEN**

**JUSTUS MWANGANGI NZIOKA.....APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

*(An appeal from the Judgment of Senior Resident Magistrate L.W. Gicheha dated 7<sup>th</sup> July, 2006 in Criminal Case No.291 of 2005 at Thika Law Courts)*

**JUDGMENT**

The appellant herein, **Justus Mwangangi Nzioka**, was charged with the offence of attempted rape of an imbecile contrary to s.146 as read with s.389 of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant, on 2<sup>nd</sup> May, 2004 at [Particulars Withheld] Farm in Maragwa District, in Central Province, attempted to have carnal knowledge of **M M**, who is an imbecile.

The appellant also faced an alternative charge, of indecent assault on a female contrary to s.144(1) of the Penal Code. The particulars were that on 2<sup>nd</sup> May, 2004 at [Particulars Withheld] Farm in Maragua District, the appellant unlawfully and indecently assaulted **M M**, who is an imbecile.

PW1, **Francis Wahome**, a clinical officer at Makuyu Health Centre, saw the complainant, a lady aged 18 years, on 3<sup>rd</sup> May, 2004. This lady, who was dumb, was accompanied by her father, and it was alleged that she had been raped. PW1 found her in fair general condition. PW1 examined her genitalia, and found no laceration, save that she had a vaginal discharge which was foul-smelling. PW1 found no spermatozoa, but he found pus cells and bacteria. The complainant had an infection, though PW1 was unable to tell its age. He treated the complainant, and filed the P3 medical-reporting form.

On cross-examination, PW1 was unable to confirm that the complainant had been raped.

PW2, **J M N** testified that he lived at [Particulars Withheld] Farm with his family, and that the complainant was his third daughter. The complainant had been dumb since birth. As he did his work in Nairobi on 2<sup>nd</sup> May, 2004 a lady, **Nduku** (PW4), came along and told him that someone, **Mwangangi**, had been arrested in his homestead. **Mwangangi** had been a neighbour, living on the next farm.

On cross-examination, PW2 said he had received a report that **Mwangangi** had entered PW2's children's room and was found lying on top of the complainant. PW2 said he believed the appellant herein had raped his daughter.

PW3, **M M** testified that he lives with his parents at [Particulars Withheld] Farm. He said he was at home with his siblings, including the complainant, when the appellant entered his parents' house and hid under the bed; PW3 and his siblings cooked, took their supper, and went to sleep; then at about 1 a.m. he heard screams, as he slept at his parents' bedroom. He stood up, lit a lamp, and pushed open the door to the complainant's bedroom. He saw the appellant lying on the complainant, with the appellant's trousers pulled down to his knees. The complainant's clothes had been pulled up. The appellant exhorted PW3 not to scream. PW3 dashed outside and locked the complainant's bedroom from the outside, and then he raised alarm by screaming, and neighbours came in response. A lady by the name **Nduku** (PW4) was the first to arrive; and she agreed with PW3 that the bedroom door be not opened until more people came. After other people came, the door was opened, and the appellant was arrested and tied with a rope; he was then taken to the Administration Police post. Those gathered donated money for fare to Nairobi, to enable a runner to reach the complainant's parents. The complainant's parents came only to find that the appellant had escaped from the custody of the Administration Police.

On cross-examination, PW3 said the appellant had sneaked into the complainant's room at about 8.00 p.m., while the children of the home were in the kitchen. Although the complainant and a younger sibling had a lamp when they went to sleep, it remained dark under the bed, and so they could not have seen the appellant in his hide-out. PW3 said that when he had been awakened by the noise from the complainant's room at 1.00 a.m., he had found her door closed, but not locked from inside. PW3's father had been away in Nairobi for about a month continuously, and his mother had joined PW3's father in Nairobi on the material day.

PW4, **Marita Nduku**, who lives on [Particulars Withheld] Farm, was asleep on the material night, when he heard the alarm raised by PW3. PW4 went to the *locus in quo*, along with others, and they learned that the appellant was inside the complainant's room. Members of the public arrested the appellant, and took him to the Administration Police camp.

PW5, Police Force No.63646 **P.C. Julius Njagi** testified that the complainant's father had gone to see him on 4<sup>th</sup> May, 2004 for the purpose of reporting that the appellant herein had raped his daughter. On the action he took, PW5 says as follows:

“I booked [the] report in the O.B.; and he further informed me that the accused had been arrested two days prior to the date of report, but had escaped from [the] custody of the APs. *I escorted the imbecile to hospital* where she was treated and discharged.....”

When the appellant was put to his defence, he opted to make an unsworn statement. He proceeded to say he remembered 1<sup>st</sup> May, 2004 when he had escorted his wife and children to school in Makueni, before returning to Maragua at 4.00 p.m. At 4.30 p.m. he went on a debt-collection visit to the home of a certain woman, and at 8.00 p.m. he left, to go to a shop. The appellant then returned home and stayed there. On 2<sup>nd</sup> May, 2004 the appellant woke up and went to work, until 7.00 p.m. (on this material date). Then he saw the complainant's mother, who said she would hand the appellant over to the Police; the two later separated, and he went to his home. On 3<sup>rd</sup> May, 2004 the appellant worked at his farm, walked around in the neighbourhood, and returned to his home. Then the complainant's father came to him (appellant) and told him he (complainant's father) had made a complaint to the Police and he would not settle the matter unless the appellant paid him Kshs.50,000/=. As he did not pay the said sum of money, the complainant's father later called him and told him the matter would go to Court; then on 4<sup>th</sup> May, 2004 Administration Police officers came and arrested him, and took him to Makuyu Police Station where he was held for eight days; being brought to Court on 12<sup>th</sup> January, 2005.

The Learned Magistrate framed the questions for resolution as follows:

**“For the prosecution to prove this charge they must prove –**

**1. that an offence took place;**

**2. that it was the accused who attempted to rape the complainant.”**

The following passage in the learned Magistrate’s analysis led to the final decision of the Court:

**“[PW3] locked the door, and started screaming.....PW4 came, and confirms that the accused had been locked inside the house. They then tied him up with a rope and took him to the DO’s camp.**

**“[The] accused in his defence denies that he was anywhere near the house when the offence occurred. In view of this evidence placing [him] in the house and in the complainant’s bedroom, he was under a duty to explain what else he could have been doing there.**

**“Further, the evidence of PW2, PW3 and PW4 is well corroborated. These were honest witnesses. The accused alleges that there is a grudge because he is a squatter and a new-comer, but I believe that this defence is an afterthought ....[I] make the finding that the fact he was found having removed his trousers and lying on the complainant who was shouting, [means] he was attempting to rape her ....I am therefore satisfied with the evidence before me and find that the prosecution have proved this case beyond reasonable doubt, and the accused is accordingly convicted.”**

The learned Magistrate sentenced the appellant to 10 years’ imprisonment.

Learned counsel **Mr. Maranga**, for the appellant, urged that the trial Court had erred in law, in holding that the offence of *attempted rape* was proved, and that consideration had not been given to the testimony of the clinical officer (PW1), who had not found any signs showing rape, or indications of an attempt to rape the complainant. Counsel also urged that the Magistrate was wrong to proceed on the basis that the complainant was an *imbecile*, when no medical opinion had been given on that question. It was submitted that the record did not show any connection between the appellant herein, and the complainant’s ailment. Counsel submitted that the trial Court had misdirected itself, relying on uncorroborated evidence, that the appellant had been found lying on top of the complainant, and was then tied up by neighbours and taken to the Administration Police camp.

Learned State Counsel, **Ms. Gateru** contested the appeal herein. She submitted that the case against the appellant had been proved to the required standard, and that the evidence properly coincided with the charge of *attempted rape of an imbecile* contrary to s.146 of the Penal Code.

Contrary to the contention of counsel for the appellant, that no evidence of *imbecility* had been brought before the Court, **Ms. Gateru** appeared to attach that attribute to just one element in the evidence; in learned counsel’s words: *“The complainant had been examined by the Court, and found unable to communicate.”* The justification in this line of submission remains unclear to the Court. There was corroborated evidence, which, I think, cannot be doubted, that the complainant had been dumb from birth, to-date. Does such an impairment in speech make the complainant an *imbecile* or an *idiot*?

For purposes of the criminal law, the definition in **Black’s Law Dictionary**, 7th ed., by **Bryan A. Garner**, (1999) may be adopted; and the word *“imbecile”* is thus defined (p.751):

*“A person afflicted with severe mental retardation.”*

Before the trial Court, there was no evidence that the complainant was afflicted with any form of mental retardation. For that reason this Court cannot hold that the complainant **was** an idiot; and it cannot be so held for the more important reason that, this Court takes *judicial notice* that many thousands of people in the world do have differing kinds of sense-impairments or disabilities, yet they still live normal lives, and

they merit recognition as normal persons enjoying common rights, who deserve common courtesy and respect. It is an attribute of human dignity, which, insofar as the Constitution protects it, must be a principle guiding judicial dispute-settlement.

Learned counsel submitted that, from the evidence, an eye-witness had perceived the appellant lying on top of the complainant, after the complainant had raised alarm by screaming. A witness perceived also, at the material time, that the complainant's clothes had been pulled up, and that the appellant's trousers had been pulled down – a setting for possible sexual encounter. Counsel's inference from that evidence was: *"This shows proof of the charge in question."* Further evidence in aid of that inference, counsel urged, is that the appellant was arrested at the *locus in quo*, and that the arrest of the appellant took place right there; and in this regard, the testimony of PW3 was corroborated by that of PW4 who heard screams from the *locus in quo* and responded by going there. It was PW4's evidence that she had found the appellant in the complainant's room.

**Ms. Gateru** submitted that the trial Court had taken the clinical officer's evidence into account, but this evidence, it is apparent, was not the most material in a charge of attempted rape. She urged that any contradictions in the evidence were minor, and should not affect the outcome of the case.

Learned counsel submitted that the ten-year term of imprisonment imposed by the trial Magistrate was by no means harsh and excessive, as the law provided for a fourteen-year maximum; so, in the circumstances, the sentence was lenient and should be sustained.

S.146 of the Penal Code (Cap.63) under which the charge was brought, thus reads:

***"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."***

I hold that a conviction on the main charge could not, in law, be sustained; because there is no evidence that the complainant was an *imbecile*, and neither is there evidence that the appellant knew she was an imbecile. The only evidence shown to this Court which associates the complainant with imbecility is that of PW5, a Police officer. Without any factual basis, PW5 merely says: *"I escorted the imbecile to hospital ...."* He cannot very well say that, because imbecility has technical elements which must be testified to by an appropriate witness – and the Police officer is not the one.

Secondly the medical officer (PW1) found no rape, or attempted-rape indications when he examined the complainant. I am in agreement with learned counsel for the appellant, that the evidence on record shows no connection between the appellant, and the discharge and the pus cells which were found in the complainant's genitalia.

The trial Court ought, in my view, to have considered this case on the basis of the *alternative charge*, that of indecent assault on a female contrary to s.144(1) of the Penal Code.

PW3's testimony that he was drawn by screams from the complainant's room, and he went there only to find the appellant lying on top of the complainant, is in my view, fully corroborated by other witnesses, in particular by PW4. The corroborated evidence that the appellant was arrested while in the complainant's room, where PW3 had seen him being recumbent upon the body of the complainant, cannot be faulted in terms of veracity. Those facts by themselves, are testimony that a female, namely the complainant, was under a sexual assault by the appellant. The fact she was under such assault is further shown by her screaming, which drew the several witnesses who came along and who arrested the appellant herein. The appellant could not, at that time of night, and without the knowledge of the owners of the house, have had any lawful cause to be found at the *locus in quo*; and had he had any such cause, he did not say it, in spite of being accorded an opportunity by the trial Court.

The applicable law, which was in force at the material time, is s.144(1) of the Penal Code (Cap.63) which provides:

***“Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment with hard labour for twenty-one years.”***

After considering the whole evidence adduced in this case, the applicable law, and the circumstances in which the offence was committed, I will make orders as follows:

(1) The conviction of the appellant on the main charge is set aside, and the sentence imposed therefor, is hereby quashed.

(2) I find the appellant guilty on the alternative charge, and convict him accordingly.

(3) I hereby sentence the appellant to a three-year term of imprisonment which takes effect as from the original date of sentence, namely 7<sup>th</sup> July, 2006.

***Orders accordingly.***

**DATED and DELIVERED at Nairobi this 25<sup>th</sup> day of February, 2008.**

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J**

**Court Clerk: Huka**

**For the Appellant: Mr. Maranga holding brief for Mr. Wachakana**

**For the Respondent: Ms. Gateru**