REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 551 of 2006

SIMON NDICHU MWANGI…….. APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From the original conviction and sentence in Criminal Case No. 2062 of the Senior Resident Magistrate's Court at Githunguri – Lucy Mutai, SRM)

JUDGMENT

SIMON NDICHU MWANGI, the appellant, was charged before the subordinate court with defilement of an imbecile contrary to section 146 of the Penal Code. The particulars of charge were that on 20th November 2005 at Mungu Village in Kiambu District within the Central Province, unlawfully has carnal knowledge of JWN aged 25 years, a girl of unsound mind.

In the alternative he was charged with indecent assault on a female contrary to section 144(1) of the Penal Code. The particulars of offence were that on 20th November 2005 at M[....] village in Kiambu District within Central Province, unlawfully and indecently assaulted JWN by touching her private parts and removing her inner pants.

After a full trial, he was convicted on the main count and sentenced to serve 20 years imprisonment. Being aggrieved by the decision of the subordinate court, the appellant appealed to this court through his counsel, G.M. Muhoro advocate.

At the hearing of the appeal, learned counsel for the appellant, Mr. Muhoro, submitted that the complainant (PW1) in fact did not implicate the appellant. It was PW2 and PW3 who were relatives of the complainant who alleged that the complainant informed them that the appellant had defiled her. In addition, the doctor stated that it was PW3 who informed him of the defilement. Therefore, counsel contended, the evidence of defilement was given by third parties, not by the complainant.

Counsel also submitted that the magistrate erred in failing to consider that the prosecution failed to produce medical evidence, especially against the appellant, that would connect him to the offence. In addition, counsel contended that there was a requirement for the prosecution to have proved that the appellant knew that the victim was an imbecile. The prosecution failed to do so. Therefore, the prosecution failed to discharge their burden. Counsel also argued that the charge sheet alleged that the complainant was of unsound mind, a term not known in law. Lastly, on sentence, the counsel argued that the sentence of 20 years imprisonment was illegal, as the maximum sentence for the offence was 14 years imprisonment.

The learned State Counsel, Mrs. Gakobo, opposed the appeal. Counsel submitted that there was sufficient evidence to sustain the charge counsel contended that though the complainant was retarded, she clearly stated that she was taken by the appellant to the bush. The complainant informed her mother (PW2) as well as PW3. The evidence of the doctor, who examined her medically a few hours later was that there were traces of spermatozoa which was evidence of sexual contact with a man. Counsel added that the evidence of PW5, the Investigating Officer, supported that of the complainant. It was the evidence of the investigating officer that the complainant mentioned the name of the appellant severally. Counsel submitted that the appellant could not be medically examined, as he was arrested after 15 days and that his defence was considered. On the sentence counsel, submitted that the sentence of 20 years imprisonment was illegal as the maximum sentence for the offence was 14 years imprisonment. Counsel urged this court to rectify the illegality on the sentence.

In response, Mr. Muhoro, submitted that there should have been a medical report on the appellant to compare the spermatozoa and infection on the complainant, with the medical condition of the appellant.

I have considered the appeal and submissions of counsel for the appellant as well as the submissions of counsel for the state.

Counsel for the appellant has submitted that the charge sheet was defective for using the terms "unsound mind". I find no defect on the charge sheet on that account. In my view, that that was use of ordinary words to describe that the complainant was an imbecile. It did not prejudice the appellant. Nor was there a complainant that the appellant did not understand the particulars of charge against him. I dismiss that ground.

Counsel for the appellant also argued that the prosecution should have proved that the appellant knew that the complainant was an imbecile. Indeed, that is the legal position which flows from section which is section 146 of the Penal Code. The said section provides –

"**146 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 for imprisonment with hard labour for fourteen years"**

Throughout the prosecution evidence in this case, the prosecution never attempted to prove that the appellant knew or ought to have known that the complainant was an imbecile. The burden was on the prosecution to prove every element of an offence against the appellant
beyond any reasonable doubt – see MUIRURI –vs- REPUBLIC [1983] KLR 205. In the present case, the prosecution failed to prove this important ingredient of the offence. Therefore, the conviction cannot be sustained.

Secondly, the complainant did not testify in court that the appellant had carnal knowledge of her. Proof of a criminal case depends on evidence tendered in court, not outside court. If the complainant could tell her mother PW1, aunt PW2 and investigating officer PW5, that she was defiled by the appellant, why could she not tell the court the same story. She was quite categorical in court that the appellant did not defile her. She was said to have been found with traces of spermatozoa. However, there was no proof that the spermatozoa was from the appellant. That spermatozoa could as well have come from another male. Again, the prosecution failed to prove beyond reasonable doubt that the appellant spermatozoa was from the appellant. On this ground also, the conviction cannot be sustained. I will allow the appeal against conviction.

On sentence, the appellant was charged, tried and convicted of the offence under section 146 of the Penal Code, not the Sexual Offence Act, which creates some minimum sentence for certain offences. Under the Penal Code the maximum sentence is 14 years imprisonment with hard labour. The sentence of 20 years imprisonment was therefore illegal. The sentence cannot also be sustained.

For the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 21st day of April 2008.

George Dulu

Judge

In the presence of –

Mr. Muhoro for the appellant

Appellant

Mrs. Gakobo for State - absent

Mwangi - court clerk