



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 233,234 & 235 of 2006

TITUS NJENGA MAKUMI.....1ST APPELLANT

CHARLES GACHERU.....2ND APPELLANT

FREDRICK CHEGE.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.9677 of 2003 of the Chief Magistrate's Court at Thika – Ms. L.M. Wachira RM)

JUDGMENT

TITUS NJENGA MAKUMI (1st appellant), **CHARLES GACHERU** (2nd appellant), and **FREDRICK CHEGE** (3rd appellant) were charged in the subordinate court with a separate charge each, of defilement of an imbecile contrary to section 146 of the Penal Code. The offences were said to have been committed on different dates in 2003. However, the victim was the same, that is, **JOAN WANGUI MULEWA**. In the alternative they were each charged separately with indecent assault contrary to section 144(1) of the Penal Code. After a full trial, each of the appellants was convicted and sentenced to serve 10 years imprisonment. They filed separate appeals to this court, which were consolidated and heard together, as they emanated from the same trial.

At the hearing of the appeal, Mr. Obuo appeared for all the three appellants and made strong submissions. The learned State Counsel, Mr. Makura, conceded to the appeals on the ground that the evidence of the prosecution was not sufficient to sustain the convictions. The learned State Counsel argued that the evidence of PW1, the mother of the complainant, was hearsay, evidence and was actuated by a grudge relating to land. In addition, counsel argued, the evidence of PW2, the complainant, was that she was indecently assaulted by several people not merely the appellants as such. That evidence should have created doubts in the mind of the magistrate, which should have been resolved in favour of the appellants. Counsel further argued that there was no medical evidence of indecent assault. Lastly, the state counsel contended that the sentence of 10 years imprisonment was harsh and excessive, as the appellants were first offenders and the maximum sentence for the offence was 14 years imprisonment.

I have re-evaluated the evidence as record, as I am required to do in a first appeal. In criminal cases,

the burden is always on the prosecution to prove its case against the accused person beyond any reasonable doubt – see **MUIRURI –vs- REPUBLIC (1983) KLR 502.**

In my view, the prosecution in our present case did not prove the case against the three appellants beyond any reasonable doubt. Firstly, the charges alleged that the appellants defiled an imbecile. There was need for the prosecution to prove that, indeed, the complainant **PW2 JOAN WAMBUI** was an imbecile. Tangible medical evidence had to be tendered in court to establish that fact. A P3 form was produced in evidence as an exhibit. It was filled by **DR. JOHN IRUNGU KAMAU (PW3)**. The P3 form merely notes in the column for general physical examination that the complainant “*has some degree of mental handicap*”. There is no evidence as to what tests the doctor carried out to establish that the complainant had a mental handicap, or that she was an imbecile. There is a letter from an organization called United Disabled Persons of Kenya dated 29.10.2003 stating that the complainant was mentally handicapped. That letter did not state that she was an imbecile. It was also signed by S.K. Arap Tororei, as Chief Executive Officer. It is not clear whether that Chief Executive Officer had any medical qualifications. In any case, that letter even if it was tendered in evidence is hearsay, because the marker did not come to court to testify on the same. It was, infact, not even referred for identification or production in court. It was therefore no evidence at all. It could not be relied upon.

From the above, the prosecution did not prove beyond any reasonable doubt that the complainant was an imbecile as alleged in the charge.

Secondly, there is the issue of the credibility of the complainant. The complainant PW2 clearly stated in court that she was beaten and forced to implicate the appellants. She stated in cross examination ?

“Mama Njoroge, Mama Kariuki and their sons beat me very badly until I agreed to go to the police to prefer these charges. If I was not beaten, I would not have brought the case at all.”

What the above means is that her evidence against the appellants cannot be trusted to be truth. It was a case that was brought to court through coercion. It creates a doubt as to the credibility of the witness. The court cannot rely on such doubtful evidence to found a conviction – see **NDUNGU KIMANYI –vs- R [1979] KLR 282.** The benefit of the doubt regarding the credibility of the witness should have been given to the appellants. It should not have been used as a strong pointer that the defilement must have occurred, as was done by the subordinate court. On those two grounds, the appeals against conviction will succeed.

The sentence of 10 years imprisonment appears to be harsh and excessive, taking into account that the appellants were actually first offenders and the maximum sentence for the offences was 14 years imprisonment. I will not say more on the sentences because I will have to set aside the sentences on allowing the appeals against conviction.

For the above reasons, I allow the appeals of the three appellants. I quash the convictions and set aside the sentences imposed on each of the three appellants. I order that the three appellants be set at liberty, unless otherwise lawfully held.

Dated and delivered at Nairobi this 12th day of March 2008.

George Dulu

Judge

In the presence of ?

1st appellant

2nd appellant

3rd appellant

Mr. Obuo for all three appellants

Mr. Makura for State

Mwangi – court clerk