



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NYERI

Criminal Appeal 341 of 2007

NICHOLAS KAMAU MWANGI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(Being an appeal from the judgment of G.P. Ngare,*

*Resident Magistrate in Senior Resident Magistrate's*

*Criminal Case No. 219 of 2006 at Kangema)*

JUDGMENT

The appellant was charged in the lower court with *defilement of an imbecile contrary to section 146 of the penal code*. The appellant after trial by the lower court was convicted as charged and was sentenced to seven years imprisonment with hard labour. The appellant has preferred this appeal against conviction and sentence. This is the first appeal. In deciding this appeal I am guided by the principles enunciated by the Court of Appeal Case of *Gabriel Njoroge vs Republic (1982 – 88) 1 KAR 1134 at page 1136* where it was stated:

*“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570).”*

PW 1 who was 41 years old stated that she worked with the complainant at G[particulars withheld]market Kangema. On 13<sup>th</sup> January 2006 at about 5p.m. the appellant was with her and requested her to become his wife. From that day on they went to the appellant's home where they slept after cooking and eating. This witness stated that they spent a night with the appellant as husband and wife. On the following day she went to her home at about 11a.m. She was taken to Kangema Health Centre and was given some documents at the police station. She was examined at the health centre.

PW 2 said that she knew PW 1. They worked together with her. She knew her to be mentally unstable and that she had suffered with epilepsy for 20 years. She recalled on 13<sup>th</sup> January 2006 at about 6p.m. as they were preparing to go home the complainant PW 1 disappeared. PW 1 did not arrive home that night and as a result the matter was reported to the Assistant Chief. On 15<sup>th</sup> January 2006 PW 1 was found to be at home. She was taken to the police station and later to hospital. The P3 that was filled at the hospital was identified by this witness before court.

The Clinical Officer was PW 3. He examined PW 1 who had attended the clinic in the company of her sister. It was alleged that she had been raped. He stated, *“She appeared mentally confused. HVS conducted show some pus cells there was no spermatozoa and I filled the P3 form”*.

PW 4 was a police officer who investigated the matter. He said that PW 1's sister reported her disappearance on 15<sup>th</sup> January 2006. The report was booked by this witness who referred PW 1 to Kangema Health Centre. He also rearrested the appellant. On that evidence being adduced by the prosecution the court found the appellant had a case to answer. In his defence the appellant stated in an unsworn statement that he went to Gakira on 13<sup>th</sup> January 2006 at about 5p.m. He talked to PW 1 and she accepted to be his wife. They went home, cooked and slept. The following day when they awoke the complainant went to her home to collect her clothes. She never returned and he was arrested the following night by the Assistant Chief. The learned magistrate found that the prosecution had proved a case beyond reasonable doubt against the appellant.

As I begin to consider this appeal I find that the word *imbecile* is not defined in the Penal Code. It is also not defined in the Mental Health Act. *Chamber Concise 20<sup>th</sup> century dictionary defines imbecile as; “Veeble,..... one who is imbecile; one who is incapable of managing his own affairs”*. Apart from the evidence of the Clinical Officer who stated that the complainant looked confused there was no other evidence to show that she was indeed an imbecile. The complainant gave clear evidence of how she consented to be the wife of the appellant. The appellant in agreement with that testimony stated that he invited her to be his wife. PW 1 was working or selling at a market. That does not seem someone who is incapable of managing their affair. In the absence of medical evidence that the PW 1 was an imbecile the court cannot confirm the finding of the trial court. Bearing in mind the evidence adduced by the prosecution and the defence offered by the appellant I find that the prosecution did not prove a case beyond reasonable doubt against the appellant. That being the case I find that the appellant's appeal does succeed. Accordingly I do hereby quash the lower court's conviction and set aside its sentence against the appellant. I order the appellant be set free unless otherwise lawfully held.

*Dated and delivered at Nyeri this 7<sup>th</sup> day of October 2008.*

**MARY KASANGO**

**JUDGE**