



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**(CORAM: OJWANG, J.)**

**CRIMINAL APPEAL 478 OF 2005**

**NDEGWA NJURU..... APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

***(An appeal from the Judgement of Senior Resident Magistrate Ms. Lucy Mutai dated 16<sup>th</sup> June, 2005, in Criminal Case No. 1392 of 2004 at the Githunguri Law Courts)***

**JUDGEMENT**

The main charge brought against the appellant herein is found in the charge sheet dated 15<sup>th</sup> September, 2004; it is: “defilement of idiot or imbecile contrary to section 146 of the Penal Code.” The particulars are thus stated: “*Ndegwa Njoru*: on or before the 12<sup>th</sup> of August, 2004 at **[particulars withheld]** Kiambu District within Central Province, had carnal knowledge of **S W C**, a girl he knew was an idiot or imbecile.” There was an alternative charge: indecent assault on a female, contrary to section 144(1) of the Penal Code; and the particulars were: “*Ndegwa Njoru*: on or before 12<sup>th</sup> of August, 2004 at **[particulars withheld]** Kiambu District within Central Province, unlawfully and indecently assaulted **S W C** by touching her private parts, namely breasts.”

The complainant appeared before the trial Court as PW1, and the learned Magistrate examined her at a preliminary stage, before directing that she be sworn, and then she was examined on her testimony in the normal manner. At the preliminary stage, these were the complainant’s words:

“I am **S W**. I do not know my age. I have been to a tailoring school in Nakuru. I do go to Church. My brother is before the Court.”

On the basis of those averments, the learned Magistrate drew certain conclusions which are on record:

***“The complainant can communicate well with the Court. She seems to have a grasp of what she is saying, [in answer to] the question put across to her by the Court. She is to give a sworn statement. She stammers and physically she looks retarded.”***

From those observations, it appears that the learned Magistrate had accepted the statement in the charge,

that the complainant (PW1) was an idiot or imbecile, even though the only negative record on PW1 that is recorded is that “*physically* she looks retarded”; there is no negative record about PW1’s intelligence, or ability to communicate. This point will be considered further on, since it was taken up by counsel for the appellant.

PW1 testified that she knew the appellant well, and that the appellant was her neighbour, and was a teacher at [particulars withheld] Primary School. Within the month of August, 2004 though on a date PW1 could not recall, the appellant went to her home and found her washing clothes. He held her by her hand, and also touched her breasts, and thrust her hand into his own under-clothing. He took her from the home, and into the farm of a lady known as **Mama Kihika**, who was the appellant’s sister, and there, he removed her underwear and also removed his own trousers. He then knocked PW1 down and forcibly lay on her. PW1 on that occasion resisted, cried, and asked to be released. When afterwards the appellant left, he warned PW1 that he would kill her if she disclosed the matter to anybody.

PW1 testified that she later recounted the incident to her mother, who convened a sort of redress meeting at home – a meeting which was attended by others, including the accused, who came with an elder. The accused was asked at the meeting to accept responsibility for any consequence of his sexual assault on PW1, such as pregnancy, or AIDS infection; but he refused to write a letter assuming such responsibility. Of the sexual relationship between the appellant and PW1, she thus testified: “The [appellant] had sex with me on the material date and [also] several days before.” She testified that the appellant had been performing the sex act on her repeatedly, after ascertaining that her mother was not at home. The incident which is the basis of the charge was reported to the Police Station, and the Police officers provided P3 forms for a medical examination.

PW3, **Mr. Samson Gitonga**, a medical officer at the Kiambu District Hospital testified that he had, on 27<sup>th</sup> August, 2004 examined PW1 who had come along with PW2 and a Police officer. He had received the report that PW1 had been raped some two weeks earlier (though the date was not specified), within [particulars withheld] Village. On the material issue, as to the medical condition of PW1, PW3 found as follows:

“On physical examination I found no injuries. On further examination [I formed the opinion that] the complainant was a young girl aged 20 – 24 years. Her genitals were normal. There was no bleeding and no discharge. I took from her a high vaginal swab [for laboratory tests], and the results were that no spermatozoa or organisms were traced. Urine was taken for pregnancy test, but [the results] were negative. I formed the opinion that in the absence of physical injuries and in general, I was unable to confirm the offence.”

PW3 testified that he was unable to ascertain if the complainant had been in contact with a man, “more so due to her age.” PW3 produced as an exhibit the P3 form which he had prepared, on the complainant’s health status.

On 27<sup>th</sup> August, 2004 PW3 also examined the appellant who had been accused of raping an imbecile – the complainant. He found the appellant’s physique normal, with no injuries on his genitalia. Urine samples were taken and when tested, were found normal, save for a number of pus cells which were detected. PW3 prepared a P3 form giving details of his findings, and now produced the same as an exhibit.

On cross-examination, PW3 testified that he had talked to the complainant and “confirmed that she is an imbecile with mental retardation.” PW3 testified that he had meant, in the P3 form, to indicate that the complainant was mentally retarded. He further said: “As per my examination I can only say I was not sure of any rape since I was not able to establish it. I found nothing on the accused to connect him with the allegation. I could not tell if the complainant had a relationship with a man.”

PW4, **Police Constable Kenneth Murage** testified that he was the officer who arrested the appellant and who investigated the case. He made the following remarks in his testimony: “My case is based on what the complainant’s mother told me. I [did] not interview the complainant due to [a] communication

breakdown. Her physical condition is obvious. I do not know if she [ever went to] school.” Of the information which PW4 had received from the medical officer at Kiambu District Hospital (PW3), PW4 thus said: “The doctor’s findings on [the] rape allegation were negative. The doctor’s evidence is not all-inclusive. I was not ordered to bring this case to Court.”

The appellant had made a sworn defence, in which he denied committing the offence charged. He said he knew the complainant who was a neighbour, and whom he would notice as he went to his place of work, at [particulars withheld] Primary School. In his words:

“I have known her since childhood. It is not true that the complainant is an imbecile since she has been to a school in Nakuru. She was doing tailoring. I do not know her occupation at the moment since I just see her at home.”

The appellant testified that, on 15<sup>th</sup> August, 2004 PW5 had told him that PW2 was accusing him (appellant) of indecently assaulting PW1. He had a meeting with PW2 and PW5, and repeated his denial of the accusation; but later he was arrested, at the instance of PW2, and detained at the Police Station. He suspected that this was a settling of scores initiated by PW2, over an outstanding land-boundary dispute.

On the evidence as adduced in Court, the learned Magistrate thus held:

***“PW1, the complainant, gave evidence which I found quite firm and clear. Although she appeared physically retarded and had [the] traits of a slow learner, she did...adduce evidence which I find quite cogent and convincing. She told the Court how [the] accused defiled her on several occasions...I was convinced that she was sure of the person she was talking about and the exact person was no other [than the] accused.”***

The learned Magistrate carefully considered the medical evidence adduced by PW3, and thus remarked:

***“Although the complainant claimed that she was defiled by the accused person on the material date, I found that her evidence was not confirmed by that of the medical officer.”***

But the learned Magistrate went to remark:

***“The complainant did not report the ordeal immediately, and this could explain why the medical officer was unable to come up with anything conclusive.”***

From the foregoing passage in the judgement, it is evident that even though the objective clinical information from Kiambu District Hospital did not show any sexual assault to have taken place, and did not connect the appellant to any sexual assault at all, all this, in the opinion of the learned Magistrate, did not dispose of the criminal link. For the learned Magistrate raised two conjectural scenarios: (i) the complainant had been subjected to an *ordeal* of sexual assault; and (ii) the *delayed reporting* by the complainant was the explanation for the negative clinical tests found at the hospital.

However, the trial Court still drew an entirely logical conclusion: “I found that it would be unsafe for us to find that indeed, the complainant was defiled.” The appellant was, quite rightly, in my view, acquitted of the main count in the charge.

But the inferences made in respect of the *first count* were, I believe, taken into account in relation to the *alternative charge*, of unlawful and indecent assault. The apt demonstration of this point is in the following words of the trial Court: “It was her [complainant’s] evidence that she was touched on the breast by the [appellant] during the ordeal. On cross-examination the complainant testified that the accused even touched her vagina.”

The learned Magistrate’s conviction of the appellant on the alternative charge was now based on the evidence of PW1 alone, and on the notion that the appellant had subjected her to an *ordeal*, in the course of an unlawful and indecent assault. Clearly, the ordeal itself would have been an ordeal of *rape* – which

itself was not proved under the first count. What is not proved, in a criminal trial, is not a fact – because it is well established that there can be no guilt ascribed to an accused person unless it is proved beyond reasonable doubt: *Woolmington v. D.P.P.* [1935] A.C. 462; *Okale v. Republic* [1965] E.A. 555 (C.A.).

Without dealing with the *consequence* of the “not-guilty” finding in the *first* count (which therefore ruled out the fact of an “ordeal” having existed), in relation to the second count, the learned Magistrate made still another presupposition, on a matter in respect of which there was no clear evidence: whether the complainant was, objectively, an *imbecile*. The learned Magistrate remarked:

***“The complainant although an imbecile, gave evidence which I found very tangible and consistent, which evidence was not challenged by the defence.”***

On a material question of *fact*, and a fact which went to the very core of the charge, evidence should have been tendered of *imbecility* on the part of the complainant. But it wasn’t; and this would be further reason why it was quite right to acquit the appellant in respect of the *first* account.

The object of fairness in the trial dictated that the appellant be confronted with a *specific charge*, even in respect of the second count. But this element appears to be lacking, in the light of the following passage in the judgement:

***“It was [the complainant’s] testimony that the offences used to take place during the day and on the farm of the [appellant’s] sister...”***

The reference is to *offences*; and these offences used to take place over an extended period of time which is not defined. That is not a sufficiently *specific charge* which would accord the appellant a fair opportunity to prepare his defence. Yet the learned Magistrate went on to hold:

***“She knew the accused person so well and in detail, a fact not in dispute, and I was convinced that indeed, the accused did touch the complainant’s breast as well as her vagina...”***

The learned Magistrate further remarked:

***“The complainant was all alone at the time and although a slow learner, she gave evidence which was very convincing and I had no reason to doubt it...I found that the complainant was indecently assaulted by the [appellant] both at the scene of crime and also before the Court [sic]...”***

The conviction on the alternative count was founded further on the “imbecility” ground which, as already noted, was not itself proved; in the words of the learned Magistrate:

***“I noted that all [that] happened was against the will of the complainant who, being an imbecile, ... was not capable of giving...consent and even if she was otherwise, it is on record that the complainant resisted during the ordeals but she was too weak to do anything [emphasis supplied].”***

The learned Magistrate found the appellant guilty as charged, on the alternative count of indecent assault, convicted him, and sentenced him to eight years’ imprisonment.

In the petition of appeal, dated 30<sup>th</sup> September, 2005 the appellant stated that the trial Court had not taken his evidence fully into account, and had closed the case without allowing him to call the witnesses he intended to call, though this fact had not been recorded in the proceedings; that the trial Magistrate erred in law and fact by failing to appreciate that the uncorroborated evidence of the complainant could not sustain a conviction in the circumstances; that the trial Magistrate had erred in law, by shifting the burden of proof to the appellant; that the learned Magistrate had erred in law, by failing to find that the evidence adduced did not support and prove the facts of the charge laid; that the learned Magistrate erred in law in failing to appreciate that the charge was vague and the evidence was also ambiguous, such that the appellant had no fair opportunity to defend himself; that the trial Court erred in law in failing to find that there was no direct and independent evidence incriminating the appellant; that a manifestly excessive

sentence had been meted out against the appellant.

The appellant's prayers were: that the appeal be allowed; that the conviction be quashed, and the sentence set aside; that alternatively, the sentence be reduced and/or fine be imposed, in place of the custodial sentence; and in the further alternative, that the conviction be quashed, sentence be set aside, and retrial be ordered before a Court having jurisdiction to hear the matter.

Learned counsel **Mr. Ngari** submitted that it was an error of law to admit the uncorroborated evidence of a complainant who was alleged to be an imbecile; that the conviction was against the weight of the evidence adduced; that defence submissions had been ignored by the learned Magistrate; that the entire judgement was faulty, as no issue had been framed for determination; that no reason had been given for rejecting the appellant's defence.

**Mr. Ngari** highlighted certain elements in the trial proceedings which showed doubts on points of fact – doubts which he urged should have been resolved in favour of the appellant. PW1 did not know her age, but PW2 said PW1 was born in 1982, though no evidence was adduced on this point. According to the medical officer (PW3), the complainant's age would have been 20 – 24 years. PW1 did not know the *date* when the offence charged had taken place. In determining whether PW1 was fit to give sworn evidence, the trial Court had asked her only three questions, though these questions appeared to have only limited relevance to the object in hand. None of those questions touched on the *duty to tell the truth*. No question had been asked to ascertain if PW1 knew why she had come to Court; and this, learned counsel urged, was a fatal error.

Learned counsel's position was, in effect, that where a witness was claimed to be an imbecile, then the Court should test the claim by asking relevant questions, in much the same way as the Court would conduct a *voire dire* examination before allowing a child of tender years to testify at all, or to testify on oath. A Court of Appeal decision, **Joseph Karanja Mungai v. Republic**, Criminal Appeal No. 157 of 2003 [2006] e KLR, was invoked in aid of this argument. In that case, the Court reiterated the principle stated in its earlier decision in **Johnson Nyoike Muiruri v. R** (1982 – 88) 1 KAR 150 in which (at p.152) the statement of law in a still earlier case, **Peter Kirigi Kiune v. R**, Cr. App. No. 77 of 1982 was cited with approval:

**“Where, in any proceedings before any Court, a child of tender years is called as a witness, the Court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the Court is not so satisfied, his unsworn evidence may be received if in the opinion of the Court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (s.19, Oaths and Statutory Declarations Act (Cap 15); Evidence Act, (Cap. 80), s.124).”**

In the absence of a proper *voir dire* examination conducted by the trial Court, counsel urged, there was no basis for taking the complainant's sworn evidence.

**Mr. Ngari** submitted that there were doubtful factual claims in the prosecution evidence, which ought to have been resolved in favour of the appellant: the complainant did not disclose dates when the offence had been committed; she excused her laconic tendency by alleging threats by the appellant to kill her, but without giving evidence of the form such threats took; she did not say when such threats stopped, so she could now disclose the commission of the offence; even after the complainant reported the matter to her mother, PW2 it still took about a dozen days before any report could be made to the Police; neither PW1 nor PW2 had recorded any statement with the Police, to the effect that the appellant had touched the complainant's breasts (which the learned Magistrate had regarded as “private parts”).

Counsel relied on the Court of Appeal decision, **Isaac Omambia v. Republic**, Criminal Appeal No. 47 of 1995 for the legal principle (which in that case was drawn from the judgement of **Sir Udo Udoma, CJ** in **State of Uganda v. Wagara** [1964] E.A. 366 at p.368) that:

***“In the absence of any amendment, the prosecution is bound by the particulars in the charge.”***

And the particulars in the alternative charge had been: indecent assault on the complainant by “touching her private parts namely breast”. In the *Isaac Omambia* case the Court of Appeal was quite clear, that the expression “private parts”, in connection with sexual offences, had a specific meaning which did *not* include breasts:

***“These particulars that the appellant touched the private parts of the complainant mean, and can mean nothing else than, that the appellant touched with his hand the ‘private parts’ of the complainant which, to give the well known and ordinary meaning of that phrase, means the genitalia of the complainant, and to no other part of her body, or as defined in The Shorter Oxford Dictionary, the ‘pudenda’ or ‘external genital organs’.”***

Insofar as the alternative charge, on which the learned Magistrate convicted the appellant, made reference to a touching of *breasts* and not *pudenda*, learned counsel urged – and in my view, meritoriously, as a matter of law – it would not be right to convict on that charge as framed.

In all the circumstances, it was urged, “it was extremely unsafe to convict the appellant, especially in view of the fact that the complainant was alleged to be an imbecile.”

Learned State Counsel *Mr. Karue*, after considering the submissions made for the appellant, conceded to the appeal. He noted that the judgement did not comply with s.169 of the Criminal Procedure Code (Cap.75) which required every judgement to contain the *points* for determination, as well as the *reasons* for the decision. The learned Magistrate, counsel noted, had simply outlined the evidence for the prosecution — and especially that of the complainant, and then attributed truthfulness to the same, without any reasons assigned. This kind of shortfall in a judgement has been held by the Court of Appeal to amount to an incurable error: *Nyanamba v. Republic* [1983] KLR 599.

Learned counsel submitted that the charge sheet in this case was defective; although the complainant said: “the accused had sex with me on the material day and several days before”, those particular days were not specified in the charge sheet. The complainant must have known the material days; and by omitting from the charge sheet a specification of those days, the appellant was denied an opportunity to account for his movements on the days in reference.

Learned counsel further noted that, by established judicial precedent, corroboration was generally required in sex-offence cases. In *Mwangi v. Republic* [1984] KLR 595 it had been held by the Court of Appeal that (p.596):

***“In cases involving a sexual offence, it was incumbent on the trial Court to warn itself that it is not safe to convict the accused on the uncorroborated evidence of the complainant but having so warned itself, the Court may nevertheless convict in the absence of corroboration where it is satisfied that the complainant’s evidence is truthful. Where no such warning is given, the conviction will be set aside unless the appellate Court is satisfied that there has been no failure of justice.”***

Learned counsel noted, correctly, with respect, that while the trial Court had duly warned itself on the danger of convicting on the evidence of a single witness, in respect of the first count of the charge herein, no such warning was recorded in respect of the *alternative charge*, on which a conviction was entered. Corroboration on the alternative count was necessary, as there was conflicting evidence on the issue.

It is quite clear to me that the conviction on the second count was not properly arrived at: firstly, the circumstances pertaining to the *second* count were dependent on the *first* count, which the trial Court rightly held could not lead to conviction; secondly, the charge was defective, insofar as it contained a wrong signification of “private parts”, in a charge of indecent assault; thirdly, the learned Magistrate failed to address the *integrity* of the complainant as a witness, after she had been described in the charge as an imbecile or idiot; fourthly, the learned Magistrate relied on doubtful evidence, and without finding any corroborative testimonies; fifthly, the charge sheet was defective as it failed to specify the occasions

when the alleged sexual offences had taken place, and, on that account, a fair opportunity was not accorded the appellant, to mount his defence; sixthly, the learned Magistrate substituted *conjectures*, such as the occurrence of a rape ordeal, for factual information such as was required to support a finding of guilt on the alternative charge. Other grounds vitiating the conviction recorded by the trial Court have been set out already.

In all these circumstances, it is clear to me that the appellant's appeal must succeed. I quash the conviction, and set aside the sentence of imprisonment imposed against the appellant. I acquit the appellant, and direct that he shall forthwith be set at liberty, unless otherwise lawfully held.

***Orders accordingly.***

**DATED and DELIVERED at Nairobi this 11<sup>th</sup> day of June, 2007.**

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J**

**Court Clerk: Tabitha Wanjiku**

**For the Appellant: Mr. S.N. Ngari**

**For the Respondent: Mr. Warue**