



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 264 OF 2001

(From original conviction and sentence in Criminal Case No. 1832 of 2000
of the Chief Magistrate’s Court, Nakuru –Mrs. S. M. Muketi)

SIMON KARANJA ZAKAYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant had been charged for the offence of defilement of an imbecile contrary to Sec. 146 of the Penal Code. The facts of the prosecution case as stated in the charge sheet are as follows:

“On the 16 th August, 2000 at [particulars withheld] in Nakuru District within the Rift Valley, the accused had carnal knowledge of S.W.N, an imbecile knowing the said S.W.N to be an imbecile woman.”

After a full trial, the appellant was found “guilty” of the offence and sentenced to 10 years imprisonment and 4 strokes of the cane by Mrs. S. Muketi, Senior Resident Magistrate, Nakuru.

In his appeal, the appellant explained that he is a matatu driver and that on the material night, he worked upto 11.30 p.m. when he parked the vehicle that he was using. After sorting out the day’s collection, the appellant proceeded to his house. When he almost reached his house, and trying to open the door, a woman accompanied by her two sons approached him. Subsequently, the two sons assaulted him very badly before they robbed him of a jacket and trouser. Later, they returned the jacket without his Identity Card and Driving Licence. It was when the appellant demanded the missing items that they took him to Central police Station where he was charged for the present offence. The appellant complained that he is diabetic and that the said disease has given him a lot of problems.

In addition, he explained that he is 65 years old, married with 10 children. On the other hand, the state, through Mr. Mutuku – Senior State Counsel has opposed the appeal on the ground that there was overwhelming evidence against the appellant. According to Mr. Mutuku, both the PW1 and PW2 had caught the appellant red-handed. The appellant was found stark naked.

In addition to the above, Mr. Mutuku deposed that the witnesses had no reason to lie against the appellant.

On sentence, the Senior State Counsel deposed that the sentence of 10 years was well deserved given the fact that the maximum sentence provided by the law is 14 years with hard labour. The Senior State

Counsel conceded that the law had been amended and that corporal punishment had been outlawed by Act No.5 of 2003.

A review of the evidence on record, clearly show that the learned trial Magistrate evaluated the same carefully and reached the proper conclusion. The evidence against the appellant was simply overwhelming because he was arrested red-handed. The above was also strengthened and corroborated by the medical evidence on record. In view of the above, the Court hereby finds the conviction safe and well-deserved.

As far as the sentence is concerned, the maximum as provided by the law is life imprisonment – and not 14 years as stated above. Given the provisions of the law, 10 years is reasonable and justified under the circumstances. Imbeciles need care and protection. They should not be sexually abused because of their disability.

The upshot is that the conviction is hereby upheld and the sentence of 10 years is confirmed.

However, the 4 strokes of the cane are set aside given the new provisions of the law. It is only to that extent that the appeal succeeds.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open Court in the presence of Mr. Mutuku, Senior State Counsel and appellant.

MUGA APONDI

JUDGE

19TH FEBRUARY, 2004