



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 12 OF 2016

JOSEPH MELIKINO KATUTA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 389 of 2010 in the Senior Principal Magistrate's Court at Voi delivered by Hon C. N. Ndegwa (RM) on 4th April 2011)

JUDGMENT

1. The Appellant herein Joseph Melikino Katuta, was tried and convicted by Hon C.N. Ndegwa, Resident Magistrate for the offence of defilement of a girl contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve twenty (20) years' imprisonment.
2. At the time of hearing the Appeal herein, it appeared to this court that the Appellant did not appear to have been intelligent and/or comprehend the court proceedings as an ordinary person would. As a result thereof, in its Ruling of 23rd February 2017, this court directed that the Appellant be referred for Psychiatric evaluation to determine his level of understanding his actions and consequences thereof.
3. In his Medical Report dated 17th May 2017, Dr C.M. Mwangome of Coast Province General Hospital opined that the Appellant was mentally retarded (mild mental retardation) and had been in that condition since his childhood and that he was not capable of following court proceedings.
4. Appreciably, there was no doubt that the Appellant had sex with the Complainant, R M J (hereinafter referred to as "PW 1"). Her evidence was corroborated by the evidence of the Clinical Officer, Toto Nyawa (hereinafter referred to as "PW 5") who testified that a high vaginal swab of PW 1 revealed presence of spermatozoa.
5. In any event, as this court pointed out in the aforesaid Ruling, there was no doubt that the element of the *actus rea* on the part of the Appellant was present in the circumstances of this case as he himself did in fact admit to having had sex with the Complainant herein, R M J (hereinafter referred to as "PW 1").
6. Having said so, following the prognosis of Dr Mwangome, this court came to the firm conclusion that despite *actus rea* on the part of the Appellant having been present, *mens rea* on his part was absent at the material time of the incident. Indeed, the common law standard is that an act is not culpable unless the mind is guilty. In other words, criminal responsibility must consist of both *mens rea* and *actus rea*. However, *mens rea*, which would have been indicative of malice aforethought on the part of the Appellant, was absent in the circumstances of the case herein.

7. Section 167(1) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides that a convicted accused person who has a mental condition is held at the president's pleasure. However, this provision found itself in the Criminal Procedure Code before the promulgation of the Constitution of Kenya, 2010 that guarantees the right of liberty to every person. As it is possible that a mentally challenged person who is convicted of an offence may be detained longer than the period stipulated in the law as the time is indefinite or indeterminate, Section 167(1) of the Criminal Procedure Code is clearly unconstitutional as it contravenes a person's right to liberty as enshrined in Article 29(a) of the Constitution of Kenya.

8. Section 167(1)(a) of the Criminal Procedure Code provides as follows:-

If the accused, though not insane, cannot be made to understand the proceedings—

a. in cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President's pleasure; but every such order shall be subject to confirmation by the High Court;

b. in cases tried by the High Court, the Court shall try the case and at the close thereof shall either acquit the accused person or, if satisfied that the evidence would justify a conviction, shall order that the accused person be detained during the President's pleasure.

9. Article 29(a) of the Constitution of Kenya provides as follows:-

“Every person has the right to freedom and security of the person, which includes the right not to be—

(a) deprived of freedom arbitrarily or without just cause;

10. In view of the mental status of the Appellant herein, there was no doubt that he had been deprived of freedom without just cause by being sentenced to twenty (20) years imprisonment. Indeed, his mental capacity ought to have been evident during the trial as this court observed right at the outset of his Appeal.

11. Punishment that is meted out on a perpetrator is intended to achieve several objectives. If it is meted out as a deterrent punishment, it is intended to deter the offender from committing a similar crime. It is also meant to make the perpetrator pay for or suffer for his wrongful act and to compensate the victim for the loss or damage that he or she has suffered. It can also achieve the objective of protecting the community by incarcerating the perpetrator and communicating the displeasure of the society to crimes and it must.

12. Notably, imprisonment as a punishment must therefore achieve any of the aforesaid objectives. It is not intended to merely punish a person who has absolutely no idea why he has been imprisoned. **Imprisonment of a convicted person who is unlikely to be reformed or deterred from future crimes because he is not aware of the consequences of his actions due to mental incapacities is tantamount to subjecting such person to torture and cruel, inhuman or degrading treatment or punishment contrary to Article 25 of the Constitution of Kenya.**

13. Article 25 of the Constitution of Kenya provides as follows:-

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

14. The constitutionality of Section 167(1) of the Criminal Procedure Code vis-a vis the provisions of Article 25 of the Constitution of Kenya was a conclusion that Kiarie wa Kiarie J also arrived at in the cases of **B K J vs Republic [2016] eKLR** i and **Hassan Hussein Yusuf vs Republic [2016] eKLR**. The common thread of his holdings was that keeping a sick person for an indeterminate period in a prison is cruel, inhuman and degrading treatment and contrary to Article 25(a) and Article 29(f) of the Constitution of Kenya.

15. It was the considered view of this court that although the Appellant defiled PW 1, it would be infringing his constitutional right that is enshrined in the Supreme law if it upheld the sentence of twenty (20) years imprisonment. Bearing in mind the Appellant's mental condition, this court found and held that the seven (7) years he had already been in prison would somehow assuage PW 1 for the offence that was committed against her by the Appellant herein. This court hopes that the said period of imprisonment would give PW 1 some sort of retribution.

DISPOSITION

16. For the foregoing reasons, the upshot of this court's decision was that although the Appellant's Appeal that was lodged on 8th March 2016 was not merited, it nonetheless allowed the same on the ground that it would be unconstitutional to continue holding the Appellant in prison to serve the remainder of his sentence. As stated hereinabove, the likelihood of him being reformed due to his mental retardation was not guaranteed.

17. It is therefore hereby directed that the Appellant be set free forthwith unless he be held for any other lawful cause.

18. It is so ordered.

DATED and DELIVERED at VOI this 20th day of July 2017

J. KAMAU

JUDGE

In the presence of:-

Joseph Melikino Katuta - Appellant

Miss Anyumba - for State

Josephat Mavu- Court Clerk