REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 142 OF 2012

CHARLES MURIUKI WAMAE…………..……..APPELLANT

VERSUS

REPUBLIC………………..……………....……..RESPONDENT

(From original conviction and sentence in Karatina Senior Principal Magistrates Court Criminal Case No. 1 of 2012 (Hon. L. Mutai) delivered on 31st July, 2012)

JUDGMENT

The appellant was charged with the offence of defilement of an imbecile contrary to **section 146** of the Penal Code. It was alleged in the particulars of the offence that on 21st day of January, 2012 at ***[particulars withheld]*** village in Iluga location, Mathira West District within Nyeri County, the appellant knowingly had carnal knowledge of R W aged 27 and who was an imbecile.

In the alternative, the appellant was charged with the offence of committing an indecent act with an adult contrary to **section 11 (1)** of the **Sexual Offences Act, No. 3 of 2006** the particulars being that on 21st day of January, 2012 at ***[particulars withheld]*** area Iluga location Mathira West District within Nyeri County, the appellant intentionally touched the vagina of R W with his penis against her will.

The appellant pleaded not guilty to both the principal and the alternative counts; however, the court found him guilty of attempted defilement and convicted him accordingly. He was sentenced to fourteen years imprisonment. He appealed against conviction and sentence on the grounds that:-

1. The learned magistrate erred both in law and in fact in convicting the appellant on charges that were not proved;

2. The learned magistrate erred both in law and in fact in convicting the appellant based on unreliable prosecution evidence; and,

3. The learned magistrate erred both in law and in fact in shifting the burden of proof to the appellant.

These grounds are contained in the appellant's written submissions filed in court on 14th July, 2015.

The evidence at the trial was this: on 21st January, 2012, J**NI (PW1)** was pressed by a call of nature; she rushed to a nearby latrine to relieve herself but somehow the latrine door could not open. She opted to relieve herself in the bathroom, next to the latrine. When she attempted to open the bathroom door, she realised that it was being pulled from inside; on peeping she saw the appellant pulling up his trousers

while the complainant was seated.

The appellant opened the door and attempted to flee but the witness grabbed him and screamed for help. The neighbours responded and detained the appellant; they also beat him up. The witness identified a hand saw which the appellant was holding and black inner wear the complainant is said to have been holding at the material time. Police officers were informed and they arrested the appellant at the scene.

The witness also testified that the complainant was an imbecile and she could not communicate effectively.

One of the neighbours who responded to the **J N's (PW1's)** screams for help was **F W (PW2).** She testified she rushed towards the direction the screams were heard from and established that it was at the complainant's home. The witness found **J N (PW2)** struggling with the appellant as he attempted to flee; she also screamed and many more people came to help subdue the appellant. She saw the appellant wearing one shoe while the other one was in the bathroom where he had been found with the complainant; she identified the pair of shoes in court.

The complainant's mother, **J N W, (PW3),** testified that her daughter had never spoken in life and that she only responded to her name; she was aged 27 at the material time. On 21st January, 2012, she left the complainant outside the house as she went to work on her farm and while there **J N (PW1)** called her; she rushed home where she found many people including the appellant. Her daughter was holding a black inner wear which she also identified in court while the accused person was lying near the door to her house. She also testified that the appellant wore one shoe while the other one was found in the bathroom. She identified the shoe and the handsaw the appellant is said to have been found with. Police officers from Kiamachibi police station came and arrested the appellant while the complainant was taken to hospital for examination and treatment. She identified the treatment cards with which she was issued when the complainant was examined and the P3 form issued by the police when the case was reported to them.

Dr Caroline Mwende (PW3), a Government doctor working at Karatina Hospital testified that when she examined the complainant she established that the latter suffered from mental retardation and for that reason she could not communicate. Upon examination of the complainant she noted some semen in her vagina. A vagina swab was done and examined but at the time she gave her evidence in court, the results had not been collected by the police.

According to the doctor, the appellant whom he also examined, had been assaulted and sustained injuries on the right leg, the left hand and to his back. Upon cross-examination the doctor admitted that it was not established whether the semen found in the complainant originated from the appellant.

The police who arrested the appellant was police constable **Zakayo Achanja (PW4)**, who was then attached to Kiamachibi police station. His evidence was that on 21st January,2012 at noon, an assistant chief called him to say that a rape suspect had been apprehended. He then proceeded to the scene where he re-arrested the appellant. He recovered the appellant's shoe, his handsaw and the complainant's underpants from the scene. He escorted the appellant to the station and issued the complainant with a P3 form. The officer also testified that the appellant was examined in hospital soon after the incident.

The appellant opted to give a sworn testimony when he was called upon to defend himself. His evidence was that he was a casual worker and that on the fateful day, his colleague whom he identified as one Mugo called him for some work; he asked him to come along with a hand saw. Soon thereafter one Jane also called him. He later spotted a lorry from which the said Jane alighted with two men. He boarded the lorry to their home. He was to offload the lorry; it is not clear from his evidence the kind of luggage he was going to offload. When he demanded his payment for the work he had done, the two men set upon him and hit on the leg with a chair. Later the police were called and he was arrested. The appellant denied committing the offence.

Section 146 of the **Penal Code**, **Cap 63** under which the appellant was convicted and sentenced provides

as follows:-

> ***146. Defilement of idiots or imbeciles***
>
> ***Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.***

The learned magistrate found the appellant to have attempted to defile rather than defiled the complainant. In coming to this conclusion, the learned magistrate found the doctor's evidence on the complainant's sexual assault to have been doubtful. According to the doctor's evidence, though traces of seminal fluids were found in the complainant's vagina, it was not established that the semen was from the appellant. Again although a specimen of high vaginal swabs was taken, the results of the tests undertaken had not been collected by the police at the time she testified.

According to the learned magistrate "no tests were carried out in the laboratory" and therefore in the absence of such "laboratory tests" it could not be concluded that the semen found in the complainant's vagina was the appellant's; for this reason she held that the appellant could not be convicted on the principal count of defilement.

The P3 form admitted in evidence in proof of the results of the complainant's examination showed, *inter alia*, that upon such examination, semen was noted in the complainant's vagina. What came out clearly from this piece of evidence and the doctor's own testimony is that there was, at least, an examination of the complainant's genitalia; this examination revealed traces of semen. Apart from this examination, the doctor testified that there was a vaginal swab which had also been subjected to examination but that the results thereof had not been collected by the police by the time the doctor testified.

In my humble view, it was a misdirection on the part of the learned magistrate to hold that there was no examination at all in the face of the foregoing evidence. There was indeed an examination except that the results of the examination were not collected by the police. As far as the examination of the genitalia was concerned, the results revealed that there was semen in the complainant's vagina; the results for this part of examination was contained, as noted, in the P3 form which the learned magistrate admitted in evidence. Without any contrary evidence, I think, the learned magistrate again misdirected herself when she held there was no proof of the presence of semen in the complainant's vagina merely because, in her respectable view, there were "no tests carried out in the laboratory". The methodology by which the doctor reached her conclusions, including the details of how she came to the conclusion that there was semen in the complainant's vagina was not in issue; what I understood the doctor to say was that though she established that there were traces of semen in the complainant's vagina, she did not establish conclusively that the semen originated from the appellant.

Having accepted the doctor's evidence that there were seminal fluids in the appellant's vagina, the question that naturally follows is how else could this semen have been inseminated if not by sexual intercourse?

Although the appellant was not caught in the act, the circumstances under which he was found with the complainant attract the inference that he defiled the complainant. The appellant was caught in a closet with the complainant alone; the latter was holding her pants and as the learned magistrate herself held, she sat in a position that was ideal for a sexual encounter; the appellant on the other hand was pulling up his trousers. He resisted attempts by **J N I (PW1)** to forcefully open the bathroom door and only opened it when sought to escape. These facts constitute what, in my view, is circumstantial evidence that the appellant defiled the complainant. The trace of semen in the complainant's vagina simply corroborated the testimony of the evidence at the scene of crime.

Section 164 of the **Evidence Act, Cap. 80** appears to make reference to this sort of evidence where proof

is sought of any particular fact; it states as follows:-

> ***164. Circumstantial questions to confirm evidence***
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> ***When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies.***

I understand this section to mean that if there is proof of circumstances that tend to confirm the evidence of a witness as to the existence of a particular fact, the court may rely on such evidence of circumstances that may have been observed at or near the time or place the fact in issue occurred. If the circumstances are proved beyond reasonable doubt, the court may convict in the absence of direct evidence; however, circumstantial evidence must be narrowly examined before drawing any inference and coming to any conclusion. The court must be satisfied that the circumstances are such that no other inference can be drawn from them other than that of guilt on the part of the accused person. The leading decisions on this issue are **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715.**

In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa quoted **Wills on Circumstantial Evidence** and held that:

> "***In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."***

In **Simon Musoke versus Republic**, this principle was extended when the same court cited with approval a passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** where it was held at page 489 that:-

> ***"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

In my humble view, the compromising position in which the appellant was found with the complainant in such an odd place as a bathroom; the fact that both were undressed; and the trace of semen in the complainant's vagina comprised inculpatory facts that implicated the appellant. Taken together, these facts were incompatible with the innocence of the appellant and incapable of any other reasonable hypothesis than that of his guilt. I would therefore disagree with the learned magistrate and find that there was sufficient evidence to convict the appellant on the main offence rather convict him on the attempt to commit the offence.

It would, however, appear that under **section 146** of the **Penal Code**, it matters little whether one is convicted of having committed the offence of having unlawful carnal knowledge with an imbecile or attempting to commit such an offence because the penal consequences are the same; under this provision of the law, whether one is convicted of commission of the offence or an attempt to commit it, he is liable to imprisonment with hard labour for fourteen years imprisonment.

The learned magistrate imposed the maximum sentence and jailed the appellant for fourteen years. The appellant, in his mitigation pleaded for mercy and said that he has family that apparently looked up to him for up-keep. The state confirmed that he was a first offender. Even though the learned magistrate stated in her judgment that she had considered the appellant's mitigation and the fact that he was a first offender, she still imposed the maximum sentence. If the learned magistrate was satisfied that the appellant was

remorseful and there was no dispute that he was a first offender and, more importantly, considering the maximum sentence is not prescribed as a mandatory one, I would say that the sentence imposed was harsh and I am inclined to disturb it and substitute it with a sentence of 10 years imprisonment.

Except for the variation of the sentence, I do not find any other merit in the appellant's appeal and it is hereby dismissed.

Signed, dated and delivered this 7th day of October, 2016

Ngaah Jairus

JUDGE