



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 30 OF 2014

(From original sentence and conviction of the principal Magistrate's court at Kilifi Criminal Case no. 122 of 2005 before Hon. C. Obulutsa - SRM)

MWAMBEJE KALAMA JUBA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant was charged with the offence of an Imbecile contrary to Section 140 of the Penal Code. The particulars of the offence were that the appellant on the 30th February, 2005 at about 6.30pm at [particulars withheld] area in Kilifi district within the Coast Province, unlawfully had carnal knowledge of C M N a girl who is an imbecile.

The appellant was also charged with an alternative count of indecent assault on a female contrary to Section 144(1) of the Penal Code. He was convicted after the trial magistrate substituted the charge of rape to that of defilement under Section 145 (1) of the Penal Code. He was sentenced to serve 20 years imprisonment. The appellant filed criminal appeal number 44 of 2005 but the same was summarily rejected under Section 352 (2) of the Criminal Procedure Code by Justice Ombija on 8th February, 2007. The appellant filed appeal number 32 of 2014 before the Court of Appeal. The Court of Appeal allowed the appeal and set aside the decision of the High Court that had summarily dismissed his appeal and referred the appeal for hearing.

The appellant's grounds of appeal as per his old appeal are that he was examined by a doctor on 3rd February, 2005 while the complainant was examined on 2nd February, 2005 and the doctor testified that the sperms that were found on the complainant did not match his blood sample, that it was claimed there was a struggle between him and the victim who was carrying water yet no soiled clothes of the victim were produced, that his defence was not considered, the evidence of PW1 was not consistent and that the sentence is harsh.

The appellant filed written submissions which elaborate on the above grounds. He contends that his rights were violated because the trial court convicted him of a charge different from the one he was facing in court. The charges were substantially amended without his notice. It was alleged that the hymen was freshly torn but the age of the injuries was not given. No proper investigations were conducted.

The State, through its counsel, promised to file written submissions but did not do so.

Before the trial magistrate, five witnesses testified. The evidence was extremely summarized by the trial magistrate. PW1, M M N, testified that the Complainant was her daughter and she was imbecile. On the 3rd February, 2005 she was from drawing water with the victim when the victim walked ahead of her. Before reaching home she saw the victim's pants on the ground. She checked on the nearby bush and saw the appellant having sex with the victim. She lifted the appellant who started running away and screamed. Two people went to the scene and helped her arresting the appellant. The appellant was taken to the police station while the victim was taken to hospital.

PW2, K T, heard PW1 screaming and rushed to the scene. He found the appellant without his trouser and the victim putting on her dress. He arrested the appellant and took him to the chief. The appellant was later taken to Kilifi Police station. PW3, N M, also heard the screams of PW1 and rushed to the scene. He saw the appellant without his trouser and the victim holding her pant in her hands. They apprehended the appellant and took him to the police station. PW4, DR. ONDIEK was based at the Kilifi District Hospital. He produced the P3 form that had been filled by Dr. Mwakangaru who was on transfer. The P3 form showed that the victim had a freshly torn hymn and blood clot. No spermatozoa was seen. PW5, PC. ODHA was based at the Kilifi police station. On 4th February, 2005, the report was made at the police station and the victim was an imbecile. He referred the victim for treatment and issued her with a P3 form.

In his defence, the Appellant gave unsworn testimony. He stated that he was 24 years old and the complainant is known to him being his neighbor. He was walking along the same road with the complainant only for a woman to accuse him of raping the complainant.

The main issue for determination is whether the appellant raped or defiled the victim. The ground of appeal that the appellant was examined by a doctor is misplaced as the record shows that the appellant was not taken for examination. The prosecution evidence shows that the complainant was raped as per the examination contained in the P3 form. The defence evidence did not raise any doubt on the prosecution case. The trial court noted that the appellant was within the vicinity where the victim was. There was no assessment by the court as to whether the victim was indeed an imbecile. She never testified and the record does not show that she ever attended court.

The appellant was checked under Section 140 of the Penal Code. Section 140 provided for the offence of rape. The Section presupposes that the victim would be an adult. The trial court noted that the victim's age was assessed as 17 years. An age assessment certificate done on the 24th February, 2005 by Dr. Tsofa was produced. The P3 form on the part filled by the police indicates that the complainant was an adult. However, the part filled by the doctor estimated the age of the complainant to be 17 years.

The trial magistrate took it that the complainant was 17 years and substituted the charge of rape with that of defilement contrary to Section 145 (1) of the Penal Code. By that time, in 2005, the Sexual Offences Act No. 3 of 2006 had not come into effect. The former Section 145 (1) of the Penal Code had been also repealed through Act No. 5 of 2003. Under the old Section 145(1) the sentence for defilement of a girl under 14 years was 14 years imprisonment with hard labour. The 14 years was the maximum sentence. That Section was replaced with a new Section 145(1) which provided for defilement of a girl under 16 years. The new Section brought in by Act No. 5 of 2003 provided the punishment as life imprisonment with hard labour. Sections 139 to 149 as well as 161, 164, 166, 167 and 168 of the Penal Code were repealed by the Sexual Offences Act.

Under the Section 145 (1) which was used by the trial magistrate to convict the appellant, the crucial provision was that it provided for defilement of a child under 16 years old. The victim was 17 years old and therefore outside the provisions of that Section. I do therefore, find that the appellant was properly charged with the offence of rape under Section 140 of the Penal Code and there was no need to substitute the charge. That being the case, the maximum sentence under Section 140 was life imprisonment. Since the complainant was an imbecile there was a provision for such people under Section 146 of the Penal Code which had provided for 14 years imprisonment. It appears that Section 146 was still in operation by the time the Sexual Offences that have not been enacted. Act No. 5 of 2003, only made minor changes on Section 146 but did not affect the punishment.

Given all the circumstances of the case, I do find that the appellant ought to have been sentenced to a maximum period of 15 years imprisonment under Section 146 of the Penal Code. That was the Section which provided for defilement of idiots or imbeciles. Similarly, Section 140 of the Penal Code which provided for rape provided life imprisonment as the maximum sentence. The facts of the case do not show to what extent the complainant was handicapped. It is just indicated that she was an imbecile. According to PW1, she was walking with the complainant when she saw her pant on the ground. Its not clear how far PW1 was from the complainant. It is also not clear how the appellant quickly took the complainant to the bush without her resistance. The prosecution evidence however, shows that the appellant was caught red handed by both PW1 and PW2. PW3 also went to the scene and saw the appellant without his trouser.

I do find that the prosecution proved its case of defilement of an imbecile contrary to Section 146 of the Penal Code. I will substitute the charge of rape contrary to Section 140 of the Penal Code with a charge of Defilement of an Imbecile contrary to section 146 of the Penal Code. The maximum sentence under Section 146 was fourteen years imprisonment. The appellant was sentenced to serve twenty years imprisonment on 19th August, 2005. He has now served almost ten years imprisonment. I do find that that period is enough punishment. The appeal on sentence is hereby allowed.

In the end, the appeal on conviction is disallowed. The appeal on sentence is allowed. The 20 years imprisonment sentence imposed by the trial magistrate is hereby set aside and replaced by the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered this **10th** day of **March, 2015**.

Said J. Chitembwe

JUDGE