



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 143 OF 2012**

**PATRICK NJIRU KAGORU.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTION**

**(Being an Appeal from the Conviction and Sentence by J.P. NANDI Resident Magistrate Runyenjes in Criminal Case No. 400 of 2012 on 27th August, 2012)**

**J U D G M E N T**

1. **PATRICK NJIRU KAGORU** the appellant was charged with the offence of **Rape contrary to Section 3(1) (a)(c)(3) of the Sexual Offences Act**. The particulars as stated in the charge sheet were as follows:-

***“On 15th day of March 2012 in Embu county, intentionally and unlawfully caused his penis to penetrate the vagina of LNN, a person who is mentally ill without her consent.”***

2. **ALTERNATIVE COUNT**

***Committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act No. 3 of 2006.***

The particulars are:-

***“On the 15th day of March 2012 in Embu County, intentionally touched the breast/vagina of LNN, who is mentally ill with his penis against her will”.***

3. The appellant denied the charges, was tried and convicted of the principal charge and sentenced to ten (10) years imprisonment.

4. When the appeal came for hearing the State conceded to the appeal the main ground being that the learned trial Magistrate declared the complainant to be vulnerable without seeing her.

5. Secondly the doctor who made that assessment was not called as a witness. Mr. Wanyonyi for the State submitted that the Court ignored the provisions of Section 125(2) of the Evidence Act which provides:-

***“A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them”.***

6. He referred the Court to the cases of:-

- (i) *Stephen Wachira Mwangi Vs Republic - Kerugoya HCRA No. 165/2012*
- (ii) *Peter Baario Vs Republic - Nyeri Misc. Criminal Application No. 20/2010*
- (iii) *Republic Vs John Mwangangi Yolo - Machakos HCR. Case No. 7/2003.*

7. The last two cases dealt with the mental status of accused persons. In the third case which was a murder case the requirement is mandatory. While in ***Peter Baario (supra)*** the Court had noted from the accused's talk that he could be having a mental problem. A mental assessment report was therefore required to confirm his status.

8. The case relevant to this present one is the one of ***Stephen Wachira Mwangi (Supra)*** as it concerned the status of a complainant whom the doctor found to be an incompetent witness but on examination the Court found that she was able to communicate with the Court. And the Court was only able to come to such a conclusion after having a conversation with her.

9. The contrary happened in the case giving rise to this appeal.

- (I) The learned trial Magistrate declared vulnerable a witness he had not seen nor interacted with.
- (ii) It was wrong for the Prosecution to present such a report to the Court without the maker being called nor a basis being laid for his failure to attend Court.
- (iii) It was also unprocedural for the Court to rely on such a report without having seen the witness.

10. The charge and particulars in the principal charge are so unconnected and the Court ought to have rejected it and asked the Prosecutor to amend it, for the following reasons:-

(i) Section 3(1) of the Sexual Offences Act provides this; a person commits the offence termed rape if:-

***(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;***

***(b) the other person does not consent to the penetration; or***

***(c) the consent is obtained by force or by means of threats or intimidation of any kind.***

Section 3(3) of the Sexual Offences Act provides:-

***“A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life”.***

The provisions above only refer to victims who are capable of giving consent but have not done so. A mentally retarded person is not capable of giving consent.

- (ii) The particulars show that the complainant was a person with a mental challenge. Such persons do not give any form of consent.
- (iii) The Sexual Offences Act does not provide for offences of rape or defilement of persons with mental disabilities. One must go back to the Penal Code which provides for such an offence.

11. I would only have agreed with the Learned State Counsel to order for a retrial if the only blunder made by the learned trial Magistrate was failure to comply with Section 125(2) of the Evidence Act. In this case where the appellant was tried on a purely defective charge sheet, and has been in prison since 27/8/2012, I find that a retrial would cause an injustice to him.

For those reasons, I allow the appeal, I quash the conviction and set aside the sentence. The appellant to be set free unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9TH DAY OF MAY, 2014.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of:-**

**Ms. Mbae for State**

**Appellant**

**Njue/Kirong CC**