



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO 13 OF 2012**

**(Appeal from conviction and sentence in Kangema PM Criminal Case No 226 of 2012 – J O Magori, PM)**

**J B M.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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

1. The Appellant herein, **J B M**, was convicted upon his own plea of *defilement of a girl* contrary to **section 8(1) and (2)** of the *Sexual Offences Act, No 3 of 2006*. He was sentenced to life imprisonment. He appealed against both conviction and sentence. He was unrepresented both at his trial and in this appeal; however, after he presented his appeal in person, he requested that the court do provide him with counsel. The court obliged.

2. In his grounds of appeal filed from prison, the Appellant challenged his conviction upon the ground that he has been of unsound mind since birth, and that therefore the trial court erred in not ordering that he be first examined by a psychiatrist to determine whether he was fit to plead or stand trial. In additional grounds filed at the time of hearing of the appeal the Appellant challenged his conviction upon the ground, in effect, that his plea of guilty was not unequivocal.

3. On 21/06/2016 this court directed that the Appellant be examined by a psychiatrist. He was so examined on 15/12/2016 at *Mathari National Teaching and Referral Hospital*, Nairobi and a medical report of that date was filed in court. *Dr. Mucheru-Wang'ombe, Specialist Psychiatrist*, noted upon his mental status examination of the Appellant, that he avoids eye contact, it was difficult to establish rapport with him, he was monosyllabic in speech though coherent, and that further evaluation of him was not possible. The Specialist Psychiatrist formed the opinion that the Appellant –

**“...suffers from intellectual disability, a condition that does not improve with time. His psychotic symptoms can however be controlled with monthly anti-psychotic injection.”**

The psychiatrist also noted that the Appellant was **“unlikely to be fit to stand trial”**.

4. The history of the Appellant obtained from family members by the psychiatrist was that he “had delayed milestones right from childhood and dropped out of school at Standard 2. He laughs alone and talks to himself since childhood. He has not been on treatment ever since.”

5. Learned prosecution counsel for the Respondent submitted that from the mental status report from *Mathari National Teaching and Referral Hospital* the Appellant was clearly not fit to plead or stand

trial, and that therefore the conviction and sentence ought to be set aside. Counsel however further submitted that it would not be in the wider interests of justice to release the Appellant back to society just yet without treatment. He proposed that this court do make an inquiry into the Appellant's mental status (as the trial court should have done) and then proceed under sections 162 et al of the Criminal Procedure Code.

6. Learned counsel for the Appellant on his part noted that the Appellant was obviously mentally challenged and was unable to give full and proper instructions. He opined that the Appellant, because of his mental condition from birth, may not have been criminally responsible at the time of commission of the offence. Counsel agreed that this court could proceed as was suggested by learned prosecution counsel.

7. I have considered the submissions of the learned counsels in light of the psychiatrist's report. I have also observed the Appellant in court – his behavior, his manner of speech and gestures. He appears to be severely mentally challenged, a condition he appears to have had since birth. It is therefore quite clear that he was not fit to plead or stand trial, and this ought to have been noted by the trial court.

8. The plea as taken was clearly equivocal on account of the Appellant's intellectual disability and cannot be allowed to stand. It is hereby set aside, along with the sentence of life imprisonment imposed upon him.

9. Having done that however, I am satisfied that it will not be in the wider interests of justice to order the Appellant's immediate release from custody. The Specialist Psychiatrist noted in his report that the Appellant's psychotic symptoms can be controlled with monthly anti-psychotic injections.

10. I will in the circumstances refer this case back to the trial court with the direction that the court do make an inquiry under section 162 of the Criminal Procedure Code as to the soundness of mind of the Appellant based on the psychiatrist report dated 15/12/2016 already referred to, and then proceed as provided in that and subsequent sections. This will enable the Appellant to benefit from treatment of his psychotic symptoms. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 27<sup>TH</sup> DAY OF APRIL 2017**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 28<sup>TH</sup> DAY OF APRIL 2017**