

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 130 OF 2015

BETWEEN

J O M APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 882 of 2015 at Senior Principal Magistrates Court at Kisumu, Hon. J. Ng'arng'ar, SPM dated on 10th August 2015)

JUDGMENT

1. The appellant, **JOHANES OTIENO MASENO** was charged and convicted on his own plea of guilty of the offence of attempted defilement contrary to **section 9(1) and (2)** of the ***Sexual Offences Act***. The particulars were that on 4th August 2015 at [particulars withheld] village Upper Kadianga Sub-location, Bwo Location in Nyakach within Kisumu County, he unlawfully and intentionally attempted to cause his penis to penetrate the vagina of CA, a child aged 13 years.

2. At the hearing of this appeal, I directed that he be examined by a psychiatrist to determine his mental status and indeed by a report dated 11th October 2016, Dr. Edwin Nyaura stated that the appellant was labouring under very serious mental psychiatric disorder that he required immediate treatment. I accordingly committed him to Mathare Mental Hospital. He has now been released and he states that he understands the proceedings.

3. It is apparent from the record that the trial court did not ascertain the appellant's mental status before recording the guilty plea. At any rate there is evidence that the appellant was suffering serious mental illness. Mr Muia, counsel for the respondent, concedes this appeal on that basis.

4. As the plea of guilty was equivocal due to the appellant's mental status, the conviction and sentence is quashed. However, the appellant shall be taken back to the trial court for a re-trial and the trial court shall deal with the matter in accordance with **sections 162 to 167** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***.

5. The appellant shall remain in custody and shall be taken to Nyando Principal Magistrates Court on **7th November 2017** to take his plea.

DATED and DELIVERED at KISUMU this 30th day of October 2017

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Muia, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.