

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.270 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. G.L. Nzioka - SPM delivered on 2nd October 2010 in Kibera CM. CR. Case No.1551 of 2010)

PATRICK SANG'ANYI ONGERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Patrick Sang'anyi Ongeru was charged with the offence of **attempted rape** contrary to **Section 4** of the **Sexual Offences Act**. The particulars of the offence were that on 10th March 2010 at *[particulars withheld]* Estate in Nairobi, the Appellant intentionally and unlawfully attempted to commit an unlawful act by attempting to insert his male genital organ (penis) into the female genital organ (vagina) of C M M (the complainant) which could have caused penetration without her consent. He was alternatively charged with the offence of **committing an indecent act with an adult** contrary to **Section 11(6)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally and unlawfully committed an indecent act by touching the breasts of the complainant. He was further charged with the offence of **attempted suicide** contrary to **Section 226** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellant attempted to commit suicide by cutting his throat with a knife. When the Appellant was arraigned before the trial magistrate's court he pleaded guilty to the charges. However, it emerged that the Appellant was suffering from a mental disease. He was referred to Mathare Mental Hospital for treatment. The treatment took some time. When he was eventually treated, he was returned to court and sentenced to serve five (5) years imprisonment.

He was aggrieved by his conviction and sentence and duly filed an appeal to this court. His appeal was based essentially on the grounds that he did not have the requisite mental capacity to commit the offence. This is because at the time he committed the offence, he was suffering from a mental disease. Ms. Ngetich for the State conceded to the appeal. She stated that the Appellant lacked the requisite mental capacity to commit the offence. He was a mental patient and had been treated at Mathare Mental Hospital for some time prior to and after the commission of the offence. On his part, the Appellant stated that he admitted to committing the offence but in reality he was not in control of his mental faculties at the material time. He urged the court to acquit him in view of the fact that he was a mental patient at the time he alleged to have committed the offence.

The Appellant was released on bail pending appeal on 16th June 2011 on the strength of a medical report which was prepared by Dr. Ngugi Gatere and Dr. John Mburu, both consultants' psychiatrists. They were of the same opinion that the Appellant suffered from a mental disease. According to Dr. Ngugi Gatere, at the time of commission of the offence, it was apparent that the Appellant suffered from severe major depressive disorder. The diagnosis was confirmed by Dr. I. Kanyanya, another consultant psychiatrist who added that the Appellant suffered from Temporal Lobe Epilepsy. From the record, it was clear that immediately after his conviction, the Appellant was admitted at Mathare Mental Hospital where he was treated for a period of more than nine (9) months.

Taking into consideration the totality of the facts of this case, it is clear that the Appellant lacked the requisite mental capacity to commit the offence. Criminal culpability is determined by the mental status of an accused person. Where it is established that an accused person lacks the requisite mental status (*mens rea*) to commit an offence, he cannot be found culpable of committing such criminal offence. In the premises therefore, the Appellant's appeal has merit and is hereby allowed. The conviction of the Appellant is quashed. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF MARCH 2015

L. KIMARU

JUDGE