



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 81 OF 2010**

FRANCIS CHOMBA NGIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Sentence and Conviction of S.M. MOKUA Senior Resident Magistrate Siakago in Criminal Case No. 1133 of 2007 on 9th September 2008)*

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

**FRANCIS CHOMBA NGIRI** the appellant herein was charged with the offence of **prostitution of persons with mental disability contrary to Section 19(1)(a) as read with Section 19(1)(h) of the Sexual Offences Act No. 3 of 2006.**

The particulars as stated in the charge sheet were as follows: -

***On the 8th day of July within Mbeere District of the Eastern Province, committed sexual offence namely Rape with S.W a person with mental disability.***

He was heard and convicted and sentenced to ten (10) years imprisonment. The appellant was aggrieved with the judgment and appealed against both conviction and sentence citing the following grounds.

1. ***The learned trial magistrate erred in both law and facts by failing to find that th charge sheet was materially defective.***
2. ***The learned trial magistrate erred both in law and facts by failing to solve the vivid contradictions present in prosecution case in his favour and yet they touched the core of the case.***
3. ***The learned trial magistrate erred both in law and facts by failing to consider or adequately consider his defence.***
4. ***The trial court findings in the judgment was not supported by evidence adduced thereof.***
5. ***The sentence imposed is manifestly harsh and excessive considering all circumstances of this case.***

The brief facts of this case are that on 8/7/2007 PW1 & PW2 heard screams from a river. They went there and found the appellant on top of the complainant while having sexual intercourse. PW1 tried to forcefully remove the appellant but he bit his finger. Members of public came and arrested the appellant.

PW4 the clinical officer examined both the complainant and the appellant. He found her to have lacerations on her right knee. The genitalia was normal and she told him she had not been raped (EXB2). He also examined the appellant. He had a swollen upper lip. He had no bruises in his genital area

(EXB1).

The appellant in his defence denied the charge and even being at the scene. When the matter came for hearing the appellant presented the court with written submissions. He expounded on his grounds.

The learned state counsel Mr. Wanyonyi conceded to the appeal on the following grounds.

- i. ***Alleged victim did not appear in court.***
- ii. ***There was no certificate from a medical doctor confirming her mental disability.***
- iii. ***The victim told the doctor she had not been raped.***

This being a first appeal this court is enjoined to re-evaluate and re-consider the evidence and come to its own conclusion. I bear in mind that I did not see or hear the witnesses. I refer to the case of ***NGUI VS REPUBLIC[1984] KLR 729*** where it was held

***“The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice, it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial courts’ findings and conclusions.”***

I have considered the submissions by the learned state counsel and those of the appellant. I have also re-evaluated the evidence that was adduced in the court below.

The appellant was charged with the offence of prostitution of persons with mental disability. And the particulars were that he raped a person namely S.W who has a mental disability. Three major ingredients were to be proved herein.

1. ***That S.W is a person with a mental disability.***
2. ***That indeed S.W was raped.***
3. ***That it is the appellant who raped the said S.W.***

First of all the said S.W was not availed in court as a witness yet she was the complainant. On two occasions the court adjourned the case because of the absence of the complainant. She was said to be a mental patient. On 12/5/2008 the prosecution had at page 10 lines 9 – 11 stated the following to the court.

***“Complainant is a mental patient. We intend to bring complainant before court for the court to make observations to give directions. We had asked relatives to bring complainant but they have not”.***

This is indeed what ought to have happened. The Court did not call for any medical documents to satisfy itself that indeed S.W was a mental patient. So what was the basis of his finding that she was a person with a mental disability?

The next issue is whether S.W was raped. PW1 & PW2 told the court that they actually found the appellant raping S.W. The evidence of the clinical officer (PW4) who examined S.W does not support their allegation. He said S.W only had a bruise on her knee and her genitalia was normal. He examined her on the same day of the alleged rape i.e. 8/7/2017.

Again what evidence was there to confirm she had been raped? There was no such evidence at all. Since there was no evidence to confirm the rape there is no need of going to the 3rd issue which was to determine if the appellant raped her. In fact what the learned trial magistrate is saying in his judgment is that there was an attempted rape. The appellant was not charged with laying on the complainant. He was charged with raping a person with a mental disability.

All in all failure to avail the complainant in court with no reasonable explanation and proof that she had a mental disability was fatal to the prosecution's case. The state conceded to the appeal on the same

grounds. I do find the appeal to have merit.

I allow it and quash the conviction. The sentence is set aside. The appellant to be released unless otherwise held under a lawful warrant.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST OF JUNE 2013.**

**H.I. ONG'UDI**

**JUDGE**

**In presence of:-**

**Mr. Wanyonyi for State**

**Appellant**

**Njue CC**