



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NUMBER 210 OF 2011

David Muchiri Njue.....APPELLANT

VERSUS

Republic.....RESPONDENT

(Being an appeal from the original conviction and sentence in Embu Criminal Case Number 1028 of 2010 by R.M. Oanda R.M on 5th November, 2011)

JUDGMENT

The appellant was charged with of the offence of rape of a person with mental disabilities contrary to Section 7 of the Sexual offences Act. He was convicted and sentenced to imprisonment for a term of 10 years.

The particulars of the offence were that on 16th May, 2010 at [particulars withheld] village of Embu District, he willingly and unlawfully caused his penis to penetrate the vagina of WM without her consent in the view of the said WM as a person with mental disabilities. He appeals against the conviction and sentence.

I have reviewed the record and I find that the appeal must succeed. Proof of mental disability of the victim is an essential ingredient of the offence which the prosecution must prove. Under Section 2 of the Sexual Offences Act, ***“person with mental disabilities means a person affected by any mental disability irrespective of its cause whether temporary or permanent and for purposes of this Act includes a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question, was:***

- a. ***Unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act;***
- b. ***Able to appreciate the nature and reasonable foreseeable consequences of such an act but unable to act in accordance with that appreciation;***
- c. ***Unable to resist the commission of any such act; or***
- d. ***Unable to communicate his or her unwillingness to participate in any such act;”***

I have evaluated the proceedings and it is clear that the mental state in terms of the definition of the Act, was not established by the prosecution. The evidence on record suggested that the witnesses considered the complainant mentally retarded yet there was no medical or other evidence to establish the fact. Since ***“mental disability”*** is a key ingredient of the offence under Section 7 of the Act, it must be established that the victim suffers from a mental disability within the meaning of the Act.

Furthermore, the complainant gave unsworn evidence which implicated the appellant. The recorded does not show that he was given the opportunity to cross-examine or put questions to her. This is a violation of Article 50(k) of the Constitution. Even where the victim is young or suffers mental disability, the right should not be denied. It is for the court to provide sufficient safeguards to the vulnerable witness under Section 31 of the Sexual Offences Act.

For the reasons I have set out, the appeal is allowed, the conviction and sentence are quashed. In view of the circumstances, I order a retrial.

Court:

Judgment read and delivered in open court this 18th day of October, 2013

D.A.S MAJANJA

JUDGE

18.10.2013

In the presence of

Mr Njogu for state

Appellant

Njue – Court clerk.