REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 316 of 2007

PATRICK MAINA MARY ……..……. …….APPELLANT
Versus

REPUBLIC……..…….RESPONDENT

JUDGMENT

Patrick Maina, the appellant herein, was convicted on his own plea of guilty for the offence of defilement contrary to section 8(1) as read with S. 2 of the Sexual Offences Act No. 3 of 2006. He was sentenced to life imprisonment. He has now come before this court to challenge both the conviction and sentence.

On appeal, the appellant has put forward a total of 6 grounds in his petition which can be summarized to two. First, the appellant alleges that he was not mentally sound at the time of taking plea hence the plea was equivocal. Secondly, the appellant claims that the sentence was harsh and excessive. Miss Ngalyuka, the learned State Counsel alluded in her submission that the plea was equivocal because the appellant was of unsound mind.

The record shows that the appellant was arraigned before the Senior Resident Magistrate's court for plea on 21st October 2005 to face a charge of defilement as earlier stated. The particulars of the charge were that on the 14th day of October 2005, in Nanyuki, in Laikipia District within the Rift Valley Province, the appellant had carnal knowledge of B.T M, a girl under the age of 11 years. On that date, Mr. Muriuki, the learned Senior Resident Magistrate noted that the appellant appeared to be of an unsound mind. He than referred the appellant to the Provincial Psychiatrist for mental examination. Thereafter several similar orders were made referring the appellant for mental assessment by the Nyeri Provincial Psychiatrist. It would appear that on 19/12/2006, the appellant pleaded guilty to the charge despite the fact that the Provincial Psychiatrist had not filed his report on the appellant. It was necessary for the trial Senior Resident Magistrate to satisfy himself that the appellant was mentally sound hence fit to plead before taking the plea. I am convinced that on this account, that the plea was equivocal hence the conviction cannot stand. I am satisfied that the learned State Counsel rightly conceded this appeal. There is no doubt, that the offence is alleged to have taken place on 14th October 2005. The appellant was originally charged under section 145(1) of the Penal Code. The prosecution applied to substitute the charge with one under S. 8(1) of the Sexual Offences Act. By then the appellant had not been consulted. There is doubt whether the Sexual offences Act could have been applied retrospectively. The original charge should have continued to its logical conclusion under section 48 of the Sexual Offences Act as read with regulation 3 of the First Schedule, Transitional Provisions. In any case the substitution was made when there was doubt whether or not the appellant was mentally sound. A fair order in the circumstances of this case is to allow the appeal and order for a fresh trial on the basis of the original charge.

In the end I allow the appeal. The conviction is quashed and the sentence set aside. The order of substituting and or amending the charge sheet is set aside. The original charge sheet dated 21/10/2005 is restored. The appellant to be held in custody and should undergo a fresh trial on the basis of the original charge on priority basis before another magistrate of competent jurisdiction other than E.G. Mbaya. Let the appellant be taken for mention before the Principal Magistrate, Nanyuki on 20/1/2010 for further orders and directions on the retrial process.

Dated and delivered this 13th day of January 2010.

J.K. SERGON
JUDGE

In open court in the presence of Mr. Makura learned State Counsel and the appellant in person.

J.K. SERGON
JUDGE