REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Revision 12 of 2010

SAIDI MASYA…………………………………………………………………..APPLICANT

-VERSUS-

REPUBLIC…………………………………………………………………….RESPONDENT

RULING ON REVISION

Against the applicant, a main charge and an alternative charge had been brought, the main charge being prostitution of persons with mental disability contrary to s. 19(1) (a) of the Sexual Offences Act, 2006 (Act No. 3 of 2006). The particulars under this charge were that the applicant, on ***27th January, 2010*** in Kaloleni District within Coast Province, committed an act of prostitution with an imbecile namely R.M., by offering her Kshs. 100/= knowing that she was an imbecile.

In the alternative charge, it was stated that the applicant had commited an indecent act with an imbecile contrary to s. 11(1) of the Sexual Offences Act. It was alleged that on ***27th January, 2010*** at the place aforesaid, the applicant committed an indecent act with an imbecile by touching the genitalia of P.N.M., an imbecile aged 46 years.

When this matter came up before the learned Resident Magistrate, ***Mr. S.W. Wewa***, on ***28th January, 2010***, the charges were read over and explained to the applicant in Kiswahili. In his reply to the principal charge, the record shows the applicant to have said: "I don't admit". But when the alternative charge was read out, the applicant replied: "I do admit that I touched her private parts".

At this stage, the record shows clear error on its face, as follows:

"Court – plea of guilty entered in respect of the [principal] charge".

Although the applicant had pleaded not guilty to the principal charge but guilty to the alternative charge, the Court entered the guilty plea in respect of the principal charge.

That erroneous entry was the basis upon which the prosecutor, ***Inspector of Police Masinde***, read out the facts of the case, which were as follows.

On ***27th January, 2010*** the applicant went to the complainant's house at Kaloleni town; and he promised the complainant who is of unsound mind, Kshs. 100/= in return for being allowed to have carnal knowledge of her. As the applicant prepared to commit the intended act, the complainant screamed, attracting members of the public who arrested the applicant and handed him over to the Police; and before the Police, he admitted to having offered the complainant Kshs.100/= in return for sexual intercourse. The complainant was taken to hospital and found to have no injuries though there had been penetration, and blood was detected in her genitalia which had spermatozoa.

After the applicant acknowledged the foregoing facts to be correct, it was thus held and recorded:

"Court – convicted [on] own plea of guilty".

The prosecution asked that the applicant be treated as a first offender; and the applicant made a statement in mitigation saying he was the bread-winner of the family, and that he had not been led by intent to commit the offence charged.

The Court concluded the matter and recorded as follows:

> "*Court* ***– the offence is serious and requires [a] deterrent sentence as accused is a threat to others. The accused to serve three years' imprisonment on the [principal] charge. The alternative charge is disregarded."***

The Court could not rightly have convicted on the principal charge, for the accused had pleaded not guilty to that charge. When the applicant admitted the facts as set out by the prosecution to be correct, the Court erroneously found him to have pleaded guilty to the principal charge – and this was in contradiction to his plea of not guilty, at the time the principal charge had been read out.

The Court should have proceeded to a hearing of evidence, in respect of the principal charge.

Further error in the proceedings is shown in the fact that, the facts as read out by the prosecutor, were more pertinent to the alternative charge, than the principal charge; yet the Court held that "the alternative charge is disregarded".

Lastly, the Court did not ensure specificity and accuracy in the taking of plea, in relation to the charges set out in the charge sheet. Consequently, the Court failed to fix the applicant with criminal liability on a focused basis as required by law; the ***generalised mode of dispensing penalty*** adopted by the Court, is inconsistent with the established judicial practices in the sphere of criminal justice.

For the foregoing reasons, the proceedings of ***28th January, 2010*** and the sentence imposed by the Court, are hereby set aside, on grounds of nullity. The applicant shall be forthwith set at liberty, unless he is otherwise lawfully held.

Orders accordingly.

DATED and DELIVERED at MOMBASA this ***23rd day of August, 2010.***

J.B. OJWANG
JUDGE