



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO.130 OF 2015

BETWEEN

JOHANES OTIENO MASENO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 882 of 2015 at Senior Principal Magistrates Court at Kisumu, Hon.J.Ng'arng'ar, SPM dated on 10th August 2015)

RULING

1. In the subordinate court, the appellant **KENNEDY OTIENO WANGURA** was charged and convicted of his own plea of guilty of the offence of attempted defilement contrary to **section 9(1) and (2)** of the ***Sexual Offences Act, 2006***. The particulars were that on 4th August 2015 in Nyakach District within Kisumu County, he unlawfully and intentionally attempted to cause his penis to penetrate the vagina of LA, a child aged 13 years.

2. He was sentenced to 10 years imprisonment and now appeals against conviction and sentence. When the appeal came up for hearing, it was apparent that the appellant could not understand the proceedings. I therefore directed that he be examined by a psychiatrist to ascertain his mental status. He was examined by Dr Edwin Nyaura who stated in his report dated 11th October 2016 that the appellant is laboring under very serious mental psychiatric disorder that required immediate treatment.

3. The procedure regarding mental illness is generally governed by **section 162 and 164** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. The relevant provisions state as follows;

162(1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.

(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.

*(3) If the case is one in which bail may be taken, the court may release the **accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the court or such officer as the court may appoint in that behalf.***

(4) If the case is one in which bail may not be taken, or if sufficient security is not given, the court shall order that the accused be detained in safe custody in such place and manner as it may think fit, and shall transmit the court record or a certified copy thereof to the Minister for consideration by the President.

(5) Upon consideration of the record the President may by order under his hand addressed to the court direct that the accused be detained in a mental hospital or other suitable place of custody, and the court shall issue a warrant in accordance with that order; and the warrant shall be sufficient authority for the detention of the accused until the President makes a further order in the matter or until the court which found him incapable of making his defence orders him to be brought before it again in the manner provided by sections 163 and 164

164. Whenever a trial is postponed under section 162 the court may at any time, subject to the provisions of section 163, resume trial and require the accused to appear or be brought before the court, whereupon, if the court considers the accused to be still incapable of making his defence, it shall act as if the accused were brought before it for the first time.

4. Although, these provisions do not expressly apply to an appeal, I hold that for purposes of this appeal, the appellant is a person who is unable to make his defence and accordingly, I will be guided by **section 162** of the *Criminal Procedure Code* and postpone the appeal to facilitate the appellant's treatment.

5. I therefore commit the appellant to Mathare Mental and Psychiatric Hospital for treatment until he can understand these proceedings.

DATED and DELIVERED at KISUMU this 8th day of November 2016

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.