



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. 202 OF 2012**

**NZOKA KAMALA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Criminal Case No. 101 of 2013 by Hon. S. K. Mutai, SRM on 28/8/2012)*

**JUDGMENT**

1. The appellant was charged with the offence of being involved in the prostitution of a person with mental disability contrary to **Section 19(1) (a)** of the **Sexual Offences Act No. 3 of 2006**. Particulars thereof being that on the **22<sup>nd</sup> day of May, 2012** at around **6.00pm**, at **[particulars withheld] village, Kyatune Location** in **Mutomo District** within **Kitui County**, intentionally and unlawfully caused his penis to penetrate the vagina of **L M M** a person with mental disability.
2. In the alternative the appellant was charged with committing an indecent act with an adult contrary to **Section 11(A)** of the **Sexual Offences Act No. 3 of 2006**. Particulars thereof being that on the **22<sup>nd</sup> day of May, 2012** at around **6.00pm**, at **[particulars withheld] village, Kyatune Location** in **Mutomo District** within **Kitui County**, intentionally and unlawfully had an act of indecency with **L M M** a female adult by touching her private parts namely breast and vagina without her consent.
3. The case was heard; he was convicted and sentenced to serve **ten (10) years** imprisonment. Being aggrieved by the decision of the court, he now appeals on the grounds that the learned trial magistrate erred in law and fact;-
  - i. By relying on evidence that did not prove the charge;
  - ii. By accepting evidence of the officer who examined PW1;
  - iii. By not appreciating that a grudge existed between him (appellant) and PW3 the husband of the complainant;
  - iv. By rejecting the defence tendered.
4. Evidence adduced by the prosecution was that on the **22<sup>nd</sup> May 2012**, at **6.00pm**, PW1, **L M M**, the complainant was on her way home when she encountered the appellant who put his finger on her vagina then removed her pant. He had sex with her and showed her the way. She went home and told her husband and children what had transpired. They took her to hospital. She was examined by **PW2, Daniel Mulwa**, a clinical officer who examined her and found that she was a psychotic patient. She had sustained bruises on the vulva which was swollen and vagina.
5. PW4, **No. 2007116585 APC James Mwiti** arrested him. PW5, **No. 85 760 PC Dickson Kikenye** investigated the case and charged him.
6. In his defence the appellant stated that on the **22<sup>nd</sup> May, 2012**, he was making bricks. He slept at

- his uncle's place. He was arrested the following day. He called a witness, **DW2 Kumala Jonathan** who supported his defence.
7. At the hearing of the appeal, the appellant relied solely on his written submissions where he stated that the charge was defective, the prosecution should have called the first health officer who examined the complainant; and that his defence was disregarded.
  8. In response thereto, learned State Counsel **Ms Amojong** submitted that the appellant was well known to the complainant who positively identified him. The clinical officer who filled the P3 form was the one who examined her. He also stated that the complainant was a psychotic patient. It was concluded the complainant had been raped; although the appellant put up an *alibi* defence, the prosecution's evidence put him at the scene. She called upon the court to find that evidence adduced was credible and the sentence passed legal.
  9. This being the first appeal, I do remind myself of the duty to re-evaluate and re-consider evidence adduced in order to come up with my own independent conclusions bearing in mind the fact that I had no opportunity of hearing or seeing witnesses who testified. (See **Okeno versus Republic 1972 EA 32**).
  10. The appellant was accused of having been involved with a person with mental disability. A person with mental disability is defined by Section 2 of the Sexual Offences act, 2006 as:

***“A person affected by any mental disability irrespective of its cause, whether temporary or permanent. Such a person at the alleged commission of the offence would not be able to appreciate the nature and reasonable consequence of the act; would not be able to resist the commission of the act and would not be able to communicate her unwillingness to participate in the act”.***

11. The Clinical Officer who testified stated that the complainant suffered from psychosis. A psychotic would be a person who has an abnormal condition or mind. Such a person may have loss of contact with reality. PW2, the husband to the complainant stated that she was mentally challenged.
12. The prosecution had a duty of establishing the fact that the complainant was mentally challenged. Had a post rape care form been filled, it would have assisted the court analyze evidence based on the perceptual disorders that the victim had to enable it reach its conclusion.
13. Prostituting would be a practice where a person engages in sexual relationship in exchange of some benefit like payment of money.
14. **Section 19(1)** envisages a situation where an accused commits a sexual act with a person who has a disability for financial gain to either himself or such a person.
15. No evidence was adduced to suggest that the appellant did engage in prostitution with the complainant in that respect.
16. In this regard the particulars of the offence did not disclose ingredients of the charge as framed.
17. There is the alternative charge of committing an indecent act with the complainant. An indecent act is stated to mean; an unlawful act that causes any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration.
18. Medical evidence adduced proves that there was penetration into the complainant's genitalia. This is contrary to the ingredients set out in the particulars of the offence. The evidence adduced does not support the offence of committing an indecent act.
19. In order for this court to make a finding, whether any other offence could have been committed under the act, the prosecution should have adduced evidence to prove that following the disorder that the complainant had, she was not hallucinating or out of reality to be able to tell who her assailant was. Without such evidence it would be unsafe to return a verdict of guilty.
20. In the result the appeal must succeed. Consequently, the appeal is allowed. The conviction is quashed and sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.
21. It is so ordered.

**DATED, SIGNED and DELIVERED at KITUI this 17<sup>TH</sup> day of JULY, 2014.**

**L.N. MUTENDE**

**JUDGE**