**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**HCCRA NO. 100 OF 2015**

**(FORMERLY NAKURU CRIMINAL APPEAL NO. 50 OF 14)**

***(Being an appeal against Conviction and sentence in Naivasha Criminal Case No. 203/2014- E. K. Kimilu Ag. PM )***

**JOEL NJOROGE NJENGA…….APPELLANT**

**VERSUS**

**REPUBLIC……RESPODENT**

**J U D G M E N T**

1. The Appellant was convicted on his own plea of guilty for the offence of Defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual offences Act. The particulars stated that between 4th and 26th January 2014, at [particulars withheld] , Naivasha sub-county, the Appellant caused his penis to penetrate the vagina of M.N.N. a girl aged 16 years.
2. He has filed an appeal to this court and raises *inter alia* the following grounds:-

**1. THAT he pleaded guilty believing that the charge against him related to child marriage.**

**2. THAT he believed the Complainant was over 18 years thus he married her and his "intentions were based upon a clear conscience……..." Other grounds related to the sentence.**

**3.** His written submissions however took the form of a defence to the effect that he married the girl believing she was over 18 years. As well, he raises several mitigating grounds in his favour. Section 348 of the criminal procedure code states that:

**"No appeal shall be allowed in the case of an accused who has pleaded guilty and been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."**

**4.**The Appellant here has impugned the plea of guilt recorded against him claiming that he believed he was pleading guilty to the charge of marrying an under age girl. He also claims that the sentence imposed was harsh and excessive. This court therefore must review the record of plea taking in the lower court in order to satisfy itself that the process was regular, and that the plea was *unequivocal.*

**5.**The principles guiding plea taking are well settled since the case of **Adan -vs- Republic (1973)**

**E.A. 445** as follows:-

**"a) The trial magistrate or judge should read and explain to the Accused the charge and all the ingredients in the Accused's language or in a language he understands;**

b. **He should then record the Accused's own words and if they are an admission, a plea of guilty should be recorded;**

c. **The prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**

d. **If the Accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the Accused's reply."**

See also **Lebiringin -vs- Republic 1974 E.A 103** and **Kato -vs- Republic (1971) E.A 542**

6. The record of the subordinate court shows that the charge was read over to the Appellant in Kiswahili language which he understood. He replied; **"It's true".** The facts in support of the charge were read out to the Appellant and the Appellant stated: **"Facts are true".** A conviction was duly entered against him. So far, the plea taking cannot be faulted.
7. The prosecution did not prove past records and treated him as a first offender stating however that the Appellant had another similar but pending case whose particulars were not given. But at any rate such statements serve no purpose. When called upon to address the court in mitigation, all the Appellant stated was that M. (N.N.) was 17 years old in 2013, which suggests that on the date of the offence in 2014, she could have been over 18.
8. The particulars of the charge stated that M.N.N. was 16 years in January, 2014. Even though the Appellant had admitted the facts as read out by the prosecution, the court should have recorded a change of plea in this case. A challenge to age, which is a key ingredient of the charge having been raised, the plea of guilt ceased to be *unequivocal*.
9. Notwithstanding the fact that Section 8 (4) of the Sexual Offences Act covers the age bracket between 14 and 18 years, the plea court could not properly proceed to sentence the Appellant. More so in this case where, it was being proposed that the Complainant was 17 in the previous year and therefore could have been 18 on the date of the offence.
10. I find therefore that the plea of guilt was not *unequivocal* for the stated reasons. I will quash the conviction and set aside the sentence of 15 years imprisonment. I direct in this case that in the interest of justice a retrial be conducted. **(See John Bell Kinengeni -vs- Republic (2015)eKLR**. ) For this purpose the Appellant will appear before the Chief Magistrate's court Naivasha on **16TH May, 2016** to take a fresh plea.

Delivered and signed at Naivasha this…… **13TH** ……day of…….**May**…..2016.

**C. Meoli**

**JUDGE**

In the presence of:

Mr. Koima for the DPP

Appellant in person

Court clerk Mr. Barasa