



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 125 OF 2014

MWANGOLO NEEMA APPELLANT

VERSUS

REPUBLICRESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 389 of 2014 of the Principal Magistrate's Court at Mariakani – Hon. Shiundu – Ag. SPM)

JUDGMENT

The Appellant herein was Convicted and Sentenced to fifteen (15) years imprisonment for the offence of defilement contrary to section 8(1) as read with Section 8(4) of the Sexual offences Act No. 3 of 2006.

The particulars are that:-

“On diverse dates between December, 2013 and March, 2014 in [Particulars withheld] village Kinango – Kwale County he willfully and unlawfully caused his penis to penetrate the vagina of N M A child aged seventeen (17) years”.

Upon being arraigned in Court on the 21st day of May, 2014 the Accused pleaded guilty, facts were read to him and he stated that they were correct and he was subsequently Convicted and Sentenced to serve (15) years imprisonment.

A perusal of the facts presented before the learned trial magistrate by the prosecutor show that the Complainant was aged seventeen (17) years at the time of the alleged defilement. The incident was reported to police after medical tests indicated that the Complainant was pregnant.

In his mitigation the Accused had told the Court that he was aged twenty (20) years.

Section 8(5) of the Sexual offences Act affords an Accused person a defence if,

“(a) It is proved that such a child deceived the Accused person into believing that he or she was over the age of eighteen (18) years at the time of the alleged commission of the offence and;

(b) The Accused reasonably believed that the child was over the age of eighteen (18) years”.

The Accused was not afforded the opportunity to raise such a defence and this was prejudicial to his case. To that extend, the plea was not equivocal.

It is noted that the Appellant was Convicted on 21st day of May, 2014. A retrial will not be prejudicial to his case. It is accordingly ordered that the Conviction and Sentence are hereby reversed and a retrial to be held/conducted by a Court of competent jurisdiction.

Mention before the Magistrate In charge Mariakani Court on **5th March, 2015** for taking of plea and further directions.

Judgment delivered dated and signed this **25th** day of **February, 2015**.

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M. MUYA

JUDGE

25TH FEBRUARY, 2015

In the presence of:-

Miss Ogweno for the State

The Appellants in person

Court clerk Musundi