REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRA NO. 80 OF 2011

(Appeal from Principal Magistrate Hon. E. C. Cherono in Webuye court in criminal case no.1269 of 2010)

RODGERS WANDABWA ::::::::::::::::::::::::::::::::: APPELLANT

~VRS~

REPUBLIC ::: RESPONDENT

JUDGMENT

The Appellant was convicted on his own plea of guilty of defilement contrary to section 8 (1) and (3) of the Sexual Offences Act no.3 of 2006 whose particulars were that on 10/9/2010 in Tongaren location in Bungoma North District within Western Province he unlawfully and intentionally caused his penis to penetrate the vagina of C.N.M a child aged 17 years. He was sentenced to serve 15 years in jail.

The facts that were narrated by the prosecution, and accepted by the Appellant to be true, were as follows. On 10/9/2010 at about 6.00 p.m. the complainant was on her way to school when she met the Appellant who begun to seduce her. He promised to marry her and take her to Mombasa where he would find her a job. She agreed to come with him to Webuye and then to Kimilili and finally to Tongaren where he took her to his grandfather's house where he defiled her. On 13/9/2010 her father was informed that she was at Tongaren. He went there on 14/9/2010 and rescued her from the house. The Appellant was arrested. The two were taken to Kiminini Police Station where a report was made and were examined at Webuye District Hospital. The complainant was not found with any lacerations or bruises on her genitalia and her hymen was not intact. The Appellant was convicted. He had no past record and asked to be treated leniently. The court called for a probation report. It was not favourable. He was sentenced to serve 15 years in jail.

The Appellant has appealed against the conviction and sentence. In the grounds he alleges he is epileptic and had just come out of hospital and was therefore confused and not able to appreciate the magnitude of the charge. He also alleges that the police and a prosecution witness had asked him to plead guilty to be able to gain release.

I have looked at the record. The complainant was 17. The Appellant ought to have been charged under section 8 (1) and (4) of the Act. He was, however, charged under section 8 (1) and (3) which deals with a complainant who is aged between twelve and fifteen. It means that the particulars and the narrated facts were at variance with the charge. The Appellant was convicted of an offence which he was not charged with. The trial court made an error of law when it failed to appreciate that the particulars and the narrated facts related to a 17 year old complainant when the statement of offence charged that the defilement was of a girl of age between twelve and fifteen. This error prejudiced the Appellant.

The Appellant asked to be retried. I find that was a fair request given the facts of the case.

In conclusion, I allow the appeal and set aside the sentence. I order that the Appellant be retried by another competent court after the charge is appropriately amended.

Dated and delivered at Bungoma this 19th day of March, 2012.

A. O. MUCHELULE
JUDGE