NEWTON CHOMBA WATHITHA……..APPELLANT

VERSUS

REPUBLIC……..……..……RESPONDENT

From original conviction and sentence of B.J. NDEDA – SRM in Cr. case No. 533 of 2008 delivered on 19/5/2008 at the Resident Magistrate's Court at GICHUGU

J U D G M E N T

The Appellant herein was charged before the Gichugu SRM's Court vide **CR. CASE NO. 533 OF 2008** with two offences viz;

1. CHILD TRAFFICKING CONTRARY TO SECTION 13(b) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006

Particulars stated in the charge sheet were as follows;

NEWTON CHOMBA WAITHITHA: On the diverse dates between 11th and 16th day of May 2008 in Kirinyaga District within Central Province did hobour A.K.G a girl under the age of 15 years for the purpose of having unlawful carnal connection with her.

2. DEFILEMENT OF A GIRL UNDER THE AGE OF 15 YEARS CONTRARY TO SECTION 8(1) and (3) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006

The particulars stated in the charge sheet were as follows;

MEWTON CHOMBA WATHITHA: On the diverse dates between 11th and 16th day of May 2008 in Kirinyaga District within Central Province had unlawful carnal connection of A. K.G a girl under the age of 15 years.

On 19/5/2008 when the matter came for plea the charges were read to the accused and he pleaded guilty to both counts. Facts were read out to the accused who admitted both counts. There was no conviction on any of the counts and the trial Magistrate went ahead to take mitigation and gave sentence.

One cannot be sentenced before he/she is convicted of an offence. This is procedurally wrong. Secondly the facts presented before the court on 19/5/2008 did no disclose any offence known in law. Section 13 of the Sexual Offences Act which was the subject of count one was repealed in 2010. And in any event the Appellant was not convicted of that offence.

My major concern is count two for which the Appellant is serving sentence. Section 8(1) of the Sexual Offences Act under which the Appellant was charged provides;

"*A person who commits an act which causes Penetration with a child is guilty of an offence termed defilement*".

The **ACT** defines penetration as meaning "*the partial or complete insertion of the genital organs of a person into the genital organs of another person"*.

There is nowhere in the **ACT** anything talking about *"Carnal Connections"*. Even if one would close his/her eyes and assume that carnal connection means penetration there is nowhere in the facts read out to the court where it's shown that the Appellant had the so called carnal connection with the complainant. Finally the P3 form produced therein was so worthless and could not even assist the court. It had writings to the effect that the *"Vaginal Canal was open and D.D.T was negative"*. I do not know what the learned trial Magistrate interpreted it to mean.

A reference to section 169(2) and section 215 Criminal Procedure Code clearly shows that a conviction precedes sentence. Secondly under the Sexual Offences Act No.3 of 2006 there are no words known as **"CARNAL CONNECTION".**

Thirdly in reference to the case of ***ADAN –VS- REPUBLIC 1973 EA 445*** the main reason why facts are read is to enable the trial court to satisfy himself/herself that the plea of guilty was really unequivocal and that the accused has no defence. The particulars of the charge herein did not disclose the ingredients of a charge of defilement under the Sexual Offences Act. The facts given by the Prosecution did not add any meaningful value to the particulars. The P3 form (EXB 1) did not in any way make things better for the Prosecution.

My finding therefore is that the plea was equivocal and cannot be left to stand. I allow the Appeal and quash the conviction. The sentence is set aside. The Appellant to be set at liberty unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED AT EMBU THIS 3RD DAY OF MAY 2012.

H.I. ONG'UDI
J U D G E

In the presence of;

M/s Matiru for prosecutor

Appellant – present

Njue – C/c