

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA OF KISII

Criminal Appeal 110 of 2004

(From original conviction and sentence of the RM's Court at Kehancha in criminal case

No.113 of 2004)

THOMAS MBARI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT:

Appellant was convicted on his own plea of guilty for the offence of defilement of a girl under the age of 16 years contrary to s.145(1) of the Penal Code. Particulars were that on 19th October 2003 at Igena sub-location in Kuria District he had carnal knowledge of CG a girl under the age of sixteen years. He was sentenced to life imprisonment with hard labour.

In his grounds of appeal the appellant states that he pleaded guilty because before the charge was read to him there were other people charged with changaa who pleaded guilty and were set free. He was cheated by a police officer that if he pleads guilty he would be set free and this is why he pleaded guilty though he never committed the offence. In essence he was saying that his plea was not unequivocal. He narrates that he was 16 years old and not 18-19 years old, as stated by the prosecutor.

The record clearly shows that appellant pleaded guilty to the charge. Facts were read to him and he admitted the same. He mitigated and said he was 15 years old. There was interpretation from English to Kiswahili language which the appellant understood. He does not deny this. It is therefore clear that the plea was taken properly.

Appellant understood both the charge and the facts as read to him. The court did the right thing. However the appellant has raised some pertinent issues in his appeal. He states that although he pleaded guilty this was under the misapprehension that he would be set free and not that he had committed the offence. He states that before his plea was taken there were some ladies who had pleaded guilty to other offences. They were warned and discharged. There was a police officer who had told him that if he pleaded guilty he will be freed and this was fortified when he saw those before him released. Of course this court has no evidence of that but if it was true then it means the plea was not unequivocal. He pleaded under the mistaken belief that he will be set free otherwise he would have pleaded not guilty. It is quite possible that this is what happened and for that reason I will allow the appeal, quash the conviction and set aside the sentence.

I however direct that the appellant be retried before another magistrate in Migori court.

Dated 17th March 2006.

KABURU BAUNI

JUDGE

Cc – Mobisa

Mr. Kemo for State

Appellant present