



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO.64 OF 2019

(AN APPEAL FROM THE DECISION OF HON.P MUTAI IN CRIMINAL CASE NO.4 OF 2019 DATED 8TH JANUARY 2019)

PATRICK NJOROGE.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **defilement of a child contrary to Section 8(1) and (3) of the Sexual Offences Act No.3 of 2006**. The particulars of the offence were that **on the month of May 2018 at [particulars withheld] village in Transzoia County intentionally caused his penis to penetrate the vagina of J. N. S. a child aged 16 years.**

2. The alternative charge was **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the unknown date in September 2018 at [particulars withheld] area in Transzoia East within Transzoia County intentionally touched the vagina of J. N. S. a child aged 15 years with his penis.**

3. The Appellant admitted the offence and he was sentenced to 15 years' imprisonment hence this appeal. The Appellant's grounds of appeal are that the plea was unequivocal and the trial court failed to warn the appellant of the consequences of admitting the charge; that the charge sheet was defective; that the conduct of the Complainant all through was that of an adult and the more reason why she became pregnant.

4. This court ordered that this matter be disposed by way of written submissions which the parties have complied. The appellants counsel has dwelled basically on the fact that the Appellant was not accorded the necessary warnings before sentencing and that the language used by the court was unascertainable.

5. The Appellant continued to argue that from the record and especially the mitigation it appears that the Complainant led the Appellant belief that she was of age and not a minor.

6. The learned state counsel on the other hand submitted that the trial court should not be faulted as it followed the laid down procedure when it convicted the appellant and that the plea was not unequivocal as submitted by the Appellant. He said that the ingredients of the offence were proved and the Appellant admitted the same during the taking of plea.

7. The court has perused the proceedings as well as the said submissions. The court is inclined to allow this appeal an order a retrial for the reason that the appellant in his mitigation negated his own plea of guilt. It is trite law that when a party pleads guilty to a charge there should not be any ambiguity at all.

8. In his mitigation the Appellant went on to state that;

“the minor was my girlfriend since when she was in class six. We went on with relationship until she cleared class eight. We engaged in sexual act. I agreed to marry her. Am ready to provide for the minor and unborn baby. Am 21 years old.”

9. Clearly the Appellant did not mitigate but was on a defensive mood. Whereas he may not have denied the offence, going into such long history of his relationship with the Complainant cannot be considered a mitigation. The trial court at that level should have then entered a plea of not guilty so as to permit a full trial and subsequently grant the Appellant the chance to explain himself.

10. In mitigation the accused person is not permitted to enter into an arena where he is placing material before the court which may be considered in evidence. It ought to be pure facts seeking the clemency of the court now that he has been found guilty. It is even more so when the accused pleads guilty to the offence.

11. In the premises and without going into the other issues raised by the appellant and which may prejudice the trial order that this matter be and is hereby referred to the lower court for retrial before another Magistrate other than Honourable P. Mutai.
12. The Appellant in the meantime is granted a bond of Kshs. 300,000 with a surety of similar amount. Let the matter be mentioned before the honourable Chief Magistrate who shall allocate the same to an appropriate court.
13. Orders accordingly.

Dated, signed and delivered in Kitale this 7th day of July 2020.

H. K. CHEMITEI

JUDGE

7/7/2020

In the presence of:-

Appellant present with Mr Mambili from prison.

Court Assistant – Silvia

Judgement delivered via Whats App.