



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 30 OF 2017

(Being an appeal arising from the Judgment in Kitale CMCR No. 3351 of 2010 delivered by M.N. Gicheru (CM)).

FREDRICK SARANO SABATI.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with 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 of the offence was that **on the 1st day of June 2009 within Trans Nzoia County intentionally caused his penis to penetrate into the vagina of CWW a child aged 16 years.**

2. On his own plea of guilty the Appellant admitted the offence and was convicted and sentence to 15 years imprisonment . The grounds raised by the Appellant in his home-grown grounds of appeal are pure mitigation. He states that he has learned his lessons and that while in custody for the last 9 years or thereabouts he has trained in several causes including biblical studies and he was a changed man.

3. The Respondent through the learned State Counsel has opposed this appeal. He argued that the Appellant had sex with an underage girl and therefore he does not deserve this courts attention or audience so to speak audience.

4. The court has perused the lower courts proceedings and in particular the qualified admission by the Appellant when he pleaded to the charge. He said;

“It is true. I had carnal knowledge of the child. I did not know that she was 16 I thought she was 18. I did not take any steps to establish her age.”

5. From there the court proceeded to read the facts to the Appellant who apparently admitted the same. Although in my view the plea was unequivocal, by virtue of the fact that he qualified the same, he nonetheless admitted the facts. In mitigation he stated that he admitted responsibility and in fact bought clothes for the child and took it to the hospital.

6. Was the Appellant deceived into believing that she was above 18 years? Most likely so based on the fact that he readily stated so in his admission. Had the matter proceeded to full trial some of the issues would have come out.

7. In **ELIUD WAWERU WAMBUI VS. REPUBLIC (2019) e KLR** the Court of Appeal after analysing Section 8(5) and (6) of the Sexual Offences Act stated that;

“We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief he or she is over the age of 18 years.”

8. This court would not delve more into the said section for the simple reason that the same is not part of the grounds raised in the appeal. Suffice to state that the trial court ought to have taken such mitigating factor in meting out the sentence.

9. For now I find that the period served in prison by the Appellant is sufficient and the appeal is hereby allowed. The Appellant be and is hereby released unless lawfully held.

Dated, signed and delivered in open court this 16th day of October, 2019.

H. K. CHEMITEI

JUDGE

16/10/19

In the presence of:-

Mr Omoria for Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.