

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CRIMINAL APPEAL NO. 8 OF 2015

LAWI KITUNGAT KITUR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence in Kilgoris SPM NO. 114 of 2004) (Hon. B.A. Ochieng Ag. SPM)

RULING

1. Appellant pleaded guilty before the lower court and was accordingly convicted and sentenced to fifteen years (15) imprisonment in accordance with **Section 8(3)** of the served offences act. The conviction and sentence were “*prima facie*” proper if regard is not given to the manner in which the plea was taken by the court. Herein, the appeal basically challenges the manner in which the plea was taken thereby rendering the plea of guilt not to have been unequivocal.
2. This court upon due consideration of the appeal and its supporting grounds and noting that the state/respondent concedes to it, would uphold the same on the basic ground that when the facts of the case were read to the appellant they were not accompanied by a medical report to confirm that the complainant was indeed a child in terms of the **Children Act**. Yes, a birth certificate was produced (Pex2) but it was not conclusive proof of age regard being given to the fact that in mitigation the appellant indicated that the complainant informed him that she was above eighteen (18) years.
3. This therefore provided a defence under **Section 8(5)** of the **Sexual Offences Act** thereby negating the plea of guilty which therefore became equivocal. Following the foregoing reasons, the appeal is allowed with the result that the conviction of the appellant by the lower court is hereby quashed and the sentence set aside.
4. There shall however be a re-trial of the case before a different magistrate of competent jurisdiction at the PM court Kilgoris.

In the meantime, the appellant be set at liberty and be remanded in police custody at Kilgoris police station to await a re-trial. Counsel be at liberty to apply for bond in the trial court.

J.R. KARANJAH

JUDGE

[Delivered and signed this 3rd day of December 2015].