



**REPUBLIC OF KENYA**

**HIGH COURT APPELLATE SIDE NAIROBI**

**CRIMINAL APPEAL NO 103 OF 1979**

**GREYSON KIMBIO .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant who was charged with defilement said “Nakubali” recorded as “I admit the offence”; but the word does not mean so much and the plea should, with respect, have been explored: see *Wanjiru v The Republic* [1975] EA 5 and *Sanjiniolo v The Republic* (unreported). Still, the appellant accepted that he had sexual intercourse with a fourteen year old girl who said that he had raped her; and he then said that he admitted the charge. (As a matter of record, he said that as a result of what he did to the girl she had infected him with disease). But the facts did not show that the girl was necessarily below the statutory age and, indeed, according to the magistrate she was not, because “her age was assessed at fourteen years”. This being so, the appellant should not have been convicted upon his plea and the proceedings following his plea were irregular and for setting aside.

Before me Mr Metho does not seek to uphold the conviction, but he asks for a retrial; and Mr Hayanga for the appellant asks for no more than a setting aside of the conviction. He relies on *Hando s/o Akunaay v R* (1951) 18 EACA 307 and *Matu s/o Gichimu v R* (1951) 18 EACA 311. But the true position is that the charge was not incorrect, and the plea was not unequivocally one of guilt. As I understand it, an order for a retrial is the proper order to be made where the accused has not had a satisfactory trial (*R v Vashanjee Liladhar Dossani* (1946) 13 EACA 150), but it should not be ordered unless the appellate Court is of the opinion that, on a proper consideration of the potentially admissible evidence, a conviction might result: *Braganza v R* [1957] EA 152. On what is before me, on a correct charge a conviction might result and I do not think it would be right to accede to what Mr Hayanga asks of me. I set aside the conviction and sentence and order a retrial by which I mean that the prosecution is free to put the appellant up on any charge (if there be any) that they may feel it proper to bring against him. The appellant must now be treated as a remand prisoner and he must be brought before a Court of competent jurisdiction with due despatch there to be dealt with by law.

*Appeal allowed. Retrial ordered.*

**Dated and delivered at Nairobi this 30th day of March 1979.**

**TREVELYAN**

**JUDGE.**