

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 79 OF 2016

BETWEEN

EDWIN KIPLAGAT BIWOTTAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal against the original conviction and sentence of Hon. H.M. Nyaberi, PM dated 18th July 2016 at the Magistrates Court at Iten in Criminal Case No. 18 of 2015)

JUDGMENT

1. The appellant, **EDWIN KIPLAGAT BIWOTT**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1) and (2)** of the *Sexual Offences Act* (“the Act”). The particulars of the offence were that on 21st December, 2014 at 2100 hours at Kowow Sub-Location within Elgeyo Marakwet County, he intentionally caused his penis to penetrate the anus of KC, a child aged 10 years.

2. The appellant does not contest the conviction but urges the court to review the sentence. At any rate, I am satisfied that the evidence against this regarding the offence is overwhelming.

3. The issue raised by the appellant is that of the age of child which is a factor that determines the sentence imposed under **section 8** of the *Act*. The age of a child is a question of fact and according to the charge sheet, it was stated that he was aged 10 years. The child’s father, PW.1 stated that the child was aged 10 years while the child at the *voire dire* stated he was 12 years old. The investigating officer, PW 4, testified that the child was aged 13 years and produced a Health Clinic Card which shows that the child was born on 6th April, 2002. The P3 form produced shows that the Clinical Officer estimated the child to be about 10 years old. Taking all this evidence into account, I find that the trial magistrate recorded what was in the Health Card which is missing from the record. The trial magistrate recorded the correct date of birth, 6th April 2002, that shows that the age of the child was 12 years 8 months when the offence was committed. For purpose of the sentence, I find that the complainant was 12 years 8 months. Accordingly, the sentence falls within the bracket of **section 8(3)** which attracts 20 years’ imprisonment.

4. The appeal is allowed to the extent that the sentence of life imprisonment is quashed and substituted with a sentence of 20 years from 9th January, 2015.

DATED and DELIVERED at ELDORET this 25th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Oduor, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.