



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 54 OF 2015

CORAM: D. S. MAJANJA J.

BETWEEN

D K alias D K alias D M.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. A. C. A. Onginjo, CM dated 6th March 2014 at the Chief Magistrates Court in Kisii in Criminal Case No. 832 of 2012)

JUDGMENT

1. The appellant, **D K alias D K alias D M**, was charged and convicted of the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act** (“the Act”). It was alleged that on 27th April 2012 in Central Kisii District within Kisii County, he intentionally and unlawfully penetrated the genital organ of RO, a child aged 12 years with his genital organ. He was sentenced to 20 years’ imprisonment and now appeals against conviction and sentence.
2. The appellant contested the conviction on ground that the prosecution did not prove its case beyond reasonable doubt. He also complained that the sentence imposed was harsh and excessive considering his age as a child at the time he committed the offence. The respondent opposed the appeal on the ground that the prosecution proved all elements of the offence of defilement. Counsel for the respondent noted that the appellant had undergone several age assessments which showed that the appellant was an adult hence the sentence was proper.
3. Although the appellant pleaded not guilty to the offence, in his sworn defence he admitted that on 27th April 2012, he met the child (PW 1) at Ogembo and they went to his home where they stayed together for 7 days. He told the court that he proposed to marry her and she agreed. He also confirmed that he had sexual intercourse with her during that time. PW 1 also admitted that she consented to have sexual intercourse with him during the time she was residing at his parent’s home.
4. Given this evidence, the trial magistrate accepted that indeed the offence of defilement had been committed as it was proved that PW 1 was a child. She testified that she was 14 years old and PW 2, the clinical officer who examined her, assessed her age to be 13 years. The totality of the evidence is that PW 1 and the appellant had consensual sexual intercourse but since PW 1 was a child she was incapable of giving consent as **section 8(1)** of the **Act** makes it an offence for a person to cause an act of penetration with a child. I affirm the conviction.
5. After the conviction, the trial magistrate noted that, “*The offender is a minor aged 16 years and in school.*” She referred the matter to the Probation office for preparation of a pre-sentencing report. Later on the trial magistrate referred the appellant to Kisii Level 5 Hospital for age assessment. When the matter came up for sentencing on 22nd August 2013, it transpired that the appellant had been sentenced to 6 months’ imprisonment for stealing in another criminal case. The trial magistrate then deferred the sentencing for another 6 months until the sentence of imprisonment was completed.
6. According to the report dated 6th August 2013, Dr M. Monda examined the appellant and found him to be above 18 years old. The matter came up for sentencing once again on 19th February 2014. A second age assessment report dated 17th February 2014 and prepared by Dr Monda stated that the appellant was 18 years old. Based on the two reports the trial magistrate found that the appellant was over 18 years old and sentenced him to 20 years’ imprisonment which is the mandatory minimum sentence provided for under **section 8(3)** of the **Act**.
7. What is apparent from the sentencing notes is that the trial magistrate did not consider the age of the appellant at the time he committed the offence in April 2012. The age assessments relied were done in August 2013 and February 2014 without reference to the time the offence was committed. In this respect, the trial court committed an error as it did not conduct any other inquiry to ascertain the appellant’s age at the time the offence was committed. Since there was doubt as to whether the appellant was above the age of 18 when he committed the offence,

such doubt must be resolved in favour of the appellant. I therefore find and hold that the appellant was below the age of 18 years when he committed the offence.

8. For the reasons I have set out, I quash the sentence of 20 years' imprisonment as it was imposed without consideration of **sections 191** of the **Children Act** that entitles the court to fashion an appropriate sentence that fits the context of the case. **Section 191(1)** thereof provides as follows:

191(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—

- (a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);*
- (b) by discharging the offender on his entering into a recognisance, with or without sureties;*
- (c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);*
- (d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;*
- (e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;*
- (f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;*
- (g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;*
- (h) by placing the offender under the care of a qualified counsellor;*
- (i) by ordering him to be placed in an educational institution or a vocational training programme;*
- (j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);*
- (k) by making a community service order; or*
- (l) in any other lawful manner.*

9. From the facts of the case, the appellant had been convicted of another offence and sentence to 6 months' imprisonment. The record does not show the facts and circumstances of that case. The appellant has been in prison since 2013. I have also considered that the act he was involved in was consensual and did not involve force or violence. Considering his age and to enable him adjust appropriately to society, I now sentence the appellant to **two (2) years'** probation from the date hereof. The appellant shall be released unless otherwise lawfully held.

DATED and DELIVERED at KISII on this 21st day of September 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.