



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC CRIMINAL APPLICATION NO. 8 OF 2016

W M M..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal from Ruling of L. N. MESA - SRM made on 7/1/2016 in Marimanti Principal Magistrate's Court in Criminal Case No. 2 of 2016).

RULING ON REVISION

1. On 4th January, 2016, W M M, the Applicant, was arraigned before the Principal Magistrate's Court, Marimanti with the offence of defilement contrary to Section 8 (1) and (3) of the Sexual Offences Act No. 3 of 2006. It was alleged that on diverse dates between 30th and 31st day of December, 2015 at [particulars withheld] within Tharaka South District in Tharaka Nithi County, the Applicant intentionally caused his penis to penetrate the vagina of "R.W" a child aged 12 years. He also faced an alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The Applicant admitted the charge and the facts. He was convicted of the principal charge and was sentenced to 20 years imprisonment.
2. On 26th January, 2016, the Applicant applied to this court for revision of his sentence. The grounds were that he was born on 2nd January, 1998; that he committed the offence in question on 31st December, 2015 at which time he was still a minor. That in the circumstances, he was a minor for all purposes and intents. That the trial court should have invoked the provisions of Section 8 (7) of the Sexual Offences Act No. 3 of 2008 and sentence him under the provisions of the Bostal Institutions Act and the children's Act. He expressed remorse and promised to avail his certificate of birth at the hearing of his revision application.
3. When the matter first came up in court on 17th March 1, 2016, the Applicant informed the court that he needed time to procure his birth certificate to prove his age at the time of the commission of the offence. The matter was adjourned today. Today the Applicant has produced birth Certificate No. [particulars withheld] dated 22/3/2016. The same shows that he was born on 20th May 1999. Mr. Ongige the Learned State Counsel left the matter to the court
4. I have considered the record. It is clear from the record that when the Applicant appeared before the trial court, he pleaded guilty to the charge. In the charge sheet, the apparent age of the Applicant was indicated as being 'JUVENILE'. On being convicted and in giving his mitigation, the Applicant informed the court, inter alia, that he was 17 years old. The court ordered for an age assessment report for the Applicant. The Assessment Report reference MOH/GATUNGA MODEL HOSPITAL/ 15/2015 was prepared from the Gatunga Model Health Centre on 6th January, 2015, The same was in the following

terms: -

"The above mentioned client came under police escort for age assessment on 6th January, 2016 at 15.50 hrs. On examination, he is clinically estimated to be about 19 years of age. This is based on physical and clinical examination".

5. On the basis of that report, the Applicant was sentenced to 20 years and imprisoned in the Meru Government Prison for adult. I have looked at the **"age assessment report stamped 6/1/2016"** The report does not show how Jacob Gitonga who signed the report arrived at the conclusion of the alleged estimated age. He has not given details of who carried out and what clinical procedures were undertaken to arrive at the conclusion made. The designation of Jacob Gitonga who signed the report is not given. To my mind that report is no age assessment report at all and it is worthless. The trial court fell into error when it relied on it and disregarded the Applicants assertions about his age. The court erred in proceeding to sentence the Applicant as it did without following the provisions of Section 8 (7) of the Sexual Offences Act which provides:-

8 (7) "Where the person charged with an offence is below the age of eighteen years, the court, upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act."

6. In this regard, the rights of the Applicant to be sentenced as a child was violated. He has spent prison not meant for children for now 1:lose to three (3) months. He is still a minor as we speak. Obviously an injustice has been committed on him was produced before the trial court. I have looked at the Probation Report dated 7th January, 2016. The same states as follows:-

"The victim is receptive on considering the accused for the court's leniency saying that she is the one who took herself to his house fearing to go to her parents late in the evening. She further had known him for some time and they had developed friendship and she had never told him that she was underage.

The community members do approve the court's leniency for the accused saying that he is a young person full of energy in his teenage years although they do not condone his actions. They however request the honourable court to warn him against re-offending and both the accused and the victim highly requires parental guidance and counseling."

7. The foregoing buttresses the possibility that the Applicant must have been a minor at the time he committed the offence and at the time he was convicted and was sentenced by the trial court. The first time the court saw the Applicant in court, he looked to be the age assessment report purported to state still a teenage not of age. Since the charge sheet gave a warning as to the apparent age of the Applicant as being a minor, the Applicant himself having told the court that he was 17years and the **"age assessment"** report having been hopelessly inadequate, the trial court erred in not having treated the Applicant as a minor and sentence him under Section 8 (7) of the Sexual Offences Act.

8. One other thing, the medical officer who filled the Past Rape Care Form (P.R.C) on 31st December, 2015 indicated that age of the Applicant as 17 years. That form was produced as PExh 2. PExh 4 was a photograph of both the Applicant and the alleged minor. From that photograph, one would be forgiven if he estimated the minor to be of the same age mate with the Applicant. She strikes one as being mature. No wonder she stated in the Probation Report that she had not disclosed that she was a minor to the Applicant. My take is that if the matter proceeded for trial a defence under Section 8 (9) of the Sexual Offences Act would have been possible.

9. Taking all the foregoing into consideration, I will allow the application, the Applicant being still a minor. I hereby review the sentence of the trial court, set the same aside and substitute the same with a probation for two (2) years to be served under the supervision of the Probation Officer, Marimanti.

DATED and delivered at Chuka this 23rd day of March 2016.

A. MABEYA

JUDGE

Court:

Ruling delivered in open court

A.MABEYA

JUDGE

23/3/2016