



REPUBLIC OF KENYA

IN THE HIGH COURT

AT HOMA BAY

CRIMINAL APPEAL NO. 126 OF 2014

BETWEEN

KEVIN OMONDI OGAL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 861 of 2012

at the Chief Magistrate's Court at Homa Bay, Hon. N. Kariuki, RM dated on 27th February 2013)

JUDGMENT

1. In the subordinate court the appellant faced a charge of committing defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act, 2006*** and an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts. The facts alleged in the main charge were that on diverse dates between May 2011 and June 2012 at [Particulars Withheld] , Rusinga West Location in Mbita District within Homa Bay, he intentionally caused his penis to penetrate the vagina of LAO, a child aged 17 years.

2. The tenor of the evidence before the trial court is that the appellant and the complainant were lovers. The complainant testified that they had had sexual intercourse at least three times. On the basis if the clear evidence of penetration and age of the PW 1, the appellant was convicted. The appellant was sentenced to serve 15 years imprisonment. He only appeals against the sentence on the grounds that he was young.

3. Due to the apparent age of the appellant, I directed that the appellant undergo a medical assessment to determine his age. According to Dr S. R. Otieno, the doctor who examined the appellant, his estimated age was about 21 years. The result of the finding is that at the time the offence was committed, the appellant would have been about 19 years old.

4. I have looked at the trial proceedings and I confirm that no age assessment was done for the appellant though one of the witnesses, PW 3 testified that the appellant was 20 years old. It must be recalled that a medical assessment of age is only an assessment and taking into account what was stated in the proceedings, whether the appellant was an adult is at best inconclusive.

5. In my view, the age of the accused is important where the person is likely to be below 18 years old. Under **section 2** of the ***Children Act***, any person who is below the age of 18 years is a child and is entitled to all the legal protections conferred upon a child. In my view, the appellant could have been below or

above the age of 18 years and any doubt as to the age could only be resolved in the appellant's favour.

6. It is important for the prosecution to ascertain the fact of the age of the accused before the trial where the accused is likely to be below the age of 18 years. Likewise, where the trial court is of the view that there is a likelihood that the accused is below the age of 18 years, it should direct that the age of the accused be ascertained at the earliest opportunity so that the issue of age is resolved during the trial.

7. This issue I have raised is not an idle one as the Court of Appeal in case of ***Dennis Abuya v R KSM CA CR APP. No. 164 OF 2009 [2010] eKLR***, dealt with a case where the evidence regarding the age of the appellant at the time of the offence was committed was inconclusive. The Court stated as follows:

Neither the trial magistrate, nor the learned judge on first appeal dealt with the issue of the appellant's age at the time he allegedly committed the offence. It may be that he was eighteen years of age at the relevant time; but it may equally be that he was below eighteen years at the time. We do not understand the provisions of the Sexual Offences Act to authorize the imprisonment of minors and we are unable, on the material on record, to rule out the possibility that the appellant was under eighteen years on 19th June, 2007 when the offence was allegedly committed. Section 8(7) of the Sexual Offences Act which states, "Where a person is charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children Act." The question of imprisoning a minor does not, therefore, arise under the provisions of the Sexual Offences Act. [Emphasis mine]

8. As the appellant could have been below the age of 18 years he ought to have been sentenced in accordance with the options available under **section 191** of the ***Children Act***. I have considered whether this matter should be referred back to the subordinate court for sentencing. Under **section 6** of the ***Borstal Institutions Act (Chapter 92 of the Laws of Kenya)***, the maximum period under which a person may serve in a Borstal Institution is 3 years. The appellant has been in custody for a period of over two years and he is clearly an adult. Given that that he should not have been in prison in the first place, I reduce the sentence to time served.

9. The appeal succeeds to the extent that I reduce the sentence to time served. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 28th day of April 2015.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.