



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 536 OF 2013

ABRAHAM NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Appeal against Conviction and Sentence in Gatundu PM Criminal Case No. 276 of 2012 - A R
Ireru, Ag. PM)**

J U D G M E N T

1. The Appellant **Abraham Njoro** was on 22/11/2013 convicted after trial of **defilement** contrary to **section 8(1) and (2)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged that on 26/03/2012 in Gatundu South District within Kiambu County he intentionally caused his penis to penetrate the anus of one **TM** a child aged 6 years. He was sentenced to life imprisonment. He appealed against both conviction and sentence, but at the hearing of the appeal his learned counsel withdrew the appeal against conviction and proceeded only with the appeal against sentence. Learned Prosecution Counsel stated that she supports the conviction but not the sentence as the Appellant was a minor at the time of commission of the offence, and also at the time of conviction and sentence.

2. I have carefully perused the record of the trial court, including the judgment. I am satisfied that the Appellant was convicted upon good and sound evidence. The offence of defilement charged was proved beyond reasonable doubt. The conviction is safe.

3. As for the sentence, life imprisonment is mandatory for defilement committed with a child aged 11 years or less. The complainant in this case was 6 years old. However, the Appellant was a minor himself when he committed the offence, a fact that the trial court itself acknowledged at page 4 of its typed judgment where it stated –

“I have carefully considered this serious matter before me. It is even worse because the offence was committed by a juvenile on another juvenile”.

An age assessment report on the Appellant obtained by order of this court confirmed that the Appellant was a minor not only at the time of commission of the offence, but also at the time of his conviction and sentencing.

4. When sentencing him the trial court appeared to be satisfied that the Appellant was then over 18 years old. The court made no reference at all to section 8(7) of the Act which provides –

“Where the person 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’s Act”.

So, it would not matter if the offender has attained majority at the time of conviction if he was a minor at the time of commission of the offence. In any event, the Appellant herein was still a minor at the time of his conviction.

5. Section 191 of the Children’s Act provides for the sentencing of convicted minors. It gives the trial court a wide range of options for dealing with a minor offender. These options do **not** include imprisonment. Notwithstanding that life imprisonment is mandatory for defilement under section 8(2) of the Sexual Offences Act, that sentence is not available for a minor offender as it is precluded by section 191 aforesaid of the Children’s Act, subsection (1) of which starts with the words –

“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 – ”

6. The sentence of life imprisonment imposed upon the Appellant was thus clearly illegal and must be set aside. It is unfortunate that the Appellant has already served one year and eight months of the sentence. The appeal against sentence is hereby allowed. The sentence is set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG’A THIS 29TH DAY OF JULY 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 31ST DAY OF JULY 2015