



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL DIVISION

Criminal Revision No. 16 Of 2014

(From Original Conviction And Sentence In Sexual Offences Case No. 12 Of 2012 Of The Chief Magistrate's Court At Malindi)

Alex Soso Bajila Applicant

Versus

State Prosecutor

RULING ON REVISION

1. This is one of two files (with Criminal case No. 4 of 2010) placed before me for revision under Section 364 of the Criminal Procedure Code, by virtue of a letter dated 30th July, 2014 addressed by Gekanana Advocate to this court.
2. I have perused the Lower Court file. The accused was unrepresented at the trial. Before the trial could be finalized he entered a plea of guilty and was convicted on 21st July, 2014 and sentenced to 20 years imprisonment for the offence of Defilement contrary to Section 8(3) of the Sexual Offences Act.
3. The accused person was seventeen years old at the time he committed the offence. An age assessment report to that effect is on record. The trial court however, pronounced itself bound to impose the mandatory sentence provided under Section 8(3) of the Sexual Offences Act. Hence the court proceeded to sentence the accused to 20 years imprisonment.
4. In the case of **Dennis Abuya v R [2010] eKLR**, the facts were almost similar to the case before me, except that there was no conclusive evidence regarding the age of the appellant at the time of the offence. The Court of Appeal 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.”

5. The Court of Appeal proceeded to quote 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 Court of Appeal concluded by stating that:

“The question of imprisoning a minor does not, therefore, arise under the provisions of the Sexual Offences Act.”

6. In the instant case before me, the accused person was certified to have been a minor at the relevant date namely, the date when the offence was committed. The sentence of 20 years imprisonment imposed in the Lower Court is therefore illegal.
7. The sentence is hereby set aside and the case remitted back to the trial court with a direction to sentence the offender as provided under Section 191(1) of the Children Act without delay.

For this purpose a production order shall issue for the offender to appear in court on 4th August, 2014.

Delivered and signed at Malindi this 31st day of July, 2014

C. W. Meoli

JUDGE