REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO.17 OF 2012

S O L.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 148 of 2011 in the Senior Resident Magistrate's court at Baricho – HON. J.N. MWANIKI (SRM)

JUDGEMENT

S O L appellant herein was charged with sexual assault contrary to **Section 5(1)(a)** of the **Sexual Offences Act No. 3 of 2006**. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** The appellant was tried and sentenced with the 1st count and convicted to serve 15 years in jail. The appellant was aggrieved and has appealed to this court against both conviction and sentence and has listed 8 grounds of appeal.

This court has looked at the grounds and the record and will consider only the first ground in the appeal which is that the appellant was convicted as an adult when infact he was a minor at the material time. When this appeal came up for directions before this court on 19th February 2014, this court directed the appellant to undergo an age assessment test which was done and the report filed in court. I have perused the report by one JOHN K. MWANGI a medical Superintendent from Kerugoya District Hospital dated 23rd April 2014 and noted that on the date of the assessment (23rd April 2014) the appellant was aged 20 years. This means that at the time of the commission of the offence he was aged 17 years old. The trail court appears not to have taken the age of the appellant into consideration during the trial and even during sentencing. The learned magistrate as a result fell into error.

I have considered both submissions of the appellant and the State and I consider the Director of Public Prosecutions submissions particularly relevant and important in this appeal. The appellant herein was a child during the material time within the meaning of **Section 2 of the Children's Act.** I have not faulted the learned magistrate on the finding of guilt on the part of the appellant. There was sufficient evidence placed before the trial court. However having seen the accused in court, it was incumbent upon the court to establish the age of the accused before proceeding with the trial so as to observe the rights of the suspect under the Children's Act. Had the learned magistrate done so then he should have invoked the operation of **Section 191(g)** of the **Children's Act** upon convicting the appellant the provisions states:-

"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.....incase of a child who has attained the age of 16 years dealing with him, in accordance with any act which provides for establishment and regulation of a borstal institution".

The appellant ought to have been placed in a borstal institution which is created by law to deal with youthful offenders and their detention therein.

Under **section 6(1)** of **Borstal institutions act Cap 92 laws of Kenya** the maximum period for an offender to be detained in borstal institution is 3 years.

This court finds that the appellant has been held wrongfully in prison for more than 3 years now and under the law he has served his sentence courtesy of his age and the law applicable.

This court for the above reasons finds merit in the appeal. It was unsafe for the trial court to convict and sentence the appellant without ascertaining his age. This appeal is therefore allowed the conviction and the sentence imposed on the appellant is set aside. I direct that he shall be released forthwith unless otherwise lawfully held.

R.K. LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 27TH DAY OF OCTOBER 2014 in the presence of

The Appellant

Mr sitati for state

Mbogo Court clerk