



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 261 OF 2012

R Y APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 1882 of 2010 of the Principal Magistrate's Court at Kwale – Hon. Aminga - SRM)

JUDGMENT

R Y hereinafter referred to as the Appellant was Convicted and Sentenced to twenty (20) years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual offences Act No. 3 of 2006.

“The particulars being that on diverse dates between the months of March, 2010 and April, 2010 at [particulars withheld] village [particulars withheld] Location–Kwale County he intentionally committed an act which caused his penis to penetrate the vagina of F Y D a girl aged fourteen (14) years and a pupil at [particulars withheld] Primary School standard four”.

The main issue in this case is that of age assessment.

During ***Voire dire*** examination, the complainant told the Court that she was aged fourteen (14) years at the time but she did not know when she was born.

In her evidence in chief at page 5 line 23 of the proceedings she states,

“In March, 2010 I was in class six I was in the same school with the Accused. He was in class 7”.

The Complainants mother (PW 2) did testify to the effect that her daughter was aged fifteen (15) years. She further told the Court that she could not recall the year of her birth. She further stated that she had her clinical card and she would avail it later if required.

The said clinical card was not availed to the Court. Whereas the Accused was referred to a clinical officer (PW 4) for examination for DNA and age assessment. No age assessment was done on the complainant herself.

Its trite law that offences under the Sexual offences Act and in particular defilement and its Sentencing regime is governed by the age of the Complainant at the time of commissions of the Sexual offence.

Its therefore incumbent upon the prosecution to prove the age of the Complainant by way of oral evidence by the parents of the Complainant or by documentary evidence.

In the present case neither the Complainant nor her mother knows when she (Complainant) was born. The Complainant gives her age as fourteen (14) years whereas her mother stated that her daughter was fifteen (15) years old.

I find it rather peculiar for the prosecution to have taken pains to establish the age of the Accused but not doing the same as regards the age of the Complainant. I find that this was fatal to their case and it would be unsafe to uphold the Conviction and Sentence.

The appeal has merit and it is allowed. Consequently I quash the Conviction and set aside the Sentence. The Appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed in open Court this **22nd** day of **October, 2014**.

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M. MUYA

JUDGE

22ND OCTOBER, 2014

In the presence of:-

Masika Learned Counsel for the prosecution

The Appellant present

Court clerk Musundi