



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO.187 OF 2010

BETWEEN

SIMON NGATIA KABURU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case No.5408 OF 2006 in Nyeri CM's court dated 21st July, 2010, SPM)

JUDGMENT

1. The appellant was charged with the offence of defilement of a girl contrary to **Section 8 (1) (2)** of the **Sexual Offences Act No.3 of 2006**. The particulars of which were that on the 17th day of November 2006 at Mitero village in Nyeri District within Central Province unlawfully and intentionally had penetration with his genital organ to J.M.M. a girl under the age of eleven years.
2. He faced an alternative charge of Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No.3 of 2006**. The particulars of which were that on the 17th day of November 2006 at Mitero village in Nyeri District within Central Province unlawfully and intentionally assaulted J.M.M. a girl under the age of eleven years by touching her private parts.
3. He pleaded not guilty to the charges, was tried, convicted and sentenced to Ten years on the alternative charge. Being aggrieved by the said conviction and sentence, the appellant filed this appeal and in his home grown grounds of appeal raised the following grounds:-

He was a minor at the time of the alleged commission of the offence and therefore the sentence imposed was contrary to **Section 191** of the **Children Act**.

4. When the appeal came up for hearing before me, Mr. Macharia appeared for the appellant while Miss. Maundu appeared for the State and conceded to the appeal.

Submissions

5. It was submitted by Mr. Macharia that the sentence imposed upon the appellant of Ten years was illegal since the same was at the time of his trial a minor and since the Children Act outlaws imposition of any sentence of imprisonment to a person below the age of 18 years the sentence can not stand. In support thereof reliance was placed on the case of **Koeh & another -vs- Republic Kericho High Court Criminal Appeal No.11 & 13 of 2004 – reported in [2004] 2 KLR 322.**

6. It was further submitted that during the trial the issue of the appellant's constitutional right was raised but the trial court proceeded with the trial before the same issue was determined. It was further submitted that medical evidence was given in two stages and that the trial court exceeded his mandate in ordering the reopening of the prosecution case when the same had been closed in violation of such jurisdiction to determine the issue of the violation of the constitutional rights of the appellant should have therefore framed the constitutional issues for determination under **Section 72 (3) of the Constitution**. Having failed to do so the subsequent trial of the appellant was therefore unlawful.
7. It is also clear that being a minor as at the time of commission of the offence, the sentence meted out of ten (10) years against the appellant was unlawful as it went against an express provision of the Children Act.
8. I would therefore allow the appeal herein, quash the conviction and set aside the sentence meted to the appellant herein having taken into account the fact that he was tried for a period of over four years.
9. The appellant should be set free forthwith unless otherwise lawfully held.

Signed and dated day of 2014

J. WAKIAGA

JUDGE

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November 2014

J. NGAAH

JUDGE

In the presence of:-

Appellant in person and

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