

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL DIVISION

CRIMINAL REVISION NUMBER 24 OF 2014

(From the original conviction and sentence in criminal Sexual Offences

Case Number 41 of 2011 of Malindi)

M D TAPPLICANT

VERSUS

REPUBLICRESPONDENT

ORDERS ON REVISION

I have gone through the record of the trial court. The accused was charged with the offence of Defilement. The Complainant was aged 15 years old. The Complainant informed the court that she got married to the accused. They lived with the accused for one month until when the Children's Officer arrested them.

The accused has applied for revision of the sentence. His main ground is that he was 17 years old when the offence was committed. The record of the trial court shows that once the court passed judgment, an age assessment report was called for. The report dated 12th August, 2013 indicates that the Applicant was about 19 years old. The offence was committed in June, 2011. The accused testified before the court and produced his birth certificate which shows that he was born on 27th February, 1994.

Given the information herein, it is established that the accused was 17 years old when the offence was committed. Section 189 of the Children of the Children Act No. 8 of 2001 prohibits the use of the words "conviction and sentence" in relation to children. Section 191 of the same Act provides for methods of dealing with child offenders.

From the record herein, I do find that there is no need to send the accused to a Borstal Institution. The Complainant's position is that the two were married. Since both of them were minors, none could give consent to have sex as under the Sexual Offences Act, a child cannot give consent to have sex. The two parties were both children. I do find that punishing one of the children would be unfair. Further, the evidence of the Complainant is quite clear. The two used to communicate on phone and definitely the parents knew about it.

In the end, the sentence of twenty (20) years imprisonment is hereby reviewed as the same is unlawful. I will discharge the accused under Section 35 of the Penal Code. The discharge is absolute. The accused shall be set at liberty unless otherwise lawfully held.

Delivered and dated at Malindi this **19th** day of **December, 2014**.

Said J. Chitembwe

JUDGE