



REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 78 & 79 of 2009

C.K.N.....1ST APPELLANT

C.M.N.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an Appeal from the Conviction and Sentence by S.M. MOKUA Senior Resident Magistrate Siakago in Criminal Case No. 1010 of 2008 on 14th April 2009)

JUDGMENT

C.K.N the 1st appellant and C.M.N the 2nd appellant were each charged with the offence attempted defilement contrary to Section 9(2) of the Sexual Offences Act No. 3/2006. The particulars indicate that the complainant J.N.N was aged 15 years.

The appellants denied the charges. The Sexual Offences Act is very particular about age. It is the duty of the Prosecution to avail evidence to confirm the age of the complainant. It is obvious PW1 was not a child of tender years. It was therefore important that her age be proved.

Her mother PW1 said she was 16 years old. PW1 herself stated she was 15 years old. There being no medical evidence nor documentary evidence to show age, I find that the age of PW1 was not established.

The particulars are specific that she was aged 15 years. It had to be established. The reason for establishment of the age of the victim is to enable the Court to know whether it was a case of defilement or rape.

The accused persons have been in prison since 14/4/2009 when they were sentenced to serve 10 years imprisonment each. They have served 3½ years of their sentence. Would this be a just case for retrial? In the case of EKIMAT VS REPUBLIC [2005] 1 KLR, the Court of Appeal held that before ordering for a retrial, each case should be considered on its own circumstances.

In this case, the appellants have done 3½ years of their sentence. After remission they are left with about 3 years to go. The offence was attempted defilement and not the actual defilement. The complainant should be over 18 years old and may not be willing to come and testify again. Due to this uncertainty, I find that an order for retrial may be an exercise in futility.

For that omission by both the Prosecution and the Court to ensure age is established, I will allow the

appellants to benefit from that gap. I allow the appeal and quash the convictions and set aside the sentences.

Both Appellants to be set free unless otherwise lawfully held under a separate warrant.

DATED AND DELIVERED AT EMBU THIS 14TH DAY OF FEBRUARY 2013.

**H.I. ONG'UDI
JUDGE**

**In the presence of:-
Ms. Macharia for State
Appellants
Njue CC**