

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISION NO 1 OF 2013

(Formerly High Court of Kenya at Nairobi Criminal Revision No 206 of 2010 from original conviction and sentence by the Resident Magistrate at Garissa in Criminal Case No 664 of 2009)

YUSSUF GABO NATAMORO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

Yussuf Gabo Matamoro (subject) was convicted of defilement of a girl aged 3 years contrary to section 8 (2) of the Sexual Offences Act. He also faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The subject had been working as house help of **MM** at the time of the offence. The evidence shows that he sexually assaulted the victim **FS**, a little girl aged 3 years at the time of the offence, on 29th July 2009 at Bulla Ifin. **MM**, the mother of the girl had taken her daughter to bed around 2.00pm. The subject is said to have committed the offence at the time when **MM** left the subject cleaning the house alone with the child. The medical evidence proved that the little girl had been sexually assaulted.

The trial court considered the evidence of five witnesses and the accused's defence. He found the main charge proved beyond reasonable doubt, convicted the subject and sentenced him to life imprisonment. At the time of hearing the case in the lower court, the subject informed the trial court that he was aged 14 years prompting the court to order for age assessment report. It was confirmed that the subject was aged 17 years as per the report dated 3rd August 2009. It seems the trial court overlooked this fact in sentencing.

The Revision jurisdiction of this court has been invoked through a letter dated 25th June 2009. There is something strange about the date in that letter. According to the court records, the subject was presented in court first on 31st July 2009 and the plea taken on 3rd August 2009. He was thereafter tried and the judgment delivered on 8th April 2010. The trial court sentenced him to life imprisonment. It cannot therefore be true that on 25th June 2009 the Resident Magistrate is addressing this Court through the Deputy Registrar that the subject has been tried and found guilty. The facts do not add up! My attempts to find out what happened have not been successful.

Be that as it may, the record of the court as to the date the conviction was entered and the sentence passed is factual. Even without paying due regard to the letter in question, the law is specific that ***"no child shall be ordered to imprisonment or to be placed in a detention camp."*** (See Section 190 of the Children's Act).

The jurisdiction of the High Court to review orders of subordinate courts is found under Section 362 of the Criminal Procedure Code. Under that provision the High Court has power to examine the record of the lower court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. This court takes into consideration that there has been delay in handling this matter as soon as possible because the matter had been filed in High Court Nairobi. The file was transferred to Garissa and received in February 2013. When the matter was placed before me, I was not able to trace the age assessment report. I directed the Deputy Registrar to call for another report. The latter report dated 7th

May 2013 places the age of the subject as 19 years. I have carefully checked the lower court record and managed to trace the earlier report which is dated 3rd August 2009. At that time the subject was aged 17 years. This would place the subject at about 18 years of age at the time the judgement was read on 26th February 2010. In the absence of a birth certificate, the age of the subject is not ascertainable. It is the view of this court that to avoid the risk of the subject serving imprisonment term when underage, it is prudent to intervene and invoke the provisions of Section 354 (3) (iii) of the Criminal Procedure Code and alter the nature of the sentence. The sentence of life imprisonment is hereby altered to a committal to a Probation Hostel for a period of three years. He will remain in custody for two weeks as a vacancy in a Probation Hostel is sought. For that purpose the matter is referred to the Probation Officer Garissa for a report as to the availability of a vacancy. I make orders accordingly.

S. N MUTUKU

JUDGE

Dated, signed and delivered this 15th day of July 2013.