



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 35 OF 2012

SONATI SIMBA APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 157 of 2012 of the Senior Resident Magistrate's Court at Mariakani – **Hon. Machage - SRM**)

JUDGMENT

SONATI SIMBA hereinafter referred to as the Appellant herein was Convicted and Sentenced to sixteen (16) years imprisonment for the offence of defilement of a child contrary to section 8(1) as read with section 8(3) of the Sexual offences Act No. 3 of 2006.

The particulars are that on the 2nd day of June, 2011 at [Particulars withheld] Village Kasemeni location within Kwale County he unlawfully and intentionally committed an act which caused penetration of his male genital organ namely penis into the female genital organ of H F a child aged twelve (12) years.

One of the main grounds for this appeal is that at the time of commission of this offence the appellant was aged seventeen (17) years old.

In his defence he told the Court so after denying having committed the offence.

At page 14 line 1 of the record of proceedings the trial magistrate did observe that and stated the following,

“For avoidance of doubt, I direct that the Accused persons age be assessed at Coast General Hospital and a report be made to Court before I deliver Judgment. OCS – Mariakani to comply. Mention on 19th January, 2012”.

On 19th January, 2012 it was noted that the order was not complied with and a further mention was fixed for 23rd January, 2012 but on 23rd January, 2012 nothing is shown to have transpired and the case was fixed for 13th February, 2012 for Judgment. Judgment was delivered on 13th February, 2013 and no mention was made of the age assessment.

This was a serious omission because section 8(7) of the Sexual offences Act provides,

“Where the person charged with an offence under this Act is below the age of eighteen years, the Court may upon Conviction Sentence the Accused person in accordance with the provisions of Borstal Institutions Act and the Children's Act”.

By reason of the foregoing this Court orders that the Appellant be taken for age assessment at Coast Provincial General Hospital by the Officer In- Charge Shimo La Tewa G.K. Prison.

Mention on 27th November, 2013 for further orders or directions.

Judgment dated delivered and signed this **15th** day of **November, 2013**.

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M. MUYA

JUDGE

15TH NOVEMBER, 2013

In the presence of:-

Jami for the State

Court clerk Musundi