



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 127 OF 2011**

**BETWEEN**

D G..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(From original conviction and sentence in Criminal Case No.77 of 2011 at the Senior Resident Magistrate's Court at Runyenjes by Hon. M.W. MUTUKU - SRM on 26/7/2011)*

**J U D G M E N T**

1. The appellant was charged with the offence of defilement contrary to **section 8(1)** of the **Sexual Offences Act** and an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. He was convicted of the alternative charge and sentenced to a term of ten (10) years imprisonment.
2. When the appeal against his conviction and sentence first came up for hearing, it was apparent to the Court that he may have been a child at the time the offence was committed. The Court directed that he undergoes an age assessment examination.
3. According to a report prepared by Dr. Ismael of the Embu Provincial General Hospital dated 26<sup>th</sup> November 2013, the Appellant is aged nineteen (19) years which means that at the time he committed the offence and was tried, he was a child within the meaning of the **Children Act** (“the Act”) as he was below the age of eighteen (18) years.
4. In the circumstances and under the Act, the appellant ought to have been dealt with under **Part XIII**. Under **section 190** of the Act no child shall be ordered to imprisonment. **Section 191** provides for further forms of dealing with child offenders including discharging the offenders, probation, committing him to a fit person or for rehabilitation, if the person is above ten (10) years and below fifteen (15) years, ordering him to be sent to a rehabilitation school amongst other forms of treatment.
5. The procedure for dealing with a child offender under **section 194** of the Act is prescribed in the **Fifth Schedule**. The **Fifth Schedule** contains the **Child Offenders Rules** which provide procedures for dealing with child offenders including prohibition of holding children in pre-trial custody for over 24 hours, provisions for bail, necessity of requiring a probation report before detention is considered.
6. Since the trial in the Subordinate Court was carried out in violation of the Act, it is a nullity as

such the appeal is allowed and conviction quashed.

7. Before I conclude, I would note that where it is apparent that the age of the accused is that of a child that is below the age of eighteen (18) years or that the age is in doubt, the Court should proceed to make an inquiry to ascertain the age of the person to avoid breach of the **Children Act** and the rights of the child.
8. The State has requested that the appellant be retried for the offences. Whether or not to order a retrial must depend on the circumstances of the case. In this case, the appellant has been denied the benefit that would accrue to him as a child offender. He is now an adult. He did not have the benefit of bail as he has been in custody since 2011 when he was charged and has been in prison since June 2011 when he was convicted. He has served two and a half years in prison which he would not have served had he been convicted as a child. In the circumstances, a retrial is not in the interests of justice.
9. In light of the foregoing, the appeal is allowed, the conviction and sentence quashed. The appellant is set free unless otherwise lawfully held.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 16<sup>TH</sup> DAY OF DECEMBER, 2013.**

**D.S. MAJANJA**

**J U D G E**

**In the presence of:-**

**Ms. Miiri for State**

**Appellant**

**Njue CC**