

REPUBLIC OF KENYA

SILAS OGORO NYAKWERI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence of the Senior Resident Magistrate's Court at Nyamira, in Criminal Case No.1307 of 2005 by L. KOMINGOI, SRM)

JUDGMENT

The appellant was charged with defilement contrary to section 8(1)(2) of the Sexual Offences Act No.3 of the 2006. The particulars of the offence were that on the 17th day of October, 2005 at M sub location in Nyamira District, the appellant, intentionally and unlawfully, defiled K. K; a girl aged 5 years. After a full trial, the appellant was convicted and sentenced to 15 years' imprisonment.

The appellant, being dissatisfied with the aforesaid conviction and sentence, preferred an appeal to this court. He stated that his constitutional rights were violated because he was held in police custody for 7 days before being arraigned in court. He further stated that the learned trial magistrate erred in law by failing to note that he was a minor at the time of commission of the alleged offence as well as at the time of passing the sentence. The appellant further stated that the learned trial magistrate erred in law and fact in taking the evidence of the prosecution witnesses in the absence of his advocate. Lastly, the appellant faulted the learned trial magistrate for failing to consider his mitigation and thereby handing down a sentence that was harsh and excessive.

The issue of the appellant's age came up before the trial court. Shortly before delivery of the judgment, the learned trial magistrate asked the prosecution to have the appellant's age verified. Without evidence of any medical assessment having been done, the prosecutor told the court that the appellant was 19 years old. The court stated that the appellant appeared to be aged between 19 to 20 years and proceeded to deliver its judgment. It may have escaped the learned magistrate's attention that the appellant's P3 form (P.Ex.2) indicated that he was 16 years as at 18th October 2005.

During the hearing of the appeal, the appellant stated that he was 15 years old at the time of the trial and that at the time of hearing this appeal he was 17 years old. There was need to have the appellant's age properly assessed and determined by a Doctor but that was not done. In the event that the appellant was found to be a minor, the hearing ought to have been conducted in strict conformity to the provisions of the Children Act, 2001.

Although Mr. Kemo, Senior Principal State Counsel, conceded that the appellant was a minor at the time when the offence was committed and urged the court to order a retrial, I am of the view that the appellant's age needs to be verified before any final decision or order is made in this matter. In that regard I order that the appellant be taken to Kisii District Hospital for age assessment and a report thereof be filed on or before 24th June, 2008 when this matter will be mentioned.

DATED, SIGNED and DELIVERED at KISII this 13th day of June, 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence of

The appellant

Mr. Kemo, Senior Principal State Counsel for the Republic

D. MUSINGA

JUDGE