



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 85 OF 2017**

**WC.....APPELLANT**

**VERSUS.**

**REPUBLIC.....STATE**

*(Being an appeal from the Judgment of Honourable R. Amwayi - Resident Magistrate, delivered on 23<sup>rd</sup> October, 2017 in Molo Chief Magistrate's Court Sexual Offences Case No. 28 of 2017)*

**JUDGMENT**

1. The Appellant, WC, was charged in the Molo Chief Magistrate's Court with the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 11<sup>th</sup> day of March 2017 in Molo sub-county within Nakuru County, he intentionally caused his penis to penetrate the vagina of FA, a girl child aged 14 years.
2. The Appellant also faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the Sexual Offence Act 3 of 2006. The specifics of victim, time and place are the same as those of the main charge.
3. After a fully-fledged trial, the Appellant was convicted and sentenced to twenty years imprisonment – the minimum sentence provided in the Sexual Offences Act.
4. On appeal, the Appellant raised many grounds but when the matter first came up for hearing, the Appellant dropped all other grounds except one: he conceded that he had a sexual experience with the victim but asked the Court to consider absolving him from custodial sentence because he was a minor at the time he committed the offence.
5. The Appellant produced his Birth Certificate. It shows that he was born on 12/06/1999. The offence was committed on 11/03/2017. That would make the Appellant 17 years, 8 months and 29 days at the time the offence was committed. In short, the Appellant had not turned 18 and he should have been tried as a minor. This did not happen. He was tried as an adult; and was convicted and sentenced as one.
6. In previous decisions, I have explained that a trial of a minor for an offence under the Sexual Offences Act which is conducted without affording the minor the protections in the Constitution and the Children Act is a nullity. Any conviction arising therefrom cannot be sustained and must be quashed. See *Peter Kuria v Republic [2019] eKLR*.
7. That is the position here. The Appellant was a minor when he committed the alleged offence and when the trial commenced. He turned 18 at some point during the trial. Moreover, both the Appellant and the victim were minors and the evidence tended to show they were in a friendship that resulted in sexual experimentation. It was discriminatory to charge the Appellant alone in the circumstances. See *P.O.O. v Republic [2017] eKLR*.
8. **In the circumstances, it is the duty of this Court to quash the conviction and set aside the sentence imposed which I hereby do. The Appellant shall be set at liberty unless otherwise lawfully held in custody.**
9. Orders accordingly.

**Dated and delivered at Nakuru this 5<sup>th</sup> day of March, 2020**

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**JOEL NGUGI**

**JUDGE**