

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 52 OF 2017

PATRICE MOIRE NYATANG'IAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from the original conviction and sentence of Hon. A.C Towett – RM dated 21st September 2017 at the Chief Magistrate's Court at Nyamira in Criminal Case No. 4 of 2016)

JUDGMENT

1. The appellant, PATRICE MOIRE NYATANG'I, was charged, convicted and sentenced to 20 years imprisonment for the offence of defilement contrary to section 8(1) and (3) of the Sexual Offences Act. The particulars of the charge were that on 25th December 2015 at 9.00 pm at [particulars withheld] in Manga Sub County within Nyamira County, he intentionally caused his penis to penetrate the vagina of DGN, a child aged 12 years.
2. The appellant now appeals against the conviction and sentence on the ground that the prosecution did not establish the elements of the offence. However, at the hearing of the appeal, the appellant informed the court that he was only contesting the sentence as he was 18 years old at the time he was convicted.
3. I have considered the proceedings and it emerged that his age was assessed at 18 years at the time of conviction meaning that when he committed the offence, he could have been below that age. At any rate, neither the trial magistrate nor the prosecution dealt with this issue early in the proceedings. I am inclined to give the appellant the benefit of doubt. Consequently I quash the sentence and substitute it with a sentence that is consistent with section 191 of the Children Act.
4. In conclusion, I affirm the conviction. I allow the appeal to the extent of quashing the sentence. The appellant is sentenced to time served. I order his release unless otherwise lawfully held under a separate warrant.

Dated and delivered at Kisii this 5th day of April 2019.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.