

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 92 OF 2016

CORAM: D. S. MAJANJA J.

BETWEEN

C T.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C. Njagi, RM dated 1st July 2016 at the Chief Magistrates Court at Kwale in Criminal Case No. 1295 of 2014)

JUDGMENT

1. The appellant, **C T**, was charged and convicted of the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act**. It was alleged that on 2nd December 2014 in Kwale District, he intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of MA, a child aged 12 years.
2. The appellant does not wish to contest the conviction but that submitted that the sentence was harsh and excessive given that he was a child at the time he committed the offence. Counsel for the State drew the court's attention to the fact that two age assessments were produced after the conviction but before sentencing which showed two inconsistent ages for the appellant.
3. The record shows that 12th July 2016 after conviction, the trial court ordered an age assessment to be done. The report dated 13th July 2016 showed that the appellant was aged 18 years. On that basis the trial magistrate concluded that the appellant could have been 16 years at the time the offence was committed.
4. When the probation officer inquired into the sentencing options for the appellant, his report showed that the appellant was 18 years old. The trial magistrate ordered a further assessment and on 4th August 2018, the age assessment report showed that the accused was 20 years old meaning that the appellant could have been 18 years old at the time the offence was committed.
5. The trial magistrate did not record the reasons why he preferred the latter report which formed the basis of sentence of imprisonment imposed on the appellant. The two reports presented to the court showed that there was a possibility that the appellant was below the age of 18 years when he committed the offence. Since there was doubt as to his age, any such doubt ought to have been resolved in favour of the appellant.
6. I wish to point out two issues which would be helpful if followed by the trial court to avoid such an occurrence. First, where there is doubt as to the age of the accused, the age assessment ought to be done at the earliest opportunity so that if the offender is a child, he or she is treated accordingly. Second, it is important that the age assessment is put the accused to comment on as he is entitled to contest it. Lastly, an age assessment report being an expert report, is based on opinion. It must provide a basis for the assessment as it is the duty of the court to make a finding not only from the report but from other facts that may emerge.
7. For the reasons I have set out, I quash the sentence of 20 years' imprisonment as it is inconsistent with the provisions of **section 190 and 191** of the **Children Act** that do not contemplate imprisonment of a child offender.
8. I have noted that the probation officer in his report had recommended probation. I therefore sentence the appellant to **two (2) years'** probation from the date hereof. The appellant shall be released unless otherwise lawfully held.

DATED and DELIVERED at MOMBASA on the 5th day of September 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Ogega, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.