



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 26 OF 2017

N C M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the judgement of the Senior Resident Magistrate M. W. Njagi in Eldoret CMCRC NO. 4965 OF 2012, dated 18th December, 2013)

JUDGMENT

N C M was charged in the lower court with the offence of defilement contrary to *Section 8(1)* as read with *Section 8(4)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that on the 26th day of October, 2012 in Wareng district within Rift Valley province, the appellant intentionally caused his penis to penetrate the vagina of *J C* a child aged 17 years.

The appellant also faced an alternative count of committing an indecent act with a child, contrary to *Section 11(1)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars hereof being that on the 26th day of October 2012 in Wareng district within Rift Valley province, the appellant intentionally touched the vagina of *J C*, a child aged 17 years.

In this matter I don't wish to get into the evidence as the appellant is simply appealing against the sentence and on ground that he was a child by the time he committed the alleged offence.

In his mitigation he had said that he was a student at the time of his arrest and is an orphan. He prayed for leniency. The court had found him guilty of the main count. He was sentenced to serve 10 years imprisonment.

During the hearing of the appeal he submitted a Birth Certificate. The court requested the registrar of Births in Uasin Gishu County to confirm its authenticity of which he did. He confirmed its authenticity. It shows the appellant was born on 31st July 1999. The offence was allegedly committed on 26th October, 2012. This shows by the time of the alleged offence the appellant was aged 14 years and was therefore a child.

The trial commenced on 19th November, 2012 and ended on 18th December, 2013 when he was convicted and sentenced. For the period, which is about one year, he was in custody as was even expressed by the trial magistrate before sentence.

It is important that the trial court by the time it passed the sentence was not aware that the convict was a child. *Section 191* of the *Children Act No. 8 of 2001* is clear on methods of dealing with a child offender. It states as follows:-

“(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways-

- (a) by discharging the offender under Section 35 (1) of the Penal Code.***
- (b) by discharging the offender on his entering into a recognisance, with or without sureties;***
- (c) by making a probation order against the offender under the provisions of the probation of Offenders Act;***

- (d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;*
- (e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;*
- (f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;*
- (g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;*
- (h) by placing the offender under the care of a qualified counsellor;*
- (i) by ordering him to be placed in an educational institution or a vocational training programme;*
- (j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;*
- (k) by making a community service order; or*
- (l) in any other lawful manner.*

(2) No child offender should be subjected to corporal punishment.

If the trial court was aware that the convict was a child, it would have effected the provisions of the said Section.

The appeal on sentence is therefore merited. It is allowed. The sentence of 10 years imprisonment passed against the appellant is hereby quashed and a report from the children officer requested for to guide the court in making an appropriate order.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 6th day of November, 2018

In the presence of:

The appellant

Ms. Mumu for state

Mr. Mwelem – Court assistant

Mention on 26/11/2018

SIGNED

S. M GITHINJI

JUDGE

6/11/2018