



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**  
**CRIMINAL APPEAL NO. 54 OF 2016**

**D O O..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Being an appeal against both the conviction and the sentence dated 5.5.2016, in Criminal Case No. 842 of 2012 in Siaya By Hon. E.M. Ayuka – R.M.)*

**JUDGMENT**

1. The Appellant **D O O** was charged **with an offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charges are that on the 7<sup>th</sup> day of October 2012, at [particulars withheld] Sub-Location in Gem District within Siaya County, intentionally caused his penis to penetrate the vagina of VA a child aged 14 years. The Appellant faced an alternative charge of **committing an indecent Act with a child contrary to Section II (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that on the 7<sup>th</sup> day of October 2012 at [particulars withheld] sub-Location in Gem District within Siaya County, intentionally touched the vagina of VA a child aged 14 years.

2. After full trial the appellant was found guilty, convicted and sentenced to some 20 years imprisonment.

3. The conviction and sentence provoked this appeal. The Appellant in his appeal sets out four (4) main grounds thus:-

*(a) That the Appellant was not accorded a fair trial as envisaged in Article 50 (2) (h) of the constitution despite the fact that He had an advocate the trial court conducted the proceedings in his absence.*

*(b) That the trial magistrates convicted him without establishing the age of the victim.*

*(c) That the trial court relied on contradictory and uncollaborative evidence without considering that the findings were unsatisfactory in law.*

*(d) That the Appellant's unsworn defence was not given due consideration whereas the same was capable of awarding him an acquittal.*

4. The Appellant appeared in person whereas the State was represented by M/s. Odumba Learned State Counsel.

5. At the hearing the appellant withdrew his appeal against conviction and urged his appeal against sentence urging the sentence meted against him was illegal as of the time of the commission of the offence he was a minor aged 16 years. That the victim was his girlfriend and that it is her who took herself to the Appellant's home and they had sex. That he did not know it was wrong to have such a relation at his age. He submitted that he is a first offender and is currently undergoing parallel studies at [particulars withheld] University. He prayed for non-custodial sentence.

6. M/s. Odumba urged that as per age assessment report filed dated 6<sup>th</sup> July 2016 following an order of this Court of 27<sup>th</sup> June 2016 the appellant is now aged 19 years, meaning as of 7<sup>th</sup> October 2012, the appellant was aged about 16 years, and a minor. The State therefore urged the sentence is illegal as it is contrary to the provisions of the Children Act. She then urged the Court to substitute the sentence with the appropriate sentence.

7. The facts of the prosecution case are that, PW1 VA on 7.10.2012 was late playing with other children when it started to rain. She sought shelter at P's home. That it became late and P's mother invited her to spend the night at her home, that earlier on her other friend W with whom they had played earlier on, asked her to accompany her to her home, as she said W's mother wanted PW1 to try on some clothes. That on arrival at W's home her mother was not present. That then W left the house and shortly returned accompanied by the appellant. That W had earlier on spread a mattress on the floor. The Appellant then carried PW1 and laid her on the mattress, removed her inner wear, removed his clothes too and defiled PW1. PW1 reported the incident to her uncle F O. The following day she was escorted to Yala Level IV Hospital where she was treated and the matter reported to Yala Police Station. On 14<sup>th</sup> October 2012 the Appellant was arrested. On 9.10.2012 the P3 form was filled revealing that the PW1's vaginal walls showed there was friction and the hymen was freshly torn. That there was creamish-whitish discharge from the vagina leading to a conclusion that the complainant, PW1, had been sexually penetrated.

8. The only issue for determination in this appeal is whether the trial Court's sentence is within the provisions of the law? The trial court did not observe the age of the appellant at the time of trial nor was there any evidence produced by the appellant as regards his age. When the appeal came up for mention on 27.6.2016, the appellant informed the Court when the offence was committed he was a minor aged 17 years prompting the court to order the Appellant be escorted to Siaya County Referral Hospital for age assessment. The Report was subsequently filed on 6.7.2016 disclosing that the appellant is now 19 years, meaning that at the time of commission of the offence thus 7.10.2012 he was about 16 years old and hence a minor.

**9. Section 8 (7) of the Sexual Offence Act No. 3 of 2006 provides:-**

***“8 (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.”***

**Section 191 (1) (a) – (l) of the Children Act also provides:-**

***“191. (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.”*

10. In view of the provision of **Section 8 (7) of the Sexual Offences Act No. 3 of 2006 and Section 191 (1) (a) – (l) of the Children Act**, the Appellant being a minor then ought not to have been given custodial sentence but should have been given one of the sentences provided for as per the aforesaid Acts. I find the sentence meted against the Appellant of twenty (20) years imprisonment to be illegal and unlawful.

11. **The upshot is that the appeal against sentence succeeds. I accordingly uphold the conviction, substitute the sentence of twenty (20) years imprisonment with two (2) years non-custodial sentence during which period the Appellant will be supervised by the Probation Officer, Siaya County.**

**DATED AND SIGNED AT SIAYA THIS 10TH DAY OF NOVEMBER, 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN THE OPEN COURT THIS 10TH DAY OF NOVEMBER, 2016**

**IN THE PRESENCE OF:**

**APPELLANT IN PERSON – PRESENT**

**M/S. ODUMBA FOR THE STATE**

**C.A. 1. K. ODHIAMBO**

**2. L. ATIKA**

**J. A. MAKAU**

**JUDGE**