



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL APPEAL NO. 12 OF 2015**

**BETWEEN**

**KELVIN OMONDI NDEGE .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 134 of 2013 at the Senior Resident Magistrates Court at Ndhiwa, Hon. B.O. Omwansa, RM dated 30<sup>th</sup> December 2014)*

**JUDGMENT**

1. The appellant, **KELVIN OMONDI NDEGE**, was charged and convicted of the offence of attempted defilement contrary to **section 9(1) and (2) of the *Sexual Offences Act, 2006***. The particulars of the charge were that on the 23rd day of June 2013 at [particulars withheld] Sub-location in Ndhiwa District of Homa Bay County he intentionally attempted to cause his penis to penetrate the vagina of WAO, a child aged 15 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1) of the *Sexual Offences Act*** based on the same facts by intentionally and unlawfully touching her breasts and vagina with his hands and rubbed his penis on her vagina. The court sentence the appellant to 10 years imprisonment.
2. Although the appellant raised several issues about his conviction, for reasons that will become apparent it is not necessary to deal with the merits of the appeal.
3. When the matter came up for plea on 27<sup>th</sup> June 2013, the appellant stated the he was 17 years old. As a result the learned magistrate directed that he undergo an age assessment. On 2<sup>nd</sup> July 2013, the recorded proceedings were as follows;

*Prosecutor: The matter is coming up for hearing today. Further the court had directed that the accused age be assessed. The report has been done together with that of the complainant. I wish to submit them.*

*Court: I have seen the age assessment report for the accused. It indicates that he is 19 years.*

4. Where an accused is likely to be child, it is important for the magistrate to ascertain the age of the accused before the trial. Any person below the age of 18 years is a child and is entitled to all the protections and rights of a child under the ***Children Act***. Furthermore, upon conviction the sentence imposed will be governed by **section 191 of the *Children Act***.

5. In ***Dennis Abuya v R KSM CA CR APP. No. 164 OF 2009 [2010] eKLR***, the Court of Appeal dealt with a case where the evidence regarding the age of the appellant at the time of the offence was committed was inconclusive. The Court stated as follows:

*Neither the trial magistrate, nor the learned judge on first appeal dealt with the issue of the appellant's age at the time he allegedly committed the offence. It may be that he was eighteen years of age at the relevant time; but it may equally be that he was below eighteen years at the time. We do not understand the provisions of the Sexual Offences Act to authorize the imprisonment of minors and we are unable, on the material on record, to rule out the possibility that the appellant was under eighteen years on 19th June, 2007 when the offence was allegedly committed. Section 8(7) of the Sexual Offences Act which states, "Where a person is 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 Act." The question of imprisoning a minor does not, therefore, arise under the provisions of the Sexual Offences Act.*

6. In the present case, the appellant asserted that his age was 17 years. When the age assessment was presented, he was not given the opportunity to challenge the evidence that was against him or offer any evidence in rebuttal. As a matter of fact, the learned magistrate dealt with the issue in a perfunctory manner. Furthermore, when the clinical officer testified during the trial, he did not produce the medical report as part of the evidence. I therefore quash the conviction on this ground.
7. I now turn to whether I should order a retrial. The principles governing whether the court should order a retrial should were stated in ***Fatehali Manji v Republic [1966] EA 343*** East Africa Court of Appeal stated;

*In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.*

8. Having regard to the fact that the appellant could have been a child at the time he committed the offence and the fact that he served a sentence of imprisonment, I do not think that in the circumstances a retrial would be in the interests of justice.
9. I allow the appeal and quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at HOMA BAY this 5<sup>th</sup> day of October 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Nyauke instructed by Nyauke and Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.