



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 251 OF 2012

JOHNNES MWANJALA APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 7 of 2012 of the Senior Resident Magistrate's Court at Wundanyi – Hon. Orege - SRM)

JUDGMENT

The Appellant was Convicted and Sentenced to twenty (20) years Imprisonment for the offence of defilement on a boy contrary to Section 8(1) as read with Section 8(3) of the Sexual offences Act No. 3 of 2006 the particulars being that:-

“On the 13th day of November, 2011 at [Particulars withheld] village Kishushe – Taita Taveta County intentionally caused his penis to penetrate the anus of J N a child aged eleven (11) years”.

The appellant pleaded guilty to the charge and was Convicted on his own plea and Sentenced to twenty (20) years Imprisonment.

When the matter came for hearing of the appeal the appellant told the Court that at the time of his Conviction he was aged seventeen (17) years. An order for age assessment was issued. On the 16th day of December, 2013 his age was assessed as eighteen (18) years.

The particulars of the charge sheet indicate the date of the incident of defilement to be on 13th November, 2011. By simple arithmetics at the time of the defilement the appellant was aged approximately sixteen (16) years.

The learned trial magistrate should not have Sentenced him to Imprisonment but should have resorted to a punishment under the children's Act or under Probation Act as envisaged by Section 8(7) of the Sexual offences Act which provides,

“Where the person charged with an offence under this act is below the age of eighteen (18)

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) of the children's Act provides for methods of dealing with offenders thus,

“In spite of 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 recognizance, with or without sureties

(c) 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 (15) 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 (16) years dealing with him, in accordance with any Act which provides for establishment and regulation of borstal institution.

(h) by placing the offender under the care of a qualified counselor

(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”.

Presently, the Appellant is aged above nineteen (19) years and most of the punishment prescribed by Section 191 are not available for the appellant.

The one that looks more available and relevant is that of community service.

It is ordered that the Probation Department does avail a report as appertains to Community Service within two weeks from the date of this judgment.

Mention **29th May, 2014.**

Judgment delivered dated and signed this **15th** day of **May, 2014.**

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M. MUYA

JUDGE

15TH MAY, 2014

In the presence of:-

Mr. Ayodo learned Counsel for the State

The Appellant present

Court clerk Musundi

M. MUYA

JUDGE

Court: Mention on **29th May, 2014** for Probation/ Community Service.

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M. MUYA

JUDGE

15TH MAY, 2014