

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 3 OF 2014

BETWEEN

SABIANO ODHIAMBO AORA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 2 of 2013 at Chief Magistrate's Court at Oyugis, Hon. G.M.A. Ong'ondo, Ag. CM dated on 18th February 2013)

JUDGMENT

1. The appellant, Sabiano Odhiambo Aora, was charged with the principle offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the ***Sexual Offences Act, 2006***. The particulars were that on diverse dates between December 2012 and 15th February 2013 at Kotieno sub-location in North East Karachuonyo Location in Homa Bay County, he caused his penis to penetrate the vagina of NAO, a child of 11 years. An alternative charge of indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act, 2006*** was preferred on the same facts.
2. When he appeared before the Court for plea, he pleaded guilty to the offence and the facts were read to him. In summary, he was found by administration police officers on 15th February 2013 having sexual intercourse with NAO. The prosecution produced two P3 forms. The first one was to confirm that NAO had sexual intercourse and while the second one was for age assessment. According to the assessment, the victim was 11 years old. As a result of his own plea of guilt, the appellant was convicted and sentenced to life imprisonment.
3. Mr Bana, counsel for the appellant, attacked the conviction on the ground that the charge sheet was defective as the principal charge stated that the child was 11 years old hence the charge ought to have been brought under **section 8(2)** of the ***Sexual Offences Act***. The offence charged under **section 8(3)** of the ***Act*** concerns intercourse with a child of between 12 and 15 years does not attract a mandatory life sentence. In the circumstances counsel urged that the entire proceedings be set aside on account of the defect.
4. Mr Oluoch, learned counsel for the respondent, supported the conviction and sentence. He submitted that the medical evidence proved that the child was 11 years old and that even though the charge was defective, the appellant ought to have been charged under **section 8(2)** of the ***Act*** which attracts a mandatory life sentence. He argued that the appellant was not prejudiced by the plea of guilt and the conviction and sentence ought to be upheld.
5. I have considered the charge sheet and evidence and I am inclined to quash the conviction for the reason that the age of the victim remains doubtful. The medical report produced shows that the estimated age was, "*as per the date of birth in the school report book i.e., 5th February 2007.*" The doctor, who prepared the medical report, did provide an independent medical basis for this assessment of age in the report. He instead relied on a school report book which was not produced in evidence and which the accused would be entitled to challenge as a basis for such assessment.
6. In sexual offence cases, age is a crucial factor in proving the offence of defilement and

determining the sentence. The fact that the appellant was convicted and sentenced to serve life imprisonment belies its seriousness.

7. In the circumstances, the appeal is allowed and conviction quashed. The appellant shall remain in custody in order to plead to a proper charge before any other magistrate at the Oyugis Chief Magistrate's Court than Hon. G.M.A. Ong'ondo on **11th July 2014**.

DATED and DELIVERED at HOMA BAY this 10th day of July 2014

D.S. MAJANJA

JUDGE

Mr Bana, instructed by Bana and Company Advocates for the appellant.

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