



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)

CRIMINAL APPEAL NO. 205 OF 2013

BETWEEN

DAVID KHISA APPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Eldoret,

(G.K. Kimondo, J.) dated 28th November, 2013

in

H.C.CR.A. NO. 142 OF 2011)

JUDGMENT OF THE COURT

1. The appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act, 2006. The particulars of the offence were that on 26th December 2008 at Jua Kali Estate in Uasin Gishu, the appellant defiled JA, a minor aged about 8 years.
2. The appellant pleaded not guilty but after trial, he was convicted and sentenced to fifteen years imprisonment. His appeal to the High Court was dismissed and his sentence was enhanced from fifteen years to life imprisonment. This is an appeal against that judgment.
3. In his memorandum of appeal, the appellant challenges his conviction and sentence on the grounds that the charge against him was defective and that the complainant’s age was not proved.
4. At the hearing of the appeal, the appellant relied solely on the written submissions he had filed. In those submissions, he argued that whereas the particulars of the charge alleged that he committed the offence on 26th December 2006, the evidence tendered in court was that the offence was committed on 26th December, 2008, two years later. He submitted that made the charge incurably defective. Regarding the complainant’s age, the appellant submitted that in the absence of any evidence in the form of a birth certificate or a baptismal card, there was no proof that at the

material time the complainant was eight years old. On those submissions, the appellant urged us to allow his appeal.

5. In response, Mr. Mulati, learned Principal Prosecution Counsel, submitted that the offence was committed on 26th December 2008. The date of 26th December 2006 given on the charge sheet was therefore a typographical error. On the complainant's age, counsel referred us to the P3 form which gave the appellant's age as 8 years.
6. We have considered these rival submissions and carefully read the record of appeal. At face value, the appellant is right that the evidence tendered in court is at variance with the particulars of the charge. However, when considered in totality, the end result is different. Whereas the charge sheet states that the offence was committed on 26th December, 2006, all the prosecution witnesses testified that the offence was committed on 26th December, 2008. The P3 form which was completed on 29th December, 2008 gave the age of the complainant's vulva injuries as 3 days. In the circumstances, as the variance is only on the year the offence was committed, stated on the charge sheet as 2006 instead of 2008 as the prosecution witnesses testified, we agree with Mr. Mulati that this was clearly a typographical error on the part of the police officer who drafted the charge which the two courts below did not notice. This is not an error that occasioned a failure of justice. Ground 1 of the appeal therefore fails.
7. On ground 2, the P3 form (completed on 29th December 2008) gave the complainant's age as 8 years. When the complainant testified in court on 10th March 2009, about three months after the commission of the offence, she stated that she was 10 years old. The complainant's mother, S A, PW2, testified that the complainant was born in 2001. All that evidence made it clear that as at the date of commission of the offence, the complainant was between 8 and 10 years old. We therefore find that contrary to the appellant's contention, the complainant's age was proved beyond reasonable doubt. Ground two therefore also fails.
8. Given that the complainant's age was clearly below eleven and that the appellant was given notice of enhancement and chose to proceed with the appeal, the learned Judge had no choice but to set aside the illegal sentence of fifteen years' imprisonment and substitute it with the life sentence prescribed in **Section 8(2)** of the Sexual Offences Act.
9. For these reasons, we find no merit in this appeal and we accordingly hereby dismiss it in its entirety.

Dated and delivered at Eldoret this 17th day of February, 2016.

D.K. MARAGA

JUDGE OF APPEAL

D.K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR