



**IN THE COURT OF APPEAL**

**AT KISUMU**

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

**CRIMINAL APPEAL NO. 80 OF 2014**

**BETWEEN**

**RICHARD MBOGA OGINGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Kisumu (Chemitei, J.) dated 22<sup>nd</sup> November, 2013***

**in**

**H.C.CR.A NO. 23 OF 2013)**

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**JUDGMENT OF THE COURT**

1. The appellant was convicted for the offence of defilement contrary to **section 8 (1) (4)** of the **Sexual Offences Act** and sentenced to 15 years' imprisonment. The offence was committed between the 8<sup>th</sup> day of June, 2010 and 8<sup>th</sup> July, 2010 in Siaya District. The appellant had caused his penis to penetrate the vagina of **E W**, a girl aged 17 years.
2. The appellant was aggrieved by the said conviction and sentence and preferred an appeal to the High Court. The appeal was unsuccessful, hence this second appeal.
3. The facts that gave rise to this appeal are simple and straight forward. On 8<sup>th</sup> June, 2010 **B, PW3**, a relative of the complainant, introduced the young girl to the appellant, who according to a P3 form produced by a clinical officer, PW4, was also 17 years old. B asked the complainant to marry the appellant but the young girl said that she was still in school. The complainant and the appellant seemed to have struck a romantic relationship as they agreed to go and sleep in the appellant's aunt's house. On the following day they went to the appellant's house where they spent the night and had consensual sexual intercourse. The next day they went to the local market and while there they were both apprehended and taken to Siaya Police Station. The arrest was occasioned by a complaint made to the police by the girl's mother. Thereafter the appellant was charged with defilement of his young friend, the complainant.

4. The appellant, in his mitigation, said that the complainant had agreed to be his wife and urged the trial court to forgive him.

5. The appellant was unrepresented before the trial court, the High Court as well as before this Court. Although in his third ground of appeal before the High Court the appellant stated that he was under 18 years old when he committed the offence, he did not advance that argument in his written submissions that he entirely relied upon during the hearing of his first appeal. We believe that is the reason why the first appellate court did not take into consideration the age of the appellant in its judgment.

6. When the appeal came up for hearing before this Court, **Mr. Ketoo**, prosecution counsel, submitted that although there was overwhelming evidence that the appellant defiled the complainant, the sentence that was passed by the trial court and affirmed by the High Court was improper, considering that the appellant was also a minor when he committed the offence. At the time of the appeal the appellant informed this Court that he was 20 years old.

7. **Section 8 (4)** of the **Sexual Offences Act** stipulates that a person who defiles a child who is between the age of 16 and 18 years is liable to imprisonment for a term of 15 years. However, this provision of the law cannot be applied to a child who defiles another child. The **Children Act** defines a child to mean any human being under the age of 18 years.

8. Whereas the **Sexual Offences Act** does not permit or excuse consensual sex between children, children who engage in consensual sex violate the law and are liable to be punished as prescribed under the relevant law. **Section 8 (7)** of the **Sexual Offences Act** states as follows:

**“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 Borstal Institutions Act and the Children Act”.**

**Part XIII** of the **Children Act** contains elaborate provisions as to how child offenders should be dealt with by courts. Had the trial court and the first appellate court taken into account that the appellant was a child we believe they would have handled him differently.

9. **Section 190 (1)** of the **Children Act** expressly states that no child shall be ordered to imprisonment or to be placed in a detention camp. **Section 191** of the said **Act** provides various methods of dealing with child offenders, including but not limited to discharging the offender under **section 35 (1)** of the **Penal Code**, making a probation order, sending him/her to a rehabilitation school or borstal institution.

10. The Borstal Institutions Act defines a youthful offender to mean *“a person who has been convicted of an offence punishable with imprisonment and has been found by the court, at the time of such conviction, to have attained the age of fifteen years but to be under the age of eighteen years”*.

The appellant herein fell within that age bracket.

11. **Section 5** of the **Act** stipulates that before sentencing a youth offender a court should consider the evidence available as to his character and previous conduct and the circumstances of the offence, and whether it is expedient for his reformation that he should undergo a period of training in a borstal institution. If the court is so satisfied, it may direct that the offender be sent to a borstal institution for a period of three years.

12. Had the trial court appreciated that the appellant was below the age of eighteen years, it would, upon reaching a finding of guilt, dealt with him in accordance with the provisions of **section 8 (7)** of the **Sexual Offences Act**. The sentence to fifteen years' imprisonment that was imposed by the trial court and affirmed by the High Court was therefore illegal.

13. On our part, we affirm the finding of guilt but allow the appeal against sentence. The appellant has been in illegal prison custody for more than three years. Consequently, the appeal against sentence is

allowed and the sentence to fifteen years' imprisonment set aside.

We order that the appellant be set at liberty unless otherwise lawfully held.

*Dated and delivered at Kisumu this 29<sup>th</sup> day of July, 2016.*

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**