



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 164 of 2009

DENNIS ABUYA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a

judgment of the High Court of Kenya at Kisumu (Karanja, J) dated 16th June, 2009

In

H. C. Cr. A. No. 105 of 2008)

JUDGMENT OF THE COURT

Dennis Abuya, the appellant herein, was tried and convicted on a charge of defilement of a girl contrary to *section 8 (1)* as read with *section 8 (2)* of the Sexual Offences Act, No. 3 of 2006. The particulars of that charge were that on 19th June, 2007 in Emuhaya District in Western Province, the appellant had carnal knowledge of one J.M, a girl aged five years.

At the time the offence was allegedly committed, the appellant was a Form Three student at A Secondary School. For some reason which is not quite clear from the record, he was not in school on the day the offence charged was committed; he was operating some kiosk at L. The trial of the appellant was between 21st June, 2007 and 15th July, 2008 when he was convicted and sentenced to life imprisonment. On the day he was sentenced, the appellant told the Magistrate that he was eighteen years old, which would mean that on the date of the alleged offence, i.e. 19th June, 2007, he would have been about seventeen years old. During the hearing of the appeal, the appellant told us that he was born in 1991 which would mean that in June, 2007, he would have been around sixteen years old.

There is a P3 Form in the record before us and it shows that on 26th June, 2007, the appellant's "*Estimated age*" was eighteen years. By "*estimated age*" we understand the clinical officer who examined the appellant at Kima Mission Hospital, was saying the appellant could be eighteen years and above or below eighteen years. There was, however, no medical report or evidence produced by the prosecution to conclusively show that the appellant was eighteen years as at the date he was said to have committed the offence.

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 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 authorise 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 alleged to have been committed. **Section 8 (7)** of the Sexual Offences Act specifically provides that:-

“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 provisions of the Borstal Institutions Act and the Children Act.”

The question of imprisoning a minor does not, therefore, arise under the provision of the Sexual Offences Act.

Due to the state of the record before us, we allow the appellant’s appeal to the extent that we set aside the sentence of life imprisonment imposed upon the appellant by the Magistrate and confirmed by the Judge on first appeal and we remit the case to the High Court with a direction that the High Court shall call for evidence establishing the appellant’s age as at 19th June, 2007 and on such evidence determine the correct legal sentence to be imposed upon the appellant. We so order.

Dated and delivered at Kisumu this 19th day of March, 2010.

R.S.C. OMOLO
.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

J.G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.