



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**HCCRA NO. 30 OF 2017**

**(FORMERLY ELDORET HCCRA NO. 162 OF 2013)**

**MARTIN KIPKORIR KAPTICH.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

***[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 234 of 2011 delivered on the 23<sup>rd</sup> day of May, 2013 by Hon. M. Kasera, PM]***

**JUDGMENT**

1. The appellant was convicted on 23/5/2013 and sentenced to serve imprisonment for 20 years for the offence of defilement contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant had “on the 22<sup>nd</sup> day of February 2011 in Koibatek District within Baringo County committed an act which caused the penetration of his penis into the vagina of MC a child aged 14years”. On the same facts, the appellant was charged with an alternative charge of indecent assault contrary to section 11 (1) of the Sexual Offences Act.

2. The DPP did not oppose the appeal and at the hearing submitted as follows:

“Miss Macharia

*Appeal is not opposed. The appellant convicted for offence of defilement contrary to section 8 (1) of the Sexual Offences Act and sentenced to 20 years.*

*Evidence of the Doctor Pw4 who examined the complainant show clearly that there was no defilement. He stated that there was no lacerations or bruises HIV negative and no sperms and no evidence of penetration. Without evidence of partial or complete penetration, the offence of defilement cannot stand.*

*This evidence contradicts evidence of Pw1 who indicated that the appellant defiled her, with contradictions of evidence the same should be used for the benefit of the accused.”*

The appellant urged the court to review the evidence especially the medical evidence.

3. Consistently with the duty of the 1<sup>st</sup> appellate court, I have re-evaluated the evidence presented by the prosecution and the Defence at the trial. See ***Okeno v. R*** (1972) EA 32, and cases cited therein.

4. When put in his defence, the appellant denied the charge and only related in his unsworn statement how he was arrested by the chief and 2 others on a charge of attempted defilement of a school girl.

5. Pw4, Dr Marachi Joram the Medical Officer at Eldama Ravine District Hospital testified to having examined the complainant, a girl aged 14 years and finding:

“*Genitalia: No lacerations or bruises Hymen had already been broken. White discharge. No sperms. Few epithelial cells which was normal.*

***Findings. No evidence of penetration”***

On cross-examination by Mr. Chebii for the accused Pw4 testified that:

*“There was no evidence of traumatic penetration”.*

On re-examination, the witness said:

*“Hymen [had] already been broken. This does not overrule defilement”.*

6. Pw3 the Investigating Officer produced the child’s clinic card indicating that she was born on 27/7/1997 and confirmed that only 2 people, the complainant and the uncle, recorded statements despite the complainant having mentioned on Elijah and Hellen and that report was made on 22/2/2011 at 5.30 pm.

7. Pw2 MT is the Uncle of the complainant gave hearsay evidence for the complainant and one Robert who was not called as a witness as follows:

*“I am MKT. I live at Kabunyony. I work as a matatu driver. I knew the complainant. I am her uncle. She is a daughter of my brother she lives at Kiptuno. On 22.2.2011 at 3.00 p.m. I was at Eldama Ravine stage. I was called by Robert. He told me the child had been defiled on the short cut to Ravine. I talked to the girl. I told her to meet me at Kobil. She told me she was defiled by Kipkorir. I took her to police station then to Eldama Ravine District Hospital MFI – 1 medical chit from Eldama Ravine Hospital identified. We went to police station. We were given p3 form. I saw the accused after he was arrested.*

*He is a village mate but my uncle within the clan. Ho grudge.”*

8. The complainant Pw1 was therefore the only witness of the alleged defilement and she testified as follows;

*“I am MJC. I live in Rongai. I go to [Particulars Withheld] Primary School in Rongai. I am in class 7. I am 14 years old. I was in [Particulars Withheld] Primary School. This year first term I was in class 7. On 22.2.2011 at 12.30 p.m. I was at the river. I was from Kiptuno I was coming to Ravine my father lives in Kiptuno. I took a short cut that go through the river. I was alone. I heard someone run after me. I turned saw accused herein he asked me if I was going to Ravine and I answered in the affirmative. He told me he was going to Ravine to take money for a building at home. At the river he asked me if we could have sex. I told him no. he asked me why not I told him not to disturb me. He sat down. I continued with my journey. After a short while he ran to me pulled me from behind threw me on the ground. I raised alarm. He squeezed my throat covered my mouth with his hand. He lifted my skirt removed my inner wear. He unzipped. Then he defiled me. I laid with my belly on the ground. He laid on me from my back. I felt pain. He inserted his penis in the place where I urinate. I cried. I told him I will tell my father. He told me not to say the incident was over. No one came to rescue me. The place was bushy. I took my inner wear. I cried as I came to Ravine. When he left me he told me to run so that he does not catch up with me. I ran met mzee Elijah. He asked me why I cried. I told him there was a man who did bad manners to me. He asked me if I knew the man. I told him I knew. He is Ritany. He told me to inform my father who is in Ravine to take me to the hospital. I informed my uncle MT. He took me to the hospital Eldama Ravine District Hospital that same day. I was treated. I was treated and discharged medical chit MFI – 1. We went to the police station where we were given p3 form. The same was duly completed we gave police child health card date of birth 13.7.1997 MJ, father is K. I was born at Rongai Health Centre. Child Health Card MFI – 3. I had known accused before that day. I used to see him walk in the village.*

*He wore a cap when he defiled me. He did not cover his face. I walked with accused for 2 minutes be defiled me. I do not know how he was arrested.*

*No grudge.”*

The typed record says Pw1 gave “unsworn” statement.

9. As observed in the Kenya Judiciary Criminal Procedure Bench Book at Page 83 an unsworn evidence of a minor received pursuant to section 19 of the Oaths and Statutory Act requires corroboration before a conviction could be based on it. The only exception is in cases covered by the Proviso to section 124 of the Evidence Act as follows:

*“124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of the alleged victim in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.*

*Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth.”*

10. The trial court which observed the demeanor of the complainant did not record any reason as may be ascribed to a holding that the complainant was telling the truth and could be believed and her not sworn evidence used to convict the accused.

11. From the record of the proceedings, this court is also not able to find that the complainant was telling the truth so as to justify a conviction on the sole evidence without corroboration. The original record in the trial court handwriting indicates he gave “sworn statement.

12. Be that as it may, the court must warn itself of the danger of convicting on the evidence of a single witness. In this case, especially the medical evidence did not support the case of defilement alleged by the complainant. The examination which is shown to have been done on the same day of the alleged defilement 22/2/2011 did not show any injuries consistent with the alleged defilement or indeed that she had been strangled as alleged.

13. In addition, the mzee Elijah who the complainant allegedly made her first report and indicated the assailant as Ritany was not called as a witness. Robert who called him and told him “*the child had been defiled on the shortcut to Ravine*” was not called as a witness. These gaps in material supportive evidence make it unsafe to convict the appellant on the sole evidence of the complainant. It was also unclear who “*Ritany*” in the testimony of the complainant was.

14. I would therefore agree with the submission of the DPP that the contradictions in the medical evidence against the evidence of the complainant, and I would add the gaps in the evidence by failure to call crucial witnesses, should be given to the benefit of the accused/appellant.

15. For the same reasons, the alternative charge of indecent act with a child is not proved.

### **Orders**

16. Accordingly, for the reasons set out above, the court makes the followings orders:

1. The conviction and sentence of the appellant for the offence of defilement contrary to section 8 (1) and 8 (3) of the Sexual Offences Act is quashed and set aside, respectively.

2. The appellant is acquitted of the offence in the alternative charge of indecent act contrary to section 11(1) of the Sexual Offences Act.

3. Surety for bond pending appeal discharged.

*Order accordingly*

**DATED AND DELIVERED THIS 24<sup>TH</sup> DAY OF APRIL 2019**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

M/S Adalo Bitok & Co. Advocates for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent.