REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 105 "B" OF 2017

WELDON KIPLAGAT KIRUI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's

Court at Eldama Ravine Cr. Case no. 863 of 2014 delivered on the 15th day of March, 2016 by Hon. M. Kasera, SRM]

JUDGMENT

1. This is an appeal from the Judgment of Hon. M. Kasera sitting at Eldama Ravine in Criminal case no. 863 of 2014 delivered on 15th March 2016 where the Magistrate convicted the appellant for two counts of defilement c/s 8(1) and (2) of the Sexual Offences Act and for creating a disturbance in a manner likely to cause a breach of the peace c/s 95(1) (b) of the Penal Code and sentenced him to life imprisonment for defilement in counts I and II, held the execution of the sentence in the second defilement count in abeyance and sentenced him to imprisonment for 6 months in count III which was to run concurrently with the sentence for defilement in Count I.

2. Briefly, the case for the prosecution was that the accused had defiled the complainant (PW1) on two occasions in May and September 2014 and when confronted by the complainant's mother (PW2) had become violent and threatened to stab her with a knife, and therefore the two counts of defilement in counts I and II and the charge of causing a breach of the peace in count III. As alternatives to counts I and II, there were respective charges for indecent act with a child based on the same facts.

3. In its judgment delivered on 15th March 2016, the trial court found the appellant guilty of all the main counts of defilement and causing a breach of peace and convicted him as follows:

> *"JUDGMENT*
>
> *The issue before Court is whether accused defiled complainant. Complainant said accused defiled her twice at his house in May 2014 and 7.9.2014.*
>
> *In May 2014 accused asked for forgiveness and they forgave him on account that he would never repeat the act. On 7.9.2014 he defiled complainant when complainant's mother asked him what he did to her daughter he beat her up.*
>
> *The P3 form produced in Court as exhibit 1 indicates complainant hymen was broken. Her labia minora and majora were slightly lacerated. Complainant said it is accused who defiled her. She said accused defiled her at 1.00 pm. On 7.9.2014 there were no people at the plot.*
>
> *The evidence on record does not reveal any bad blood between accused and complainant. The evidence by complainant is corroborated by that on the P3 form.*
>
> *I find there was opportunity because those who lived at the plot were on duty where accused and PW2 worked, knife was identified by PW1. Complainant slapped accused who hit her back.*
>
> *I find accused guilty convict him accordingly **u/s** of 215 of C.P.C counts I, II and III of the charges."*

4. The Appellant being aggrieved filed a Petition of Appeal on 23th March 2016 on the following grounds:

> *a) The learned trial Magistrate erred in law and fact by sentencing me to life imprisonment contrary to the provisions of the Sexual*

Offences Act which postulates that the sentences are subject to prove of age. The Complainant herein was assessed to have been 12 years and therefore the sentence is not only harsh but excessive.

b) That the learned trial Magistrate erred in law and in fact by failing to appreciate that the evidence produced by the doctor who examined the Complainant was exaggerated as no sperms or semen would be found in vagina past 72 hours. The Medical Officer who examined the Complainant examined her on the fourth day which was over 72 hours. He did not specify the age or date when the hymen was supposedly broken and hid evidence was ambiguous and doubtful.

c) That the pundit trial Magistrate erred in law and in fact by appreciating the evidence of a non-coherent complaint.

d) That the learned trial Magistrate erred in law and in fact when she maliciously based my conviction on purported evidence adduced in Court yet the same were not proved beyond reasonable doubt.

5. The Appellant filed an Amended Petition of Appeal on 13/6/17 on the following grounds:

1. That the learned trial Magistrate erred in both law and fact by sentencing the Appellant to life imprisonment contrary to the Provisions of the Sexual Offences Act which provides that sentences are subject to prove of age. The Complainant herein was purported to be 12 years at the time of the alleged offence and therefore the sentence was not only harsh but excessive.

2. That the learned trial Magistrate erred both in law and fact by convicting the Appellant of the offence of defilement based on the evidence of the minor which were uncorroborated and inconsistent.

3. That the learned trial Magistrate erred both in law and fact by failing to find that the Prosecution did not prove their case beyond reasonable doubt to warrant conviction of the Appellant.

4. That the learned trial Magistrate erred in both law and fact by disregarding the appellant's uncontroverted defence thereby arriving at a manifestly unjust conclusion that the Appellant was guilty of the offence.

5. That the learned trial Magistrate erred in both law and fact by relying on the evidence presented in the Pw3 form which is ambiguous and doubtful.

6. That the trial Magistrate erred in both law and fact by failing to thoroughly analyze the evidence on record thereby arriving at a manifestly unjust conclusion that the Prosecution had proved its case beyond doubt.

7. That the learned trial Magistrate erred in law and fact by failing to find that the exact age of the minor child was never established to warrant her met out the conviction.

8. That the learned trial Magistrate erred in both law and fact by convicting the Appellant on count III of creating disturbance without any corroborative evidence.

9. That the learned trial Magistrate erred in both law and fact by failing to find that the doctors conclusion of penetration did not implicate the Appellant in any way to warrant conviction.

10. That the learned trial Magistrate erred in law and in fact by allowing Pw4 to produce the P3 form thereby denying the Appellant the opportunity to cross-examine the maker of the documents.

11. That the learned trial Magistrate erred in both law and fact by failing to carry out a voire dire examination of the Complainant.

6. In urging the appeal, the Appellant through his advocate, Mr. Chebii, submitted as follows:

1) That the voire dire was not conducted properly as the minor was not informed of the importance of telling the truth and example being she told the Court she goes to [Particulars Withheld] academy, while Pw2 stated she attended [Particulars Withheld] Academy and Pw4 was that she was a student at [Particulars Withheld] Primary School.

2) That the charge sheet was defective on count I and II. In charge one he is charged under section 8 (1) and 8 (2) of the Sexual Offences Act which relates to children aged 11 years or less. The same is not also supported by the P3. The Complainant attested to being 13 and this was corroborated by the mother but the age assessment showed 12 years. The mother even after asserting to have the Birth Certificate, she did not produce it in Court. The mother even after asserting to have the Certificate, she did not produce it in Court.

3) There was a miscarriage of justice when the P3 was produced by a Police Officer and not the doctor hence Appellant was denied opportunity to cross-examine the maker, and consent was not sought from the Appellant. Section 77 of the evidence act provides that it would have been produced by any other doctor who is privy to handwriting of the maker. The P3 does not show where the doctor got his information from to fill it and neither was the doctors Medical Ref. No. indicated. The P3 also indicates the degree of injury as grievous harm. The treatment chit did not have name of the maker

4) The alleged defilement took place on 7/9/14 while the Treatment Card indicates it as 5/9/2014. The Medical Report is also confusing and the doctor did not make proper assessment of the issues such as distinguishing abnormal discharge and the periods

the minor was having.

5) They state that there was no corroboration of issues such as that of threats did not arise as alleged by Pw3 and Pw4, and that defilement was an afterthought after the fight between the Appellant and Pw2. This is proved by the fact the incident took place on 7/9/14 (Sunday) but the report was made to Pw3 on 10/9/14. Further the Complainant had not gone with the mother to report to Pw3 that she had been defiled.

6) Count III has not been proved beyond reasonable doubt as there was no witness from the estate to corroborate this account. This issue of the knife did not arise during examination in Chief but came up during cross-examination. Pw2 also admitted to slapping the Appellant, the appropriate charge would have been assault.

7) They also submit that the Court failed to take into account the account of the Appellant that he was at work on 7/9/2014 and there would have been witnesses.

8) The Court also made an assumption that at 1.00 pm on 7/9/2014 he was not at work while others were at work.

9) Since the two (Appellant and Pw2) fought each other the same should have been affray.

10) The Court did not indicate the basis of life sentence on a defective charge.

11) They thus pray the Court to allow the appeal relying on the authorities they had filed.

7. The Ass DPP, Ms. Macharia, for the Prosecution submitted as follows:

a) That the age of 12 years was corroborated by Pw4 and that the age assessment report was a legal document that is accepted by Court and state that the child should be construed to be 12 years old.

b) It does not matter who among Pw1, Pw2 or Pw4 is correct in regards to which school the Complainant attended all that matters is the evidence of the Complainant. The issue of the School is a non-issue.

c) There was an error on the charge sheet where the Appellant is charged under section 8 (2) which sentence is life imprisonment while he ought to have been charged under 8 (3) for a minimum sentence of 20 years.

d) There is enough evidence on record that Pw1 was defiled by the Appellant a person well-known to her and thus the prosecution has proved its case beyond reasonable doubt.

e) The error on the charge sheet should not justify the release of the Appellant but the Court should exercise its jurisdiction under section 382 and 354 of the Criminal Procedure Code and convict appropriately.

f) Pw2 was slapped without injury being caused and could not justify her going to hospital and hence a charge of causing disturbance.

g) There was enough evidence on defilement as there was interference and penetration as the hymen was not intact.

h) The doctor could not appear in Court as he was doing an operation and the Appellant did not oppose application for police to produce Medical Report.

i) The Complainant should not suffer an injustice on mistake of Court, Police or any other Party and this Court should consider retrial if the irregularities cannot be cured by section 382 of the Criminal Procedure.

8. The verbatim submissions by Counsel for the parties is set out below:

"Mr Chebii

Appellant charged in Ravine 863 of 2014 for defilement in 2 counts and creating disturbance.

Appeal dated 21/3/16 amended on 12/6/17.

11 grounds of appeal

Voire dire examination not proper for Pw1

It resulted in miscarriage of justice and complainant was not told of the importance of sworn or unsworn evidence at Pw1. There was no finding as to whether the minor understand the importance of sworn or unsworn and of telling the truth.

There was no ruling on whether the child understand. The complainant gave untruthful evidence. In evidence in chief, "I go to

[Particulars Withheld] Academy". Pw2 the mother states the child went to school [Particulars Withheld] Academy.

Pw3 said that the child said that she went to school at [Particulars Withheld] Primary School. The child was not told of the importance of telling the truth and she went on to tell the untruth and it led to a miscarriage of justice. There was contradictions in the evidence.

Defective charge sheet.

2 .the appellant was convicted on charge sheet on count I and II.

Count I defilement of child contrary to section 8 (2) of Sexual Offences Act for 11 years and below. The particulars of the charge show the child is 12. The charge ought to have been under section 8 (3) Sexual Offence Act.

The trial court meted out an illegal sentence of life imprisonment.

Count I has no P3 form on the court. We submit it was erroneous for the magistrate to convict on the count notwithstanding that the charge was defective.

3. Age of the complainant was not proved.

Complainant states that she is 13 years. The mother at page 16 states the girl is 13 years and that the assessment indicates 12 years. I have birth certificate and clinical card. The documents ought to have been produced to states the exact age. It was a material failure.

Age assessment report

Medical officer who is not named approximate age at 12 years, born 17/10/2002.

It is reliable assessment.

P3 form was produced by P4 the police officer instead of the doctor. There was miscarriage of justice. The police officer should not produce P3 form in a serious case.

Page 20 of the record.

Accused states that will not wait for witnesses. There is no reason given why the doctor did not come to testify. No ruling that the Doctor could not be traced. The record does not show whether the appellant was asked whether the Investigation officer could produce the P3 form. The appellant was denied an opportunity to cross examine the maker of the document.

Section 77 of the evidence Act are reports by Government analyst even after the order for production order section 77 it ought to have been produced by the doctor who was familiar with the authority of the doctor. In this case the doctor was available.

P3 form exihibit No. 1

No, medical officer's reference number the doctor in filling the P3 form does not indicate where he got the information used to fill the P3 form. There is no record.

The degree for injury was grievous harm. The P3 form should have had the maker of the treatment card of the hospital Exh. No 2.

Allegation of defilement on 7/9/14 yet date of 5/9/14 is shown on treatment card. The medical report is confusing. The doctor could not have made a proper assessment.

The P3 Form has serious errors. The report of 10/9/14 indicated defilement in May of that year. The doctor was not able to distinguish the normal discharge and the period the child was having.

On the basis that the doctor was not called to give evidence and allow the appellant to cross-examine, there was miscarriage of justice and the conviction ought to be set aside.

Corroboration

Evidence of complainant

It was not corroborated by Pw2 and the P3 forms which were unlawfully produced by Pw4 yet he was not qualified.

Pw1 evidence. The trial court did not analyze the evidence. The issue of threats do not arise as alleged by Pw3 and Pw4. The complainant did not indicate any threats.

Defilement case came as afterthought after appellant fought with Pw2. Pw2 called the appellant to her house when they fought with Pw2.

7/9/14 is assessed to be on a Sunday. The report was made to Pw3 on 10/9/14. Pw3 states that the Pw2 had gone to report a beating by appellant. The complainant had not gone with the mother to report that she had been defiled.

Pw2 evidence is at page 16.

Count no.3 creating disturbance was not proved beyond reasonable doubt. The charge should have been assault or affray. Pw2 admits that she slapped the appellant. The prosecution however chose to charge for creating disturbance on the appellant.

This is alleged to have taken in a housing Estate. There was a Mr. Cornelia independent witness who was not called to corroborate what happened in the estate.

Pw2 in examination in chief does not talk of a knife. It is only in cross-examination where it is stated that the appellant had a knife.

There is evidence that Pw2 (mother) had a knife and she had sought to stab her with a knife. After reporting to the police station, Pw2 took her child to school and ordered that she be disciplined by the head teacher.

It cannot be pointed that it is the appellant who defiled the complainant.

Evidence of the defence

Evidence not controverted on 7/9/14, the said he was at the farm at lunch time. There could have been someone who saw them. The court failed to take into account the defence.

Assumption

The court assumed that the appellant had opportunity at 1.00pm because the other were at work. The court cannot pressure or assume evidence.

The Pw2 slapped had appellant who hit her back. It should have been affray.

The court did not indicate the basis of life sentence as the charge sheet was defective.

S. 124 evidence Act the marked documents do not support the evidence of the complainant.

We urge the court to allow the appeal. I rely on the authorities filed in court.

Court at 1.49 pm

Stood over to 2.30 pm.

At 2.30 pm.

Miss Macharia for DPP.

Mr Chebii for appellant

Appellant present.

Miss Macharia

Appeal opposed.

2 counts of defilement contrary to section 8 (1) and 8 (2) Sexual Offences Act and for creating disturbance under section 96 of the Penal Code.

Charge sheet stated that complainant was 12 years corroborated by Pw4.

Pw1 and Pw2 stated age at 13 years. Age assessment of 12 years is a legal document which was accepted in court as the proof of age. We submit complainant was 12 years of age.

Voire dire at page 17 of record.

By the voire dire the magistrate is supposed to establish whether child understand the nature of the oath so as to give sworn or unsworn evidence. No requirement for a ruling just a decision by the magistrate.

Voire dire

Different names of the schools by Pw1, Pw3 and Pw4. It is not clear who among the 3 who gave the correct information. What is important is the evidence of the complainant and the issue of schooling is a non-issue.

Proof of age at 12 years, there was an error in the charge sheet as appellant was charged under section 8 (2) leading to his conviction for life. The appellant ought to have been charged under 8 (3) for a minimum sentence of 20 years.

We submit that there is enough evidence on record to show that Pw1 was defiled by the appellant who was a person well known to her. She testified that the appellant defiled her in May and September 2014.

The first time she informed her mother who warned the appellant and he apologized. However, the appellant defiled her the second time on 7/9/14.

Pw2 confirmed the appellant who did not take it kindly and hit her severally and tried to stab her with a knife.

Pw2 reported the matter of defilement to the police and also that of creating disturbance. She also took the complainant to hospital. There is therefore only <u>one P3.</u>

In the first incident appellant was only warned and the complainant was not taken to hospital.

Prosecution proved case beyond reasonable doubt. The error in charge sheet cannot justify release of the appellant. I rely on section 382 and 354 of the CPC for the court to use its powers to convict.

Charge of creating disturbance

Decision as to the charge depend on the evidence. If Pw2 was slapped without injury which would not justify the going to hospital it should only be creating a disturbance.

Hymen broken or absent

The said 2 terms of hymen broken or absent clearly show that there was interference and penetration as the hymen was not intact.

At page 25 of the proceedings, defence submitted that the investigating officer produced the P3 on behalf of the doctor as he was at the time he was performing an operation. The same application was not objected by the accused.

As there was defilement, the complainant should not suffer injustice because of the mistake of the court, police or other party concerned. If need be I urge the court to consider a retrial may be appropriate, if the magistrate's court be cured by section 382 of CPC. That's all.

Mr chebii in reply

The age of the minor was not proved by the prosecution.

Age assessement has no basis for arriving at the age and date of birth.

Charge sheet error is substantial.

I rely in Kaingu Kasom CA at Malindi.

Appellant did not consent to the production of the P3 by the investigating officer, he had said he was waiting for the witnesses and the investigating officer who was a layman could not be cross examined on the P3.

Pw did not understand the importance of the testimony in court. The court did not make a ruling on whether she understand the nature of the oath and of the importance of telling the truth. She was not informed as to the requirements of the court.

Appellant boxing Pw2 no injuries and therefore no assault. Both should have been charged as Pw2 accepted that she slapped the appellant.

Report of the defilement Pw3 said the first report was an assault not defilement. There was a question as to who had defiled the complainant. There was no independent witness as to what had happened.

If it is true the appellant had defiled the complainant in May 2014, there would be no hymen so there held no question of broken

hymen. No good reason for production of medical report on behalf of a doctor who was in the vicinity and the Court could have adjourned to call the doctor."

Issues for determination

9. Upon considering the charges and the evidence and submissions by counsel for the parties, the court frames the issues as follows:

a. Whether the charges were defective; and if so whether a retrial should be ordered; if not,

b. Whether the offences of defilement of the complainant and creating a disturbance in a manner likely to cause a breach of the peace were proved; and if so,

c. Whether the appellant was shown to have been the perpetrator;

Determination

Voire dire examination of child witness

10. With respect, I do find that the trial court properly and substantially conducted a ***voire dire*** examination in accordance with section 19 of the Oaths and Statutory Declaration Act on the child complainant in charges counts Nos. I and II and, thereupon reached a conclusion that she could give evidence unsworn and duly warned the witness to tell the truth, as follows:

"***PW1***

What is your name?

I am DJ

How old are you?

I am 13 years old.

Do you go to school?

I go to [Particulars Withheld] Academy.

Which class are you?

Which class are you?

I am in class 7.

Do you go to church?

I go to AGC.

Who is God?

God is our protector.

What does God do to sinners?

He forgives sinners if they request him to forgive them.

Do you know police?

Police is a person who maintains peace.

Court: Witness is told to tell the truth. She is giving unsworn statement."

11. The defect on the charge sheet counts nos. I and II charging the offence under section 8(2) of the Sexual Offences Act which applies for defilement against a victim aged under 12 years, when the evidence before the court was that the complainant was 12 years at the time of the defilement could have been cured by an order for suitable amendment under section 214 of the Criminal Procedure Code. See ***Lazarus Ocharo Kieya v. R*** Kisii HCCRA No. 252 of 2011, (2015) eKLR where this court held as follows:

> *"As held in **Jason Akumu Yongo v. R** (1982 – 88) KLR 167, the fact that evidence is given differently to the particulars of the charge can still render the charge defective so as to bring section 214 into operation. Section 214 of the Criminal Procedure Code is in the following terms:*
>
> ***214. (**1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the Court that the charge is defective, either in substance or in form, the Court may make such order for the alteration of the charge, as the Court thinks necessary to meet the circumstances of the case:…The trial Court could have amended the particulars of the charge sheet under section 214 of the Criminal Procedure without prejudicing the Appellant in any way as the charge remained under the provisions and penalty prescribed in section 8 (2) of the Sexual Offences Act."*

12. There was prejudice in this case, however, because the appellant was convicted without amendment and without the court identifying which sub-section of section 8 of the Sexual Offences Act, and the sentence of life imprisonment may well have been given because of the mistaken belief that the charge properly fell under section 8 (2) of the sexual Offences Act. It is subsection (3) that applied, which prescribes a minimum sentence of imprisonment for 20 years and the sentence of life imprisonment, though it could be imposed depending on the circumstances of a case under the same sub-section, may have been excessive in the circumstances of this case.

13. In addition, the production of medical evidence of the treatment chits and P3 and age assessment report by the Police Investigations Officer, although permissible under section 77 of the Evidence Act, denied the appellant the opportunity to test their veracity by cross-examination of the makers of the reports. Section 77 of the Evidence Act provides as follows:

> *" **77.** (1) In Criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.*
>
> *(2) The Court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.*
>
> *(3) When any report is so used the Court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."*

14. The court hesitates, because it has not been served with substantive argument thereon, to find the procedure under section 77 of the Evidence Act unconstitutional for being a breach of the fair trial guarantee of Article 50 (2) (k) of the Constitution, which guarantees the right of an accused person ***"(k) to adduce and challenge evidence"*** adduced against him. There is in section 77 (3) an avenue to give effect to the accused's right to challenge the evidence by cross-examination of the maker of the official report.

Defective trial

15. Be that as it may, the trial of the appellant was defective on the two grounds of defective charge sheet which did not set out the correct statement of the offence he is alleged to have committed being an offence of defilement c/s 8(3) rather than 8(2) of the Sexual Offences Act and for denying his opportunity guaranteed by the Constitution to challenge evidence presented against him by way of cross-examination of the maker of the medical reports.

16. As held in the well-known ***Fatehali Manji*** case, (1966) EA 343, the remedy for a defective trial is retrial unless the interests of justice dictate otherwise, saying.

> ***"In general a retrial would be ordered only when the original trial was illegal or defective.** It would not be ordered where conviction was set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction was vitiated by mistake of the trial Court for which the Prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. **Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice required it."***

Justice for both sides

17. In this case, the appellant has been in custody for slightly over three (3) years (as at 15th March 2016), I should agree with the DPP that the justice of the case lies with a proper trial being conducted so that there should be justice both for the Complainant and the Appellant. Although the Prosecution in case framed the charge under the wrong section and defaulted in calling the makers of the medical reports and treatment chits, the prospect that the complainant was defiled by the appellant as charged is a serious enough matter to warrant a retrial.

18. In the case of ***Opicho v. R. Criminal appeal no. 208 of 2008*** [2009] KLR where the appellant had been in custody for "over two years" the Court considered the factors to be considered in ordering a retrial and held as follows:

> *"In many other decisions [besides **Fatehali**, above] of this court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether **on a proper consideration of admissible or potentially admissible evidence, a conviction might result from a retrial**; at the end of the day, each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it. See Muiruri v Republic [2003] KLR 552, Mwangi v. Republic [1983] KLR 522, and Bernard Lolimo Ekimat v. Republic Criminal Appeal No. 151of 2004(UR).*

The prosecution had nothing to do with the omissions made in this trial. On the contrary it was the prosecution who drew the attention of the court to the required procedure but the trial court was entirely to blame for what followed. ***The allegations made against the appellant are extremely serious and of public interest as they relate to child abuse, a phenomenon now topical on the world stage, and in this country, due to its prevalence. It is in the interests of justice that the appellant receives a fair trial and if he is to be acquitted or convicted, then it ought to be seen it was, in either case, in accordance with the law. We are inclined in all the circumstances of this case to order a retrial."***

Merits of the prosecution case

19. The evidence before the trial court was principally as follows:

*"**PW1***

I am DJ. I am 13 years old. I go to [Particulars Withheld] Academy. In May 2014 at 4.00 pm I was at home in Kapkolia. Weldon called me to go to his house. We live a plot. Our house is 2 rooms away from his house. He closed the door. Told me to lie on the mattress which was on the floor. He told me if I do not do that he would kill me. I laid on the mattress. He removed my inner wear.

He had my canal knowledge. I did not have sex with him willingly. He did it for a short while. I then went home to sit with the baby. I felt bad but there was no one in the plot. Weldon then left to go for a walk. He moved out of the plot but he later came to live there again. I told my mum and she asked him. He said he would not repeat the act. On 7.9.2014. He called me to his house at 1.00 pm. He closed the door told me to lie on the mattress he had sex with me. He removed my inner wear. He laid on me as he had sex with me. I felt bad. No one was at the plot my mother works at [Particulars Withheld]. My father is not around. I told mum that Weldon had sex with me. Mum went to ask him and he beat my mother. We went to AP at Kamelilo to make a report that accused had sex with me.

I later made a report at Eldama Ravine station. I went to Eldama Ravine District Hospital for treatment. I was given medicine. I was given a letter from police station. It was a P3 form on 10.9.2014.

PW2

I am JR. I live Kapkolia. I work at Ravine [Particulars Withheld]. I know complainant. She is my daughter first born. Born in 2002. She is 13 years. She goes to [Particulars Withheld] Academy. I have 3 children. I have off day on Mondays in May 2014. She told me Weldon had sex with her 8.9.2014 at 5.00 pm. Complainant told me the previous day Weldon defiled her and she reminded me that I did not take action previously when Weldon defiled her. On Tuesday I came from duty. I waited for Weldon. I was with Cornelia. I asked Weldon what he did to my daughter. He said he did not do anything. He boxed me severally after I slapped him. I made a report to Chief Tuitoek of Perkera Location. On Wednesday 10.9.2014 I made a report to police. Accused was arrested from Chemsito farm. Mr. Kambogo sat us in the office asked him if he defiled the child. He said he was dealing with a big girl who is 16 years. He was asked if he had sex with him. PW1 he admitted. Said he be forgiven. I took the child to the hospital. Later to police station. I was given treatment note and age assessment report. It indicate she is 12 years. MFI – 1 P3 form identified. Age assessment report MFI – 3. I took my child to school told the teacher to discipline her. I live with Weldon at the plot for less than one year. I have no grudge against accused.

PW3

I am at Kamelilo AP camp. On 10.9.2014 at 9.00 am I was at Kamelilo AP camp. JJ made a report that her neighbor had beaten her. She said she was told Weldon accused was defiling her child. She called accused to ask him what happened between him and the child. They argued and accused beat complainant. I took my colleague went to complainants house. Accused was not there he had gone on duty. We went to [Particulars Withheld] where he worked. J also worked there. He said he beat J because she said he was defiling her daughter. He said he did not force the child to have sex with him. We interrogated complainant in the presence of accused severally but accused threatened him that he would stab her if she told anyone what happened. Accused had a knife the day he beat J complainant. I also identified the knife as the accused used to threaten her when he defiled her. I had not known any of the witnesses. I have no grudge against accused.

PW4

I am 60131 Sgt. Sarah Situme. I work at Eldama Ravine police station. On 10.9.2014 I was at Eldama Ravine police station crime branch officer. I received a girl of 12 years old. She was a student at [Particulars Withheld] Primary School. They were with 2 Ap's and accused. I interrogated complainant. She said in May 2014 she was alone at home. Accused who was a neighbor at the plot called her to his house and defiled her. He told her not to tell anyone. She not tell anyone as accused threatened to kill her if she disclosed that she was defiled by accused. Accused moved out of that plot and he came back later on. On 7.9.2014 complainant was left at home to take care of their sick sister. Accused called her and defiled her again. I also interrogated Pw2 her mother who told me she went home on 7.9.2014. She was told by complainant that accused defiled her. PW2 asked accused why he defiled her daughter. Accused came with a knife and threatened to stab her with a knife. She made a report at Kamelilo AP camp. Apc Ogata PW3. I sent complainant to the hospital for treatment. P3 form was issued. She had slight laceration in her private parts. I issued P3 form on 10.9.2014. P3 form signed 11.9.2014 by Dr. Arafa. Classification is grievous harm. Her hymen was broken. Labia minora and seminal seen.

P3 now exhibit 1.

Treatment note exhibit 2.

I did age assessment and she was found to be 12 years.

Age assessment report 11.9.2014 now exhibit 3.

Knife now exhibit 4.

DW1

In May 2014 I was living near complainant's mother. I left that place went to live in Kamelilo till 5th September, 2014. I went back to leave near them for 2 days after water was taken there. On 7.9.2014 I was on duty at green house in Cheplito farm till 2.00 pm. At 2.00 pm I went rest for 15 minutes then I went back on duty. I left at 5.00 pm. I did not go to Kapkoito gate. I went to resource centre till 8.00 pm when I went home and slept.

On 8.9.2014 I woke up went on duty till 4.00 pm. I went to my house. Neighbours told me complainant was found with someone in a maize plantation. The mother threatened her with a knife. C took the knife from her hands. On .9.2014 I went on duty worked till evening. I left at 4.00 pm went home and bathed. Complainant's mother called me to her house. I went there she told me if I met Philip on the way I told her I did not meet Philip. She said Philip asked her about her daughter. She said I told Philip to leave her daughter who I said was for everyone. I told her I did not say that she slapped me and pulled me by collar. She raised alarm neighbours came. I went to Eldama Ravine town. I came back at 8.00 pm.

A neighbor told me complainants mothers asked for forgiveness as Philip lied to her about me. On 10.9.2014 complainants mother made a report at Kamelilo post that I beat her. Later police Godfrey Ogatha came with a Samuel Obiero to my place of work. They asked me why I beat complainant GC (PW2). I told them she called me at her house and said I talked badly about her daughter. I just defended myself from her. I have said the truth PW2 called me to her house and later attacked me. I have no ill motive against complainant and her mother. I lived with them for 2 years. I am framed because I hit her back when she was beating me. I f I did the act evidence could have been found.

Cross-examination by Prosecutor: I know complainant and her mother. I lived with them for 2 years. Complainant was not visiting me in my house. I went to Kamelilo on 28.4.2014. I have not called Landlord as a witness. I had a wife in Kamelilo. When I was arrested my wife went to Nairovi. She changed her number. Those who lived with me moved out of that plaice. I do not have a register on how I was going on duty. I went to resource centre with my friends. We met at 4.00 pm. Complainants mother slapped me in her house. She said I talked bad about her daughter. EC said complainant was in maize plantation with another man. I did not tell Kabogo that I defiled the complainant. Complainant said I defiled her in May and in September. I did not do that."

20. In view of the order for retrial, and so as not to prejudice the fair trial of the case, this appellate court cannot delve into the merits of the case as to determine whether or not the charges facing the appellant are proved. That determination must await the re-hearing of the defilement charges and determination by a competent court differently constituted.

21. This court only determines, as it is required to consider, that on a proper trial, as may be mounted by a retrial, there is evidence upon which ***"on a proper consideration of admissible or potentially admissible evidence, a conviction might result from a retrial"*** for the offences charged.

22. However, as regards the charge of creating a disturbance, there was evidence from the prosecution witness PW2, the complainant in charge count No. III that she had confronted the appellant on being told of the alleged defilement by the complainant in charges counts I and II and ***"He boxed me severally after I slapped him"***. As submitted by Counsel for the appellant, this evidence disclosed a case of affray c/s 92 of the Penal Code rather than one of the appellant creating a disturbance c/s 95(1) (b) of the Penal Code. The conviction for the offence of creating a disturbance and the sentence of six (6) months therefor, which the appellant has, in any event, fully served will be quashed and set aside.

Orders

23. Accordingly, for the reasons set out above, the court makes the following orders:

1. The Appellant's Appeal herein is allowed and the conviction and sentences for the offences of defilement and creating a disturbance contrary respectively to section 8 (1) and 8 (2) of the Sexual Offences Act and section 95 (1) (b) of the Penal Code charged as counts Nos. I, II and III are quashed and set aside.

2. The Appellant is acquitted of the charge of creating a disturbance c/s 95 (1) (b) of the Penal Code and the sentence of imprisonment for six (6) months therefor is set aside.

3. The appellant shall be retried for the offences of defilement charged under counts I and II herein before a competent court differently constituted at Eldama Ravine Law Courts.

4. For the purposes of directions for the retrial, the trial court file shall be returned forthwith and the case shall be mentioned before the head of station at Eldama Ravine law courts on **Friday the 26th April 2019.**

Order accordingly.

DATED AND DELIVERED THIS 24TH DAY OF APRIL 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Chebii for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent.