



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**HCCRA NO. 54 OF 2017**

**(FORMERLY ELDORET HCCRA NO. 145 OF 2014)**

**AJC.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

**at Kabarnet Cr. Case no. 434 of 2014 delivered on the 12<sup>th</sup> day of September, 2014**

**by Hon. E. Kigen, RM]**

**JUDGMENT**

1. The appellant was convicted and sentenced to imprisonment for 20 years for the offence of defilement contrary to section 8 (1) and 8 (3) of the Sexual Offences Act on 12<sup>th</sup> September 2014.

2. On appeal, on an application by the appellant by Notice of Motion dated 9/3/18 which was conceded by the DPP, the Court took additional evidence on appeal pursuant to section 358 of the Criminal Procedure Code. From the complainant and the witness of the complainant, the effect of which was that the complainant had told in the trial Court that the appellant had defiled her.

3. The mother of the complainant testified that she had been told after 4 days:

*“The child told me later after Amos had been sentenced to 20 years jail. It was not true. She said that she feared that as she had been late to school she gave the excuse. A is my brother. The complainant is the accused’s niece. It is not a wrong for complainant to go see the accused.”*

4. On the part, the complainant who is 18<sup>1/2</sup> years testified as follows:

***“Pw2 Adult Female Christian sworn and states in Kiswahili***

*I am CCS. I am 18<sup>1/2</sup> years. I am a student at [particulars withheld] Secondary School in Form 4. I know AC, the appellant. He is my uncle.*

*I recall the Criminal case that I filed a charge of defilement in Criminal case 434 of 2014.*

*I remember that upon evidence the appellant was sentenced to 20 years. I was 14 years then could at [particulars withheld] Primary School. I was in class 7.*

*My mother did not testify in the Criminal case.*

*A was jailed. I wrote a letter on 17/9/2017. I wrote to my mother. I said I wanted to have the case of AJC to be withdrawn. I said so because what I said in Court was not truthful.*

*I testified in Court and said that I would tell the truth. I told untruthful because I feared.*

*I had been late in school and when I was asked where I was I told a lie. If I had told the truth I would have been beaten.*

*It was the teacher who took the matter to the police. When I heard that A had been sentenced to 20 years I felt very bad and that is why I called my mother.*

*A has never defiled me.*

*Letter of 2/9/17 is in my handwriting. I wrote it voluntarily I was not promised any reward or other inducement.*

*I still stand by the letter been as I have lived 18 years of age.*

*[Paragraph 5 of letter]*

*I had a child with a friend. It is not AC.*

*Letter of 2/9/17 appellant Exh. No. 2 by complainant.*

5. Against the background of the evidence the DPP did not oppose the appeal submitting:

*“Considering the evidence produced before the Court, I do not oppose the appeal. The appellant has been in custody for about 4<sup>1</sup>/<sub>2</sub> years since 12/9/2014 when he was sentenced. I urge the Court to look at the evidence and set the appellant at liberty.”*

6. For the appellant, Counsel urged that it was appeared that the appellant was wrongly convicted and prayed that the appellant be acquitted of the charges.

### **Determination**

7. I have considered the evidence before this Court and the trial and the effect of the identification evidence on appeal is to put a doubt as to the truth of the defiled charge and the benefit of his doubt must be given to the appellant.

8. The Court notes the complainant’s Birth Certificate No. 0435190 produced in the trial Court and observes that the complainant is minor under 18 years old and the evidence before this Court given on Oath after she has attained the age of discretion must be given due weight.

9. I have noted the Defence statement before the trial Court where he said:

*“The offence is a lie.*

*On that 15.5.14 I was in town Kabarnet visiting my sister and I came back on Friday. On Saturday I was arrested and I did not know what offence I had committed. I was told by the Chief that I would go to the station where I would know my mistake.*

*I refused to be arrested and asked the Chief to explain to me my mistake. I was taken to the police station where I was told I had defiled a minor. I was released on bond when the complainant sent her friend called C to tell me that I had been arrested for a mistake I did not commit.”*

10. Dw2 Melvin Jelagat Confirmed the appellant’s statement testifying that:

*“When on bond the complainant came and asked me to call the accused. I called the accused and the complainant told him that it is C who had touched her breasts and asked me to fix Amos which I did. CS noted at [particulars withheld].” (sic)*

11. It is also noteworthy that the appellant protested his innocence upto the Court of trial when in mitigation, he said:

*“I did not commit the said offence and if I did commit the offence I am sorry.”*

### **Conclusion**

12. The Court gives the appellant, the benefit of doubt as to the truth of the defilement charge. The appellant shall be acquitted of the charge of defilement contrary to section 8 (1) and 8 (3) of the Sexual Offences Act and the sentence of imprisonment for 20 years is set side.

### **Orders**

13. Appeal is allowed. The appellant is acquitted of the defilement contrary section 8 (1) as read with 8 (3) of the Sexual Offences Act and the sentence imposed on him is set aside, and the Court directs that the appellant be released from custody unless he is otherwise lawfully held.

14. The complainant, on her admission before this Court, lied in her testimony before the trial Court, and in terms of section 19 (2) of the Oaths and Statutory Declarations Act committed an offence. The matter shall be reported to the DPP who, in exercise of the State’s Prosecutorial Powers under Article 157 of the Constitution, shall consider in his discretion whether to prosecute the complainant in this case who admitted to have lied as a minor before the trial Court.

*Order accordingly.*

**DATED AND DELIVERED THIS 10<sup>TH</sup> DAY OF APRIL 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.