



**REPUBLIC OF KENYA**

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

**HCCRA NO. 51 OF 2017**

**(FORMERLY ELDORET HCCRA NO. 124 OF 2014)**

**DAVID KARIWO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 139 of 2014 delivered on the 18<sup>th</sup> day of July, 2017 by Hon. E. Kigen, RM]**

**JUDGMENT**

1. The appellant was on 18/7/2014 convicted and sentenced to imprisonment for life for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act.

2. The trial court admitted the evidence of the minor complainant upon voire dire examination in which it found that:

*“The minor is a child aged about 4 years old. She does not go to church. She is of tender age and although she can be able to express herself. She does not understand the meaning of giving evidence under oath. She will therefore give unsworn evidence”.*

3. The complainant gave evidence as follows:

*“My name is CN from [particulars withheld], I do not know my age, I do not go to school. I cannot remember the date but I know the accused [the minor points at the accused] I was at home outside our house the accused fell me and touched my private parts [the minor touches her private parts] I was wearing another skirt not this one, he removed my skirt by flipping it upwards.*

*He took his penis and put inside my vagina. He took me next the store and did bad manners to me. I cried and my mother came, when the accused saw my mother he ran away.*

*I was taken to hospital and given medication. I do not know the accused's home, but I know him he is called Lodoso. My private parts are still painful. He also inserted his fingers on my private parts after which he took maize from our store.”*

4. The trial Court did not allow the appellant to cross-examine the minor complainant, and in this, the Court fell into fatal error. The appellant as accused is entitled to fair trial right to challenge evidence presented against him under Article 50 (2) (k) of the Constitution.

5. In addition, as observed in the Kenya Judiciary Criminal Procedure Bench Book 2018 at page 84 whether the evidence of a child of tender years is taken sworn or unsworn, the same is subject to cross-examination, as follows:

*Kenya Judiciary Criminal Procedure Bench Book, 2018 at p. 84 paragraph 96.*

*“The evidence of a child sworn or unsworn received under section 19 of the Oaths and Statutory Declaration Act is subject to cross-examination pursuant to the right to fair trial which encompasses the right to evidence and to challenge the evidence produced against the accused.”*

6. The appellant's trial was, therefore, defective for breach of the appellant's constitutional guarantee of fair trial for cross-examination of his accuser, and a retrial is necessary.

7. Without considering the prosecution evidence in detail, there is evidence of the mother who allegedly found the appellant running away from her house after defiling the minor and that of clinical officer who examined the child and found evidence consistent with sexual penetration upon which a court in proper trial may found a conviction. This court does not, however, make a determination on the facts so as not to prejudice the retrial.

8. I have considered that the appellant has been in custody for close to 5 years of his life imprisonment since 18/7/14. However, as in **Opicho v. R** (2009) KLR 369, I consider that the offence of defilement in this case of a 4 year old, is a serious offence which the interest of justice for both the complainant and the appellant call for a retrial as:

*“The allegations made against the appellant are extremely serious and of public interest as they relate to child abuse...It is in the interest of justice that the appellant receives a fair trial and if he is to be acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law”.*

**Order**

9. Accordingly, for the reasons set out above, the conviction and sentence of the appellant for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act is quashed and set aside.

10. There shall be an order for the retrial of the appellant before a competent Court at Kabarnet and for directions for that purpose, the appellant shall be produced before the Magistrate in charge on Friday 24<sup>th</sup> May 2019.

*Order accordingly.*

**DATED AND DELIVERED THIS 22<sup>ND</sup> DAY OF MAY 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent