

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal No. 58 Of 2017

DANIEL BUSUGU alias WILFRED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. A.K Mokokross – SRM

dated 7th October 2016 at the Principal Magistrate’s Court at Kilgoris

in Criminal Case No. 1230 of 2015)

JUDGMENT

1. The appellant, DANIEL BUSUGU alias WILFRED, was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars were that on 1st September 2015, at [Particulars Withheld] Location of Trans Mara West District within Narok County he intentionally caused his penis to penetrate the vagina of PS, a girl aged three years, 6 months. The appellant was convicted and sentenced to life imprisonment.

2. I am constrained to allow the appeal as the record shows that the appellant was not given an opportunity to put questions to PW 2, the child, after she had testified through an intermediary. The right to cross examine a witness is a fundamental right enshrined in Article 50(2) (k) of the Constitution and buttressed by section 208 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya). Even where a child gives unsworn testimony or testifies through an intermediary, the accused must be given an opportunity to put his question to the witness. In this case, the questions would have been put to PW 2 through the intermediary or the court.

3. I therefore quash the conviction. I am also satisfied that in view of the seriousness of the offence, the overwhelming evidence against the appellant and the fact that witnesses are available, I will order a retrial.

4. The appeal is allowed. The conviction and sentence are quashed. The appellant shall remain in custody until 8th October 2018, when he shall be taken to plead afresh at the Kilgoris Magistrate’s Court.

Dated and delivered at Kisii this 28th day of September, 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.