

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 64 OF 2018

BETWEEN

WILBERFORCE KULOVA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. R.M Oanda – PM dated 31st January 2018 at the Principal Magistrate’s Court at Kilgoris in Criminal Case No. 1300 of 2016)

JUDGMENT

1. The accused was charged, tried and convicted of the offence of defilement contrary to **section 8(1) and (2)** of the Sexual Offences Act. The particulars of the offence were that on the evening of 7th October 2016 within Narok County, he intentionally caused his penis to penetrate the vagina of GNF, a girl aged 5 years.
2. I am constrained to allow this appeal on the ground that the record shows that the child, PW 1, was not cross-examined as no opportunity was given to the appellant to do so. Further, the testimony of the child was taken on the day he was charged and without giving him witness statements. Nevertheless the learned magistrate directed that child may be recalled at a later stage in the proceeding. The record shows that PW 1 was present in court on a later date but no opportunity was given to the appellant to cross examine her. I therefore find that the appellant’s right to a fair trial particularly the right to cross examine a witness under **Article 50(2)(k)** of the Constitution was violated.
3. I am satisfied that there is overwhelming evidence to support a conviction and in view of the nature of the offence and sentence imposed, a retrial will be appropriate.
4. I allow the appeal, quash the conviction and sentence but order a re-trial. For that purpose the appellant shall remain in custody pending a fresh hearing before the Magistrate’s Court at Kilgoris. He shall be taken before that court on **6th December 2018**. The matter shall be heard by any other magistrate other than Hon. Oanda, PM.

Dated and delivered at Kisii this 29th day of November 2018.

D.S MAJANJA

JUDGE

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

Appellant in person.