



**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CRIMINAL APPEAL NO 124 OF 2014**

**(From original conviction and sentence in Kangema**

**PM Criminal Case No 113 of 2014 – E M Kagoni, Ag SRM)**

**HARRISON KAMAU GITHINJI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**1.** The Appellant **Harrison Kamau Githinji** was convicted after trial of *defilement of a girl* contrary to **section 8(1) and (3)** of the *Sexual Offences Act, No 3 of 2006*. He was sentenced to 10 years imprisonment. He has appealed against both conviction and sentence.

**2.** The conviction is challenged upon the main ground of lack of evidence to justify the conviction. Learned prosecution counsel does not support the conviction for the same reason.

**3.** I have read through the record of the trial court in order to evaluate the evidence and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

**4.** The complainant was aged about 16 years. The complainant (who testified as PW3) had ran away from home after quarrelling with her mother on the day of the alleged offence (14/03/2014). She found the Appellant who was her friend on the way. He gave her refuge for the night in his house. Her testimony in court was that she and the Appellant did not have sexual intercourse. By this testimony she retracted her statement given to the police to the effect that the Appellant had sexual intercourse with her. She told the court that she had told the so out of fear. It will be noted that what she had told the police in her statement came after what appeared to be cross-examination by the prosecutor – apparently without leave of the court!

**5.** The medical evidence tendered before the court was that the complainant was sexually active. However, there was no evidence of penetration in the relevant period.

**6.** For some inexplicable reason the trial court ignored the complainant's testimony in court and chose to rely upon what she had told the police in her statement. The court thus convicted the Appellant not upon evidence led before it, but upon a statement given to the police earlier!

**7.** The conviction clearly cannot be supported and learned prosecution counsel properly conceded the appeal. I will allow the appeal in its entirety. The Appellant's conviction is hereby quashed and the sentence passed against him set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 23<sup>RD</sup> DAY OF MARCH 2017**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 24<sup>TH</sup> DAY OF MARCH 2017**