



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BOMET**  
**CRIMINAL APPEAL NO. 31 OF 2015**

**WESLEY KIPKOECH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original Conviction and Sentence in Criminal*

*Case No. 39 of 2013 PM's Court Bomet Hon. V. Kasanga - RM)*

**JUDGMENT**

The Appellant was Convicted and Sentenced to life imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006.

The particulars are that on the 28<sup>th</sup> day of October, 2013 at [particulars withheld] Village, Bomet County did cause his penis to penetrate the vagina of S C a child aged eight (8) years.

Being aggrieved by both Conviction and Sentence the Appellant has lodged this appeal on the following grounds:-

- 1. The learned Magistrate erred in law and in fact in that she erroneously admitted in evidence hearsay evidence as there were no eye witnesses to the alleged offence.*
- 2. That the learned trial Magistrate ignored material evidence like the absence of spermatozoa and the fact that upon examination the genitalia of the Complainant was found to be normal.*
- 3. That the Magistrate incorporated in her Judgment matters not canvassed in evidence.*
- 4. That the appellant was not given an opportunity to cross-examine the Complainant.*
- 5. That the learned trial Magistrate did not consider the possibility that another person could have committed the offence owing to the gap between the commission itself and the time the P3 form was filled.*
- 6. That the evidence by the prosecution witnesses was contradictory and full of discrepancies and therefore invaluable.*

7. *That mitigating circumstances in the case were not considered.*

The Prosecution called six (6) witnesses in support of their case.

This is the first Appellate Court. It has a duty to evaluate and consider the evidence on record with a view to arriving at its own conclusions and also bearing in mind that unlike the learned trial Magistrate this Court did not have the opportunity of observing the demeanor of the witnesses. **Okeno V Republic 1972 EALR.**

**BRIEF FACTS.**

The Complainant was a child aged eight (8) years at the time of the alleged act of defilement. She gave unsworn statement after a *voire dire* examination was conducted by the learned trial Magistrate. She testified to have met the appellant near a river at Mercy's farm at about 5.30pm. He pulled her to some bushes near the river, removed her clothes and his and proceeded to put something in her private parts. After finishing he warned her not to tell anybody and he left. When she went home she told her mother what had transpired. She also went and reported this to R who was her sister-in-law. She further told the Court that the appellant was known to her as he was a friend of her brother A. PW2 R testified to have send the Complainant to a neighbour called Mercy to be given telephone contact. Mercy took to her the contact and left the Complainant behind. PW1 later went home. Later, her mother went to inquire from her whether she had sent the Complainant to Mercy's place and if so when. She revealed to her that she had seen some discharge from PW1's private parts. She showed her the pant and dress which Complainant wore on the material day. The clothes had stains. They interrogated the Complainant who initially refused to talk but she later said that it was the appellant who had defiled her. The Doctor who examined the Complainant found that she had a torn hymen and lacerations on the labia minora and posterior vagina wall. There was no discharge of blood or STI. He was of the view that there was positive penetration.

The Doctor also examined the appellant on 6<sup>th</sup> November, 2013 upon examination he found nothing significant.

In his defence the appellant gave a Sworn Statement. He testified that on 28<sup>th</sup> October, 2013 he had gone to school and later at about 5.00pm they proceeded to the nearby trading centre while in the company of A a brother to the Complainant. He was left in charge of a video shop by one Amos. Amos returned at 8.00pm while in the company of A, Complainant's brother and they went to take tea. Later they went to A home where he spent the night. The following day he went to spent at his sister place. On Sunday he went to A home. Later the Complainant's mother and R, PW2, confronted him and alleged that he had defiled the Complainant. He denied and called A who told them that he was with the appellant who was supervising a video shop. He demanded that he be taken to hospital for examination.

Later after one week he was arrested and charged with this offence.

**ANALYSIS**

In this case the Complainant alleged to have been defiled by the Appellant on the 28<sup>th</sup> day of October, 2013 at 5.30pm and that she reported the incident to her mother after arrival at home.

Complainant's mother (PW3) testified to have been informed by the Complainant that she was feeling irritation on her private parts by the pant she was wearing.

This information was given to her while she was at PW2's house on 3<sup>rd</sup> November, 2013. She refused to tell them what had happened. It was after she was beaten by PW2 that she revealed that Wesley had defiled her.

From the above, its not correct for the Complainant to have testified that upon arrival at home she

informed her mother of what had happened. The incident took place on 28<sup>th</sup> October, 2013. Her mother and PW2 came to know about it on 3<sup>rd</sup> November, 2013. At least that is their evidence.

PW3 (A) did not testify of having met the Complainant on 28<sup>th</sup> October, 2013 and a report having been made to her of a defilement. She testified to have gone home on 2<sup>nd</sup> November, 2013 and found the Complainant at PW2's house. Its on the following day that the Complainant informed her that the pant she was wearing was irritating her private parts. This informs the reason why the Complainant was presented to the Doctor on 4<sup>th</sup> November, 2013 for examination, which was a span of close to a week after the alleged defilement. The doctor was positive that there was evidence of penetration but he did not give the exact or approximate age of the injuries on the hymen which was torn.

The appellant was presented to him on 6<sup>th</sup> November, 2013 for examination. No significant evidence could be found after such a period.

The Complainant in this case gave an unsworn statement. The Appellant was not accorded the opportunity of facing his accuser and cross-examining her, more so when there was no other evidence to link him with the offence.

The learned trial Magistrate did not inform the appellant of his right to cross-examine the Complainant so as to test the veracity of her evidence.

Article 50 (2) (k) of the Constitution provides:

*“Every accused person has the right to a fair trial which includes the right to adduce and challenge evidence.”*

Complainant's evidence can only be properly challenged by way of cross-examination. There is no provision in the Criminal Procedure Code that denies an accused person the right to cross-examine a Complainant who gives an unsworn statement.

I find that failure to accord the accused the opportunity to cross-examine the Complainant denied him the opportunity to test and challenge the veracity of her evidence and this was prejudicial to his case.

This case was not proved beyond reasonable doubt. The Conviction was not safe. It is quashed and the Sentence set aside.

The Appellant is set at liberty, unless otherwise lawfully held.

**DELIVERED, SIGNED AND DATED THIS 23RD DAY OF MAY, 2017.**

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**M. MUYA**

**JUDGE**

In the presence of:

- 1.Learned Counsel for the Prosecution- Miss Keli
2. Learned Counsel for Defence- Mr. Motanya
3. Hillary- court assistant