



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 49 OF 2014

(FORMERLY KISII HCCRA NO. 130 OF 2012)

BETWEEN

ZABLON OBURU SAM .....APPELLANT

AND

REPUBLIC .....RESPONDENT

*(Being an appeal from the original conviction and sentence in Criminal Case No. 355 of 2010 at Principal Magistrate's Court at Kehancha, Hon. J. R. Ndururi, SRM dated on 1<sup>st</sup> July 2010)*

JUDGMENT

1. The appellant, **ZABLON OBURU SAM**, was charged with the offence of defilement contrary to **section 8(4)** of the *Sexual Offences Act, 2006*. The particulars of the offences were that on 22<sup>nd</sup> March 2010 at about 10.00 am in [Particulars Withheld] within Kuria District, he caused the penetration of the genital organ of HN aged 11 years with his genital organ. He also faced a second count of committing an indecent act with a child contrary to **section 11(1)** of the *Sexual Offences Act*.
2. He was convicted on the principal charge and sentenced to serve 20 years imprisonment. He now appeals against the conviction and sentence on the basis of the grounds set out in the petition of appeal filed on 31<sup>st</sup> May 2012 on the principal ground that the learned magistrate erred in relying on evidence that was full of discrepancies and that the sentence was harsh. He supported his arguments by filing written submissions.
3. Learned counsel for the respondent, Ms Owenga, supported the conviction and submitted that the prosecution proved all the elements of the offence and that the sentence was proper and legal.
4. I have considered the record and come to the conclusion that the appeal must be allowed. The complainant, PW 1, who gave unsworn testimony, was not cross-examined. The record does not show that the appellant was given the opportunity to cross-examine her yet her testimony was crucial and formed the basis of the conviction. **Article 50(2)(k)** of the Constitution protects the right of every accused to challenge evidence given against him. Even where the victim is young or vulnerable the right to challenge evidence through cross-examination should not be denied. The accused should always be given an opportunity to put forth his questions. It is for the court to provide sufficient safeguards to the vulnerable witness under **section 31** of the *Sexual Offences Act* by for example asking the questions through an intermediary. **Article 50(7)** of the Constitution likewise provides that, *"In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court."* In this case though, there was no indication that the complainant was so vulnerable to the extent that no questions could be put to her directly or through an intermediary.
5. The appeal is allowed and the conviction and sentence quashed. As this appeal is allowed on the basis of a defect in the trial, the appellant shall be retried.
6. The appellant shall remain in custody until such time as he shall plead to the fresh charges on 24<sup>th</sup> November 2014 at the Kehancha Senior Resident Magistrate's Court. The trial shall commence

within 21 days from the date hereof.

**DATED and DELIVERED at MIGORI this 21<sup>st</sup> day of November 2014.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.