

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 114 OF 2011

BETWEEN

PETERSON MUREITHI NJERU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Siakago Criminal Case 767 of 2010 by S.M. Mokuu P.M on 6th July, 2011)

JUDGMENT

1. The appellant faced two charges in the subordinate court, the first one was that of defilement contrary to **section 8(1) and (3)** of the *Sexual Offences Act* and an alternative charge of indecent assault of a child contrary to **section 11(1)** of the *Sexual Offences Act*. The appellant was convicted on 6th July 2011 of offence of defilement and imprisoned for a period of 20 years. He now appeals against conviction and sentence.
2. The brief facts are that between 29th August 2010 and 1st September 2010, PW1's mother reported the loss of her daughter SW to the police at Gachoka police patrol base. Through a tip off from members of the public, the parents were informed PW1 was in the appellant's house. Police proceeded to the accused's house where they found the appellant with the child in the house. He was arrested and taken to Gachoka Police Patrol Base.
3. The first witness to testify was the child, PW 1, who gave unsworn testimony after a *voire dire* examination. She testified how she was lured by the appellant to his house and locked up and how the appellant later had sexual intercourse with her. On the basis of this evidence and corroborating evidence the appellant was convicted.
4. The record does not show that the appellant was given the opportunity to cross-examine or put questions to PW 1. This is a violation of **Article 50(k)** of the Constitution which protects the right of every accused person to challenge evidence against him. Even where the victim is young or vulnerable the right to challenge evidence through cross-examination should not be denied. It is for the court to provide sufficient safeguards to the vulnerable witness under **section 31** of the *Sexual Offences Act*.
5. The appeal is accordingly allowed on that basis and a retrial of the appellant ordered. The appellant shall be taken forthwith to plead before the Magistrates Court.

DATED, SIGNED and DELIVERED at EMBU this 30th day of October 2013

D. S. MAJANJA

JUDGE