**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**HIGH COURT CRIMINAL APPEAL NO. 56 OF 2012**

***Originally Eldoret Chief Magistrate Criminal case No. 837 of 2011***

**EMMANUEL KIPKOECH CHEMWOK ….....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT ON APPEAL**

***(Being an appeal against the decision of Honourable A. Alego, Principal Magistrate at Eldoret, in Eldoret CMCC Criminal Case No. 837 of 2011)***

The appellant was charged with one count of defilement contrary to Section 8(2) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the offence as noted in the charge sheet were that on the 17th day of November, 2011, [particulars withheld] Location, Eldoret East District within Rift Valley Province, the appellant intentionally and unlawfully caused his genital organ (penis) into the genital organ (vagina) of one JBM ( a minor aged 9 years). There was an alternative charge of an Indecent Act with a Child contrary to Section 11 (1) of the Sexual Offences Act. The particulars noted were that on the 17th day of November 2011, the appellant unlawfully allowed his penis to come into contact with the vagina of the minor.

The prosecution called five witnesses whereas the appellant gave sworn testimony and called two witnesses. At the end of the trial, the learned trial magistrate found the appellant guilty of the principal charge and sentenced the appellant to life imprisonment. The appellant is aggrieved and has preferred this appeal against both conviction and sentence. The appellant has stated the following as his grounds of appeal :-

*1. The learned trial magistrate erred in law and fact by convicting the appellant on highly doubtful medical evidence when there was no defilement at all.*

*2. The learned magistrate erred in law and fact by convicting the appellant on contradictory prosecution evidence.*

*3. The learned magistrate erred in law and fact by failing to consider defence evidence to the effect that the appellant did not commit the alleged defilement but somebody else may have done it, if at all there was defilement.*

*4. The learned trial magistrate erred in law and fact by failing to consider alibi evidence of the appellant.*

*5. The learned magistrate erred in law and fact by convicting the appellant on fabricated charges and*

*evidence and failed to consider defence evidence that there exist (sic) long drawn difference (sic) between the family of the appellant and that of the complainant.*

*6. The learned magistrate erred in law and fact by convicting the appellant in the absence of any medical examination of the appellant to link him with the alleged defilement.*

This is a first appellate court and I have duty to re-evaluate the evidence and determine whether the findings were correct.

As is stated earlier, the prosecution called a total of five witnesses. PW-1 was a medical officer stationed at the Moi Teaching and Referral Hospital. She testified that she examined the minor who was said to be aged 9 years. In her evidence she identified the clothings of the minor and her underwear which she said were covered with "widow jack". She also gave evidence that she noticed the genitalia perenium of the minor as swollen and tender and the hymen was torn. There was also vaginal discharge white in colour. There were no spermatozoa noted. She concluded that there was positive evidence of vaginal penetration. She filled the P3 which she produced as an exhibit.

PW-2 was the complainant herself. She testified that she was born in the year 2001. She is a primary school child in Class 3. A voir dire was conducted and she gave sworn evidence. She testified that she knew the appellant as he stayed next to them. She testified that on 17th November 2010 at 5pm she had gone to see the appellant's wife who had gotten a baby. As she was going back home, she stated that the appellant waylaid her and pushed her into the forest; that he removed her clothes and panty and defiled her; that he gagged her mouth so that she could not scream; that he later left. She testified that she bled and rushed home to inform her mother. They later reported with her mother to the police station.

PW-3 was the mother to the minor. She produced the minor's clinic card to prove her age. She testified that on the material day she was at home when her daughter went to take water to the appellant's home as his wife had just delivered. She came back home but with black jacks all over her body and clothes. She checked her private parts and noted a discharge. She identified the skirt and panty in court as being those of the minor. She testified that she took the minor to Kapsoya District Hospital and later reported to the police station. She stated that after the event, the appellant disappeared and only appeared after three months. She stated that she saw semen in her daughter's panty.

PW-4 was the sister to the minor. She stated that she was herding cattle when her sister raised a distress call. She went to the fence. She found PW-3. They checked the private parts of the minor and she saw sperms between her legs. She stated that the minor's panty also had sperms all over and the skirt had black jacks all over. They then went to hospital and later reported the matter to the police station. She stated that the appellant disappeared for three months.

PW-5 was the investigating officer, stationed at Kapsoya Police Post. He was on duty on 2nd March 2011 when the appellant was brought by Administration Police officers. He testified that a report had earlier been made and a P3 form issued. He produced the clothings of the minor and the clinic card as exhibits. In cross-examination, he stated that he never went to the scene of the crime. He stated that the report was made on 20th November 2010.

The appellant was put on his defence. In his sworn evidence, he testified that he is 31 years old and is a conductor along the Eldoret-Iten-Kabarnet route. On the material day, he stated that he was at work as usual. He went back in the evening and nothing happened. Later his son, K.K, met C (presumably the minor victim). K.K is a son that he said he sired outside marriage. He stated that there is a grudge between his family and that of the minor victim. In cross-examination, the appellant asserted that he was at work in a matatu and gave one Timothy as the driver of the day. He denied ever having gone into hiding. DW-2 was the wife to the appellant. It is not very clear from the record whether in examination in chief she stated that on the material day the appellant was at home or at work. However in cross-examination, she stated that the appellant was at work. She stated that the minor victim came to her home as she had delivered a baby. She gave her vegetables to go home with. She later heard that her step-son (presumable K.K) had defiled someone which version later changed to point at the appellant.

DW-3 stated that she is a businesswoman and on the material day she went with the appellant to bring charcoal from Kabarnet and came back at around 7 pm. She (DW 3) later heard that he (the appellant) Ahad been arrested.

The appellant then sought adjournment to call another witness. However on the rescheduled day, he stated that the witness had died.

The learned trial magistrate evaluated the evidence and found that there was evidence of defilement. As to whether it was the appellant who committed the offence it was her opinion that this had been proved. She reasoned that the appellant did not tell the court where he was between the alleged date of offence to the time he was arrested. She also pointed out that the appellant never called the driver nor his son as a witness.

On my part, I have re-evaluated the evidence. I think there is no doubt that the minor victim was born in the year 2001. The clinic card actually shows the date of birth as 10th July 2001. The offence was allegedly committed on 17th November 2010 and the minor was therefore slightly over 9 years at the time of the alleged offence. The only direct evidence on the aspect of the actual act of defilement is that of the minor herself. The other witnesses were called to corroborate the evidence of the minor.

The minor testified that it was the appellant who defiled her. PW-3 and PW-4 testified that they took the minor to hospital on the same day. No treatment records were ever availed to court to demonstrate the findings of the person who initially examined and treated the minor. It was never explained why this bit of evidence was never tabled before court, if at all it was available. Although it is not mandatory for such evidence to be tabled to sustain a conviction, in my view, it is very critical evidence, and the prosecution always ought to endeavour to furnish the same, because that evidence is the first contact between the victim and a medical practitioner. In the circumstances of this case, such evidence could have shown whether there was spermatozoa and also the state of mind and physical condition of the minor, immediately or soon after, the alleged incident. PW-3 and PW-4 also never quite explained why it took them a while before reporting the matter to the police. It seems from the evidence of PW-5, the police officer, that the report was made on 20th November 2010 three days after the incident. There is of course nothing wrong in making a report to the police days after the incident, but this evidence, to me, is important in the circumstances of this case, because the appellant's evidence was that he was at home all along without any issue being raised and was surprised to be arrested in March 2011.

No evidence was called by the police to say what they did after receiving the report on 20th November 2010. Did they for example go to arrest the appellant but never found him at home ? Did they find him at home but required more investigations to be conducted and that is why they did not arrest him earlier? There are no answers to these questions. As I stated, the answers to these questions in the circumstances of this case are important because the appellant stated that he had been at home all along with no issue being raised, which would be unusual, as a complaint had already been made that he had defiled a minor. It is not even clear whether PW-5 merely arrested the appellant or that he investigated the matter. If he investigated the matter, he never gave an account of how he started and completed his investigations, and what exactly made him reach the conclusion that the appellant is the one who had defiled the minor. He never visited the scene of crime and indeed there is no evidence that the scene of crime was ever visited by any police officer after the incident was reported on 20th November 2010. The Administration Police Officers who are said to have brought the appellant to the police station were never called to give evidence. It was never disclosed whether these Administration Police Officers arrested the appellant at home or if the appellant was arrested while in hiding.

The P3 was filled on 26th November 2010 which was 9 days after the alleged incident. There are no actual findings on examination of the minor which are noted in the P3. There is reference in the P3 form purporting to give "findings of 17/11/2010". The "findings of 17/11/10" are that "there is perineal oedema and tenderness, hymen freshly torn, whitish vaginal discharge." Now I have a problem here. The P3 was filled on 26/11/2010 not on 17/11/2010. The person who filled the P3 works at Moi Teaching and Referral Hospital. There is no evidence that she was at Kapsoya Dispensary where the minor was being treated. In fact, she has not testified that she treated or saw the minor on 17th November 2010. Where

then did she get the findings of 17/11/2010? Whose findings were they? No evidence at all was led on this. Moreover, if these were the findings of 17/11/2010, what were her own findings when she examined the minor victim on 26/11/2010 ? I have absolutely no evidence before me that she examined the genitalia of the minor victim on 26/11/2010, and if she did examine, the results of her investigations are nowhere in the P3 or in any other document or evidence tabled before court. The only reference is the findings of 17/11/2010 the source of which are not disclosed.

As stated earlier, the only evidence that directly connects the appellant to the offence is that of the minor and nothing else. The court of course is permitted by Section 124 of the Evidence Act to convict on the sole evidence of the victim. That provision of the law is as follows :-

*Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*

*Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*

It will be seen from the above that the court can convict on the sole evidence of the victim. The court must however give the reasons for believing that the victim is telling the truth. I have read the judgment of the learned trial magistrate and I have not found anywhere where she has recorded any reasons that she is satisfied that the minor alleged victim was telling the truth so that she could proceed to convict based on the provisions of Section 124 of the Evidence Act. I think this was a fatal omission on her part as the evidence of the minor was the only evidence that directly linked the appellant to the offence.

In evaluating the defence evidence, the learned trial magistrate was of the view that the only way in which the alibi of the appellant would have been verified was to call the driver of the matatu where the appellant said he was working. I have seen no evaluation whatsoever of the evidence of DW-3 and why the court thought that she was not telling the truth so as to require further corroboration by the driver. Although the appellant did not say exactly which witness it is, that died, and he was therefore unable to call as a witness, in the appeal he stated that the driver is the witness who died, and this is probable. That said, I am not of the opinion that the only corroborative evidence of his alibi had to be the driver. Any person who saw the appellant on the day of the alleged offence was competent to adduce alibi evidence. I neither saw nor heard DW-3 and it fell upon the trial magistrate to say why she thought her evidence could not be believed and why it required further corroboration. This was not done in this case. The alibi evidence of the appellant was therefore not properly tested against the evidence of the prosecution witnesses.

I think there are many loopholes in the case as presented before the trial court which loopholes bring forth doubt as to whether the minor was defiled, and if so, whether it was the appellant who actually defiled her. Courts ought only to rely and convict or acquit on the basis of evidence and nothing else. I on my part do not know whether or not the appellant committed the offence but there is no question, in my view, that the evidence tabled by the prosecution raises doubt as to whether it is the appellant who committed the offence. The appellant must be given the benefit of such doubt. These doubts have been raised in the manner in which the police did their investigations and/or by a failure by the prosecution to call crucial evidence.

It is my view that the conviction was unsafe in the circumstances. I therefore quash the conviction and sentence. I also see no basis upon which the appellant may be convicted on the alternative count. The appellant is to be set free unless otherwise lawfully detained.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF NOVEMBER 2013

**JUSTICE MUNYAO SILA**

**HIGH COURT AT ELDORET**

***Read in open court In the presence of:-***

***The appellant acting in person.***

***Mr. Mulati for the state.***