



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT ELDORET

Criminal Appeal 92 of 2006  
(From the original conviction and sentence in CM.CR.3500 OF 2006 by the A.B.  
Mong'are (RM))

GEOFFREY KIPTOO BIRECH:.....APPLICANT

VERSUS

REPUBLIC:.....RESPONDENT

JUDGMENT

**GEFFREY KIPTOO BIRECH** was on the 27<sup>th</sup> day of October 2006 convicted of the offence of defilement of a girl under the age of fourteen (14) contrary to the provisions of section 145 (1) of the Penal Code. The offence was allegedly committed on the 1<sup>st</sup> day of June 2006 at M.K farm. He was sentenced to imprisonment for a term of 20 years with hard labour. Being dissatisfied with both conviction and sentence the Appellant has filed this appeal and raised the following grounds that he pleaded not guilty and the evidence produced in court was uncorroborated hearsay, the trial magistrate shifted the burden of proof to the accused and that the medical evidence adduced exonerated the accused from blame. In his written submissions the Appellant stated that the case was not proved beyond reasonable doubt. He added that since the complainant states that the accused used a condom then there was no proof that it was him who committed the offence. That there was no blood on the complainant and

that means that there was no penetration. He states that key eye witnesses did not give evidence and so the available evidence is not corroborated. He prays that the conviction be set aside and he be set at liberty.

This court in assessing and evaluating the evidence adduced in the lower court finds that the complainant gave a graphic account of what was done to her by the accused whom she knew as Brown Kiptoo and she also knew that he lived at K.

He did not deny this at either cross examination of the witness or in his unsworn statement in his defence. She felt pain and cried and the cry led the accused to leave the complainant alone. Her cries attracted two girls C and M who came and led the complainant home where she reported the ordeal to her mother. She said that the Appellant threw away the used condom and put the unused ones in his pocket and left. The evidence is believable. PW2 the mother of the complainant said the girl was limping on one leg. The village elder who gave evidence as PW3 found 4 condoms in the pocket of the accused. That corroborates PW1's evidence as to the condoms the accused put back in his pocket after using one when defiling her. The P3 form produced in evidence showed the external private parts being hyperemic. The hymen was intact. I find that there was penetration of the genital organ of the complainant by the genital organ of the complainant. That would be the reason the complainant cried in pain due to the insertion of the Appellant's penis into her vagina. Such penetration appears not to have been complete as the hymen was not broken but that is immaterial. Penetration is defined as the **partial** or **complete** ( emphasis provided) insertion of the genital organs of a person into the genital organs of another person. Defilement is an act which causes penetration with a child. I therefore uphold the trial magistrate's finding that defilement was proved. The complainant's vivid descriptions of what happened to her coupled with the P3 form do prove penetration albeit partial. I find

therefore that conviction was sound and I uphold it.

The sentence given by S.145 (1) of the Penal Code at the time the offence was committed is imprisonment for life. The accused was given 20 years with hard labour. I am not persuaded that the sentence should have been anything shorter than that seeing that, the life of a 5 year old girl was ruined and changed for ever.

This appeal is found to be without merit and is accordingly dismissed.

**DATED AND DELIVERED AT ELDORET THIS 4<sup>TH</sup> DAY OF MARCH, 2010**

**P.M.MWILU**  
**JUDGE**

**IN THE PRESENCE OF:-**

Paul Ekitela - Court clerk

Kabaka - State Counsel

Geofrey Kiptoo Birech - Appellant

Right of appeal 14 days.

**P.M.MWILU**  
**JUDGE**