



**REPUBLIC OF KENYA**

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

CRIMINAL APPEAL NO. 50 OF 2018

DTK.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

**[Appeal from the original conviction and sentence in Kabarnet Senior Principal Magistrate's Court Criminal Case (S.O) No. 12 of 2018 delivered on 10<sup>th</sup> August, 2019 by Hon. V. O. Amboko, RM]**

**JUDGMENT**

***Introduction***

1. The appellant who was first remanded awaiting his trial on 19<sup>th</sup> March 2018, was upon conviction sentenced on 10<sup>th</sup> August 2018 to imprisonment for 10 years for the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act as an alternative count to a charge of defilement c/s 8 (1) and (2) of the Sexual Offences Act. The appellant had been charged as follows:

***“DTK: On the 16<sup>th</sup> day of March 2018 North Sub-county, within Baringo County intentionally and unlawfully caused his penies to penetrate the vagina of JK a child aged 2 ½ years. ”***

The appellant faced an alternative charge of committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

***Judgment of trial court***

2. Upon trial the trial court found the alternative charge as proved but acquitted the appellant of the main count of defilement in the relevant part of the *JUDGMENT* as follows:

***“The complainant in this case did not testify as the court declared her a vulnerable witness by virtue of her being a child of tender years. The evidence of penetration was adduced by PW1, PW3 and PW4. PW4 in her testimony told the court that when she checked the complainant's private parts they were swollen and there were sperms on the said genital organs. PW1 also testified that when he checked the complainant her genital organs were swollen and looked bigger than normal. PW1 never mentioned that he saw the presence of sperms on the genital organs of the complainant.***

***The evidence of both PW1 and PW4 is on the issue of swollen genital organs is corroborated by the PW3 who examined the complainant and filled both the PRC and P3 forms. From the PRC form which was filled on the 17<sup>th</sup> of March 2018. The complainant had a swollen labia majora and bruises on the labia minora, her vagina was swollen, her hymen was normal. The P3 Form***

indicates that there was no spermatozoa, there were numerous pus and epithelial cells Based on her findings she concluded that the complainant had been defiled.

I find that the presence of a swollen labia majora and bruises on the labia minora confirms that there was contact made between the perpetrator and the complainant's genital organs. However the swelling and bruises in the labia minora does not sufficiently prove that there was partial or complete insertion of the genital organs of the perpetrator in the complainant's genital organs. The swollen labia majora and bruises prove that an indecent act was committed against the complainant.

### **Age of the victim**

The age of the complainant at the time of the offence was proved by the production of the mother and child health hand book. The child health hand book which was produced as exhibit 4 indicates the date of birth of the complainant as 4<sup>th</sup> of July 2015. This means that at the time of the incident the complainant was 2 years and eight months old. PW4 also corroborated the date of birth of the complainant through her.

I am satisfied that the age of the complainant was sufficiently established.

### **Identity of the Perpetrator**

The evidence that links the accused person to the offence was that of PW1 and PW4. PW4, places the accused person inside the house where the incident occurred. It was her testimony that;

"I left JK in the house, I left her in bed as she was asleep. I locked the door from outside. I came back at 7:30pm, I found the door was open the child was crying. I asked who was in the house from outside. I entered in the kitchen and got a torch. I lit the torch and went to the house to see who was inside. The accused person then suddenly came from inside the house. I found JK on the bed her underwear was removed, not completely on one leg and her trouser. The child was awake still lying on the bed crying, when I saw the accused person he tried to zip his trouser. I checked JK's body her private parts they were swollen, I saw sperms on her genital organs I left the house and asked the accused person why he had defiled my child he denied having defiled her. He told me he had just arrived in my house. I started screaming and my neighbour William arrived"

From the evidence of PW4 the accused and no other person was inside her house when she arrived. The accused person in his testimony stated;

"I arrived home and did not find anyone, JK was in the house, it was around 7:00pm. I went to the kitchen, put the vegetables and called RK.. RK e is my aunt. JK started crying inside the house. The door was locked from outside. I opened the door, JK came outside the house. I locked the door and went to the kitchen with JK I lit a fire and placed water on the fire. I started chopping vegetables, RK came to the kitchen as I was cutting vegetables. She asked me why I had opened the door of the house and allowed JK into the kitchen. I told her that JK was crying inside the house. She asked me why JK had removed her trouser, I told her she had urinated on it, and she had on her panty. She started quarrelling with me because I had removed JK's trouser"

The evidence of the accused person places himself at the scene at around 7:00pm. Upon arrival he found the door of the house locked from outside. Given that PW4 stated that she had left her house at 7:00pm to go to the Posho Mill, places the accused at the scene immediately or shortly after PW4 had left. The accused person had stayed with the complainant from 7:00pm until PW4 arrived. This rules out the possibility of the existence of another person other than the accused person in PW4'S house when the incident occurred. According to her evidence PW4 returned home at around 7:30pm.

I do not doubt that the incident took place between 7:00pm and 7:30 pm. This means that the

accused person had stayed alone with the complainant for around 30 minutes. The absence of any other person in the house provided an opportunity for the accused person to commit the offence. According to PW1 the accused person told him that he had removed the complainant's trouser because she had urinated on it this is also corroborated by both PW4 and the accused person. This means that there was contact between the complainant and the accused person before PW4 arrived at the scene. The action of the accused person in zipping his trouser when he saw PW4 also links him to the offence of indecent act.

The accused person in his defence told the court that PW4 was using the case to frame him after he refused PW4 to sell his father's goat. I find his defence a mere denial. The accused person did not raise the issue of the goat when he cross examined PW4. PW4'S evidence was credible and unshaken, as it was consistent with PW1 and the medical evidence adduced in support of the case. There is no evidence on record that would suggest PW4 and PW1 acted in concert to make up a case against the accused person.

I find the accused person's defence lacks merit. In the upshot having established that the offence of committing an indecent act with a child was proved beyond reasonable doubt. I find the accused person guilty and convict him of the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006.”

### **The appeal**

3. By amended Grounds of Appeal filed herein, the appellant challenged the judgment of the trial court on grounds as follows:

- “1. That the trial court erred in law and fact as it failed to observe that the charge sheet was defective.
2. That the trial court erred in law and fact as it failed to accord this matter a fair hearing.
3. That the trial court erred in law and fact as it failed to give consideration to the appellant's defence evidence.
4. That the trial court erred in law and fact as it failed to hold that the prosecution did not prove its case beyond any reasonable.
5. That the trial court erred in law and fact when it failed to observe that penetration was not conclusively established.
6. That the trial court erred in law and fact by shifting the burden of proof from the prosecution to the appellant.
7. That the trial court erred in law and fact as it failed to hold that the witnesses evidence was conspired.”

### **Submissions**

4. The appellant filed written submissions and the DPP made oral submissions to which the appellant responded as shown in the record of proceedings of 12/2/2020 as follows:

“12/2/2020

#### **Appellant**

I have written submissions. I wish to add in Kalenjin language. The case involves a family matter. When my mother died in 2009, we lived with my father who married the complainant in

2016. We lived together until 2018. We had disagreed in 2017 about goats at home. She threatened to do something to me which I would never forget. I left home and went to the goat pen in the same shamba. I used to bring milk for the lady and I would return to the goat pen. My father later asked me to come and stay in the house. We stayed until 2018. We disagreed with the lady about bringing another man in the house. We even fought with the man. I then went to sleep. In the morning, I was told that the chief was looking for me. I was arrested by Kenya Police Reserve. The testimony by the [prosecution] witnesses was false.

### **DPP**

Appeal is opposed.

Appellant was charged with defilement c/s 8(1) and 8 (2) of the Sexual Offences Act with alternative charge of committing indecent act with a child c/s 11(1) of the Sexual Offences Act. He was convicted of the alternative charge and sentenced to serve 10 years. Victim was a child aged 2 years 8 months at the time of the offence. The child's health card was produced as exhibit indicating she was born on 4/7/2015. She was declared vulnerable witness by virtue on her age. Her mother PW4 acted as intermediary and testified on her behalf.

PW4 testified that on 26/3/2018 at around 7.00pm she left her child in the house and went to the Posho Mill. She came back at around 7.30pm and found her house which she had locked from outside open. She asked who was in the house and the appellant came out. Her baby was crying inside the house. On entering the house she found her child on the bed but her underwear and trouser had been removed on one leg. Appellant on seeing PW3 tries to zip his trouser. The conduct of the appellant made PW4 check on the child and on checking, the private parts of the child were swollen and there were sperms on the genital organ. She screamed and her neighbour PW1 came to the scene. The neighbour PW1 checked on the child's private part and confirmed that they were swollen.

PW3 a clinical officer testified that the child had a swollen labia majora and bruises on labia minora. Her vagina was swollen but hymen was normal. The trial magistrate held that the swollen labia majora and bruised labia minora confirms contact between the perpetrator and the child genital organ. However, the same does not prove partial penetration as the hymen was normal. I do agree with the trial court that there was no penetration. Considering the age of the child damage would have been more if there was penetration. However, the offence of indecent act with a child was proved beyond reasonable doubt.

Appellant was the only person in the house with the child when the offence was committed. PW4 testified that she had left her door locked and when she came back she found the door open and the appellant came out and he was zipping his trousers.

In his defence, the appellant placed himself at the scene and confirmed that he was the only person with the child at the time. He also stated that he was the person who removed the child's trousers and pantie because she had urinated on them. However, this could not make sense as they were removed half-way. The action of removing the trousers and panties could not cause the genital organ to be swollen and bruised.

The appellant was convicted on the alternative charge of indecent act and sentenced to 10 years imprisonment which is the minimum under section 11 (1) of the Sexual Offences Act. Evidence was overwhelming and we urge court to dismiss the appeal.

### **Appellant in reply**

I did not remove the child's clothes. I changed the child's clothes because she had urinated on herself. We then stayed in the kitchen and I started cutting vegetables. It was at this time that the child's mother came. She asked me who had opened the door for the child. I told her that I was

the one who had opened for the child after she cried. She asked me why I had removed the child's clothes. I said that I had changed the clothes and the clothes removed were in the kitchen. The lady quarrelled me and called Koimur who came and I told him what I had done.”

### **Evidence before the trial court**

5. The evidence presented by the prosecution and the defence in the trial court is set out in full as follows:

*“PW 1 I am William Koimur, I live in Likwon village Kaptilomoi Sub-location. Am a farmer. I am a community health volunteer at Kaplikwon. As a volunteer I am involved in ensuring children are immunized and the welfare of their health.*

*I know RK, she is my neighbor. I know JK she is a daughter of RK. JK is 2 years old.*

*I know DTK, I have seen him in RK's house. DTK is in court (Accused identified) I saw him in RK's house on 16/3/2018 at around 7.00pm/ I was looking for my sheep in the farm. My farm is near RK's house. I heard a scream from RK's house, I went to RK's house to see what had happened. I got to RK's house and found DTK and RK outside. RK was quarrelling and was telling DTK he had done a bad thing to her child.*

*RK told me to check if the child had been defiled. The child was inside the house on the bed. I entered the house with RK, it was dark, we used a torch. The torch belonged to RK, I saw the child on the bed, her underwear and trouser was removed on one leg.*

*One leg was dressed and the other did not have clothes. The child was JK. The child looked scared, she was quiet. I checked her genital organs and saw they were swollen, it looked bigger than normal.*

*At that time DTK came into the house and he saw the child. He told me he had removed the child's clothes because she had urinated on them. DTK is then left the house and went outside. I called RK's relative, by the name of SK, he told me to inform the chief. I called the chief through mobile phone. The chief was John Chesire Ruto. The chief advised me to arrest DTK. Together with the help of other neighbours we arrested DTK and took him to the chief. The chief arrested him and I left and went home.*

*Later on I was called and went to Nginyach police station where I recorded my statement.*

### **CROSS-EXAMINATION**

**You were outside when I arrived. I saw you there quarrelling with RK. I saw her child JK Your father is the brother of RK's husband. You stayed at the scene for some time.**

**RE-EXAMINATION:** Nil

**PW 2** *I am John Chesire Ruto, I live in Likwon Village. I am the area assistant chief of Likwon, Kaptilogwo. I know RK. She lives in [Particulars withheld] village. I know RK's children. She has 2 children. The first born is between 3 & 4 years. The second is almost 1 ½ years. I know DTK, he was brought to my office. He is in court (Accused person identified).*

*On 16/3/2018, at 8.00pm, I was on my way home. I received a call from William Tonui a community health worker. He informed me that he heard a scream from RK's house. When he went to her house, he found RK and DTK quarrelling outside the house. DTK became hostile when he saw William, he tried to find out what happening. RK asked William to go and check what DTK had done to the child. William told me he went to the house and found the child was defiled.*

*I told William to mobilize other community members to arrest DTK. The following day they*

brought DTK to my house at 8.00am DTK was brought by William, 2 other people and RK with her children. I asked DTK why he had defiled the child. He denied having defiled the child. I took DTK to AP police officers where he was taken to Nginyach police station.

I recorded my statement the following day.

#### CROSS-EXAMINATION

You were arrested in the evening. You denied having defiled the child when I inquired from you.

RE-EXAMINATION: Nil

**PW 3** I am Betty Cheruto Tuitoek from Kabarntonjo District Hospital. I am a registered clinical officer. I have worked for 4 years in Kabartonjo district hospital.

On 17/3/2018, a minor by the name JK alleged to have been defiled by a person best known to the mother. The mother reports to have left the child sleeping and went to the posho mill. When she came back home she found her door open and tried to inquire who was inside.

The alleged perpetrator responded it is me and I am drunk. The mother reported that the alleged perpetrator came from the room. The child was in. The mother reported that she found the child crying undressed the trouser only and holding her private parts. Her neighbor who was guarding sheep heard them quarrelling and came to see what was happening. The mother reported that she was advised to take the child to hospital. The child cried the whole night. She did not give any medication.

The mother took the child to Barwesa where she was given medication and referred to Kabartonjo district hospital. I examined the minor at the Kabartonjo district hospital. The child had swollen labia Majora and bruises on the right labia manora. I did a swab of the labia Majora and the lab results indicated numerous pus cells and numerous epithelial cells. I gave her treatment of syrup brufen and augmenting and flagyl to treat the infection.

From the examination the child had been defiled. Probable type of weapon was a blunt object. Degree of injury was harm. I filled the P 3 on 18/3/2018 and signed on the same date.

I have a treatment note filled on 17/3/2018. I filled a PRC form on 18/3/2018 and P 3 form.

Treatment note 17/8/2018 Ex 1.

PRC form Ex 2

P 3 form Ex 3

#### CROSS-EXAMINATION

The child's Labia majora were swollen and bruised. When a child is bitten by an insect on the private parts it gets swollen but not bruised. I examined the child on 17/3/2018. I examined the child and formed the conclusion.

RE-EXAMINATION: Nil

**PW 4** I am RK. I live in Likwon. JK is my daughter. I know the accused person he is my nephew. He is in court. My daughter JK was born on 4/7/2015. I have a mother and child health handbook as proof of age. I wish to produce the handbook as proof of age.

Mother and child health handbook PMFI 4.

The complainant lives with me. I have another child, his name is A. I am a widow. On 16/3/2018, at 7.00pm I had gone to the posho mill. I carried my child A. I left JK in the house. I left her in bed as she was asleep. I locked the door, from outside. I came back at 7.30pm. I found the door open. The child was crying. I asked who was in the house, from outside, I entered the kitchen and got a torch. I lit the torch and went to the house to see who was inside. The accused person then suddenly came from inside the house. I found JK on the bed, her underwear was removed, not completely, by one leg and her trouser. The child was awake still lying on the bed crying. When I saw the accused he tried to zip his trouser. I checked JK's body. I checked her private parts, they were swollen, I saw sperms on her genital organs. I left the house and asked the accused person why he had defiled my child. He denied having defiled her. He told me he had just arrived in my house. I started screaming and my neighbour William arrived. He asked what had happened I told him to check my child as she had been defiled. I remained outside with the accused person as William went into the house to check JK. William later came outside to where we were and told me the child had been defiled. William reported to my sister in-law what had happened, my sister in law and William reported to the chief. William and other neighbours arrested the accused person.

On 17/3/2018 I took the child to Barwesa health Centre. I was referred to Kabartonjo District Hospital. I went on the same day. My child was treated and examined. We spent the night in the hospital, samples were taken from my child's private parts and taken to the laboratory. She was given medication. We were then discharged on 18/3/2018. I recorded my statement at Kabartonjo police station.

#### CROSS –EXAMINATION

**I found you in my house. You were not in the kitchen. I told William to check on JK. After the incident you went to your house. You were arrested 17/3/2018 in the morning. You were taken to the chief and later to Nginyach police station. I recorded my statement in Kabartonjo. You were at Nginyach police station. I was in the hospital in Kabartonjo. You have never quarreled with William. William is my neighbour. The doctor examined JK and concluded she was defiled. There are no photographs to prove you defiled JK. You do not live in my house. I found you in my house, I checked my child and she had been defiled.**

#### RE-EXAMINATION: Nil

**PW 5** I am No. 42250 CPL Michael Makokha attached to Nginyach police station. I recall on 18/3/2018. A lady by the name of RK reported at Kabartonjo police station that on 16/3/2018 she had left her house and went to the posho mill at 7.00pm she had left her child JK sleeping in the house. The child was almost 3 years in Likwon village. When she came back home at around 7.30pm, she found her door opened and found the accused inside her house while the child was crying in bed with her underwear and trouser removed from her right leg. They started quarrelling with the accused person. Her neighbour William heard the noise and went to inquire what had happened. William entered the house and saw JK had been defiled. William was a health volunteer and he advised her to seek medical attention for the complainant. William called the area chief and reported the incident. The area chief advised him to seek help from the neighbours and arrest the accused person.

On 17/3/2018, the accused was taken to AP camp Barwesa, was brought to Nginyach police station. I rearrested him and started investigations. The mother of the complainant took her to Barwesa health centre where she was referred to Kabartonjo district hospital. The child was examined and treated on 18/3/2018 she was given a P 3 form that was filled. The P 3 confirmed the complainant had been defiled. I recorded witness statements. I also asked for proof of age and the complainants mother brought the child health book which indicates date of birth of the complainant as 4/7/2015. Mother and child health book Ex 4.

*The accused person was charged with the offence of defilement.*

#### **CROSS-EXAMINATION**

*The doctor confirmed the child was defiled. We have a police patrol base in Kabartonjo. The child and mother went to Kabartonjo district hospital. She recorded her statements at Kabartonjo as it was near to where she was. The witness statement was recorded on 18/3/2018 at Kabartonjo.*

**RE-EXAMINATION:** Nil

**DW 1** *I am DTK. I live in Likwon. I am a farmer. On 16/3/2018, I left the farm at 6.00pm I went to check on my goats. I bought flour and vegetables. I went to my house in Likwon. I arrived home and did not find anyone. JK was in the house. It was around 7.00pm. I went into the kitchen and put the vegetables and called RK. RK is my aunt. JK started crying inside the house. The door to the house was locked from outside. I opened the door JK came outside the house. I locked the door. I went to the kitchen with JK and lit a fire and placed water on the fire. I started chopping the vegetables. RK came to the kitchen as I was cutting vegetables, she asked me why I had opened the door to the house and allowed JK into the kitchen. I told her that JK's was crying inside the house.*

*She asked me why JK had removed her trouser, I told her she had urinated on it. She had on her panty. I told her JK trouser had been soaked in urine. She started quarrelling with me because I had removed JK's trouser. She told me I should have not removed JK's trouser.*

*Koimur arrived and asked us why we were quarrelling. RK took JK to the house and came back and talked to Koimur. Koimur called me and asked me why I was quarrelling with RK. I had quarreled with Koimur before. I asked Koimur if it was his house. I asked him how many times I had chased him away from the house. Koimur left. I went back to the Kitchen. I prepared food and ate and went to sleep.*

*I woke up the following morning at 5.00am Koimur came accompanied with other people and told me that I had been summoned by the chief. I went to the chief thinking it was because I had quarreled with Koimur.*

*I went to the chief and informed me that it had been reported that I defiled JK. I told him I did not defile her. He told me Koimur had reported me. The chief to AP post in Barwesa. I stayed there till 5.00pm. I was taken to Kinyach. I was taken to hospital and was taken to Kabarnet police station and was brought to court.*

*The mother to the complainant has brought false allegations to court. My mother left me in the year 2009. I stayed with my father and grandmother until 2016.*

*My sister subsequently got married. I remained with my father. My father married RK the complainant's mother. I used to stay close to them.*

*I started living in RK's house. My father got employed in Ainamoi he left home. I was left living with RK. RK asked me to sell 1 goat. I refused to sell until my father got back. She told me that she would do something that I would never forget.*

**Cross-examination:** Nil”

#### **Issues for determination**

6. The issues arising from the submissions of the parties on appeal are whether the charge before the trial court was defective and whether the prosecution had by sufficient evidence proved that the offence of defilement or, in the alternative, indecent act with a child had been established with respect to the

ingredients of the offences, namely, penetration or contact, respectively; age of the complainant; and identity of the accused as the perpetrator of the offence(s).

### **Determination**

#### *Charge sheet*

7. There is no merit in the objection as to the misspelling of the name of the complainant in charge sheet apparently as JK while witness testimony indicates her name as JK. Indeed, the writing in the charge sheet which is in handwriting may well be read as JK as the writer's **m** appears as an **n** and vice versa. Indeed, while the child health card is clearly written as belonging to JK, the PW4 is shown to have testified on JK in the trial court's handwriting and in the typed judgment the complainant's name is given as JK. It is clear however, that the witnesses were testifying on the complainant's child whose name as given in the child card, P3 form and hospital treatment notes is given JK. The misspelling of the name must have arisen from the handwriting of the drafter of the charge sheet whose letter m is not clearly written as an m. However, having looked at the charge sheet the writing of m in the name JK is very similar to the writing of the two lower case **ms** in the names of the 2<sup>nd</sup> witness listed therein as William Koimur. Whatever the spelling of the name it is clear from the prosecution and the defence evidence that the complainant is the appellant's cousin and daughter to the appellant's auntie PW4.

8. As regards any discrepancy in the OB on the charge sheet and the Ob no. given on the P3 form, no prejudice is shown to have been occasioned by such alleged discrepancy in view of the consistent evidence of prosecution as to the alleged act, the report thereof to the authorities and the confirmation of the injuries on the child and the defence's own admission of participation in an act which was claimed to be an innocent act of merely changing wet underwear and trousers of the child. No prejudice whatsoever is occasioned by misspelling of the complainant's name as JK instead of JK.

9. I do not find merit in the objection to the competency of the charge sheet.

### **Analysis of Evidence**

10. I have considered the evidence before the trial court pursuant to the duty of the first appellate court (*Okeno v. R* (1972) EA 32) There is no dispute that the appellant was found at the scene having removed the child's inner pant and trousers; the question is whether he had done so as he changed the child who had urinated on herself as he stated in his Defence or as he defiled (or attempted to defile her) or in the course of indecent act with the child as charged by the prosecution.

11. Although not charged with attempted defilement, the appellant may, if that be the evidence, be convicted of attempted defilement pursuant to section 180 of the Criminal Procedure Code. But the appellant was in fact charged with an alternative charge of indecent act with a child which carries the same penalty as the attempted defilement and the court may properly convict on the alternative count charged rather than on proved attempted defilement if that were established to be the case.

### **Age of the complainant**

12. At some point in the trial the prosecution applied for an age assessment to be conducted as the mother had brought a tattered card as follows:

*“PROS: The child's mother is in court, however, she was unable to bring documents proving the age of the child. The documents that she brought. A card is tattered. I pray for an order of age assessment on the child, I pray for another hearing date.*

*COURT: Age assessment to be carried out on the minor today. Matter adjourned to 8/5/2018.”*

13. The Prosecution subsequently produced Exhibit PEX 4 shows the complainant's date of birth as 4/7/2015 and it is in the trial court file in original. The court does not accept the objection of the

appellant that the age of the complainant was not proved. Indeed, the trial court whose observation on such matters as to the age of a child witness this court must defer on the principle of **Okeno v. R** (1972) EA 32, formed the opinion that the child was a **vulnerable witness** on ground of tender age as follows:

*“Prosecutor: I have an application to make. The complainant who is in court is a minor. She is 2 ½ years. The child is still learning how to talk and communicate. She is a child of tender years and she is unable to comprehend the proceedings. I apply for her mother to be appointed as an intermediary to give evidence on behalf of the minor since the minor is vulnerable due to her age.*

*Accused: I have no objection to the application.*

*COURT: Is the complainant present in court.*

*Prosecutor: Yes she is*

*COURT: Examination of the complainant’s mother*

*COURT: What is your relationship with the child. She is my daughter (Witness)*

*COURT: How does she communicate?*

*Witness: The child is still learning to speak. She has learnt a few words. She is 2 ½ years.*

**COURT: The complainant is a child of tender years. She is present in court and appears to be learning how to speak. As per child health book brought by the mother. He date of birth is 4/7/2015. She is 2 years and 10 months. She is a vulnerable witness by virtue of her age.**

**The application to appoint her mother as her intermediary is allowed as the child cannot properly express herself.”**

14. The court accepts that the victim of sexual assault in this case is a child below the first bracket of age delimitation under section 8 (2) of the sexual Offences Act, and by reason of the said age falls within the offence of indecent act with a child under section 11(1) and Proviso thereto of the Sexual Offences Act.

15. The court only points out to the correct objective in appointment of an intermediary to help a vulnerable person to communicate with the court. It is not a procedure for a witness to testify on behalf of a vulnerable child/person. As observed in the **Kenya Judiciary Criminal Procedure Benchbook, 2018** at paragraphs 99-103 pp. 85-6:

*“100. .... Since the intermediary acts a mouth piece for the vulnerable witness, the implication is that an intermediary can also be an independent witness giving his or her own version of the evidence in respect to the same case (MM v R Court of Appeal at Nairobi Criminal Appeal No. 41 of 2013). Evidence from an intermediary who is also a witness should be taken before the person acts as an intermediary.”*

16. No prejudice is shown to have been suffered by the appellant in the mother’s testimony as an **intermediary** on events which she observed as independent witness rather than helping the child who was declared vulnerable to communicate with the court.

### **Defilement or indecent act**

17. Although the appellant claimed to have only changed the inner clothes of the child because she had urinated, the evidence of the complainant’s mother testified that she found the appellant in her house with the child whose panties and trousers had been removed on the one leg only, and the appellant zipping up his trousers. The evidence by the complainant’s mother (PW4) is supported by that of PW1 William

Tonui Koimur, a neighbour and area community health volunteer who responded to the screams from the complainant's mother's house and when asked by the mother to check on the girl said:

*“RK told me to check if the child had been defiled. The child was inside the house on the bed. I entered the house with RK, it was dark, we used a torch. The torch belonged to RK, I saw the child on the bed, her underwear and trouser was removed on one leg.*

*One leg was dressed and the other did not have clothes. The child was JK. The child looked scared, she was quiet. I checked her genital organs and saw they were swollen, it looked bigger than normal.*

*At that time DTK came into the house and he saw the child. He told me he had removed the child's clothes because she had urinated on them. DTK then left the house and went outside. I called RK's relative, by the name of SK, he told me to inform the chief. I called the chief through mobile phone. The chief was John Chesire Ruto. The chief advised me to arrest DTK. Together with the help of other neighbours we arrested DTK and took him to the chief. The chief arrested him and I left and went home.”*

18. PW2 John Chesire Ruto, the Chief confirmed receiving a call from the community leader (PW1) and instructing him to mobilize other community members to arrest the appellant.

19. PW3, Betty Cheruto Tuitoek, Clinical Officer from Kabartonjo District Hospital testified that on examination of the child at the hospital on reference from Barwessa, she found that –

*“The child had swollen labia Majora and bruises on the right labia minora. I did a swab of the labia Majora and the lab results indicated numerous pus cells and numerous epithelial cells. I gave her treatment of syrup brufen and augmenting and flagyl to treat the infection. From the examination the child had been defiled.”*

20. PW5 CPL Michael Makuku, the investigation Officer confirmed re-arresting the appellant when he was brought from the Nginyach AP Camp, Barwessa. He produced the Child's Mother and Child Health Card indicating the child's date of birth as 4/7/2015.

21. In his defence, the appellant testified as DW1 admitting his interaction with the child as follows:

*“On 16/3/2018, I left the farm at 6.00pm I went to check on my goats. I bought flour and vegetables. I went to my house in Likwon. I arrived home and did not find anyone. JK was in the house. It was around 7.00pm. I went into the kitchen and put the vegetables and called RK. RK is my aunt. JK started crying inside the house. The door to the house was locked from outside. I opened the door JK came outside the house. I locked the door. I went to the kitchen with JK and lit a fire and placed water on the fire. I started chopping the vegetables. RK came to the kitchen as I was cutting vegetables, she asked me why I had opened the door to the house and allowed JK into the kitchen. I told her that JK's was crying inside the house.*

*She asked me why JK had removed her trouser, I told her she had urinated on it. She had on her panty. I told her JK trouser had been soaked in urine. She started quarrelling with me because I had removed JK's trouser. She told me I should have not removed JK's trouser.*

*Koimur arrived and asked us why we were quarrelling. RK took JK to the house and came back and talked to Koimur. Koimur called me and asked me why I was quarrelling with RK. I had quarreled with Koimur before. I asked Koimur if it was his house. I asked him how many times I had chased him away from the house. Koimur left. I went back to the Kitchen. I prepared food and ate and went to sleep.*

*I woke up the following morning at 5.00am Koimur came accompanied with other people and told me that I had been summoned by the chief. I went to the chief thinking it was because I had*

*quarreled with Koimur.*

*I went to the chief and informed me that it had been reported that I defiled JK. I told him I did not defile her. He told me Koimur had reported me. The chief to AP post in Barwesa. I stayed there till 5.00pm. I was taken to Kinyach. I was taken to hospital and was taken to Kabarnet police station and was brought to court.*

*The mother to the complainant has brought false allegations to court. My mother left me in the year 2009. I stayed with my father and grandmother until 2016.*

*My sister subsequently got married. I remained with my father. My father married RK the complainant's mother. I used to stay close to them.*

*I started living in RK's house. My father got employed in Ainamoi he left home. I was left living with RK. RK asked me to sell 1 goat. I refused to sell until my father got back. She told me that she would do something that I would never forget.”*

## **Findings**

### ***Penetration***

22. Weighing the evidence of the prosecution and that of the defence as a whole, and having considered the submissions by the appellant and the DPP on appeal, the court finds the charge of defilement is proved by the evidence of bruises on the labia majora and minora even though the hymen was not broken. This court does not accept the conclusion of the trial court that there was only contact and no penetration, even partial “*insertion*” in the words of the trial court. With respect, this court considers that partial penetration within the meaning of section 2 of the Sexual Offences Act is complete as evidence shows that there was injury to the labia majora and minora, even though full penetration was not achieved but for purposes of defilement partial penetration is sufficient. It could never be right that a sexual assault in which the *labia majora* and *labia minora* were injured could not amount to defilement by reason of lack of broken hymen or injury thereto.

However, the DPP accepted the trial court's position and did not challenge the finding of lack of penetration, and this court shall, therefore, not interfere with the conclusion and convict the appellant thereon.

23. The court, however, agrees with the trial court that with the injury to the labia minora, there was contact for purposes of the offence of indecent act contrary to section 11(1) of the Sexual Offences Act., which offence as, therefore, proved beyond reasonable doubt, and there is no need to consider the existence of attempted defilement as an offence, even if defilement were not found to have been established.

### ***Identification of the appellant as perpetrator***

24. There was no question as to the identity of the appellant as he was the last person shown on evidence to have been with the complainant whose examination disclosed sexual injuries amounting to defilement or indecent act as found by this court and the trial court. The identification of the appellant as perpetrator of the proved offence is consequential on the finding of the court on *what* transpired between him and the complainant: whether it was *innocent* change of the child's clothes or *culpable* act of sexual assault as charged.

25. The appellant's defence that he had only changed the child's clothes as she had urinated and that there was a grudge between the appellant and the auntie (PW4) and the community leader (PW1) which were proffered as reason for allegedly trumped up charge must be rejected when view against the consistent evidence of the prosecution evidence as to the occurrence of the sexual assault. The alleged grudge could not explain the findings of the clinical officer of injury in the complainant's private parts.

26. There was, in addition, no logical connection between the mere changing of the clothes of child and the established injury on the private parts of the child coupled with the complainant's mother's testimony that she had found the appellant zipping up his trousers, and if this were a fabrication, the screams which had attracted the witness PW1 to the complainant mother's house and the quarrelling between him and the complainant to which PW1 testified and which the appellant concedes, are inexplicable. The allegation of a grudge is too vague to raise any doubt as to consistent evidence of the prosecution, even bearing in mind that the accused has no duty under criminal justice system to prove his innocence to a criminal charge. There is no **loco parentis** relationship as to oblige the appellant to change the allegedly soiled trousers and inner pantie of his 2<sup>1</sup>/<sub>2</sub> year old female cousin, the daughter of his auntie wife to his father's brother. Moreover, the appellant's alleged disagreement with the complainant's mother PW4 over intended sale of a goat does not hold water because no connection is shown as to how the appellant's responsibility as a nephew to supervise the auntie's exercise of authority over her private affairs of her home with the appellant's father's brother. The appellant appeared to go for grudge-searching after conviction as the issue of the complainant's mother's infidelity urged in submissions before this court was not taken up in cross-examination at the trial court. And the disagreement about the goat is alleged to have taken place in 2017 and this incident in March 2018 taking away proximal causation between the two events.

### **Conviction**

27. By reason of the foregoing, the Appeal from conviction has no merit and the same will be dismissed.

### **Sentence**

28. In sentencing the appellant the trial court said:

**Court:**

*I have considered the accused person's **mitigation** and the fact that he is a **first offender**. Section 11(1) of the Sexual Offences Act gives a minimum of 10 years for the offence of indecent act. I therefore sentence the accused person to 10 years imprisonment. Right of Appeal 14 days.*

**V.O. AMBOKO, RM.**

*10/8/2018*"

29. It is clear that the trial court did not consider the period of close to 5 months pretrial detention pursuant to section 333 (2) of the Criminal Procedure Code, and in rectifying this the court will direct that the sentence of 10 years imprisonment herein shall commence on **19<sup>th</sup> March 2018**, when the appellant was remanded pending his trial.

### **Orders**

30. Accordingly, for the reasons set out above, the appellant's appeal from conviction is dismissed. However, the appeal from sentence is allowed to the extent that the court directs, pursuant to section 333 (2) of the Criminal Procedure Code, that the sentence of imprisonment for 10 years imposed on the appellant herein shall commence on **19<sup>th</sup> March 2018**, when the appellant was remanded pending his trial.

*Order accordingly.*

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF MAY 2020.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.