



**REPUBLIC OF KENYA**

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

**HCCRA NO. 14 OF 2017**

**(FORMERLY ELDORET HCCRA NO.189 OF 2011)**

**RKK.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 334 of 2011 delivered on the 21<sup>st</sup> day of September, 2016 by Hon. E. Bett, PM]**

**JUDGMENT**

1. The appellant who was on 21/9/2011 convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8 (2) of the Sexual Offences Act appealed to this Court on the grounds set out as follows:

*“AMENDED GROUNDS OF APPEAL PURSUANT TO SECTION 350 (2) (V) OF THE CRIMINAL PROCEDURE CODE*

*I'm aggrieved with the sentence of life and the conviction which was entered from the case of defilement contrary to section 8 (1) (2) of SOA No. 3/2006 delivered on 21/09/2011 by H.M. Nyaga at KBT Law Court hence this appeal I am arguing that the trial Court erred in law and fact by convicting and sentencing me:*

*(1) On Fabricated and Coached evidence tendered by Pw1*

*(2) Without observing that age of the alleged minor was not proved.*

*(3) By relying on a Fatally unreliable and faked P3 Form.*

*(4) And failed to observe that identification of the accused was improper.*

*(5) And failed to observe or cite that crucial witnesses were not availed.*

*(6) Without noticing the material irregularity within the proceedings.*

*(7) Without appreciating that witnesses lacked credibility and incompetency.*

*(8) (a)HIV examination done upon the appellant was against the law.*

*(b) Investigations were shoddy*

*(c)on unknown mode of arrest*

*(d) and failed to consider my defence instead shifted the burden of proving and used my HIV condition to secure the unsafe conviction contrary to section 169 of the Criminal Procedure Code.”*

The appellant also filed elaborate written submissions corresponding to the grounds of appeal and filed in the name of RKK.

2. At the hearing of the appeal, the appellant disowned the name RKK and alleged, as in his defence before the trial Court, that he was a

different person named, JKC as shown in the submissions of the parties before this Court as follows:

“Appellant

*I am ready to proceed.*

Appellant

*I did not wish to add anything to the submission filed.*

Miss Kitilit

*Offence of defilement under section 8 (1) is read with section 8 (2) Sexual Offences Act all the ingredients were proved. Penetration was proved by FP3 that the child was raped and her genitalia had to undergo repair surgery. Lab tests showed that the child was infected with HIV. The accused was also taken to medical examination and was found to be HIV. All through the proceeding he kept stating that he had HIV.*

*Age was proved. Child was 6 years as indicated in the P3 Form. The Court was also able to observe the child.*

Identification

*It was a case of recognition the appellant was well known to the 6 year old child as she said that he was her mother’s boyfriend and that she used to do manual jobs at her aunties. It was the complainant who pointed out the appellant as “adui” enemy when he came to work.*

*It was at night but the accused spoke to the child and she was able to recognize him.*

*In his defence, appellant said that he was not RKK but JKC.*

*At p. 31 trial Court addressed the issue. It was not just the name identification. Pw1 and Pw2 knew the appellant in person.*

*The child being a child of tender age, the evidence to corroborate by medical evidence. Pw1 was consistent in her statement to control the police and in evidence before the Court. Her evidence was not fabricated.*

Appellant

*I do not have anything. There were 2 people one RKK and I JKC. It was not me but it was my friend RKK. RKK was born in 1989 while I was born in 1970. I took my ID in 1989 as JKC.*

*RKK was employed by MC to draw water for about 2 months and I used to give him a place to sleep. It was a rental house.*

Court

1. *In the interest of Justice, before the Court dismisses the appeal, the appellant shall be escorted through DCIO, Eldoret to a police station where his finger prints may be taken and this indicating confirmed for the radical Bureau for Registrar of Persons*

2. *Mention for directions on 25/7/18”*

3. *Upon request by order of the Court, the Registrar of Persons by letter dated 17/9/2018 reported that upon a finger print search to confirm the identity of the appellant, “no record had been traced.” I would, therefore, dismiss the objection by the appellant that he was a person other than the RKK charged herein. Indeed, in his own communication to Court, for instance, for the request for proceedings dated 2/8/2013 and the Amended Grounds of Appeal filed herein, the appellant signs as RKK ADM/NAIV/1785/011/LS and Eldoret 2680/17/Life according to prisons he was held at the material time. Indeed, the grounds of appeal challenging the evidence before the Court do not raise the question of identity.*

### **Analysis of Evidence**

4. *Upon a voire dire examination in what the trial court found the complainant aged, in the estimation of the Court between 5-6 years, to be able “to distinguish between the truth and lies”, the complainant as PW1 gave an unsworn evidence as follows:*

“PW1

*I am DC. I don’t know my age. At the moment I am not in school. I used to go to [particulars withheld] Primary School in top class. Our church is at the school. I live at [particulars withheld] with my mother. My father died. I recall that my mother and I had gone to a place where she drank busaa. Then she took me to a hotel to have supper. The accused was in the hotel sitting down. My mother was very drunk. The accused said that he would escort us home. My mother said that she would get a lodging room for the girl at the*

centre. I went to sleep in the room. The accused and my mother left. After a while, the accused came back to the room alone. He told me to be quite. He covered my mouth with his hand. He removed my underpants and my skirt. He then proceeded to do "tabia mbaya" with his thing. He warned me to be quite. He did tabia mbaya to me the whole night. In the morning he left. When my mother came I told her what had happened. Instead of listening to me she hit me saying I was a liar. She took me to my aunt's home and left me there. I did not tell my aunt what had happened.

The accused came to my aunt's home. He carried water for her. That's when I told my aunt.

My mother is a drunkard. My aunt took me to hospital. My mother was arrested by the police. She does not take care of me. I don't want her near me. I was taken to the police station where I told the police what had transpired.

#### RE-EXAMINATION IN SWAHILI

I had not known you before the incident. I saw you at the hotel that day. You left with my mother then you came to the room where I was asleep."

5. PW2, the Chief Inspector of Police who conducted an identification parade on the accused testified as follows:

"PW 2

I am No. 230847 Chief Inspector Samuel Nario, the OCS Marigat police station.

On 21/5/2011 at 2.00 pm PC Mercy Mwikali of the Gender and children Desk asked me to conduct an identification parade in respect of the accused.

The witness was a girl of 6 years of age. The accused gave me his name as RKK. I told him the purpose of the identification parade and if he wanted a friend or advocate to be present. He consented and said he did not want a lawyer. I took 8 other suspects. The accused was the 9<sup>th</sup> person. I told him to choose a position. He chose position 7. Between 6 and 8 I called the girl from the girl from the office. She went and on seeing the accused. She started giggling. She said that it was the accused who had done Tabia Mbaya to her. I told her to touch the person she was referring to. She went and tapped the accused on his left hand. The accused said he was satisfied.

I produce the identification parade form as exhibit 1. The accused imprinted his right thumb print as true fashion."

6. The complainant's auntie PW3 testified as to how she discovered the defilement of the complainant, and of the identification of the appellant as the assailant, as follows:

"PW3

I am MC of Marigat. I am a casual worker. DC is my niece. Her mother is my elder sister. I knew the accused. He was the boyfriend to the complainant's mother LR.

On 26/4/2011 LR came with the complainant. She left the girl there. She did not tell me anything. I assumed she was going to drink as she is an alcoholic.

**I noticed that the girl had an awkward walk. She also had a smell. I went with her to the river to bath. I removed her clothes to examine her. I thought she had a boil due to her walking style. I noticed that her pants has a pus-like substance. She screamed when I touched her private parts. I examined her again. I was shocked by what I saw. Her vagina had a tear downward, almost to her anus.**

I called a neighbor to see what I had seen. I called **Rael** who works for child care. My sister also arrived. She was drunk. Rael took the girl to hospital in company of her mother. They came back at night. My sister disappeared after that leaving her child in my care. I was given some medicine to give her by inserting in her vagina. **On 29/4/2011, the accused came to my home. I told him to get water for me for pay. He left after bringing the water. Then the complainant told me that it was the accused who had done Tabia Mbaya to her. She called him adui yangu (my enemy). The girl refused to go back to her mother's home. That when I realized that the girl could have been telling the truth, so I took her to the police station. I traced the accused and called the police who arrested him. We got a P3 form (exhibit 1.)**

The girl is still under my care. Her mother is a prostitute at Marigat. She has abandoned her child.

#### CROSS-EXAMINATION IN SWAHILI

You are my sister's boyfriend. You are not a relative."

Significantly, PW3 identified the appellant as her sister's boyfriend.

7. PW4 the volunteer Children Officer, Baringo based at Marigat confirmed receipt of report on the complaint's injury and her own

observation when she went to see the child as follows:

“PW4

*I am **Rael** Chesire Chebunet. I am a volunteer Children Officer Baringo. I am based at Marigat. I knew the complainant when her aunt came to me on 26/4/2011. I received a report that the girl was injured in her vagina. I went to see the girl at her aunties home. Her mother also arrived. At first she did not want to take the girl to hospital. The girl has a pus like substance in her vagina. She had a tear. She had a foul smell. We took her to hospital where she was given medicine. The complainant mother had little interest in the girls situation. I went to the police station where a P3 form was issued.”*

8. PW5, the examining Clinical Officer testified as follows:

“PW5

*On 23/5/2011, I treated a patient known as DC a girl of about 6 years of age. I filled a P3 form for her on that date. She gave history of defilement. She had been treated earlier as patient No. 3855/11. On examination of her genitalia, I found that she had bruises on the labia Majora and labia Minora. There was a whitish vaginal discharge. We did laboratory tests. She had pus cells on urinalysis test for syphilis was negative. Pus cells were noted on a vaginal swab. No spermatozoa were seen. HIV test was positive. I found that there was evidence of defilement/penetration. I signed the P3 form which I produce as Exhibit 2. I also examined one RKK who came under police escort. He had allegedly defiled a child. On examination, he was a male adult of about 23 years of age. He had normal genitalia. Laboratory tests were done syphilis test was negative. Pus cells were noted together with red blood cells. Upon urinalysis HIV test was positive. I produce the P3 form which I have signed as Exhibit 3.”*

9. PW6, the Investigating Officer confirmed arranging for the identification parade to be conducted by her OCS and that the complainant had identified the accused in the parade.

10. Upon being put on his defence the appellant gave an unsworn statement set out in full as follows:

“ACCUSED STATES IN KISWAHILI

*I am **JKC**. I am not the said RKK as stated in the charge sheet. I was at Marigat when I was arrested. I hail from Marakwet. I was taken to the police station. I was taken to an identity parade. The child was forced to incriminate me. I was taken to hospital. I have not taken an identity card yet. I am on treatment for HIV at Ampath since 2009.”*

### **Determination**

11. The medical evidence of PW5 confirmed complainant’s allegation of defilement when he found that “*she had bruises on the labia majora and labia minora*” and he found that “*there was evidence of defilement/penetration*”. PW1 related how the appellant had gone to her room and had sexual intercourse with her, and she was able to identify the assailant both at her auntie’s house when the appellant went to fetch water and upon an identification parade conducted by the OCS (PW4) Marigat police station. I have no doubt that, by any name so called, RKK or JKC, the appellant was the assailant. The sentence was in accordance with section 8 (2) of the Sexual Offences Act.

### **Orders**

12. Consequently, for the reasons set out above, the Court finds no merit in the appellant’s appeal herein and the same is dismissed.

*Order accordingly*

**DATED AND DELIVERED THIS 22<sup>ND</sup> DAY OF MAY 2019**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

Appellant in person.

Ms. Kitilit, Prosecution Counsel, for the Respondent.