



**REPUBLIC OF KENYA**

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

**HCCRA NO. 225 OF 2017**

**JOAB JOMO.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 85 of 2016 delivered on the 4<sup>th</sup> day of December, 2017 by Hon. R. Yator, SRM]**

**JUDGMENT**

1. The appellant was on 4/12/17 convicted and sentenced to imprisonment for life for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act. The particulars of the offence were that the appellant had “on 25<sup>th</sup> day of January 2016 at [particulars withheld] village in Koibatek Sub-county within Baringo County committed an act which caused the penetration of his penis into the vagina of NJ a child aged 4 years old.” (sic)

2. The appellant challenged the conviction and sentence on the Amended Grounds of Appeal set out as follows:

1. **THAT** the trial learned Magistrate erred in law and fact in relying with Prosecution evidence which was doubtful to convict me.
2. **THAT** the trial Magistrate erred in law and fact when he convicted me on a defective charge sheet.
3. **THAT** the trial Magistrate erred in law and fact when he convicted me whereas he disregarded my testimony in my defence.
4. **THAT** the trial Magistrate erred in law and fact when he convicted me on Prosecution testimony which was not proved beyond reasonable doubt.

3. In elaboration of the grounds of appeal, the appellant filed written submission as follows:

**“SUBMISSION**

**GROUND ONE: UNRELIABLE AND DOUBTFUL EVIDENCE**

*My Lordship, in support of my contention that the conviction meted on me was manifestly unsafe and a nullity. It is from the record that the testimony of Pw1, the mother to the complainant is not a creditworthy witness in her testimony on the allegations made against the appellant. Her testimony on how the victim was injured cannot be used to sustain a conviction. Her allegations were only a suspicion of what happened to the victim.*

*My Lordship, the minor (victim) illustrate to her exactly what had happened to her – see pg 11 line 11...”she said Joab pricked her with a stick on her private parts...” It was Pw1’s interpretation of this statement to mean that she was defiled by Joab – see line 13 – 14...”when she said she was pricked with a stick I understood she was defiled...” why did this Pw1 not found out why Joab had pricked the minor as she was told? She ignored the statement of the minor and form her own opinion that she was defiled. She in fact says she observed blood stains and whitish discharge. What do you think Pw1 implied by saying – whitish discharge – From the twist she makes it was likely that Pw1 had in her mind that the whitish discharge was spermatozoa.*

*Pw1 arrived home at 5:30 pm – pg 10 line 15...”I returned around 5:30 pm ...” she found S and N her daughter (Pw3) playing with the sprinkler at the shamba. As the minor had a cold she could not take her to hospital since it was late. Pg 11 line 1 – 4 Pw1 further states that it was at 7:30 pm when she discovered that the girl was injured (defiled). The questions that arises here are:*

If the minor had been defiled by the accused, why then did she fail to tell her mother exactly what had happened to her? The victim was a girl of 4 year old, the experience she encountered was one that was indeed serious and something Pw3 could not have even hesitated in telling anyone of what had happened to her. It is human-knowledge that girls who are old enough may not be willing to expose or tell about the sexual assault they might undergo. Pw3 was a minor who could not shy from what had happened to her. Being a minor of that age, atleast some evidence needed to be adduced from which it could be construed that defilement took place between the minor and the accused. If any attempt was made to penetrate the complainant's private parts by the accused, there is no way the complainant would forget the experience or that detail in her evidence. The minor did not even tell that the accused slept on her.

My Lordship, it was the second day when the minor told her mum that she was defiled, this upon her mother insisting on what had happened. This by Pw4. During her cross-examination Pw4 states that the child said she was pricked with a stick – pg 20 line 14. During the minor's testimonies she was hesitant in talking about the ordeal. Why is this so? See pg 15 testimony of Pw3 especially when she states what had happened to her. See **J. Heydon Evidence, cases and materials 2<sup>nd</sup> Butterworths London 1984**. The reasons were put thus;

“First a child's power of observation and memory are less reliable than adults.

Secondly, children are prone in a make-believe world; so that they magnify incidents which happened to them or invent them completely.

Thirdly, are egocentric so that details seemingly unrelated to their own world are quickly forgotten by them.

Fourthly, because of their immaturity they are very suggestive and can easily be influenced by adults and other children one lying child may influence others to lie; anxious parents may take a child through a story again and again so that it becomes drilled in untruths. Most dangerously a police man taking a statement from a child may without ill motive use leading questions so that the child tends to confuse what actually happened with the answer suggested implicitly by the question.

A fifth danger is that children often have little notion of the duty to speak the truth and may fail to realize how important their evidence is in a case and how it is for it to be accurate.

Finally, children sometimes in a way evil beyond their years. It is observed that Pw3's hesitation may have been due to what her parents had suggested to her. If really the minor had been sexually assaulted by the accused there was no reason for her not mentioning that instantly.

My Lords, what Pw1 suspected to have happened to the minor became true. When she called Pw2 at the shop who came with her husband and the accused. Upon arriving home to did not reveal anything to the accused. They left him and later at night they arrested and beat them. If they had suspected that he had defiled the minor why all this secret on him? There must have been a plan to hutch up the fabrications on the appellant. When Pw1 arrived home she found Pw3 the victim playing with the sprinkler at the shamba – see pg 11 line 1 -2. If really the minor had been sexually assaulted to the degree the Clinical Officer observed, how could this child continue playing and that she could not immediately tell mum of what she had suffered from the time she arrived home until late at around 7:30 p.m.? May the Honourable Court observe that the allegations were not founded on sound reign. All these Prosecutions witnesses in their testimonies is not credible and worthy.

The maker of the P3 form itself never testified on the medical observation he recorded. The maker of the document was one best in place to adduce the evidence he observed on the complainant. Pw6 could not tell the origin of the said P3 form and could not tell or explain anything on matters raised by the appellant, see cross-examination on pg 36.

The Issuing Officer (station of the P3 form did not sign, the date and time of the alleged offence was not indicated on the P3 form. To add salt on the same P3 form is that the Medical Officer's Ref. No. is not indicated. I contest that the said P3 form was invalid. It is contested the veracity, validity, authenticity, originality and the genuineness of the said document. The glaring gaps and irregularities couple up with this document puts the entire Prosecution evidence in doubt. The findings if the Clinical Officer were in doubt as the injuries noted on the genitalia did not linked the appellant to the assault. It was stated that, the approximate age of injuries were some hours – see pg 35 line 20. What does some hours mean? How many hours? Or how long was it. This doctor making the document would have shed more light on the same. In **BEN MWANGI –V- REP NAIROBI HCCRA 471 OF 2001**, it was held;

At the end of the day the Doctors findings were very important were positive to findings of defilement but felt short of connecting the appellant to the findings to the appellant by failing to connect the injuries to the time of the offence. The Doctors finding did not connect the date of the alleged defilement of the complainant with the age of injuries noted. It was worthiness evidence for the purpose of this case. Some hours does not give the correct time of the allegations. Being an expert witness, how could the Court draw its conclusion on such testimony? The Prosecution witness and its evidence was not one that a conviction could lie. it is for this reason that I contend that the appellant's conviction was manifestly unsafe.

## 2) DEFECTIVE CHARGE

My Lordship, the charges against the appellant did not contain the necessary information as to the nature of the offence charged. SECTION 134 OF THE CPC provides that:

“Every charge or information shall contain and be sufficient if it contains a statement of the specific offence or offences with which

the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

The rule for framing of the charges was not observed and is thus my irresistible contention that the plea taking on 27.01.2016 was an exercise in futility. The plea taken was therefore invalid. The particulars of the charge sheet omitted the word **unlawful** thus meaning that the act of penetration caused to the victim was not “unlawful” act. This omission was fatal to the Prosecution case. The same rendered the plea defective in nature as the plea entered was in respect of a sexual act, which is not unlawful in nature. This alone coupled by the fact that the frame-up vitiated the entire trial process. In DAVID ODHIAMBO –VS- REP. CR. APP. NO. 5 OF 2005 (C.A). At Mombasa the appellant was charged with an offence of rape whereby there was an omission of the word “**unlawful**” in the particulars of the charge sheet. The Court of Appeal held as follows:

“We would draw the attention of those duty is to draw-up “charges and to trial magistrate that rape is defined under section 139 of the Penal Code is that “any person that has unlawful carnal knowledge of a woman or a girl without her consent..... there can be no reason for not giving the statutory definition of rape in the particulars of the charges. The same applies to indecent assault on females. In future we would expect the Prosecution and the trial Magistrate to ensure compliance with these elementary requirements.”

Your Lordship, in the instant case the offence alleged to have been committed was defilement and the word unlawful ought to have been inclusive in the particulars of the charge sheet. Section 43 (1) of the Sexual Offences Act No. 3 of 2006 describe intention and unlawful acts. The omission of the word “unlawful” in the particulars of the charge sheet facilitated the defectiveness of the charge. In SIGILAI –VS- REP (2004) 2 KLR 480: it was held; “The principle of the law governing the charge sheet is that an accused should be charged with an offence known in law. The offence charge should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to prepare his defence. The charge sheet ought to have been amended prior to taking of the plea, this was not done and hence in my submission the entire trial process was an exercise in futility. The defect in the charge was a substantive one and prejudicial as the offence was not disclosed in sufficient accurate fashion to give the appellant adequate notice to charges facing him. The paramount consideration in determining whether or not the defect in the charge is incurable or not is whether there is prejudice occasioned to the accused in putting up his defence because of the words used in the charge. This was the holding in KILOME –VS- REP (1980) KLR 194

My Lordship, It is my contention that the said judgment was invalid. This is not a situation where it can be said that the defect is curable under section 382 of the C.P.C as indeed the appellant was substantially prejudiced and was not accorded to a fair and impartial trial as enshrined by Article 25 (c) of the Constitution. In my argument herein I am guided by the observation in the Court of Appeal as laid down in the case of RAMADHAN AHMED –VS- REP E.A.C.A (1955) VOL. 22 at pg 395 where it was held:

“In a first appeal, in Criminal matter, the onus is upon the appellant to show that the finding of the Court of the first instance was unreasonable and couldn’t be supported having regard to the evidence”. See also ALBANUS MWASIA MUTUA –VS-REP (2006) eKLR it was held:

“...at the end of the day it is the duty of the Court to enforce the provision of the Constitution, otherwise there would be no reason for having those provisions – in the first place...”

It is in the interest of Justice that justice should be done and everyone is equal before the law. Article 27 (1) Everyone is equal before the law and has the right to equal benefit of law. This in contest that the appellant’s right to fair trial as by the Constitution was violated. Our Constitution has provisions of that protects the Bill of Rights. Fair hearing being one of the rights which are not derogable. Under Article 25 (c) the Courts are required to adopt an interpretation that favours the enforcement of a right or fundamental freedoms.

#### **GROUND 3/4 DEFENCE**

My Lordship, the trial Court disregarded the appellant’s testimony in his defence without giving reasons for the same. It was infact the appellant’s testimony that the charges were framed against him. He gave glaring issues that made the Prosecution’s case of doubt. The Prosecution’s witness were unreliable as none other those within that vicinity was availed to testify. There were those who were alleged to have come at night and beat up the appellant before taking him to the police station. May the Court note that the appellant’s rights were violated. It is clear that the trial Court disregarded the appellants defence, but did not give reasons why she believed the Prosecution’s evidence...a trial Court is obligated to look at the case as whole to see whether the Prosecution’s case is credible and evidence reasonable, sufficient to discharge the burden squarely on it to prove a charge beyond reasonable doubt. The trial Court failed to appreciate the inconsistencies and anomalies in the Prosecution evidence viza viz the defence case – This was the holding in STEPHEN CHARO MAVUO –VS- REP (2015) eKLR.

My Lordship, even if the trial Court had to rely on the evidence of the victim alone as per section 124. The Court did not warn himself on the dangers of the victim’s uncollaborated statement. How the Court found that the minors twist to saying it was the appellant’s susu’s that injured her was doubtful. The Court to consider that S. 124 (2) EA, he was under duty to record reasons for believing the complainants evidence which she at first not stated as being true. The Court did not record why it believed that the complainant was telling the truth. The mother to Pw3 had said that she suspected that the minor had been defiled when the minor said she was pricked with a stick. The child had indeed gone to fetch firewood with the appellant. In SAWE –VS- REP (2003) KLR 364 Court of Appeal stated:

Suspicion however, strong cannot provide the basis for inferring guilty which must be proved by evidence beyond reasonable doubt. It was the mother who formed the opinion that the child had been defiled yet the minor herself clearly told her she was pricked with a stick. The Prosecution is duly bond to prove the charge. This is always on their shoulders. The mother of the child claimed to have

produced a child health card that showed the minors age. Again the said document has not been produced or tendered by the Prosecution. The trial Court went ahead in convicting the appellant without ascertaining the age. This was avital ingredient in the case of defilement. The age gives mandatory sentence in Sexual Offences Act.

My Lords in summing up my submissions may the Honourable Court observed that the evidence brought forward by the Prosecutions was inconclusive, contradictory and therefore unreliable. Pw2's evidence was not founded on sound evidence and one which cannot be overlooked or glossed over as to her suspicious. I humbly submit that a conviction based on such. It is my contention that the evidence tendered by the Prosecution was not capable to have sustain a conviction hence the appellants conviction was manifestly unsafe."

4. At the hearing of the appeal, the appellant relied on the submissions and the DPP made oral submissions in opposition to the appeal as set out in the proceedings as follows:

**"Appellant present**

*I have written submissions and I am ready to proceed. I will reply to DPP's submission*

**DPP**

*Appeal is opposed.*

*Defilement contrary to section 8 (1) and (2) and sentenced to life imprisonment.*

*Complainant aged – 4 years at the time of offence. I refer to child's clinic card show she was born 17/12/11.*

*Pw3 states that on the material date she came from school and found grandmother, the appellant and her sibling at home. The grandmother left and left her with the appellant with the younger sister to the complainant called S. Later S went to shop on the evening and the complainant and the appellant went to the shamba to fetch firewood.*

*After that the complainant went to sleep on the bed where the appellant found her. He removed his thing for urinating and poked it into the private parts.*

*The complainant had no pants. The appellant then told the complainant to say that it was firewood that had poked her.*

*Pw3 informed her mother in the evening that she had been poked by firewood and she was taken to hospital.*

*Pw1 testified that on that material date when she came back to the house in the evening, she realized that the complainant was unwell as she could not relieve herself and she was crying. She informed Pw1 who is a neighbor and they checked the complainant together. Pw4 testified that when they checked the complainant, the private parts had a tear and blood stains. On enquiring from the complainant, she just said and she had been pricked by a stick and later said it was the appellant who had noted her to say so. She opened up and stated it was the appellant who had defiled her.*

*Pw3 knew the appellant well as they used to stay together with also Pw1 and Pw2. Pw1 and Pw2 stated that the appellant had been then engaged from close to 1 year. He was therefore positively identified. Pw4 is the doctor who testified on behalf of the Doctor who filled the P3 form on examination.*

*External genitalia inflamed and reddened. There a tear which was superficial and deep. Clitoris region was torn and Labia Minora bruised with blood stains.*

*Approximate age of injury was a few hours. Recorded that the child had been defiled.*

*Appellant was the only person in the company of the complainant a few hours. He was with complainant all the time and the complainant never left his sight.*

*The evidence is overwhelming alleged the appellant he urged Court to dismiss the appeal.*

**Appellant in reply**

*I worked at the home. As we drew to the end of the year there was disagreement alleging the pay timely delay.*

*It was a trumped up charge resulting from the demand from salary. I had worked with the family for 1 year.*

*I could not remain in [employment] if I had done the alleged act. They would also not have accommodated me in the family. That is all"*

**Issue for Determination**

5. The issue for determination in this appeal is whether on the evidence the offence of defilement has been proved beyond reasonable doubt and whether the appellant was shown to have been the perpetrator.

### **Analysis of Evidence**

6. The role of the first appellate Court to re-evaluate the evidence and make its own conclusion before considering whether the trial Court's decision is to be upheld or set aside to clear cut as held in **Okeno v. R** (1972) EA 32.

7. The story begins with the mother of the complainant who discovers the injuries on her daughter for which the daughter explains that "*Job [appellant] pricked her with a stick on her private parts,*" the child's grandmother Pw2 then confirmed checking the private parts the complainant and suspected she had been defiled, and advised her daughter Pw1 to take the child to hospital where it was confirmed that the child had been defiled and she, therefore, told her daughter Pw1 to seek her cousins help to arrest the appellant; Pw3 was the complainant herself who detailed how the appellant had "*removed his thing for urinating and poked her private parts*" and told her to say it is firewood that poked her; Pw4 is a neighbor whose help the complainant's mother sought to check the child and find out what was the matter with her and who found that the child's private parts had a tear and a blood stains; Pw5 was the Investigating Officer who testified as to the child informing her that "*it was not firewood that injured her but that the accused defiled her by inserting 'kitu chake cha kukojoa' which I understand to mean the penis*" and further produced the child's birth certificate as PEX No. 1, which indicates that she was born on 17<sup>th</sup> December 2011; Pw 6 was the doctor who presented the medical evidence on behalf of his transferred colleague who had examined the child and completed the P3 form, and testified that injuries on the complainant were "*consistent – with penalization i.e defilement,*" and the appellant when put on his defence, gave an unsworn statement and suggested that the child was injured when she fell from a wooden ladder.

8. The detailed testimony of the witness is set out seriatim labour:

#### **“PW1**

*I come from Solian and I operate a Book shop on 25<sup>th</sup> January, 2016 I left in the morning for job as usual. At home I stay with both my parents and child and I left my child N. having gone to school. In the evening I returned around 5:30 p.m., and I found Joab (accused pointed out) who was our worker, while was hanging his clothes I left him at home that morning and had worked at our home for almost one year. He lived also at our home.*

*I have two children; S. and N. who were playing with the sprinkler at the shamba and on seeing me they came and the eldest who is N. who told me to take her to hospital and I told her it was late as she was having a cold. After preparing supper is asked N. to do her homework first before eating and told me she had no homework as she had sent away for fees. I then served them food around 7:30 p.m. and after eating I asked them to go for short call before going to bed and S. relieved herself and I asked N. why she could not relief herself and she told me that she had said I take her to hospital but I refused. I asked her to relief herself and on bending she cried and I pleaded with her what the problem was and she continued crying. I went to inform a neighbor Mama Kemboi that my child was not well and on arrival we asked her what the problem was and she said Joab pricked her with a stick on her private parts and on checking she had blood stains on vaginal part with whitish discharge and she did not tell us further how it happened. When she said she was pricked with a stick I understood she was defiled. I then telephoned my mother who was at the shop and on arrival she came with Joab who had gone to the Centre and she saw the child and advised me do not show any reaction and not tell accused anything.*

*That night we took the child to hospital while with Mama Kemboi and went to Eldama Ravine District Hospital and on examination it was found that the child had been defiled and we returned home and arrested the accused and escorted him to the police and we were together with my cousin brothers. We woke him up while asleep and denied being there and when beaten we feared he will be injured by a mob hence put into vehicle and brought to the station. The following day P3 form was filled. We took accused to station around 3:00 a.m., in the night. I took the child to hospital while with those clothes. She is now 4 years 5 months old. I have the Mother and Child Health Booklet showing date of birth as 17<sup>th</sup> December 2011 and in names of the victim – **MFI-1**.*

*- Treatment chit – MFI-2 from Eldama Ravine District Hospital dated 25<sup>th</sup> January, 2016.*

*- P 3 form of 26<sup>th</sup> January, 2016 – MFI-3*

*- PRC form of 26<sup>th</sup> January, 2016 – MFI-4*

*I have never disagreed with the accused before and we never disagreed with my parents and Joab is the one in Court (pointed out).*

#### **Cross-examined by Accused**

*I recorded statement. The child said she was poked with a stick. Mama Kemboi is not in Court.*

**Re-examination: Nil**

#### **PW2**

*I come from [particulars withheld]and I am a business lady. PW1 is my daughter whom we live with at home. Joab Jomo was my employee who worked around 2015 and close to a year. He used to live at my home. On 25<sup>th</sup> January, 2016 I had left home to my place of work and stayed till 7:00 p.m. and I left behind Joab and N after being send home for fees. At around 7:00 p.m., Pw1*

telephoned me saying she did not know what Joab had done to the child and I left with accused and my husband D K and on arriving at the gate we left him behind while locking the gate. We then went to the house and entered the bedroom and found child in bedroom with the mother and I checked her private parts and I did it shortly so as accused not to suspect and we went to the sitting room and I suspected she had been defiled.

We then all ate together with accused who after said he was going to sleep. When he had left I told Pw1 to dress the child warmly and to foot up to place of my brother in-law and my husband followed and picked them to hospital as I remained with the younger child and was brought to Eldama Ravine District Hospital. The child was treated and brought home around 1:00 a.m. Pw1 said child had been examined and confirmed she was defiled and already put on ARV's. I then told them to call the cousins who went to arrest accused and we put him to vehicle and was brought to the station. When they arrested him they started to beat him and as we feared he will be injured he was immediately put in the vehicle. I then came to record my statement the following day. I had never disagreed with accused who did his job well and I trusted him and I never heard him disagree with any of my family members.

#### **Cross-examined by Accused**

The men who arrested you are not witnesses. The child said you poked him with something for urinating and that she does not say that but that she was instead poked with a stick. I was not around when offence was committed as the mother called me.

#### **PW3**

I live at the Centre with my mother and S and grandmother and grandfather and H. I go to school at [particulars withheld] and I am in Top class. I am 4 years old. When I was sent home for fees I found S at home and mother was away at work (hesitates to state name). I also found Joab at home I changed my uniform then Joab gave me food and S also ate as well as grandmother. I then went to play with S and grandmother went to the Centre and S went to sleep on the chair and I went to fetch firewood with Joab and I went to put it on fire (hesitates to talk) and he told me to go sleep and that to sleep in my bed and Joab and found me sleeping (hesitates to say what happened) and he came and he removed his thing for urinating and poked it in my private parts (holds private parts) I had not put on my pant and he opened zip to his trousers. He told me to say it is firewood had poked me. I felt pain. When mum came I told her and I was taken to hospital by mum.

#### **Cross-examined by Accused**

I changed my own clothes when I came from school. I told mum it was your 'susu' thing that poked me.

#### **PW4**

I come from Solian and I am a casual labourer in the forest. I know the accused who was a shamba boy at my neighbor one D K and wife is one L (PW2) and he worked for L and I had seen him work there for some months but not close to a year.

On 25<sup>th</sup> January, 2016 in the evening at night while at my kitchen when G (PW1) came running to my home saying I go check her child (N) and on checking her I saw the child's private parts while her mother was present and her private parts looked it had a tear and the child kept saying she felt like urinating and I advised them to take her to the hospital and I went home but I was advised to accompany the mother to take the child to Eldama Ravine District Hospital.

The child's private parts which had a tear also had blood stains which I saw. After she was treated we returned the child home and the mother was given some treatment chits. The mother first said the child was pricked with a stick and when the mother insisted she said that Joab had told her if asked she says she was pricked with a stick.

The child was in fear and could not talk and say what happened but later it was the mother who narrated to me. I had never disagreed with accused who was a good boy and could not suspect he would commit such an offence.

#### **Cross-examined by Accused**

I recorded my statement and I do not know the truth if the child was pricked with a piece of wood or not. When we took her to hospital as there was a tear which is different from being pricked (poked). I had not known what had happened as I was called to check on the child.

#### **Re-examination**

The child said she was pricked with a piece of firewood and the mother told me that she says she was pricked with a stick as advised by accused. I went and personally saw what had happened to the child and her private parts looked like a tear/cut and could not have been poked with a stick due to nature of injury.

#### **PW5**

Attached Eldama Ravine Police Station and I am the Investigating Officer herein. On 26<sup>th</sup> January, 2016 I do recall I went to office at 8:30 a.m. and I went through the O.B and found a report had been made of defilement and suspect had already been arrested and case minuted to me by OCS for investigations. I waited for complainant to come and later on arrival with her parent and parent told me that on 25<sup>th</sup> January, 2016 the mother left their home in Solian for work then complainant had gone to school and she came from

work in the evening and prepared super and took with the children and before going to sleep asked child to go for short call first and when complainant went for short call she was crying and mother asked her what the problem was and she said the accused who was working for her grandmother had injured her private parts with a stick (firewood) and mother was surprised and was still a new mother hence called a neighbor to examine the child and when the woman came and informed her she advised they take child to hospital and they went together with neighbor to Eldama Ravine District Hospital where they informed the child had been defiled and on returning they woke up the accused who was a worker at that homestead to tell them what had happened and neighbours had also woken up after hearing the rumours and accused in the car and took him to the station and made report. I gave the P3 form and accompanied them to hospital where I was escorting accused to hospital as well for examination.

On returning, I recorded the child's statement who told me that on 25<sup>th</sup> May, 2016 she left home for school and on arrival were sent home for fees and returned home and she found the accused with her grandmother and younger sister and the grandmother left her with her sister under care of accused as she went to Solian Centre and accused prepared food for them and before lunch was ready her grandmother had asked her to change from her school uniforms and accused asked her to remove even the biker and pants and she removed and put on a skirt. He then served them lunch after which the younger sister slept and was put to sleep on the chair and accused asked the complainant to follow her to fetch firewood and accused asked her to lie down while facing up and he then lied on her and he opened his zip and defiled the child telling her if asked she says it was firewood and was defiled at the shamba and later when child was asked what the problem was she said it was due to firewood. I then asked for complainant's Birth Certificate but instead I was brought the child's Clinic Card showing she was born on 17<sup>th</sup> December 2011 at Solian Health Centre – child Health Book – P. exhibit 1. The child told me that it was not firewood that injured her but that accused defiled her by inserting ' **kitu chake cha kukojoa**' which I understand to mean his penis. I then preferred charges against accused and he is the one in Court (points out) and I never used to know her before. I learnt that accused had been employed at that homestead for close to a year.

#### **Cross-examined by Accused**

I did not visit the scene and you were brought by complainant's grandfather to police who was your employer and not a witness. Offence was at the shamba and no clothes were recovered as exhibit so to show if either dusty and did had in fact removed her uniform plus pant and biker and which the mother washed after she came from work. The child told the mother you pricked her with firewood. The child was walking while I took her to fill P3 form and already she had been treated. As per my statement (referred) I did not record offence was at the shamba and it is not false as the child said you defiled her at the place you were going to fetch firewood.

I interrogated you and insisted that while you were cooking when the firewood pricked the child and it is very hard for firewood to prick the child at her private parts.

#### **PW6**

Medical Superintendent Eldama Ravine District Hospital. Among my duties are managerial and clinical and in-charge of all my staff. I have a P3 form for a minor filled by Dr. Muendo Charles who I personally know and he currently was transferred to Meru County and was personally working at our facility and had worked for 2 years and I worked with him and I am familiar with his handwriting and signature and confirm the same belong to him.

The medical examination request by OCS Eldama Ravine and minor alleged to be defiled by person known to her as reported by the mother. That mother discovered on 25<sup>th</sup> January, 2016 at 7:00 p.m. form child crying out of pain while passing urine the child was well groomed, quiet and no influence of any drugs. On general body examination was normal and **on vaginal examination she had no inner wear and external genitalia was inflamed and reddened, penneal tear which was superficial (not deep). Clitoris upper region was torn and bruised labia minora with blood stains and anal section was normal. There was no discharge and visible blood stains. On high vaginal swab was normal and no spermatozoa seen. Urinalysis and VDRL and HIV tests and results were negative e. the approximate age of injuries were some hours and child was treated with antibiotics, painkillers and anti-HIV infection and doctor form degree of injury as grievous harm and was consistent with penalization i.e. defilement** and signed on 26<sup>th</sup> January, 2016 and I wish to produce the P3 form as **P. exhibit 3**. I have a PRC form for same patient and age indicated in P3 form of the minor was 5 years. I also have outpatient card dated 25<sup>th</sup> January, 2016 for same patient with same history as P3 form and wish to produce PRC form **P. exhibit 4** medical card **P. exhibit 2**.

#### **Cross-examined by Accused**

I do not know you. I did not fill the PRC form nor the P3 form but filled by my colleague and I did not examine the child but seen by my colleagues and I was not involved in examination. I know the doctor who examined child is Dr. Muendo Charles. I am not aware if Dr. Muendo was bribed. The victim examination and kind of injuries confirms she was defiled and no spermatozoa was seen and it is not a must spermatozoa should be seen. The P3 form indicates perennial tear which was superficial which is in between anal and vaginal area. Labia minora were bruised with blood stains. The probable type of weapon was penalization i.e penis. The P3 form should be stamped from the police station issuing and I cannot tell if it originated from that police station. I am not aware of you were taken to hospital for examination (referred to treatment chit – outpatient attendance card for 26<sup>th</sup> January, 2016 patient with history to have defiled a minor on 25<sup>th</sup> January, 2016 and parents were at job. Jomo 24 years). For a child it is difficult hymen to be broken and she will be injured on the outside before internal.

#### **Re-examination**

I came to testify as I was summoned by Court as Dr. Muendo is not around but went on transfer and it is part of my duties. The absence of spermatozoa does not mean there was no defilement.

## **DW1[ACCUSED]**

I come from Kakamega and I was a farm labourer. I do recall the material date while at [particulars withheld] village where I had been employed by D K as a herd's boy and shamba boy and also there was sheep. From 20<sup>th</sup> it had reached my pay day and I started demanding my salary till the 24<sup>th</sup> and he did not pay me as I needed to send money to my poor parents to pay for my siblings fees on 24<sup>th</sup>. I reported to work together with wife of D one L C to dig out potatoes and shortly we saw the child crying from school while saying she was either sick or had been sent for fees and L (Pw3) told her since she had no fees, she asked her to go change uniform and she went to change from uniform and later we left shamba with Pw3 (L) till home and she prepared so as to take the potatoes and vegetables for sale at the Centre and she asked me to assist her up to the Centre to carry the same and before we left she fed the two children after which I left with her to Solian and I then returned to carry out with my duties. On arrival I did not find the children at home and I did not bother to check on where they had gone and in the evening I went back to assist L at [particulars withheld] and returned with her at home at 8:00 p.m. and they left me behind to lock the gate and then we went to compound and took dinner after which I asked for my salary and they did not pay me and I told them they had taken long for them to pay me and proceed to pay in the morning.

At 3.00 a.m., they called me out to assist in looking for cows that had gone into the shamba. On opening door I saw light from D-light and suddenly I was slapped and I fell unconscious and found myself at the police station. As per evidence of Pw1 the child victim before going to school and told the mother she was sick and the mother did not get concern of her illness but promised to get her medicine when back from school. While in Court, the child said she had been pricked/poked by firewood and as per her statements she says she had told the mother she was sick. The time of 4:00 p.m. of alleged offence she was not at home and when her mother came from work she found her while at home alone and found me washing my clothes while the child was at the shamba where sprinkler was spraying. When the child saw the mother and my radio was low and I could not tell if children were at the shamba and the mother questioned why I had not noticed the children spoiling vegetable at the shamba and when she called out, complainant, she came and other children ran away as they were spoiling vegetables. When the child came she climbed a ladder that one uses to access the compound and her clothes were wet due to playing with sprinkler's water and also had mud and she then slid and fell on the ladder and we witnessed the same with the mother and she sat in between the timber making the ladder and I went and removed her from the ladder and I did not know she had been injured. The mother then changed her clothes that had mud and were wet.

Pw2 the mother told Court she did not find the child at home and informed Court of where the child was. L C whom I had come with from the Centre told Court she did not witness but what was told to her through phone while at Centre on Solian. Pw4 – P said the mother of the child went and told her how the child had been injured and she had not witnesses the same.

As per the doctor's evidence, she agreed with the Court that she did not attend to the complainant and accused at the hospital and that he could not recall if both accused and victim were examined. As per evidence of the doctor he could not tell well if samples collected did proof to any evidence linking me to the offence. He also told Court that no sperms were traced in the complainant that I was the one who defiled her. As per the Investigation Officer's evidence, she also told Court she did not visit the scene and only got report of a suspect at the station already and did not produce any clothes in Court so to proof the charges. She also said I had told the child we go fetch firewood at the shamba where I then defiled her, yet she did not go to that shamba so to bring photographs to show if shamba is fostered or not. She said she did interrogate me at the police station and did not record in the police on what we talked about.

The names on charge sheet and those in statement are different and in charge sheet she says I am known as Joab Jomo while in statement it reads Job Jomo which are two different names. The P3 form has rubber stamp of the hospital only. The P3 form is hence illegal on record. I was linked to charges herein as I was in that homestead as an employee and had it not been my demands for salary I would not have been before this Court and I was framed with charges which I have not established how I would have defiled the child. The evidence on record is contradictory as when I had been injured while at police station and when I asked my employer for payment he said he had not entered into any job agreement nor that I was his employee while in real sense as a herds boy/shamba boy no employment documents is required as you only issue your ID and to date I am in custody and my first time to be charged with any kind of offence. That is all."

## **Determination**

9. The appellant's submissions as to the susceptibility or easy influence of a minor to or by suggestion by adults and therefore the charge of influence testimony, is the very reason for the provisions of section 19 of the Oaths and Statutory Act and 124 of the Evidence Act, with exception of Sexual Offences where the Court may convict where the evidence of the child is the only available evidence, if for reasons to be recorded, the Court believes she is telling the truth, where the law requires corroboration for the unsworn evidence of a child admitted pursuant to section 19 of the Oaths and Statutory Act. This is a protective measure to prevent the very fear of the children being prone to adult influence in their testimony. Moreover, as observed in the Kenya Judiciary Criminal Procedure Bench Book at P. 84, the evidence of a child whether sworn or unsworn is equally subject to cross-examination by the accused as with the case of adult witness.

10. In this case, the child's evidence that she had been pricked by the appellant's penis and told to say that injury had been caused by a stick is corroborated by the medical evidence of the examining doctor who found evidence of bruises to the labia minora and clitoris upper region and superficial perineal tear and the general genitalia inflamed and reddened, which the doctor concluded was "consistent with penilization." The injuries had also been observed by the mother Pw1, grandmother Pw2 and the neighbor Pw4.

11. It is unconceivable that the alleged injury by a stick theory of the defence or fall from a ladder alleged by the appellant could, in fact, have resulted in the injuries pin-pointed to the complainant's private parts. Such precision so that the injuries are concentrated only on the private parts and not any other part of the whole wide body of the complainant is not realistic, and I have no any difficulty in rejecting the appellant's defence when weighed against the prosecution evidence as one whole.

**Orders**

12. Accordingly, for the reasons set out above, the appellant's appeal herein has no merit and the same is dismissed.

*Order accordingly.*

**DATED AND DELIVERED THIS 12<sup>TH</sup> DAY OF JUNE 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent