REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 74 OF 2017

PHILIP KIMECHWA.....1ST APPELLANT

ALPHAEUS CHEROP.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being appeals from original conviction and sentence delivered in Kabarnet P.M.C.Cr. Case No. 117 of 2013 by Hon. S. O. Temu (PM) on 7th December, 2015.]

JUDGMENT

Introduction

1. The appellants were respectively the 2nd and 1st accused in the trial court facing separate offences charged as follows:

> "*Count I*
>
> *Defilement contrary to section 8(1) of the Sexual Offences Act No. 3 of 2006*
>
> *Particulars*
>
> *Alphaeus Cherop on the 14th day of March, 2013 at* [particulars withheld]*in Baringo District unlawfully caused his penis to penetrate the Vagina of J. K. a child aged 10 years in contravention of the said Act.*
>
> *Alternative Charge*
>
> *Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006*
>
> *Particulars*
>
> *Alphaeus Cherop on the 14th day of March, 2013 at* [particulars withheld]*in Baringo County unlawfully and indecently committed an indecent act by touching the breasts of J. K. a child aged 10 years.*
>
> *Count II*
>
> *Compelled or induced indecent act contrary to section 6(a) of the Sexual Offences Act No. 3 of 2006.*
>
> *Particulars*
>
> *Philip Kimechwa on the 14th day of March, 2013 at* [particulars withheld] *in Baringo District within Baringo County intentionally and unlawfully compelled or induced A C to engage in an act by touching the buttocks of J. K. a child aged 10 years. "*

2. Upon conviction on the respective main charges of defilement and compelled or induced indecent act and sentence to imprisonment for, respectively, 20 and 5 years, the accused appealed to the High Court against both the conviction and the sentences.

Grounds of Appeal

3. The appellants' grounds of appeal were set out as follows:

> "Being dissatisfied and aggrieved by the decision of the trial Court the appellants appeal on the following amended grounds of appeal dated 21/7/2017.
>
> 1. That the learned trial magistrate erred both in law and fact by not noting that the charge sheet was defective.
>
> 2. That the learned trial magistrate erred both in law and fact by not realizing that the proceeding were irregular.
>
> 3. That the trial magistrate erred both in law and fact by failing to note that the Voire Dire examination on PW1 was improperly done.
>
> 4. That the trial magistrate erred both in law and fact by convicting the appellants yet the age of the complainant had not been proved.
>
> 5. That the trial magistrate erred in law and in fact by relying on feeble medical report to convict the appellants.
>
> 6. That the learned trial magistrate erred in law and in fact by relying on the prosecution's evidence which was both hearsay and extraneous.
>
> 7. That the trial magistrate erred both in law and fact by not noting that the Investigation of this case was not conclusive and exhaustive.
>
> 8. That the trial magistrate erred in law and facts by failing to consider that the prosecutions witnesses' statements were doubtful, incredible, contradicting and uncorroborated."

Submissions

4. The appellant's Counsel filed written Submissions and orally highlighted the same wand the DPP then made oral submissions as follows.

Appellant's written submission dated 11th September, 2017

5. The appellant urged his grounds of appeal as follows:

> 1. Defective charge
>
> The second part of the charge which is the penal section was omitted. The appellants were charged with section 8(2) of the Sexual Offences Act instead of section 8(3) of the Act. The trial magistrate made a misdirection when he included the penal section on the charge saying "*it is not fatal to the conviction…. omission is not fatal as I will put the sentence where the age bracket lies as par….pg. 63 lines 16-18 contrary to section 8(1) and 8(3) of the Sexual Offences Act No. 3 of 2006" (pg. 65 lines 14-16).*
>
> This alters the charge and affects the administration of justice since the accused must not only prove that they did not defile the complainant and that the complainant was more than ten years.
>
> 2. Irregular proceedings
>
> "*The proceedings of this proceedings are irregular in conformity to section 169(1) of the Criminal Procedure Code, the plea had not been recorded according to the language used not indicated."*
>
> 3. Improperly done Voire dire
>
> The correct procedure to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth.
>
> The appellant cited ***Johnson Muiruri v. Republic*** [1983] KLR 445
>
> The reception of the complainant's evidence was not justified at all, hence the provision of section 19(1) of the Oaths and Statutory Declaration Act was violated.
>
> 4. Age of complainant Courts have held overtime that age is important factor in defilement stating the prosecution provided the birth certificate to court but it was meant to prove the age, it served only to contradict the age of the complainant indicated on the charge sheet and on the p3 form. The documents shows the complainant is 11 years 2 months and 10 months at the time of the incident.

5. Medical examination

The appellants were not medically examined to ascertain their involvement in the alleged offence. 72 hours had already elapsed after the complainant was examined and the complainant had taken a bath. There was no forensic or DNA test done to verify the appellants' involvement in the alleged offence. It was alleged that the complainant walked by herself, passed her home and went further to the professor's house to get milk. In ***Paul Mwakio Mwashumbe v. Republic*** [2016] eKLR

"Bearing in mind the said delay, cause of injury or the person who could have caused it could not be attributed to the appellant herein. While this court noted that fear of being killed may have been a good reason for PW1 not to have reported the incident to anyone, it found it difficult to fathom how a nine year old child could have been sodomised and continued carrying herself as a child who had not received such traumatic injuries."

It is clear that PW1 was okay until she attended games in school at around 4.00 pm on 15th March, 2013 when Mr. C spotted her limping. The whole story originates in school the following day after the complainant had subjected herself to games. Her parents should have noticed her abnormalities first, this is foreign evidence.

The investigating officer failed to conduct an identification parade so as to clear doubt in the matter of identification. If the second accused was her neighbor, why is she saying that she saw him for the first time and though she states she saw the appearance of the 2nd accused person when he held her, she did not give any description.

Vital witness were not called to clear doubt in court; Mr. C who was Mrs. B at the field, Mrs. B who had chance to participate in the interrogation at the staffroom.

Essentials evidence were not produced in court; Blood stained clothes, treatments notes from Kabartonjo District Hospital, the Investigating Officer failed to prove the age of the Complainant, the Investigating Officer failed to visit the scene of the crime.

6. Charge against the 2nd accused person.

The prosecution witness gave doubtful and contradicting evidence. According to the particulars of count II it is alleged that the 2nd appellant induced the 1st appellant to engage in an incident act by touching the buttocks of PW1. 1st appellant was found guilty on the first charge and not on the alternative charge as indicated in the particulars of count II. Therefore the charge against the 2nd appellant were not confirmed or corroborated at all.

PW1's mother gave contradicting evidence when she said, "I looked at the complainant and she had injuries on her private parts," on cross-examination she said; "I did not indicate on my statement that I had looked at the child's private parts" she further stated on re-examination by the prosecution that "I was alone when I looked at the minors private parts" she denied her previous statements and thus her evidence lacks truth in it. Appellants relies on the case of ***Ramakrishna Pandya v. Rep*** [1957] EACA stating when evidence is contradicting and doubtful, the court should not rely upon. The appellant was not caught in the act the only evidence the court relied on was that of the complainant who kept as contradicting herself.

7. Appellant's Alibi

The appellants stated in their defence on oath stated that they met at about 8.00 pm at the 1st appellant's home on the date the incident.

Appellant quoted Section 309 of the Criminal Procedure Code stating;

'If the accused person adduced evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have for seen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

The prosecution failed to dislodge the evidence that the appellants were in a different place. Appellant used ***Victor Mwendwa Mulinge v. Rep*** [2014] eKLR Court held that:

*"…..But even assuming that the appellant raised the defence of alibi for the first time while in court, as rightly submitted by Mr. Oguk, pursuant to the provisions of **Section 309** of the **Criminal Procedure Code** the prosecution could have sought leave to adduce further evidence in reply to rebut the appellant's defence…The prosecution failed to do so."*

Karanja v. Rep [1983] KLR 501 the court held that:

"in a proper case, a trial court may in testing a defence of alibi and in weighing it with all the proper evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought. In this case, we do not know whether the appellant in his statement to the police had stated that on the material day and time he was in a college class. This is an issue that ought to have been dealt with by the trial court but that court failed to discharge that duty."

Finally, PW1 stated that the 1st appellant covered her mouth and used a stick which he threatened her with. The court ought to take judicial notice that it is not humanly possible to hold her mouth hold a stick and defile at the same time. Appellant also cited ***Paul Mwakio Mwashumbe v. Rep*** [2016] eKLR as an authority that the appellant could not be found liable on the uncorroborated unsworn evidence of a minor complainant. Relying on Mwashumbe, it was sought to cast doubt on the ability of the complainant to bear the trauma of having been defiled until the next day when a teacher noted her limping at 4.00pm after attending school games.

DPP's submissions

6. The Ass. DPP, Ms. Macharia, made oral submissions as follows:

> "*Submissions by DDP*
>
> *Appeal opposed.*
>
> *Appellants were convicted of defilement contrary to section 8 (1) (3) of Sexual Offence Act and induced indecent contrary to section 6A of the Sexual Offence Act. Appellant 1 convicted of defilement sentenced to 20 years and appellant 2 for induced indecent and convicted to five years.*
>
> *The two appellants were rightfully convicted. Complainant stated she was 10 years which corroborated by their parents Pw3 and Pw4 although they did not produce a birth certificate. A birth certificate was later forwarded by Investigating Officer. Rightful age of minor was 12 years 3 months falling within the bracket of section 8 (1) (3) of 12 – 15 years. The time appellants were positively identified.*
>
> *Pw1 testified that the 1st appellant was the one who defiled her while the 2nd appellant assisted him and facilitated the offence.*
>
> *Evidence of Pw1 was corroborated by the mother pw3 who testified that she checked the private part of the complainant and saw some injuries. Pw2, also testified that Pw1 was defiled. Pw2 was a teacher at the . He said that he saw the complainant limping and asked his colleague Pw 6 and the mother to check on the complainant.*
>
> *Pw6 was also a teacher of the complainant. Pw2 referred to Pw6 as she a female teacher.*
>
> *Pw1 told her mother that she was defiled by the 1st appellant. Complainant was testified as she said it was the 1st appellant who defiled her and she did not say it was but of them.*
>
> *Both Pw1 and Pw3, the complainant and the mother knew the appellants well as they were boda boda riders.*
>
> *Pw5, Clinical Officer testified to the injuries which was identified by the court. At page 33 of the proceedings, Pw5 produced the P3 forms exhibit no. I and defence objected for the reason that the complainant should not referred to P3 form. The prosecution explained that the document belonged to the physician and it was that required to be supplied to the complainant. P3 forms produced by the physician before the complainant would not completed the contents just where they are minor. The prosecution who explained that there was no prejudice in the admission of the P3 form. The defence Counsel knowing well that this was a case of defilement should have asked the document as it was not in good faith.*
>
> *We request that the court considers the document as this was serious offence against a minor. At page 38 we also objected the production of a birth certificate to prove the age of a minor and fortunately the objection was rejected.*
>
> *Pw1 testified that it was the 2nd appellant that picked her from the road and fled her on the motor bike when was being ridden by the 2nd appellant. She also testified that it was the 2nd appellant who lifted her over the fence to the first appellant and clearly said how the 2nd appellant said that he had assisted her to the extent. See page17 line 1 – 4*
>
> *After the 2nd appellant left and the 1st appellant proceeded to defile the complainant.*
>
> *It is clear from the evidence that the 2nd appellant did not defile the complainant but he assisted and facilitated the 1st appellant.*
>
> *The prosecution witnesses were consistent in their evidence. The evidence was overwhelming and the sentence meted as well with the law.*
>
> *In response the submission of Counsel that it was day time, at page 16 line 18 – 19. It was a path that lead to the river. It was well used by many people. It is also clear that they had passed over the fence. It is not on the road as alleged.*
>
> *Complainant walking for 3 kilometers*
>
> *It is not obvious that anybody should notice such a child.*
>
> *It is whether the child was defiled. The court has to find on whether child was defiled by the 1st appellant.*

Clothes the complainant was wearing

The clothes were washed by the minor. It is set for the court to question why the minor washed them. It is only relevant that the clothes were not presented because they had been washed. The prosecution was able to prove that the minor was defiled even without the clothes.

That the 2nd appellant did not run away.

It is not obvious that somebody who commits the offence must run away. There people remain to cover up the offence. The fact of running away in shying the court be seen to prove or disprove on offence.

B not called to testify

I refer to page 36 line 3 – 4, Pw6 said that she was with B when they interrogated Pw1 at the staffroom. The evidence by Pw 6 was the same as that of B and it did not prejudice the case if B did not testify.

Voire dire examination

At Page 15 line 18, 19 and 20

'I will tell the truth…"

The Magistrate was able to establish that she understood the nature of the oath. That is why she gave sworn evidence.

It is not correct that children always know the age.

I refer to the handwritten notes which shows that it was explained what language the appellant wanted to use and they pleaded not guilty.

I also invite the court to check for the handwritten notes on the question of voire dire and whether section. 211 was complied with.

Defence of alibi

The defence should be raised on the earliest possible opportunity. The appellants raised their defence and the prosecution grant opportunity to rebut.

We pray that the appeal be dismissed."

7. The court found the complainant to understand the nature of the oath and therefore directed sworn testimony upon a voire dire examination recorded as follows:

"I am a pupil at [Particulars Withheld] in standard five. I am 10 years old. I will tell the truth.

8. The evidence before the trial was as follows:

PW1 J K

Sworn statement from the Minor

"My name is J K, I stay with my mother and father. I saw the accused person when they had defiled me.

The 2nd accused was my neighbour at [particulars withheld].

On 14/3/2013 at about 5.30 pm I was going to pick milk when I reached the road one motorcycle had come with two passengers. That is the two accused persons herein. The motor cycle stopped and the 2nd accused asked me whether I knew the road to the school, I did not answer and as I was about to walk away the 2nd accused held me and placed me on the motorcycle. I screamed for help but there was nobody nearby, the 2nd accused had held my mouth and the motor cycle had driven off. The 1st accused was the one driving, we had gone to a path which goes to the river. The 2nd accused took me and placed me on the ground as he held my mouth. The 1st accused had passed one fence and the 2nd accused placed me on the fence, the 1st accused held me on the other side of the fence. The 2nd accused informed the 1st accused that he had assisted him to that extent he then left.

The 1st accused put me to the ground and removed my clothes and he defiled me. He had a cane and was holding my mouth. I tried to scream. When accused finished defiling me he left me and warned me not to tell my mother or father. The 1st accused had also left me and went away. I had bleed and I had put on my clothes and went home. I found that M W had taken milk to our home. I was

afraid to tell my mother and father, I did my homework, took a bath and went to school the following day.

Teacher B summoned me at school and asked me what was happening, I lied to her that I fell down. I then informed her that the accused had defiled me. She rung my mother, my mother come to school and took me to Kabartonjo Hospital in the company of three teachers B, B C and A. I was treated. I was taken to Kabarnet Police Station, I was issued with a P3 Form (MFI P 1).”

Cross-examination by Mr. Tarus

“I am the eldest, I go to school with C. Alphaeus takes Ca to school alone. C is in class four. I saw the accused for the 1st time when they defiled me. I use the main road when I go for milk, I then cross the road using a short-cut. They two picked me on the main road.

I was able to identify Alphaeus because he takes pupils to school. I had seen the 2nd accused appearance when he was holding me. I did not give the police the 2nd accused’s names, I saw him at the road after the incident.

I went to school on the 15/3/2013 after the defilement. I left the clothes I was wearing at home. We had gone to Kabarnet District Hospital in the morning before the police station.

The teachers had asked Alphaeus to take me home, I had not informed them that he was the one who defiled me. Alphaeus did not warm me when he took me home on 15/3/2013 while in the company of L and T.”

PW2 A C

“I am a resident of [particulars withheld], *I teach at* [particulars withheld] . *I know the complainant herein, she is a pupil at my school. On 13/3/2013 I was at school, and was on-duty. I had seen J limping as she was coming back from the pay-ground, I asked my colleagues B and B to go see what was going on. After an hour of interview the two teachers informed me that she had been defiled but did not disclose as to who had done it. I asked the two teachers to take her to her parents and inform them what had happened. On Sunday I was summoned to the Police Station.”*

Cross-examination by Tarus

“I still teach at the same school. The pupils had come from the play-ground at 5.00 pm. I asked the child what was happening and she stated that she had been injured by a thorn.”

PW3 L K

“I am a resident at [particulars withheld], *I work at the DC’s Office* [particulars withheld]. *The complainant is my daughter. On 15/3/2013 I was attending a funeral at* [particulars withheld] *village at 5.00 pm I received a call from teacher B stating that she wanted to see me. I went and met the said teacher. The teacher informed me that they had noticed that my daughter was not walking well, I told the teacher that I had noticed, and the teacher told me that they had suspected she had been defiled.*

I went home and asked the complainant what had happened and she stated that Alphaeus had defiled her that he threatened to kill her if she reported the incident. I looked at the complainant and she was limping.

The complainant stated that the two had taken her to the forest and the 1st accused had removed her clothes and defiled her. I summoned teacher B and B and we took the complainant to Kabartonjo District Hospital and referred to Kabarnet District Hospital where she was treated and we went to Kabarnet Police Station where we reported. We were issued with P3 Form at the Police station.”

Cross-examination by Tarus

“I had received statement at the police station, I signed my statement. I did not take the clothes to the police station as I had washed them. The incident took place on 14/3/2013. The doctor looked at the complainant part. The complainant had washed her pant. I did not indicate in my statement that I had looked at the child’s private parts, I only indicated in my statement that the child had suffered injuries. I have known the accused since 2011 the two have carried me and the complainant in their motor bikes.

The school is 300 meters from the [particulars withheld] *Township.”*

PW4 I M

“I am a resident at [particulars withheld], *I am a business man. The complainant is my daughter. I know the accused persons as they are neighbours. On 15/3/2013 I was within Kabarnet when a teacher from the complainant’s school met me and inquired about my wife’s number. I asked my wife and she stated that the complainant had been defiled. I asked her to take her to hospital. Later when I went home my wife told me that she had been treated.*

Following day I took the child to Kabarnet District Hospital where she was treated. We then reported the incident at the Kabarnet

Police Station and we were issued with a P3 Form and arrest warrants."

Cross-examination by Tarus

"I reached home at 8.00 pm. The Police at Kabarnet gave me warrants of arrest and I took them to Kabartonjo and gave to CPL Lagat. We found the accused at their home in one house. I had gone with two officers."

PW5 Benjamin Kendagor

"I am a Clinical Officer attached at Kabarnet District Hospital. On 16/3/2013 I treated a patient by the names J K, 10 years old. She was under the escorts of her parents. It was alleged she was defiled by a person known to her on 14/3/2013. She was treated on 15/3/2013 at Kabartonjo District Hospital.

Upon examination she had pain on the neck upon touching, thighs were painful on knee. Hymen and the labia minor and major were reddened, there was a whitish discharge from her vagina.

We took specimen from her private parts and there were many cells seen which were moderate in nature. HIV was negative. I concluded that there was an act of sexual penetration.

I filled the P3 Form and signed on16/3/2013."

Cross-examined by Tarus

"The minor had been sent to [particulars withheld] *before I saw her. The injuries on the Complainant were painful to touch. Hymen was freshly broken based on lab results. The availability of blood cells on the urine."*

PW6 B T

"I work at Nakuru, the complainant herein was a pupil at a school I was earlier on. On 15/3/2013 we had gone to the fields to watch football, I was with one other lady, one teacher summoned us and asked us whether we had seen how the complainant was walking. We took the complainant to the staffroom for interrogation. She first denied she was unwell later she stated that she had been defiled. We then summoned her mother. I had then gone to the stage and I found 1st accused and asked him whether he knew where the complainant stayed he said yes, I then asked him to take them home.

When the mother come and we asked her to investigate as to what happened to the complainant, the mother stated that indeed the child had been defiled and we assisted her take the complainant to hospital where she was treated and went home.

The complainant was in class five. I later recorded my statements at Kabarnet Police Station."

Cross-examination by Tarus

"At the field I was with Mr. C and B . I was with B when we interrogated the child at the staff room. We were at the filed at 3.00 pm. The complainant at first stated that that he had pain on the leg but he had new injuries.

I knew Alphaeus the 1st accused because I used to use his motor bike.

The complainant had boarded the motor vehicle with difficulties and she was assisted by B . The complainant informed us not to inform her mother about the incident."

PW7 No. 225975 CPL Isaac Langat

"I am attached to Kabartonjo Sub-county. On the 7/3/2013 at about 4.00 pm on Sunday one adult man had come to our offices with an arrest warrant from Kabarnet, he wanted Alphaeus Cherop arrested. I went with my colleague to Alphaeus's resident and showed him the arrest warrant, I arrested him over defilement and I had escorted him to Kabarnet Police Station where he was arrested."

Cross-examination by Tarus

"I arrested the accused about 1.00 pm."

PW8 No. 95393 Zuma Everlyne Agufa

"I am attached at Kabarnet Police Station at gender and children section. On 16/3/2013 at about 4.00 pm I was at the Police Station when two persons a male and a female come with their daughter, they informed me their child had been defiled. I

interrogated the child in the absence of the parents. The child was walking with difficulties and she informed me that due to the pain she had over the incident. She had pain on the neck. She informed me the act of defilement was committed by one Alphaeus. The parents had medical evidence from Kabartonjo and Kabarnet District Hospital she had been treated. I issued the parents with a P3 Form and issued an arrest warrant to Kabartonjo. The 2nd accused person come to the Police Station and the complainant stated that he was with the 1st accused person when he defiled her. I arrested the 2nd accused person. The parents gave me a birth certificate."

Cross-examination by Tarus

"*As per the birth certificate the complainant was born on 14/1/2002 by March she should have been 11 years and 2 month. The age on the charge sheet was given to me by the parents. The 2nd accused had come to the station to visit the 1st accused person and was identified by the complainant."*

Defence Case

DW1 Alphaeus Cherop gives sworn statement that;

"*I am a resident of* [particulars withheld] *centre, I am a boda boda rider and 24 years old. On 14/3/2013 I was on duty up to 5.00 pm, I took one customer to Kapkombe which took 30 minutes. I did not go to town after. I went back to pick my wife and went home at about 6.00 pm. I come to know the complainant in court, I knew her parents. One teacher had summoned me to pick the child herein whom I took to her home which she directed me to."*

Cross-examination by Prosecution

"*I came to know the complainant in court."*

DW2 Philip Kimosop gives sworn evidence and states;

"*I am a resident of Kuresoni, I am a boda boda rider. I came to know the complainant in court. On 14/3/2013 I was with my late uncle at 1.00 pm he had asked me to carry 3 sacks of maize. I had carried the maize at 100 per bag to town 5 km from Kuresoni, I carried work up to 7.00 pm and went home. I stay at Kuresoni at Kangethes house together with my brother. My brother stays the next home where I was. The 1st accused had asked me to go to his house to take tea I was there till 8.00 pm when one person come and knocked the door and he opened it, this was on 17/3/2013.*

The officer one Ibrahim informed the 1st accused that he had warrant arrest against him. He took him to Kabartonjo I went home and slept. On 18/3/2013 I went to Kabartonjo AP camp and we talked with the minors parents and the officer but they told me to go away. At 3.00 pm the officer to the 1st accused to Kabarnet police station I went together with the accused and I was arrested.

I was not with the 1st accused on the date of the incident up to 8.00 pm."

Cross-examination by prosecution

"*The complainant stays at Kuresoni centre together with her parents. I did not know how long the complainant was at the centre."*

Judgment of the trial Court

9. In its Judgment dated 7th December, 2015, the trial Court (Hon. S. O. Temu, PM) ruled as follows:

"*Upon hearing the entire evidence the issues for determination were:*

1. *Whether the complainant was indeed defiled.*
2. *Whether the 1st accused had committed any offence under the Act as per his actions.*
3. *Whether the defence raised contradicted the evidence tendered by the prosecution.*
4. *Whether the evidence of PW1 was enough to warrant a conviction for the alleged offence.*
5. *Whether the age of the complainant was proved as required.*

The evidence of the complainant was after voire dire was taken, I was satisfied that indeed the complainant was capable of knowing the difference between telling the truth and a lie. The evidence tendered by PW1 was tested through cross-examination and there was no contradiction, I had found the minor's evidence truthful and reliable.

PW1 was able to identify the two accused person well in court and they were not new to her. The incident took place at 5.50 pm it was not dark complainant had humble time to see the two accused person well before the act.

The said certificate indicated that the component was born in 2002 January 4th meaning the complainant was 12 years at the date of the incident.

In Eldoret Criminal Appeal No. 116/2013 ***Kennedy Otieno alias Baba Angoa v. Republic*** *p. 7 on age of sexual assault under the Sexual Offences Act. Age is a critical component which forms part of the charge which must be proved the same way as penetration in the case and defilement.*

It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.

I make the finding that the complainant was under the age bracket of the ages of 12-15 years.

With the above in mind it is clear that:

1. *The complainant was defiled.*
2. *The complainant was between the age brackets of 12-15 years.*
3. *The accused were properly identified by the complainant.*
4. *The 1st accused was the one who defiled the complainant.*
5. *The 2nd accused had assisted the 1st accused to take the complainant to the forest where she was defiled.*

I do make a finding that the prosecution had established a prima facie case against the two accused persons beyond reasonable doubt. I thus find the first accused guilty of the offence of defilement contrary to section 8(1) and 8 (3) of the Sexual Offences Act and I convict him for the same.

I also find the 2nd accused guilty for the offence of compelled and or induced indecent act contrary to section 6(a) of the Sexual Offences Act No. 3 of 2006 and I convict him for the said offence."

ISSUES FOR DETERMINATION

10. The issues for determination by the Court are as follows:

a) Whether defilement of the complainant had been proved;

b) Whether the 2nd appellant (1st accused) was proved to have been involved in the defilement; and

c) Whether the 1st appellant (2nd accused) was guilty of the offence of compelled or induced indecent act.

DETERMINATION

Analysis of Evidence

11. As counseled by ***Okeno v. R*** (1972) EA 32, this Court as a first appellate court has considered the evidence presented before the trial court. At the outset it may be pointed out that the court may convict on the sole evidence of the victim of sexual offence without corroboration, pursuant to the Proviso to section 124 of the Evidence Act, as inserted by Act No. 5 of 2003.

12. In ***Paul Mwakio Mwashumbe v. R*** [2016] eKLR, the Court relied on ***Johnson Muituri vs. R*** (1983) KLR 445 held as follows:

"28. Appreciably, as PW1 adduced unsworn evidence, the appellant could not be found liable for the alleged offence based on her evidence alone unless it was corroborated by other material evidence, a position that was held by the Court of Appeal in ***Johnson Muiruri vs Republic,*** *supra."*

With respect the position, taken by the court in that an accused could not be found liable on the unsworn evidence of the minor complainant unless it was corroborated by other material evidence was erroneous. That position was altered by the amendment in 2003 to section 124 of the Evidence Act by Criminal Law (Amendment) Act No. 5 of 2003 as follows:

"103. Section 124 of the Evidence Act is amended by inserting the following proviso-

Provided that where in a criminal case involving a sexual offence the only evidence is that of a ***child of tender years*** *who is the*

*alleged victim of the offence, the court shall receive the evidence of the **child** and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the **child** is telling the truth."*

The trial court was entitled to find the accused persons guilty on the sole evidence of the complainant victim. The word 'child' and the words "a child of tender years who is" in the Proviso to section 124 were through the Sexual Offences Act 2006 (2nd Schedule) substituted by the words "alleged victim".

Whether complainant was defiled

13. The court is now entitled to accept the sole evidence of the complainant under section 124 of Evidence Act, whether such evidence was sworn or unsworn contrary to the holding in the 1983 case of ***Johnson Muiruri v. R,*** supra, which stated the law as it then was. Moreover, the evidence of the complainant minor was given on oath. The trial Court had upon a ***Voire dire*** examination of the child determined that she could give evidence on oath.

Voire dire examination

14. It is now accepted that the *Voire dire* examination need not follow the question and answer format of ***Johnson Muiruri,*** and it suffices that an examination is conducted and recorded leading the finding by the court as to the matters set out in section 124 of the Evidence Act. The Court of Appeal in The trial magistrate in this case has recorded the answers given by the minor justifying his acceptance of her knowledge of the nature of the oath and consequent reception of her evidence on oath. See ***James Mwangi Muriithi v Republic*** [2016] eKLR and ***Maripett Loonkomok v Republic*** [2016] eKLR, where the Court of Appeal at Mombasa (**Makhandi, Ouko and Minoti, JJA**.) said:

*"But the origin of the rule on Voire dire examination of a child witness as we know it today was first applied in the ancient yet landmark English case of **R** v **Braisier** (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that;*

> ***".. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence**"(our emphasis)*

*Although this decision, through **section 19** of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children's testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that Voire dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See **Johnson Muiruri v R (1983) KLR 447.** The courts today accept both the question and answer format and the recording of the child's answers only. See **James Mwangi Muriithi** (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of **sections 208** and **302** of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See **Nicholas Mutua Wambua and another v R Mombasa Criminal Appeal No.373 of 2006.**"*

15. I think that in this case, the trial court was entitled to find the child to understand the nature of the oath to justify her evidence on oath from her answers in the *Voire dire* as follows:

> ***"Minor's Voire dire is taken:***
>
> *My name is JK. I am a pupil at [particulars withheld] at Kabartonjo in Standard five. I am 10 years old. I will tell the truth whoever tells truth will go to heaven.*
>
> ***Court:***
>
> *Minor will give sworn evidence in English and Kiswahili."*

I do not find merit in this ground of appeal.

Corroboration

16. In this case, however, there was corroboration of the complainant's evidence, even if the old position before the 2003 amendment to section 124 of the Evidence Act obtained. The evidence of the examining clinical officer doctor corroborates the evidence of the complainant when in cross-examination he confirms that:

"The injuries [on] the complainant were fresh and painful to touch. The hymen was freshly broken based on the lab results. The availability of blood cells on the complainant's urine was prove that there were injuries in her private parts. They can also be due to menstruation but the complainant herein was below 10 years so it could not apply."

There is also corroboration in the circumstantial evidence of the teachers PW2 and PW6 who testified to the complainant's difficulty in

walking a day after the alleged defilement prompting the inquiry which led to her disclosing to the mother that the 1st accused had '*defiled*' her. PW8, the police officer who received the complainant and her parents at Kabarnet Police Station on 16th March, 2013 also testified that "the child was walking with difficulty and it was due to the pain she had over the incident."

Age of the Complainant

17. The complainant's teacher B PW6 confirmed the complainant's testimony that she was in class five. The complainant and her parents said she was 10 years. The Birth Certificate presented by the Investigating Officer indicated that she was born on 14th January, 2002. The Investigating Officer said that the age [of 10 years] in the charge sheet had been by the father of the complainant.

18. As is now trite, the age of the complainant is a matter of fact for determination by the trial court. I do not see that the trial court erred in any way in relying of the month-specific age given in the Birth certificate in preference to the generalize age statement given by the child and the parents.

19. I would agree, that there was no prejudice to the accused by the court's acceptance of the older age bracket when the accused had been with defilement under a lower age bracket and which accordingly carries are severe penalty. In both, the accused had to respond to the charge of defilement which is the offence of sexual intercourse with a *minor*, and they cannot be heard to say that they did not know the charge they had to meet. To defend a charge as set out in the charge sheet that he had committed an act that caused penetration of a minor aged 10 years can only be more exacting than a charge showing that the child was older, and the 2nd appellant was therefore fully aware of the allegation of defilement of a child aged 10 in the charge and the adopting of an older can only ameliorate rather than prejudice the appellant's case against him. By adopting the older age bracket of twelve – fifteen years, the penalty for the offence becomes lighter under section 8(3) of the Sexual Offences Act with an imprisonment of 20 years, than the one applicable to the offence of defilement with a child aged ***'eleven years or less'*** which, under section 8 (2) of the Act, attracts life imprisonment.

20. With respect, I do not agree with Counsel for the appellants, that there is a gap in the law with respect to children between the ages of 11 – 12 years. Such cases are to be accounted under the bracket "11 years or less because they are not yet attained the age of 12, in which case they would be covered by the bracket 12 – 15 years. A person who defiles a child aged 11 and a few months but before the age of 12 must be sentenced under section 8(2) of the Sexual Offences Act.

21. Under section 8 (1), a person who commits an act which causes penetration with a child is guilty of defilement. Sections 8(2), 8(3) and (4) of the Sexual Offences Act provide for penal sections according to the age of the victim: imprisonment for life for defilement of a child aged 11 years or less; not less than 20 years for a child aged between 12 – 15 years; not less than 15 years if the child is aged between 15-18.

IDENTIFICATION OF THE ACCUSED PERSONS.

Appellant No. 2 (Accused 1)

22. The 2nd appellant was identified by the complainant who said she knew him by name Alphaeus and he carried a school mate named C to school. PW6, Teacher B T said she knew the 1st accused because she had used his motor bike before and he had carried children on the said date and she had asked him whether he knew where the complainant stayed and he replied in the affirmative and therefore asked him to take her home.

23. PW3 the mother of the complainant said she knew the accused 1 and 2 since 2011 (testifying in July 2014) and that the two had carried her on their bikes and even the complainant as well as her siblings before, and Accused 1 was the one who carried the complainant to school more regularly.

24. In their sworn defences, the Accused persons confirm they were boda boda riders but each gave ***alibi*** defence placing them elsewhere on 14/3/13 when the alleged defilement is said to have taken place at [particulars withheld]. According to complainant, the incident happened at 5.30 pm on 14/3/13, when she was going to pick milk from a neighbor at [particulars withheld]. She knew the 1st accused as a neighbor at Kuresoni, but did not know the 2nd accused name.

25. On cross-examination, the complainant said she had told her mother that it was Alphaeus who had defiled her prompting the police officer at Kabarnet to issue warrant of arrest as confirmed by the father of the complainant PW4 and the arresting officer PW7.

26. I have considered the *alibi* evidence of the appellants and when weighed against the evidence presented before the Court by the prosecution, as a whole; the identification evidence of the complainant PW1 and her report of the defiler by name to the mother leading to the warrants of arrest of the 2nd accused, leaves no doubt that she knew the appellants who were *boda boda* operators who ferried school children to her school, and that they had been involved on the incident leading to her defilement on 14th March 2013, the incident which she disclosed upon discovery by the teachers of her difficulties in walking.

27. I agree with the holding in ***Victor Mwendwa Mulinge v. R*** [2014] eKLR that by virtue of section 309 of the Criminal Procedure Code the Prosecution may call for rebuttal evidence even where an alibi defence is raised late in the proceedings, and that having failed to do so it may not be heard to object that the alibi was an afterthought; and that the burden of proving the falsity, if at all, of the accused's alibi lies on the prosecution. See ***Karanja v. R*** [1983] KLR 501.

28. However, in this case the prosecution evidence outweighs the alibi defence making it unbelievable and false.

29. I find **Appellant 2 (Accused 1)** was properly identified and his involvement in the defilement of the complainant proved.

1st Appellant (Accused II)

30. Accused II, Philip Kimechwa, was charged with compelled or induced indecent act contrary to section 6 (a) of the Sexual Offences Act no. 3 of 2006. The particulars were that he "on the 14th day of March, 2013 [particulars withheld] village in Baringo District within Baringo County intentionally or unlawfully compelled or induced Alphaeus Cherop to engage in an indecent act by touching the buttocks of J K, a child aged 10 years."

31. This charge was unintelligible. It was not clear whether Kimechwa compelled or induced Cherop into an indecent act involving the latter touching the buttocks of the girl or any other act induced by the former's touching the girls genitals. In either case, the act of indecent act is not clear. If the indecent act alleged is the touching of the girl's buttocks by the 1st accused Cherop, then the offence charged is the wrong one because section 6 (a) of the Sexual Offences Act applies where the indecent act is with the person who compels or induces the doer of the act on him or her. If the indecent is on another person the correct provision of the law is section 6 (b) of the Sexual Offence Act.

32. ***Indecent act*** is defined in section 2 of the Sexual Offences Act as follows;

> "*Indecent act"* means an unlawful intentional act which causes –
>
> (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include any act that causes penetration.
>
> (b) Exposure or display of any pornographic material to any person against his or her will."

Section 6 of the Sexual Offences Act is in the following terms:

> ***"6. Compelled or induced indecent acts***
>
> *A person who intentionally and unlawfully compels, induces or causes another person to engage in an indecent act with—*
>
> *(a) the person compelling, inducing or causing the other person to engage in the act;*
>
> *(b) a third person;*
>
> *(c) that other person himself or herself; or*
>
> *(d) an object, including any part of the body of an animal, in circumstances where that other person—*
>
> *(i) would otherwise not have committed or allowed the indecent act; or*
>
> *(ii) is incapable in law of appreciating the nature of an indecent act, including the circumstances referred to in section 43, is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than five years."*

The "indecent act" whatever it was, was not alleged to have been done on or with "the person compelling, inducing or causing the other person to engage in the act" is prescribed under section 6 (a) of the Sexual Offences Act.

33. There is, accordingly, no valid charge, under Count II of the charge sheet dated 18/3/13 and the same was liable to be dismissed in accordance with section 89 (5) of the Criminal Procedure Code, which provides as follows:

> "*89. (5) Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order."*

34. The 1st appellant (2nd accused) may have been charged for his alleged role in the defilement for the offence of gang rape in terms of section 10 of the Sexual Offences Act or with defilement as a principal offender within the meaning of section 20 of the Penal Code. Section 10 of the Sexual Offences Act provides as follows:

> "*10. Gang rape Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life. [Act No. 7 of 2007, Sch.]"*

35. In the alternative, the accused could have jointly been charged with defilement under the principle of Principal Offenders pursuant to section 20 (1) (e) of the Penal Code, which provides as follows:

> "*20. (1) When an offence is committed,* ***each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it,*** *that is to say -*

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence; and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission."

36. ***Aiding and abetting*** is defined in Black's Law Dictionary as follows:

"*Aid and Abet - To **assist** or facilitate the commission of a crime, or to promote its accomplishment."*

There is in the testimony of the complainant that the 2nd accused had held the complainant and put her on the motor bike ridden by the 1st accused and later passing her on the 1st accused over a fence and stating that he had assisted the 1st accused thus far, evidence upon which a verdict of common intention to commit defilement of the complainant with the meaning of section of the 10 of the Sexual Offences Act and section 20 of the Penal Code, by way of aiding and abetting, may be found.

37. Section 179 (2) of the Criminal Procedure Code which allows a court to convict forp a ***lesser*** charge even if the accused was not charged with it, if it considers it proved against the accused, is not applicable to this matter. Section 179 (2) provides as follows:

"179. When offence proved is included in offence charged

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

38. On the evidence presented herein the 2nd accused may only have been found guilty of defilement if he had been charged with defilement under section 8 (1) of the Sexual Offences Act, as a principal offender under section 20 of the Penal Code, or for the offence of gang rape under 10 of the Sexual Offences Act, both which with a possible sentence of imprisonment for life and a minimum of 15 years cannot be ***lesser*** charges to the offence of compelled or induced indecent act which carries a sentence of imprisonment for not less than 5 years. Accordingly, there is no occasion for application of section 179 (2) of the Criminal Procedure Code.

39. Having not been so charged and, therefore, having not had an opportunity to defend himself, and the permissive provisions of section 179 of the Criminal Procedure not being applicable, the 1st appellant/2nd accused must be released from custody not having properly been arraigned before the Court. The 2nd accused was charged under an invalid charge, the conviction for which must be quashed and the sentence therefor set side.

Orders

40. Accordingly, for the reason set out above, the Court pursuant to section 354 (3) of the Criminal Procedure Code, makes the following orders:

1. **The appeal by the 1st appellant Philip Kimechwa is allowed, his conviction quashed and sentence set aside.**

2. **The appeal by the 2nd Appellant Alphaeus Cherop is without merit and it is dismissed.**

41. There shall, therefore, be an order that the 1st appellant (2nd accused) **Philip Kimechwa** be released from custody unless he is otherwise lawfully held.

DATED AND DELIVERED ON THIS 2ND DAY OF MAY, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ngaywa Ngingi & Kibet Advocates for the Appellants.

Ms. Macharia Ass. DPP for the Respondent.