



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO.51 OF 2017

LAZARUS OMONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence passed by Hon. Adhiambo,

Senior Resident Magistrate in Ukwala SRM Cr Case No 73 of 2015 on 15/5/2017)

JUDGMENT

Introduction

1. The Appellant **LAZARUS OMONDI** was charged before the Senior Resident Magistrate's Court at Ukwala in Criminal Case No. 73 of 2015 with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006, the particulars of the offence being that on **4.10.2014** the appellant while at Uholo Primary School Jera Sub-Location within Siaya County intentionally caused his penis to penetrate the vagina of Q.A.O. a child aged 14 years. The appellant pleaded not guilty to charge and the matter proceeded for hearing.

2. The trial magistrate, Hon. G. Adhiambo after hearing seven prosecution witnesses and considering the appellant's mitigation, found the appellant guilty of the offence defilement as contemplated under section 8 (1) as read together with section 8(3) of the Sexual Offences Act and convicted him under section 215 of the Criminal Procedure Code sentencing him to 20 years' imprisonment.

3. Dissatisfied by the said conviction and sentence the appellant filed his petition of appeal based on the following grounds:

- a) **That the trial court failed to observe that nothing linked him with the alleged offence.**
- b) **That the trial court failed to observe that the sentence imposed was against the weight of the evidence adduced.**
- c) **That the trial court failed to appreciate that the sentence imposed was unconstitutional due to its mandatory nature.**
- d) **That the trial court failed to appreciate that the prosecution case was full of contradictions hence unsafe to base a conviction upon.**
- e) **That the honourable court be pleased to serve him with a copy certified trial records to enable me erect more grounds.**

4. The appellant initially filed a petition of appeal however his advocate on record Mr. Miyare filed an amended petition of appeal on the 22/11/2018 in which they sought adduce new evidence on appeal. The court after hearing the appellant proceeded to allow the appellant to adduce new evidence

Appellant's Submissions

5. The appellant submitted that his conviction on the fact that the complainant's allegation that she was defiled by the appellant resulting in a pregnancy was not sustainable as the alleged date of defilement was on the 4/10/2014 whereas delivery of a full term baby was on 9/4/2015, confirming that she conceived prior to the alleged 4/10/2014.

6. In the appellant's view, delivery date, just like the date of the alleged defilement on 4/10/2014 and age of PW3's pregnancy when she was examined by PW7 on the various dates of 16/2/2015 and 18/2/2015, was/is thus a very relevant and indispensable issue/question in determining the Appellant's guilt. Accordingly, the appellant submitted that this provided overwhelming evidence that the Appellant did not defile the complainant as alleged.

7. The appellant further submitted that whereas he had lived positive of HIV/AIDS since 2004, the HIV/AIDS test conducted on the blood sample collected from the complainant by PW7 tested negative when PW7 examined the complainant on 18/2/2015 which was 7 months from the date of the purported sexual contact and this raised reasonable doubt as to the alleged defilement of the complainant by the Appellant

8. It was further submitted that the trial court erroneously and unlawfully determined that the Appellant had admitted to committing the alleged offense, and proceeded to convict him on the basis thereof based on alleged confessions to PW1, the complainant's teacher, PW2 complainant's teacher, PW3 the complainant, PW4 the complainant's mother and PW5 the investigations officer all which were inadmissible and could not be proved against the Appellant.

Analysis & Determination

9. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424.”

10. The prosecution evidence as laid out in the trial Court was as follows; **PW1 OCO** who identified himself as a teacher working at the U Primary School told the court that on 3.2.2015 some villagers went to the school to report that the complainant who was a student in the aforesaid school had been impregnated by one of the teachers of the said school. He said that since the head teacher was then not in school he attended to the villagers who came with the complainant Q.A.O. stated that when he interrogated the complainant, the complainant stated that in the year 2014 during third term on a Saturday while other students had gone for lunch, teacher Lazarus requested her to warm tea at the school kitchen. He said that the complainant said that as she was in the school kitchen the said teacher Lazarus that is the appellant person herein followed her to the kitchen and told her that he wanted to have sex with her. He said that the complainant said that he tried to refuse but the appellant insisted and so she finally gave then the appellant had sex with her in the school kitchen. He said that he thereafter relayed the said information to the head teacher and told the villagers to avail themselves at the school the following day. He said that the following day, the villagers who included the father of the complainant availed themselves at the school and the complainant repeated the same narration in the presence of the head teacher. He said that by then teacher Lazarus the appellant had been absent from school for 2 days. He said that since teacher Lazarus was still absent, the head teacher told the villagers to avail themselves at the school on the 9th of the same month when the attendance of the appellant would be secured. He said that the head teacher sent a letter to teacher Lazarus through one of their colleagues who happened to be a neighbour to teacher Lazarus and on 9th the said teacher Lazarus that is the appellant availed himself at the school. He said that on that 9th the villagers availed themselves at the school again in company of the complainant. He said that they had a closed door meeting at the school which was attended by PW1, the head teacher MA, the complainant and the appellant. He said that in the presence of the appellant, the complainant reiterated her earlier narration and that when teacher Lazarus the appellant was asked whether what the complainant said was the truth the appellant answered in the affirmative. He said that after that the parents of the complainant reported the matter at the Bar Ober Police Station and that they were later summoned to the Ukwala Police Station where they recorded their statements. He identified teacher Lazarus as the appellant person herein and stated by then he had worked with the appellant for a period of 2 years. He said that prior to that the appellant used to teach in a neighboring school and that he had known the appellant for a total of five years. He said that the appellant willingly admitted committing the offence before then and that they never forced the appellant to admit.

11. On cross-examination he said that he started working at U Primary School and he said that in his statement, he recorded that at first the complainant told him that she had been impregnated by a boy who schooled at the Ramunde Secondary School, one FO but she later changed her statement and said that she was impregnated by a teacher. He said that the complainant said that when she undertook a pregnancy test and was on her way back the appellant looked at the lab results confirming that she was pregnant and that it is the teacher who told her that in case she is asked who impregnated her she should say that she was impregnated by a boy called FO because if she was to say the truth the appellant would lose his job. He said that it is only the complainant who could tell this court why she chose on the name of FO. He said that it is the senior teacher who looked at the medical report. He said that previously he had never heard of such complaints being made against the appellant. He said that he only attended 2 meetings.

12. **PW2 JMAA** who identified herself as a teacher working at the U Primary School and a senior teacher at the said school as well as the class teacher of class where the complainant was a student stated that she noticed changes in the complainant. She said that the complainant became sluggish and that there was even a time she vomited in class. She said that later on another day the complainant asked for permission to leave school alleging that she had a headache and she said that's she told the complainant to tell her mother to take her to hospital as she was going for lunch. She said that later at 3.00 p.m. on a day she said she could not recall the complainant's mother went to school to ask for permission for the complainant whom she said could not attend school because she was unwell and she had to go to hospital. She said that she granted her the permission sought. She said that on 26.1.2015 the complainant was taken to the Jera Dispensary and later at 2.00 p.m. the complainant availed the medical report to her at the library. She said that on looking at the medical report she noticed that the complainant had tested positive for pregnancy. She said that the complainant also told her that indeed the doctor had told her in the presence of her mother that she was pregnant. She said that she took the medical report form the complainant and gave it to the deputy head teacher COO after directing the complainant to resume classes. She said that later at games time. She asked the complainant as to who was responsible

for pregnancy but at first the complainant denied being pregnant but she later said that she was impregnated by a student who schools at the R Secondary School by name FO. She said that she told the complainant to avail her parents at the school the following day as they made arrangements to go to Ramunde Secondary School to know more about the boy who was alleged responsible for pregnancy. She said that the parents of the complainant did not avail themselves at the school but only came to collect the medical report but she said that she refused to hand over the medical report. She said that later the mother of the complainant availed herself and stated that she wanted to take the complainant to the Khunyangu Sub-District Hospital so that she could be sure whether she was indeed pregnant. She said that the Deputy Head teacher prevailed upon the father of the complainant to avail himself at the school but he failed to do so. PW2 stated that on 3.2.2015 she was away from the school but on 9.2.2015 she (PW2) was called to the school library by the head teacher where she said she found the complainant, the complainant's mother, the complainant's father, her colleague Mr. Omondi and the head teacher. She said that she was briefed that she had been called because the complainant had been impregnated by a teacher of the said school that is Lazarus Omondi. She said that the complainant was given a chance to talk and the complainant told her that around October 2014 when teachers had gone for lunch the appellant who is also a teacher sent her to the school kitchen to warm tea but the appellant followed her to the kitchen and touched her while telling her that he was interested in her. She said that the complainant said that she told teacher Lazarus that she did not understand what the said teacher meant. She said that the complainant said that since class 8 pupils were passing the said teacher Lazarus that is the appellant went back to the staffroom. She said that the complainant said that teacher Lazarus did follow her to the kitchen again where they had sex then she went home took a shower and went back to school in the afternoon. She said that when she asked the complainant why the complainant was giving her conflicting statements, the complainant said that it is teacher Lazarus who told her what to say so that teacher Lazarus would not lose his job. She said that when teacher Lazarus was given an opportunity to speak, teacher Lazarus admitted having sex with the complainant in the school kitchen. She said that she was told that the relatives of the complainant had availed themselves at the school over the same issue on 3.2.2015 and that on that 9.2.2015 the said relatives who were outside the meeting venue were also informed of what went on at the meeting. He said that after that they referred the complainant to the Bar Ober Police Station. She said that they were later called to the Ukwala Police Station where they recorded their respective statements. She identified teacher Lazarus as the appellant person herein and stated that she had known the appellant for about four years. She said that the complainant said that complainant said as she was from the hospital she met the appellant at the school gate and the appellant looked at the report then the appellant told her not to say the truth.

13. On cross-examination she reiterated her earlier testimony and stated that her responsibility is to protect the rights of children and further that is why she was even before court. She said that the complainant had never been involved in cases of indiscipline. She further stated that students are not allowed to go to the kitchen and stated that they have a school cook. She said that her colleague found out FO really existed and also found out where he lived but the parents of the complainants did not approach the boy. She even said that the mother of the complainant feared that if her husband would have known the complainant was expectant that could have adversely affected her marriage. She said that when the complainant's mother was about to go to the boy's home, a different version as to who impregnated the complainant emerged. She said that the father of the complainant said that he learnt of the complainant's pregnancy through a relative. She said that the outcome of the meeting of 9th did set free the boy who was said to be FO and that nobody bothered to go to the boy's home after that. She said that the girl made a confession and the appellant admitted the confession so she found no need to call the boy. She said that the complainant is a minor so it does not matter whether or not she scream. She went on to say that the kitchen is a few metres from the staffroom and the classes are at the far end. She said that she had never in the past heard of similar complaints against the appellant. She said that the head teacher must be having the minutes of the meeting.

14. **PW3 a minor** was taken through *voire dire* examination and I found that she was suitable to give sworn evidence. PW3 the complainant in her sworn evidence told the court that she was a student at B Primary School. It was her testimony that on 10.10.2014 she was at Uholo Primary School when at around 1:00 p.m. teacher Lazarus called her from class and asked her to warm tea for him (the appellant) she said that's he accompanied the appellant that is teacher Lazarus to the office to collect the matchbox so that she could light a fire at the school kitchen. She said that she went to the school kitchen, lit a fire and started preparing tea. She further stated that the appellant followed her to the school kitchen and told her that he was interested in her. She said that she asked the appellant what interest the appellant had but the appellant did not respond. She said that the appellant left the kitchen and again went back to the kitchen. She said that inside the school kitchen the appellant lifted up her uniform up to her waist. Removed her inner pant and had sex with her. When asked to elaborate further she stated that the appellant removed his trouser and inner wear then inserted his penis into her vagina. She said that after that the appellant asked her to take the tea in the kitchen and then go home for lunch. She said that the appellant also warned her not to disclose the incident to anyone and that the incident should remain a secret between her and the appellant as he was likely to lose his job in case the complainant told anyone of the incident. She said that she went home and went back to school at 2.00 p.m. She said that later in the month of December she frequently fell ill and then her mother took her to hospital. She said that she feared disclosing the incident to her mother because the appellant had warned her to keep the incident a secret. She said that when they resumed school in January she frequently fell ill and then her teacher advised her mother to take her to hospital to find out what was wrong with her. She said that before she went to hospital the appellant went to their home to ask why she had not gone to school. She said that her mother told the appellant that it is her class teacher who had advised her to take her (the complainant) to the hospital. She said that at that time the appellant there was a science test that the complainant did not have to miss. She said that her mother insisted on taking her to hospital and told the appellant that she (the complainant) would sit for the test in the afternoon. She said that when she was taken to the Jera Dispensary tests were done on her and it was confirmed that she was pregnant. She said that as she went back to school she met teacher Lazarus the appellant at the school gate. She said that the appellant asked her to avail the medical report book which had been issued to her at the hospital. She said that the appellant read the treatment book and that after that she took the treatment book to the class teacher by the name of J. She said that after her parents realized that she was pregnant they went with her to school but on that day the appellant was not at the school. She said that the following day she attended a meeting which was also attended by her parents, the senior teacher and teacher Lazarus the appellant. She said that when teacher Lazarus was asked if he was the one who had sex with her teacher Lazarus admitted. She said that teacher Lazarus promised to talk to her mother back at home but teacher Lazarus failed to avail himself. She said that the matter was reported at the Bar Ober Police Station where she recorded her statement and that the following day they went to the Ukwala Children office, she said that at the children office the appellant denied having sex with her and the appellant was taken to the Police Station. She identified her treatment notes and P3 Form dated 16.2.2015 and 18.2.2015 respectively as PMFI 1a and 1b respectively. She identified the appellant person herein as the teacher Lazarus she was referring to. She went on to say that the appellant was her science teacher who started teaching at Uholo Primary School in the year 2014. She said that she did not have another boyfriend.

15. On cross-examination the complainant said that she was defiled on 4.10.2014. She then reiterated her earlier testimony. She said that at the time she was defiled in the school kitchen, the door was not closed but it had just been pulled. She said that the appellant defiled her for the first time on that day. She said that she did not scream and that the appellant did not hold her mouth to prevent her from screaming. She

said that the appellant had sex with her on the floor and that she bled. She said that 4.10.2014 was a Saturday and that there were no students around the school. She confirmed that there is a canteen behind the school kitchen but no one was at the canteen at that time. She said that at that time the kitchen window was closed. She said that she took long to report the incident because teacher Lazarus the appellant told her that the incident should remain a secret. She said that at the time of the pregnancy she was not told how old the pregnancy was. She said that from October to February it is 4 months. She insisted that it is teacher Lazarus who impregnated her and that teacher Lazarus impregnated her for the first time in October. She said that she did not have any boyfriend. She said that she did not know anyone by the name of B and that the alleged Boniface was not her boyfriend and that she was not impregnated by B. She said that it was only her pant which was stained. She said that after the sexual intercourse with teacher Lazarus she experienced difficulty in walking for 2 days. She further stated that no one saw her leaving the kitchen. She went on to state that she washed her stained inner pant. She said that at the time of defilement she was 14 years and that she was born in the year 2000. She said that she started experiencing morning sickness in December but all through her mother did not notice anything. She said that when she was found pregnant she decided to disclose the secret and that if she would not have been impregnated she would not have disclosed the secret.

16. On re-examination she reiterated her evidence in chief and in cross examination saying she did not have sex with anyone before October 2014.

17. **PW4 MAM** who identified herself as a resident of Mohwayo in Kateg Jera told the court that on 23.1.2015 she took her daughter the complainant who was unwell to the Jera Dispensary and the doctor found out that the complainant was pregnant, She said that she later interrogated the complainant as to who was responsible for the pregnancy and the complainant told her that it was teacher Lazarus Omondi who was responsible for her pregnancy. She said that the complainant told her that there was a time teacher Lazarus asked her to warm tea for him in the school kitchen and as he was warming the tea teacher Lazarus followed her to the kitchen then told her that he was interested in her. She said that complainant told her that when she asked teacher Lazarus as to what he meant teacher Lazarus went back to the kitchen again where teacher Lazarus had sex with her after forcing her to the ground. She said that teacher Lazarus inserted his penis into the vagina of the complainant and that after that the said teacher told the complainant to keep the incident at secret because in case she disclosed the incident the teacher was likely to lose his job, She said that she reported the incident to the head teacher of U Primary School then a meeting was held at the school which meeting was attended by herself, the head teacher of U Primary School together with his deputy, the appellant and the complainant then the complainant narrated what teacher Lazarus the appellant did to her. She said that when the appellant teacher Lazarus was asked whether what the complainant had said was true the appellant admitted. She said that after that she reported the incident at the Bar Ober Police Post and then at the Ukwala Children Office. She said that while at the Children Office, the appellant denied committing the offence. She said that she knew teacher Lazarus because she used to see him at the school during school meetings and that she had known teacher Lazarus for a period of one year. She said that the appellant was the Complainant's science teacher. She said that at that time the complainant was 14 years. She identified the complainant's birth certificate showing her date of birth as 6.4.2000 as SPMF12. She said that the complainant did not have a boyfriend and she could not even have time to have a boyfriend.

18. On cross-examination she said that the doctor will the age of the pregnancy. She said that the doctor said that she was 7 months pregnant. She further stated that if the complainant was defiled in October by February the pregnancy ought to be 4 months. She however insisted that the appellant admitted impregnating the complainant. She said that she did not realize at any time that the complainant was walking abnormally.

19. **PW5 No. 51554 sergeant Richard Machassio** of Oyugis Police Station told the court that he was previously attached at the Ukwala Police Station. He said that he is the officer who investigated this case. He said that on 18.2.2015 the complainant then aged 14 years and who was a class 7 pupil availed herself at the Ukwala Police Station while in the company of her mother and father, the children officer and the appellant. He said that the complainant reported that on 4.10.2014 during lunch hours while she was at school the appellant who was then a teacher at the said school instructed her to go to the kitchen and prepare tea for the appellant. The complainant he said, said that by then the other pupils and teachers had left for lunch. He said that the complainant said that as she was preparing tea for the appellant, the appellant stormed into the kitchen, knocked her down, undressed her and then inserted his penis into her vagina thereby forcefully having sex with her. He said that the complainant said that immediately after the incident she never experienced her monthly periods. He said that he learnt that the complainant had already been taken to hospital and confirmed pregnant. He said that on interviewing the appellant the appellant told him that he had sorted out the matter with the parents of the complainant. He even said that the appellant confessed to him that he was responsible for the complainant's pregnancy and that the appellant even promised to cater for the child. He said that the appellant recorded his statement voluntarily on his own handwriting that he was responsible for the pregnancy and that he was ready to cater for complainant's child. He said that this the appellant did without any form of coercion. He said that at that time the appellant was not even in custody so he was not coerced. He said that he issued the complainant with a P3 Form then proceeded to the scene at U Primary School. He said that he thereafter recorded the statements of witnesses and collected the relevant documents. He identified a copy of the complainant's birth certificate indicating the complainant's date of birth as 6.4.2000 as PMF1 2. He further produced the statement recorded by Lazarus Omondi on 18.2.2015 as PMFI 1a. He identified the appellant herein as the person he arrested and charged.

20. On cross-examination he reiterated his earlier testimony and insisted that the appellant recorded his statement on his own will even before arrest at a room where he was alone. He said that he did not explain **Article 49 of the Constitution** to the appellant before the appellant recorded his statement but he said that he told the appellant that whatever he was writing could be used as evidence against him. He however stated that he did not record that in his statement. He said that he was well versed with the provisions of **Section 25 of the Act of the Evidence Act**. He said that he is aware that a confession should be taken before a chief inspector, the person may have a lawyer or friend while making the confession, he should not make the confession under duress, he should not have any injuries and he should not be hungry. He said that in this case the appellant recorded his statement upon his own request. He said that hearing from the appellant is also part of investigations and that it was procedural for the appellant to record his statement.

21. **PW6 No. 83706 Sergeant Charlotte Mwinga of Ukwala Police Station** told the Court that she took over the case from Inspector Machassio who handed over the file to her as he was not feeling well. She produced the original birth certificate serial No. 2055632 of Quinter Atieno indicating her date of birth as 6.4.2000 as P exhibit 1.

22. **PW7 Dr. Ojwang Fanuel a Medical Officer** working at the Kenya Defence Forces, Kenya Air Force at the Nanyuki Air Base told the Court that he was previously working at the Ukwala Health Centre as the Medical Superintendent between the 2014 and 2015. He said that he had attended court to produce the Medical Report of Q.A. which he had filled. He said that by then the said patient was 14 years. He said

that he attended to the patient on 16.2.2015 when the patient was 15 years old and her outpatient number was 1213/15. He said that the patient was a primary school pupil who reported to have been forcefully penetrated sexually by a male teacher well known to her on Saturday the 4.10.2014 after the said teacher tricked her to make some tea for him over lunch hour when the other pupils and teachers had gone for lunch. He said that the patient said that the sexual intercourse was unprotected and that the teacher told her not to report the matter or else the teacher would lose his job. He said that the patient said that since the sexual act took place she had never experienced her menstrual flow and that she had experienced her last menstrual flow on 28.9.2014. He said that on examining the said girl he found that she was of fair condition and that the positive findings were on the abdomen. He said that the patient's abdomen was distended and there was a dark line from her umbilical region which was a sign of pregnancy. He said that by then the fetal heart beat could be felt and it was then at 150. He said that he did a speculum examination of the girl's genitalia and he noted a white discharge. He said that girl's cervix was normal but her hymen was not intact and that was evidence that she had been penetrated before. He said that he made a conclusion that the girl was defiled and that the girl was pregnant. He said that laboratory tests done on the samples collected from the patient revealed as follows; the VDRL test was negative, the HIV test was negative, on urinalysis leucocytes were noted which he said was evidence of bacterial infection. He produced the treatment sheet of Q.A. dated 16.2.2015 as P. exhibit 1c. He stated that two days later that is on 18.2.2015 he attended to the same Q.A. who came in company of her mother and who had a P3 Form. He said that the patient had a light blue dress that is a school uniform, that was clean and she gave a history of having been defiled by a person well known to her that is a teacher in the school kitchen over lunch hour in the absence of everybody else then the teacher later threatened her not to report the matter. He said that the patient said that she had not experienced her menstrual flow since the sexual act. He said that on examination, he found that the patient was a young girl who was pale and who had an extended abdomen. He said that the patient's upper limbs and lower limbs were normal and that the approximate age of the fetus was 7 months. He said that was just an estimate and that he classified the kind of injuries that the girl sustained as grievous harm. He said that he signed the P3 Form on 18.2.2015 and stamped the P.3 Form. He said that in Section C of the same form he indicated that the nature of offence was defilement with teenage impregnation, the pelvis, *labia majora* and *labia minora* were all normal, the vaginal wall was stained with whitish discharge; the cervix was virgin that is it had never given birth and it was normal. He said that in Section b he indicated that the whitish discharge on the vaginal cavity is suggestive of candida infection and the additional remarks were that the girl needed counseling to cope with the pregnancy and child birth. He said that he also indicated that the teacher was never bothered to follow up on the issue according to the report that was given. He produced the P3 Form of Q.A. dated 18.2.2015 as exhibit 1b.

23. On cross-examination he reiterated his earlier testimony and stated that the girl said that the offence occurred on 4.10.2014. He said that averagely on examination the girl was 7 months pregnant. He insisted that that was just an approximation. He said that there are several ways of telling the fetal age. He said that the first one can use the last menstrual period and calculate backwards, or use the ultra sound and that one could use approximation which is the common method used at the clinics. He said that one looks at the size of the abdomen. He said that in this procedure the mother or the girl lies down facing upwards and you estimate how upwards the abdomen has moved. He said that if the abdomen has moved up to the level of the navel then it is 20 weeks then every extra finger that represents 2 weeks and so one can look at how many fingers pass the navel then put them into weeks and add to the 20 weeks. He said that the method has a lot of errors and that the younger the woman the more likely one is likely to get a bigger number of months. He said that if the baby is big one gets to overestimate if he/she uses the third method. He further stated that if there is more amniotic fluid one is likely to overestimate if they use method.

24. He said that for young girls or shorter women the pregnancy seems to be bigger earlier than for taller women. He said that being an estimate and a scientifically approved procedure and recorded that. He said that the estimation he did showed that the age of the fetus was 7 months but to get the accurate results one could use an ultrasound. He said however that at that time there was no need for an ultra sound. He said that he was satisfied with the results he wrote on the P3 Form. He further stated that if one is defiled on 4.10.2014 by 18.2.2015 the pregnancy would be 4 months.

25. Placed his defence, the appellant opted to give a sworn testimony as well and called a witness. The appellant testified that he used to be a teacher and that he used to teach at the U Primary School. He said that he used to be the drama and the science teacher. It was his testimony that on 4.10.2014, a Saturday, he went to the said school to teach remedial classes for class 6 to 8. He said that from around 9:00 a.m. to lunch he taught class 6 and 7 and then he left for lunch at around 1:00 p.m. He said that he went to a shopping centre behind the school. He said that he took a lunch break of around one hour that is from 1:00 p.m. to 2:00 p.m. and that at 2:00 p.m. he went back to school. He said that he taught class 8 pupils for around one hour and then he went to the staff room where he said he marked exam papers. He said that the classes used to end at 4:00 p.m. and so when he was in the staffroom some students were in the school. He said that after marking exams he left for home. He said that the complainant Quinter Atieno was a class 6 pupil at the said school and he generally knew her. He said that he went home alone on his bicycle. He said that after that day he went on doing his duties at the school as usual. He said that the whole of the year 2014 nothing unusual took place but in February 2015 he was summoned to the school library where he was informed that the parents of Q.A. were complaining that he (the appellant) had impregnated her. He said that in the presence of the head teacher, the deputy head teacher, the senior teacher and the parents of the complainant he said that those allegations were untruthful. He said that after that the head teacher told him to go back to class and to continue performing his normal chores. He said that he complied and continued doing his normal duties. He said that after that time he never communicated with the complainant or even her parents. He said that around two weeks from that day he received a letter from the Children's Office summoning him to present himself at Ukwala Children Office so that he could shed light on the complainant's pregnancy. He said that after receiving the summons on 18.2.2015 he availed himself at the children office where he told the children office that he only learnt about the allegations at the meeting held in school. He said that after around one hour, the children officer rung the police he was arrested and taken to the Ukwala Police Station. He said that at the Police Station Mr. Machasio told him to record his statement. He said that by then he had not been told why he had been taken to the Police Station. He said that inside the cells he found a boy who was a neighbour while he used to teach at Segwa. He said that as he was talking to the boy Mr. Machasio grabbed him, pulled him to a corridor then gave him a piece of paper. He said that he was told to write a statement about what Q.A.'s mother and Q. had said at the Children's office. He said that he told Mr. Machasio that he was not ready to record a statement because he was in shock and further because it was his first time to be at the police cell. He said that Mr. Machasio slapped him and told him that he knows how to deal with teachers like him. He said that Mr. Machasio was reading something from the paper and he was telling him to write the things. He said that he wrote down what Mr. Machasio read for him and then he was taken back to the cells. He said that up to date he has never been in touch with Q. or any of the family members of Q. the complainant. He said that he had taught at Uhoho Primary School for some years and some months.

26. On cross examination he stated that his relationship with the other teachers was cordial and okay. He said that there were around six male teachers in aforesaid school and on that day 3 male teachers were teaching the remedial classes. He said that when he was summoned

to the head teacher's office he found the parents of the complainant, the complainant, the chairman of the board of management, the head teacher, the deputy head teacher and the senior teacher and that the other villagers were standing outside the classroom. He said that the head teacher told him that, that was a simple matter and that he should just agree to what the parents were saying. He said that Q. was around 15 years and that he admitted impregnating the complainant because he knew that once the investigations are done the truth would come out. He said that he could not say why he was pointed out amongst all the male teachers but he said that before he even joined that school there were several pregnancy related cases in that school. He said that he could not tell whether teachers were responsible for all the other pregnancies. He said that he thinks he was being used as a scapegoat. He denied being responsible for the pregnancy of the complainant. He further stated that there was no way he could defend himself because he was new. It was his testimony that the head teacher forced him to agree but he said that the head teacher did not threaten him. He said that he never said anywhere that the head teacher coerced him.

27. On re-examination he stated that when he met with the head teacher they were alone and that the head teacher told him that it was a simple matter and that after that he was going to write him transfer letter. He said that 2 male teachers including him were teaching Q's class.

28. **DW2 JOO** who identified himself as an ECD class teacher at Uholo Primary School said that she had taught at the said school for four years. She said that the appellant was also a teacher at the said school and she confirmed that she understood the charges facing the appellant. She said that the complainant was also known to her and that she knew the appellant since childhood. She said that the appellant was currently a form one student. She said that she used to be in the same football team with the complainant and that around September 2014 as they were practicing for a football competition. She realized bodily changes on the complainant which included lightening of her skin. She said that it reached a point that the complainant could not practice. She said that their football matches were on 10.12.2014, 17/12/2014 and 22.12.2014 and that she realized that the complainant was unable to play well in the first two matches and further that she did not participate in the third match. It was her testimony that when she asked the complainant why the complainant had not participated, the complainant said that she was sick. She said that she realized that five girls in the team of eleven were pregnant including the complainant which information she said she received from the other four girls who were pregnant. She said that Q. the complainant tried to terminate her pregnancy but she did not succeed. She said that when she asked the complainant as to who was responsible for her pregnancy the complainant said 3 people; a student at R Secondary School, a herdsman from their village and another man who works at the Uholo Centre. She said that the complainant told her that all the aforesaid 3 men were her lovers and that she slept with them on the same day. She said that she told the complainant to find out who impregnated her so that if the teachers asked her who impregnated her she will be able to state who actually impregnated her. She said that later when the schools opened the complainant told them that she was impregnated by the boy who schools at R by the name of W. She said that she waited for the complainant to identify the boy to her but the complainant did not. She said that she waited for 3 weeks and then reported the matter to the senior teacher JMA but after 2 days the said senior teacher had not taken any action. She said that on the third day the complainant went to ask for permission to leave school then the senior teacher told her to go to hospital and after that to avail the treatment book. She said that Q. complied and on the senior teacher going through the treatment book, she found that indeed the complainant was pregnant. She said that after that the complainant was sent home to avail her parents. She said that the teachers were called for a meeting and when the mother of the complainant asked the complainant as to who was responsible for her pregnancy she said that a boy from Ramunde Secondary School was responsible for her pregnancy. She said that after that the complainant was sent home and told to avail herself at the school after one week. She said that after that Q. and the four girls held a discussion and advised Q. to point out a financially stable person as the person who impregnated her and they settled on teacher Lazarus because apparently to them he was a financially stable person as the person who impregnated her and they settled on teacher Lazarus because apparently to them he was financially stable person who had asked her name. She said that later the four girls used to tell her (PW3) whatever they used to discuss with the complainant. She said that later Q. approached her and asked her of her views about how the girls had told her to frame up teacher Lazarus as the person who impregnated her. She said that at that point she said that she told the complainant that she was not the complainant's parent and that she should discuss those issues with her parents. She said that she did not discuss that with anyone else. She said that the complainant went and held discussions with her parents and that the following day the complainant availed herself at the school with her parents where they met the head teacher and senior teacher. She said that she then saw a land cruiser picking the head teacher and the senior teacher. She said that the following day the land cruiser went to the school and then teacher Lazarus, the head teacher, the deputy head teacher and the senior teacher were taken away. She said that they later learnt that teacher Lazarus was arrested. She said that later after some time the complainant gave birth. She said that after a long time Q. went to her home with the said child and told her to tell teacher Lazarus that she was forced to mention teacher Lazarus as the person who impregnated and that she would do anything possible so that the court case would end because her parents thought that the issue now would be solved at the school then the teacher's salary would be deducted for the maintenance of the child. She said that she relayed the information to teacher Lazarus and teacher Lazarus told her to tell Q. to continue with what she was doing. She said that Lazarus did not defile the complainant because when the complainant was mentioning the men she had sexual intercourse with she did not mention teacher Lazarus.

29. On cross-examination she reiterated her earlier testimony and stated that she was not related to the appellant. She said that she did not tell the parents of Q. that Q. told her that she had slept with 3 men neither did she tell the senior teacher. She said that the other five male teachers who used to teach at the school used to talk to the female students. She said that she did not disclose the advice the four girls gave Q. to the head teacher, deputy head teacher and the senior teacher neither did she disclose the information to her fellow teachers. She said that she kept quiet because everybody saw the appellant being arrested.

30. When the matter came up for hearing of the appellant's case before this court on appeal, and with leave of court, the appellant called 2 additional witnesses in support of his case. **DW3 JO** from County Civil Registrar of Busia testified that he was in Court to establish that Birth Certificate No. 0031506599 was issued by his office in respect of the child **FO** born on 9.4.2015 at Khunyangu Sub-County Hospital whose mother was **QAO**, 14 years old. In cross-examination by Mr. Okachi for the prosecution he stated that the complainant was the mother to the child.

31. **DW4 Michael Odhiambo Mutula** who worked as a nurse at Jera Dispensary responsible for security, safety's documentation of Health records for patients at the facility. It was his testimony that he was in court to produce health records for the appellant who was a patient (comprehensive) care services having been confirmed a HIV/AIDS positive on 25.2.2002 in Kisumu and enrolled in the hospital Jera in July 2013. He testified that when a HIV positive patient defiles a minor, there are chances of infection but there are also chances that the defiled person or child concerned may not be infected.

Determination

32. It is trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013**, where it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

33. The ingredients of age and penetration were proved beyond reasonable doubt before the trial court, by production of the complainant's birth Certificate as an exhibit. There was further proof beyond reasonable doubt that the complainant's genitalia was penetrated into as she was found to be pregnant when she was examined in February 2015. What is in question is whether the appellant was positively identified as the one who caused penetration.

34. There were no witnesses to the alleged offence. The appellant was convicted based on firstly the testimony of PW3 and on the appellant's alleged admission. Section 124 of the Evidence Act provides as follows:

“Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

35. It is worth noting that PW1 and PW2 stated that at first the complainant said that she was impregnated by a boy who used to school at the Ramunde Secondary School. The complainant herself testified that although she had stated that she was impregnated by a boy who used to school at the Ramunde Secondary School, that that was the response the accused told her to give in case she was asked on who impregnated her. Further, it is noted that at first while testifying the complainant said that she was defiled on 10.10.2014. She again corrected her statement and said that she was defiled on 4.10.2014 at the school kitchen.

36. In addition, the further evidence by the defence witness **DW3 Jacob Olontulet** from County Civil Registrar of Busia testified and established that Birth Certificate No. 0031506599 was issued by his office in respect of the child **FO** born on 9.4.2015 at Khunyangu Sub-County Hospital whose mother was **QAO**, 14 years old. In cross-examination by Mr. Okachi for the prosecution he stated that the complainant was the mother to the child.

37. Thus during the hearing of this appeal the evidence adduced was that the complainant gave birth on 9.4.2015. If as testified by the complainant that she was defiled on 10.10.2014 or even on 4.10.2014, then no doubt as at 9.4.2015 she was only six months pregnant yet there was no evidence of a preterm birth. The complainant insisted in her testimony that she never had any sex with anyone else before 4.10.2014.

38. The law on contradictions and inconsistencies was stated in the case of **Twehangane Alfred vs. Uganda (2003) UG CA 6** it was held that:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

39. In the instant case it is my considered opinion that difference in date of the alleged defilement and the fact that the complainant claims that she was defiled by the appellant after which she became pregnant was not a minor issue to be ignored by the court. This coupled with the un rebutted testimony of DW2 and DW3 cast aspersions upon the testimony of the complainant.

40. The trial court in its judgement dismissed the issue of the complainant's pregnancy in relation to the alleged defilement stating that the complainant could have been pregnant when defiled. However when the complainant was cross-examined by the appellant she testified that the only reason she raised the issue of defilement was because she was pregnant. In my humble view, this testimony combined with the inconsistencies in her testimony portrays a complainant and being more than economical with the truth about her alleged defiler.

41. The appellant further submitted that the alleged admission relied on by the trial court in arriving at its decision was inadmissible. From the trial record I am at a loss as to where the appellant confessed as stated by the trial court. The appellant testified that he was forced to write a statement by the initial investigating officer Inspector Machasio. The Evidence Act cap 80 at Section 25 provides:

“(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and third party of the person's choice.”

42. The subsidiary legislation, that is the **Evidence (out of court confessions) Rules, 2009** sets out the rights of an accused person who makes a confession. Those Rule inter alia requires the officer recording a confession to ensure the accused person has stated his preferred language of communication; is informed of his right to have legal representation; is not deprived of food, water or sleep; his period of arrest and detention in police custody established and recorded; has no medical complaint, if any it is adequately addressed; and the accused

communicates with the third party nominated by him. The recording officer should not record a confession of an accused person who complains to him of being a victim of torture or whose physical appearance shows signs of physical injuries. The recording officer shall ensure that the written confession contains the following statement:-

“I have read the above statement and I have been told that I can correct alter or add anything I wish. The statement is true. I have made it of my own free will.”

43. The rules also require the recording officer to be a prosecution witness at the trial to prove to the court beyond reasonable doubt that the rules were complied with. In the instant case, none of the rules cited above were complied with and as such it was an error for the trial court to rely on the same when convicting the appellant.

44. In light of all the above, I find and hold that the prosecution failed to prove the ingredient of identifying the appellant as the person who defiled the complainant and as such failed to prove their case against him beyond reasonable doubt. I find the conviction of the appellant was unsafe. I allow this appeal, quash the appellant’s conviction and set aside the twenty (20) years imprisonment imposed on him by the trial court. Unless otherwise lawfully held, the appellant **LAZARUS OMONDI** is hereby set at liberty.

45. File closed

Orders accordingly.

Dated, Signed and Delivered at Siaya this 30th Day of November, 2020

R.E.ABURILI

JUDGE