REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 11 OF 2020

TOO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence passed in Siaya PM's Court SO Case No 52 of 2019 by

Hon Muthoni Mwangi, Resident Magistrate on 25/8/2020)

JUDGMENT

INTRODUCTION

1. The Appellant herein **TOO** was charged before the Principal Magistrate's Court at Siaya in **Sexual Offense Case No. 52 of 2019** with the offence of defilement contrary to Section 8 (1) as read together with Section 8(3) of the Sexual Offence Act No. 3 of 2006. The particulars of the offence being that on the 22nd September 2019 at 1800hrs at [particulars withheld] village, [particulars withheld] sub-location, South, East Alego in Siaya sub county within Siaya County he intentionally caused his penis to penetrate the vagina of QAM [full name withheld for legal reasons], a child of 12 years.

2. In the alternative, the appellant was charged with the offence of committing an indecent act with the same child QAM, a child contrary to section 11(1) of the sexual offence Act. No. 3 of 2006.

3. The appellant pleaded not guilty to both the main and alternative charge and the matter proceeded for hearing.

4. The trial magistrate, Hon. Muthoni. Mwangi after hearing five prosecution witnesses and three defense witnesses, found the appellant guilty of the offence of 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. After mitigation and a presentence report, the trial Magistrate sentenced the appellant to serve thirty (300 years imprisonment.

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

a) ***That the learned trial magistrate erred in law and in making a finding that an offence of Defilement contrary to section 8 8(1) as read with Section 8(3) of Sexual Offences Act No. 3 of 2006 had been established and proved against the Appellant to the required standard in criminal law.***

b) ***That the learned trial magistrate erred in fact and in law in disregarding the defence of alibi raised the Appellant at trial without any basis and on reason at all.***

c) ***That the learned trial magistrate erred in law and in fact in failing to reconcile contradictory evidence on material facts thereby arriving at wrong conclusion of fact.***

d) ***That the learned trial magistrate erred in fact and law in shifting the burden of proof on the accused person contrary to dictate of criminal law.***

e) ***That the learned trial erred in fact and in law in arriving at a conviction for an offence under section 8(1) of sexual offences Act against the weight of evidence.***

Appellant's Submissions

6. In support of the grounds of appeal, the appellant through his counsel Mr. Okutta and Ms Julie Soweto filed written submissions which they also highlighted orally. The Respondent's counsel Mr Okachi made oral submissions.

7. On behalf of the appellant, it was submitted that the burden of proving the overt act of penetration, and that the appellant was the one who caused the penetration, if at all, was with the Prosecution. Further, that, that burden never shifted to the accused person at any stage. It was submitted for the appellant that PW1 – the complainant – never stated or described what was allegedly done to her. It was further submitted that there was no other independent or direct evidence of any other witness in support of the alleged act of penetration from any of the witnesses called by the Prosecution. Further, that the trial Court relied on the testimony of PW4, the Clinical Officer who only relied on the history to determine the existence of the overt act yet the testimony of PW4 did not conclusively establish and/or prove the overt act of penetration, if any, by what means and by whom and at what time the hymen was allegedly broken. That PW4 stated that there are other things that can break the hymen.That the victim never stated whether there was partial or complete insertion by the appellant of his genital organ into that of the victim. That the victim testified that the appellant never removed his clothes at any one time and that she only said he did 'tabia mbaya' which is an euphemism. Further submission was that as there was no direct evidence linking the appellant to the offence, other tests should have been conducted to conclusively determine the perpetrator.

8. It was further submitted that the trial court erred when it chose to rely on assumptions or inference when there was no evidence before it linking the Appellant to the alleged offence as Regulation 5(1) of the Sexual Offences (Medical Treatment) Regulations, 2012 provided for the trial court's duty to ensure that there is necessary and sufficient evidence to convict and that the Court is not without recourse. That DNA test should have been conducted to prove or disprove the allegations against the appellant and that at best the evidence of PW4 was circumstantial.

9. It was further submitted that failure to give a clear and unequivocal description of what the Appellant allegedly did created reasonable doubt that there was penetration as required to convict. The appellant further submitted that use of euphemisms alone that ***"alinifanyia tabia mbaya"*** was not persuasive, nor conclusive to prove the overt act of penetration.

10. The appellant's counsel further relied on the case of **Busia High Court Criminal Appeal No. 65 of 2016** ***Isaac Oduor versus Republic*** where the Court cautioned against strong reliance by Trial Courts on the evidence of broken hymen as proof of penetration in the absence of other compelling corroborating evidence as was, according to the appellant's counsel, in the instant case.

11. The appellant's counsel submitted that no amount of cumulative unsworn evidence could increase the probative value of the individual values in reference to PW2's testimony which according to counsel, required corroboration just as much as PW1's testimony because both gave unsworn evidence as they were minor children hence their evidence was of little or no probative value and as such the Trial Court erred in relying upon PW2's testimony as corroborating the testimony of PW1 without any independent corroboration of either, both being the evidence of children.

12. It was further submitted on behalf of the appellant that the inconsistencies in the testimony of the prosecution witnesses specifically PW1 as against those of PW2 and other prosecution witnesses were not minor but material inconsistencies on the material elements necessary to prove the charges and criminal liability against the Appellant. That the trial court did not attempt to reconcile those inconsistencies or to consider them or one version over the other. Relying on the case of **John Mutua Munyoki v Republic [2017] eKLR** it was submitted that the inconsistencies and contradictions in the testimonies of the prosecution witnesses cast doubt on their evidence and that such inconsistencies must be resolved in favour of the appellant. Further reliance was placed on **Bukenya & Others v Uganda (1972) EA 549** and a submission made that the prosecution was obliged to make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

13. The appellant's counsel further submitted that the trial court erred by failing to consider and evaluate the appellant's alibi evidence as the evidence of DW3 was never challenged, discredited or disproved in any way and further that the trial court did not allude to or make any reference whatsoever to the alibi defence set up by the Appellant. Reliance on this proposition was placed on the Court of Appeal case of **Victor Mwendwa Mulinge v Republic [2014] eKLR** where it was stated that "***It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution.***"

14. The appellant further relied on the case of **Macharia v Republic (1970) EA 210** where it was held that ***"if material evidence by the defence goes unchallenged, the Prosecution is deemed to have accepted it."***

15. Mr Okutta added that the trial court did not consider the appellant's defence of alibi supported by DW2 who ought to have been a prosecution witness hence the court shifted the burden of proof to the appellant and that she never referred to the defence evidence in her judgment which was an error. Counsel urged this court to quash the appellant's convicted and set aside the sentence imposed.

Respondent's Submissions

16. On behalf of the Respondent, Mr Okachi submitted orally and maintained that the prosecution proved its case against the appellant beyond reasonable doubt and established all the elements of defilement hence the appeal has no merit at all. Counsel submitted that the alibi defence was never proved and that the appellant was well known to the victim and PW2 as their 'father'-uncle hence there was no mistaken identity. It was counsel's submission reiterating the evidence adduced in the trial court that the evidence of PW1 was corroborated by PW2 and PW4. Counsel submitted that the issue of history is informed by the narration given by the victim to the other witnesses and to PW4 the Clinical Officer. Further, that the child was testifying against her father so she could not have elaborated further. In addition, it was submitted that the act can take place with or without the appellant removing his clothes. It was submitted that DNA testing was not mandatory and hence failure to do so was not fatal to the prosecution case. Mr Okachi maintained that the prosecution evidence was consistent hence the appeal should be dismissed.

17. In a brief rejoinder, Ms Soweto submitted that the burden of disproving alibi defence was on the prosecution not the accused/appellant herein. Further, that the evidence of PW2 contradicted that of PW1 hence the court should have reconciled that evidence which it failed to do

so hence this appeal should be allowed, conviction of the appellant quashed and sentence set aside.

Analysis of the evidence before the trial court

18. This being a first appeal, the duty of the first Appellate court was succinctly stated in **Okeno v Republic (1972) EA 32** and restated in the case of **Kennedy Harold Ouma v Republic [2020] eKLR.** Briefly put, this court must reconsider the evidence before the trial court, evaluate it itself and draw its own conclusion though it should always bear in mind that it neither saw nor heard the witnesses and should make due allowance in that respect.

19. Revisiting the evidence adduced before the trial court, the prosecution evidence as laid out was as follows: PW1 QAM the complainant & a minor gave unsworn testimony as she did not understand the nature of solemnity of an oath. She testified that on 22nd September 2019 at around 6.00 p.m. she was with her friend J and L in their farm in [particulars withheld] when the appellant whom she pointed out to the court and referred to as ***''baba yetu''*** –our father -called her to get some sugarcane. That when she entered the house, the appellant locked the door and her friends left. The appellant then told her to go to the bed and remove her clothes and after she did so, he did what she referred to as ***''tabia mbaya''*** to her. She further stated that she felt pain as the appellant did the said ''tabia mbaya'' to her. She stated further that she was crying as the appellant did the said ***tabia mbaya''*** to her. It was her testimony that their other children namely B, T and O went to her aid. She testified that B went to the house and found her after the appellant had left after which they left together for home and while on the way they met their grandmother whom they informed and upon the grandmother checking her vagina, she saw blood. She testified that she was taken to the police station and later to the hospital. She stated that that was her first time to ever engage in sexual intercourse. The trial court noted that the witness was firm as she gave her evidence before the court.

20. In cross examination. PW1 stated that on that day she had gone to collect firewood and the appellant called her when they were about to go home. She further stated that it was a bit dark when the incident happened. PW1 further stated that T was her father's brother and she had never witnessed any bad relations between her father and T.

21. PW2 BO, also a minor whom the court ruled did not understand the nature and solemnity of an oath gave evidence that on that day his sister Q.-PW1 was not at home as he had heard the appellant herein calling her at around 5.00 p.m. to pick some maize. He referred to the appellant as ***''baba mkubwa''*** and stated that their father had told them that he was their ***'baba mkubwa.'*** He went to look for his sister Q-PW1 at 7. 00p.m and found her on the bed in the house of their father the appellant herein. He stated that he found his sister Q-PW1 naked and after she dressed they went and informed their grandmother of what had happened. He identified the appellant before the court.

22. In cross examination, PW2 stated that the appellant called PW1 at around 5.00p.m on that day. He further stated that the appellant had also threatened to cut him with a panga if he found the complainant in his house after he enquired on her whereabouts. He also stated that the appellant and his father usually had arguments.

23. PW3 POM the father of the complainant testified that on 22nd September 2019 he had gone to work at Paporiang when he received a call from his eldest daughter B informing him that T had defiled Q-PW1. He stated that he lost his mind and ran off and rushed home where he found AA his step mother who informed him that the child had been defiled. It was his testimony that he reported the incident at Nyangoma Kogelo Police Station where the police instructed him to ensure that the child did not shower or change her clothes. He stated that he took PW1 to the hospital the following day where she was tested and given preventive drugs to prevent HIV infection and pregnancy. He stated that his daughter was born on 27th July 2007, and that the appellant was his brother.

24. In cross examination, PW3 stated that he did not witness the incident but was informed by his daughter B. He stated that the said B and her grandmother would both not be witnesses in this case. He also denied the existence of any land issues between himself and the appellant.

25. PW4 Isaac Imbwaga, a clinical officer from Siaya County Hospital testified that the complainant was taken to hospital in a grey cotton dress with a history of having been defiled by a paternal uncle at [particulars witheld] village. It was his testimony that the complainant reported 14 hours after the incident. He testified that on genital examination, the girl had a bruised ***labia minora and majora,*** laceration on the vagina walls as well as blood clots on the vaginal introitus and freshly broken hymen. He testified that the HIV test and VDRL test were both negative and that on urinalysis test, there were pus cells but no spermatozoa whereas on high vaginal swab there were pus cells and epithelial cells seen. He testified that from the history and physical examination, he ascertained that there were obvious features suggesting virginal penetration the probable weapon being a blunt object. He noted that there was inflammation and blood along the vaginal introitus and he produced the P3 form as exhibit 1, the lab request form as exhibit 2, the treatment notes as exhibit No. 3 and the Post Rape Care Form as exhibit No. 4.

26. In cross examination, PW4 stated that he had been a Clinical Officer for 3 years and had done close to 30 examinations of sexual assaults and that in those cases the case of vaginal penetration was sexual assault. He further stated that there were no spermatozoa upon laboratory examination. In Re-examination he stated that in this case there was force used to inflict injury.

27. PW5 No. 11082 PC Edna Atsiayo from Kogelo Police Station gave evidence that on 22nd September 2019 she was at the station when the father of the complainant One Mr. M went with his daughter and reported that his daughter had been defiled. It was her evidence that upon interrogating the complainant she stated that the appellant T who was her uncle had called her when she was collecting firewood and asked her to pick some sugarcane. It was then that he locked the door to his house and told the complainant to go to his bed and remove her clothes which she did. She testified that from the P3 form it was evident to her that the girl had been defiled. She testified that the father of the complainant availed a birth certificate which showed the date of birth of the girl 27th July 2007 and that on the 23rd September 2019 the father of the complainant called the OCS to inform him that the accused was planning to run away. It was her testimony that they arrested the appellant and upon interrogation the appellant stated that the girl was his child and he could call her at any time.

28. In cross examination, PW5 stated that she had over 2 years' experience as an investigating officer. She further stated that from her observation, the girl was walking with her legs apart and appeared to be in pain. She further stated that Beryl the elder sister was not called as

witness as she was not at the scene but only informed of the incident and that is why she had not been called as witness. She stated further that she did not encounter any grandmother of the complainant in the course of the investigations.

29. Placed on his defence, the appellant opted to give a sworn statement and indicated that he had 2 witnesses to call.

30. In his sworn defence statement, the appellant narrated the circumstances surrounding his arrest. He stated that on 22nd September 2019 he woke up and went to church at around noon. It was his testimony that he later left home at 2.00 p.m. and went to the center where he was with a friend called Pule until 8.00 p.m. and went home and slept. That at midnight he heard a knock on the door and on opening he saw the policemen who arrested him and took him to the station. That the following day he was told that he had been arrested for sleeping with his brother's daughter Q-PW1 and he was very surprised. He further stated that on the said date that is 22nd September 2019 he did not see the child. He stated that the allegations were therefore a surprise to him.

31. In cross examination, he stated that on that day he stayed at the club from 2.00 p.m. to 8.00 p.m. and that he did not see Q. that day. He further stated that Q. may have been lying and that Bromic her brother was very cunning and had stolen from him before. He added that he had issues with his brother since he wanted to sell a parcel of land.

32. DW2 AA the appellant's mother gave evidence that on 22nd September 2019 she met B, O, B and Q and they informed her that T had done bad manners to Q. She stated that she checked the girl's genitals but could not find any indication that she had been defiled. That they then went home and called their father who later came and they left together. She further stated that there was a land dispute between T and his brother when T stopped him from selling his land. In cross examination, she stated that B and her siblings had told her that T had defiled Q and that, that was around 7.30 p.m. when she met them. She further reiterated that there was a land dispute between the father of the complainant and the appellant who stopped him from selling the land and stated that the land in question belongs to the father of the complainant.

33. DW3 Felix Odongo testified that on 22nd September 2019 he was at a bar called galaxy with his friend called TO, the appellant herein from 2.00 p.m. to 8.00 p.m. when they left together aboard a motorcycle, dropped the appellant at home before proceeding on his journey. In cross-examination he reiterated his claim and stated that he was a bit drunk on the aforementioned day.

Determination

34. I have considered the grounds of appeal, the evidence adduced before the trial court and submissions for and against the appeal herein. In my humble view, the issues for determination in this appeal are:

> ***a) Whether the prosecution proved its case beyond reasonable doubt vis a vis avis the appellant's alibi,***
>
> ***b) Whether the prosecution's case was marred by material contradictions and inconsistencies and whether the trial court failed to consider the contradictions and inconsistencies in the prosecution's case thus prejudicing the appellant and***

35. To secure a conviction on a charge of defilement, the prosecution must prove all the three elements of defilement as set out in section 2 of the Sexual Offences Act and as highlighted in **Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013**, which was cited with approval in **Kyalo Kioko v Republic [2016] eKLR** that:

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

36. Therefore, did the prosecution prove all the ingredients of the offence of defilement beyond reasonable doubt?

37. **On the ingredient of age of the complainant,** it is necessary to determine the age of the complainant to settle the issue of sexual offences case as the sentence to be meted out depends on the age of the complainant. The question that then arises is whether the age of the complainant was in the circumstances proved as required. Meoli J in the case of **Stephen Gitwa Kimani v Republic [2017] eKLR** stated as following regarding proof of age of a complainant in sexual offences:

> ***''Thus it matters not that no formal age assessment form was tendered, contrary to the Appellant's submissions. The court could well have relied on the oral and medical evidence on record in respect of the age of the complainant.***
>
> ***17. Consideration the question of proof of age in defilement cases, the court of Appeal sitting in Malindi stated in Mwalongo Chichoro Mwajembe v Republic, Msa. App.No. 24 of 2015 (UR)***
>
> ***'' ……..the question of proof of age finally been settled decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decision from the High Court that age can also be proved by observation and common sense. See Denis Kinywa - vs – Republic, Criminal Appeal No. 19 of 2014 and Omar Uche Vs Republic, Criminal Appeal No. 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond reasonable doubt. This form of proof is a direct influence by the decision of the Court of court Appeal of Uganda in Francis Omuroni is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable……''***

38. Ngugi J in **MEM v Republic [2018] eKLR** citing the Court of Appeal case of **Mwalongo Gichoro (*supra*)** stated as follows in respect of proof of age:

> ***''The appellant complains that no documentary evidence was produced to show that the complainant was less than eleven years old. That is true. However, age is a matter of fact which can be proved by oral testimony just like any other fact in issue. The court of Appeal has proved a conclusive answer to this question in Mwalongo Gichoro Chichoro Mwanjembe v Republic, [2015] EKLR:***

39. In the instant appeal, the complainant who testified as PW1 stated that she was 10 years old, she however could not recall her date of birth. The father of the complainant who testified as PW3 gave evidence that his child was born on 27th July 2007 and identified her birth certificate before court. The investigating officer who testified as PW5 stated that the father of the complaint availed the birth certificate of the minor which he did and the same indicated the date of birth as 27th July 2007. She produced a copy of the said birth certificate as Prosecution Exhibit No. 4. The evidence of the father of the complainant as far as the age of his daughter is concerned was corroborated by the said copy of birth certificate showing the date of birth as 27th July 2007 thus placing the complainant's age at 12 years and 2 months as at the time of the alleged incident. It is therefore my finding that the ingredient of age of the complainant was proved beyond reasonable doubt.

40. **On whether the ingredient of penetration of the complainant's genital-vagina was proved beyond reasonable doubt,** the penetration here is by way on male organ (penis into the sexual Organ of the female. Section 2 of the sexual Offences Act defines penetration to mean ***partial or complete insertion of the genital organs of a person into the genital organs of another person***. According to the interpretation of Section 2 the slightest and brief arousal Penetration is sufficient to complete the crime. The law does not envisage absolute penetration into the genital nor the release of spermatozoa or semen of the male organ for the act of penetration to be said to be complete.

41. In this case, PW1's unsworn testimony which was subjected to cross examination was that the appellant herein who she pointed out to the court and referred to as ***"baba yetu"*** called her to get some sugarcane. That when she entered the house of the appellant, the appellant locked the door and her friends left. The appellant then told her to go to the bed and remove her clothes and after she did so, he did to her what she referred to as ***"tabia mbaya."*** She further stated that she felt pain in her vagina as the appellant did the said "tabia mbaya" to her. She stated further that she was crying as the accused person did the said tabia mbaya to her.

42. It was submitted by the appellant that penetration was not proved as there was no medical evidence linking the appellant to the alleged offence and that the complainant did not describe what was allegedly done to her by the appellant.

43. From the evidence of PW1, this court agrees with the trial court that the complainant's testimony of using ephemism ***"tabia mbaya'*** clearly implied that she was defiled when she mentioned the words ***"Tabia Mbaya."***

44. It is common for minors appearing in our courts to use such words to indicate that they were sexually assaulted or to put it aptly defiled. This court therefore takes judicial notice that to minors in cases such as the present one the words ***"Tabia Mbaya"*** means nothing short of defilement especially where penetration is established.

45. This court is satisfied that from the narrative of the ordeal by the complainant that the appellant took her to his house, locked it and told her to sleep on his bed and remove her clothes then he did '***tabia mbaya'*** to her and that she felt pain afterwards, that this was a sufficient description of the ordeal and an act of defilement and the fact of penetration was established by PW4 who examined her and found her with a freshly broken hymen. The evidence of the said Clinical Officer describing the injuries found in the victim's genitalia did corroborate the evidence of the minor on penetration.

46. **In CRA 1035 of 2013 at Kitale Daniel Arasa v Republic [2014] eKLR** the court stated persuasively but quite correctly that:

> ***"It is common knowledge in this country and the court may thus take judicial notice that the words "Tabia Mbaya" i.e. bad manners coming from a young girl who has been a victim of sexual violence connotes nothing but sexual intercourse. Children in particular would always refer to sexual intercourse as "Tabia Mbaya" perhaps due to shyness or they may not know what description to give to such act.***
>
> ***Suffice to hold that "Tabia Mbaya" is euphemism for sexual intercourse in sexual offences. The evidence by the complainant (PW1) and the clinical officer (PW2) was sufficient, corroborative and credible enough to establish the offence of defilement.***
>
> ***The learned trial magistrate was therefore correct in his finding that penetration as defined by the Sexual Offences Act was proved."***

47. This court finds no reason to interfere with the trial court's finding that the appellant engaged in an act that caused penetration; and is satisfied that the prosecution proved this key ingredient to the desired threshold.

48. I reiterate that the evidence by the clinical officer (PW4) that the complainant on being examined was found to have a freshly broken hymen was further proof that she was defiled. In addition, although the "age" of the broken hymen was an irrelevant factor which could not be taken into account in disproving the act of defilement, the labia minora and majora and external part of the complainant's vagina was bruised and inflamed. The complainant was being examined within 24 hours of the time of defilement. It is however instructive to note that a penetration could be complete even without the breaking of the hymen.

49. On high vaginal swab there were pus cells and epithelial cells seen. From the history and physical examination, he ascertained that there were obvious features suggesting vaginal penetration. The probable weapon was a blunt object. PW4 produced the P3 form as exhibit 1, the lab request from as exhibit 2, the treatment notes as exhibit No. 3 and the Post Rape form as exhibit No. 4. In the case at hand the medical

evidence tendered showed that there were injuries on the complainant's genital organs.

50. On the need for corroboration of evidence in sexual offences, the proviso to Section 124 of the Evidence Act, the court can convict the accused on Evidence of the Sexual offence victim alone and it needs no corroboration, such as a medical document or any other if the conditions set out therein are complied with. This court notes that the trial court found that the minor was firm and consistent in giving her testimony and found no reason to believe that she was being untruthful. That was a finding of fact by the trial court which had the opportunity to see and hear the complainant testify and observed her demeanor. I have no reason to differ with that finding of fact.

51. However, I note the submissions by the appellant that the unsworn evidence of both PW1 and PW2 who were minors bore no evidential value. The appellant cited the Court of Appeal in the case of **Johnson Muiruri v R [1983] KLR 445** that had addressed itself to the matter of evidence of a child of tender years as follows:

> ***"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which (case) his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him." [Emphasis supplied]***

52. In the instant case, the trial court satisfied itself as to PW1's and PW2's intelligence and truthfulness and only proceeded to record their statements as unsworn on the grounds that they did not understand the solemnity of an oath. This in my opinion is not unique for minors. I therefore do not agree with the submission by the Appellant's counsel that unsworn testimony of minors which in the instant case was subjected to serious cross examination was of no evidential value simply because the witnesses were minors. I find that the testimony of PW2 corroborated that of PW1 and further the testimony of the Clinical Officer PW4 corroborated that of PW1.

53. In view of the foregoing analysis of evidence I am satisfied that the ingredient of penetration was proved to the required standard that is beyond reasonable doubt.

54. Finally, on the ingredient of identification of the perpetrator, both PW1 and PW2 testified that the appellant was known to them as they had been informed by their father PW3 to refer to him as "baba mkubwa." Recognition is more reliable than identification as was held in the case of **George Kamau Muhia v Republic [2014] eKLR**. In the instant case, the complainant was clear that the victim was playing near the appellant's house at about 6pm when he called her to go and get sugarcane when he directed her to his house and instructed her to lie on his bed and he asked her to remove her clothes –full dress and panty, she remained naked and took solid oil used for cows and held her shoulders and he defiled her as she felt pain and she pointed at her vagina saying she was feeling pain and cried as he defiled her—did ***'tabia mbaya'*** to her and that he told her to be quiet. Accordingly, iam satisfied beyond any shadow of doubt that the victim who knew the appellant very well as the brother to her father took time with the attacker and talking to him saying she was in pain and crying while he told her to keep quiet, positively identified her assailant.

55. The appellant further impugned the trial court's judgement on the grounds that there were contradictions in the testimonies of the prosecution witnesses. He cited examples such as the difference in the complainant's age as testified on by the complainant, PW4 and the complainant's father. I have already addressed myself on the alleged contradictions regarding the complainant's age. He further raised the issue of whether it was sugarcane or maize that the appellant allegedly called the complainant to take or whether the complainant was naked or had dressed up when PW2 found her in the bed of the appellant when discovered after the incident as emerges from the testimonies of PW1 and PW2.

56. The Court of Appeal of Kenya addressed itself on the issues of contradictions in the case of **Richard Munene v Republic [2018] eKLR** stated:

> ***"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."***

57. I have weighed and reviewed the nature of the inconstancies in issue. They are peripheral in nature and do not rapture into the heart of the prosecution's case. The alleged inconsistencies are not material and cannot be a basis of inferring that the Appellant was not connected with the offence when cumulatively taken with the rest of the evidence. They are easily resolved in favour of the prosecution. See also **GE Konori v Republic [2020] eKLR**

58. In **Richard Munene v Republic [2018] eKLR it was stated:**

> ***"It is a settled principle in law however, that it is not every trifling contradiction or inconsistency in the evidence of prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.***
>
> ***In this appeal the inconsistencies identified are in relation to the dates on P3 Form and treatment notes, the names of the complainant on the charge sheet and in the birth certificate, the date of the offence on the charge sheet and the treatment card; that the complainant+***

told different people different version of what had happened to her; that she had been injured by a stick; that she had a headache; and that she had been defiled.

To our mind these are matters of fact which both courts below satisfactorily reconciled by finding that they were insufficient to set aside the prosecution case against the appellant. There is no merit on this ground.

59. Accordingly, I find that there was no material contradiction during the trial of the appellant to prejudice the appellant. Consequently, this ground fails.

60. The appellant also raised the issue that the prosecution failed to call crucial witnesses during the trial. The appellant relied on the **Bukenya (supra)** case. from the testimony of PW1 and PW2, there were other children who were playing with the complainant when she was called by the appellant. In addition, the victim stated that when her and PW2 left the appellant's house she met her grandmother who, checked her and saw that she had been defiled. Apparently it is the same grandmother who testified for the defence, for her son and not for her grand daughter. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides:

"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

61. In **Donald Majiwa Achilwa and 2 other v R (2009) eKLR** the Court stated:

"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

62. In **Keter v Republic [2007] 1 EA 135** the court held inter alia:

"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

63. In the instant case. the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case. The trial court was in my opinion not at liberty to determine which witnesses are sufficient to prove the prosecution case. nonetheless, iam satisfied that the evidence by the witnesses who testified proved the prosecution's case beyond reasonable doubt against the appellant and as the other witnesses were not eye witnesses whose evidence if left out would be inferred that the evidence if adduced would have been adverse to the prosecution's case, I find that this ground of appeal is devoid of any merit and is dismissed.

64. As to whether the trial court erred by failing to consider the appellant's defence and alibi I note that in his sworn defence statement, the appellant linked his woes to alleged land dispute between himself and the father of the complainant who was his brother. The appellant maintained that the father of the complainant took issue with him since he did not permit him to sell the land. According to the defence evidence tendered by DW2 the said land dispute involved a parcel of land belonging to the father of the complainant.

65. First and foremost the trial court record is clear that the trial magistrate took in into account the defence of the appellant in her judgment before making her final determination hence it is not true that she did not consider the defence. See the 3 rd and 4th paragraphs of the last page of the judgment.

66. In my view the defence was being untruthful having admitted that the land in question belonged to the complainant's father I would see no reason why the accused would stop him from disposing off the said land since he had no proprietary interest in the same.

67. The appellant further gave an alibi that on the material date he was at galaxy bar with DW3. I have considered that alibi defence vis avis the evidence adduced as a whole by the prosecution witnesses and the appellant and his witnesses. In the case of **Kiarie v R {1984} KLR** The Court of Appeal laid down the following principle:

"An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons."

68. It is settled Law that the prosecution bore the burden of proving the charge against the appellant at the trial court. However, in relying on an alibi defence, nevertheless the entirety of the prosecution direct or circumstantial evidence must be appraised to establish whether the appellant was elsewhere and not at the scene of the crime. The conduct of the appellant and the decision to raise an alibi defence at another stage of the proceedings should not escape scrutiny of the court.

69. In support of this right proposition, the court in **R vs Sukha Singh S/o Wazer Singh & Others {1939} 6 EACA 145** held as follows:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because,

firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped."

70. That is precisely what happened in this case. The plea of alibi certainly was never even part of the cross-examination issues raised at the trial by the appellant. Though in Law, time of the disclosure, might not be in issue, under Article 50 of the Constitution on the right to a fair hearing the prosecution required adequate notice to investigate the allegation of the alibi defence.

71. The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it. See **Charles Kasena Chogo v Republic [2019] eKLR**

72. Having considered the totality of the evidence of the prosecution witnesses' vis a via the defence, I find the evidence of the Prosecution witnesses was firm, consistent and reliable and proved the offence of defilement to the requisite standard that is beyond reasonable doubt. The alibi defence could by no means dislodge the evidence of the prosecution witnesses which in my view remained watertight against the appellant. I further find that the trial court did not shift any burden of proof from the prosecution to the appellant as alleged.

73. On the whole, I am satisfied on the evidence adduced that conviction of the appellant for defilement was sound and that this appeal is devoid of merit.

74. On sentence, the appellant was sentenced to serve 30 years imprisonment upon conviction. The sentence was lawful considering the minimum set in section 8(3) of the Sexual Offences Act. However, In the case of **Jared Injiri Koita v R[2019]e KLR** and in **Christopher Ochieng v Republic [2018] eKLR** where the Court of Appeal agreed with the Supreme Court in **Francis Karioko Muruatetu & Another vs Republic SC Pet. No. 16 of 2015** it was stated as follows:

"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

75. From the record, the appellant herein was a first offender. In mitigation, he said he had a family who relied on him. Guided by the above authorities from the Supreme Court and the Court of Appeal, I am inclined to interfere with the sentence imposed on the appellant. I set aside the sentence imposed and substitute it with a prison term of fifteen years imprisonment to be calculated from the date of arrest.

76. Final orders:

a) The appeal against conviction is dismissed. The conviction is affirmed.

b) Appeal against sentence is allowed. Sentence imposed by the trial court is set aside and substituted with imprisonment for a period of 15 years from the date of arrest.

c) File closed

Orders accordingly.

Dated, Signed and delivered at Siaya this 16th Day of December, 2020

R.E. ABURILI

JUDGE