



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 46 OF 2017

(CORAM: R. E. ABURILI - J.)

MARTIN RICHARD ODUORAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against Conviction and Sentence on judgment delivered in 25/4/2017 in Criminal Case No. 712 of 2016 at Ukwala Law Courts before Hon. G. Adhiambo, SRM)

JUDGMENT

1. This Appellant herein **Martin Richard Oduor** was convicted and sentenced to serve life imprisonment on 25th April 2017 by Hon. G. Adhiambo, SRM, Ukwala vide Ukwala SRM Cr. Case No. 712 of 2016.

2. In the said court, the Appellant was tried for the offence of defilement of a child aged 11 years and the Appellant also faced the alternative charge of committing an indecent act with a child. The child in question whose name shall be withheld for legal reasons is known as **J.A.O.** The appellant was convicted on the main charge.

3. Dissatisfied with the said judgment, conviction and sentence, the Appellant filed this appeal on 4th May 2017, setting out 4 grounds of appeal namely:

(1) That the evidence adduced before the trial court was inconsistent and could not sustain a sound conviction;

(2) That the medical evidence relied upon did not ascertain conclusively the evidence of defilement hence there was lack of sound corroboration;

(3) That I cannot recall what transverse during the trial hence pray for trial proceedings to adduce more evidence;

(4) That I pray for Order of Habeas corpus.

4. The Appellant urged this court to allow his appeal in its entirety. At the hearing of this appeal, the Appellant filed a “supporting affidavit” which was nonetheless unsworn and therefore this court shall consider it as a statement of facts that the Appellant who was unrepresented relied on as his written submissions in support of his appeal, albeit the same was also unsigned which means there are no valid written submissions filed by the Appellant before this court and therefore I shall rely on the grounds of appeal as filed and the oral submissions made in court on 22/10/2018. This is because it is now settled law that an unsigned pleading or document has no validity in law as it is the signature of the party filing the pleading or document that signifies or authenticates the same and ownership of the document; and without a signature, a document or statement which is on record is not owned by anyone. It is amenable for striking out.

5. In his oral submissions in support of his appeal, the Appellant submitted that the evidence given and the medical report were different. That the charge sheet stated that the child was aged 13 years but he was convicted and jailed for defiling an 11 year old child; That PW1 stated that she did not know who defiled her but that PW3 stated that the child as defiled in her home; That according to the evidence, the child was defiled on the road and that although PW2 stated that she knew the defiler, no description was given of the said defiler. That at page 59 of the judgment, the trial court did not weigh the evidence properly.

6. In opposing the appeal, Mr. Okachi Senior Principal Prosecution Counsel submitted that the Prosecution proved the guilt of the Appellant beyond reasonable doubt; that the issue of age of the Complainant was settled and that the Appellant was convicted on the main charge which was clear that the Complainant was aged 11 years and that this fact was proved.

7. It was further submitted that the Appellant herein was caught red handed by the child's father in the process of defiling the Complainant hence his identity was proved.
8. It was also submitted that the expert witness showed that the child was defiled.
9. Counsel urged this court to uphold the conviction and sentence meted out by the trial court as the offence is very serious in that it traumatizes the society at large besides the victim and her family.
10. In a rejoinder, the Appellant submitted that the medical report did not connect him to the offence.
11. This being a first appeal, this court is required to re-evaluate the evidence and come to its own independent conclusion as to whether to uphold the conviction bearing in mind that it neither saw nor heard the witnesses testify (See Okeno v Republic [1972] EA 32).
12. Therefore in order for this court to proceed with the task of determining this appeal I must first set out the evidence as presented before the trial court.
13. The Prosecution called 4 witnesses to advance its case. PW1 who was the Complainant testified on oath after *voire dire* examination that she was a student at M. (full name of school withheld) Primary School in Class 5. That on 5/12/2016 at about 5.00 pm she went to the stream, fetched water and on her way back home, near her grandmother's farm, someone emerged from behind her, held her and placed her down and lay on top of her and when she tried to scream, he held her throat, used his right hand to remove his penis which she called 'dudu' or something he uses for urinating and pulled off her pant, tore it and inserted that thing 'dudu' in her vagina which she called 'my 'thing' that I use to urinate.' The person then continued with the act of defiling her and when he saw her father he escaped. That her father was heading to the stream when he found the person defiling her and he asked the person who was defiling her "why are you running back?" but he continued running away.
14. PW1 stated that the person who defiled her, "did bad manners to me," was well known to her as she used to see him in a house close to her home but as she was new in the area she could not tell the name of the owner of the compound. She further stated that her father found her lying on the ground and the person was defiling her "going on with the act of putting his 'dudu' in my thing for urinating." That her father took her to hospital at Rangala Mission Hospital.
15. According to PW1, on the same day, the said person who had defiled her went to her home carrying a panga and accompanied by his wife saying that PW1's father had lied against him. That the said person went to her home before her father took her to hospital. That at the hospital, she was examined and the doctor confirmed that she had been defiled.
16. That the following morning they went and reported the matter to Ugunja Police Station with her father. They took with them the clothes that she wore on the material day and time when she was defiled. They recorded statements and the police gave them a letter to Ambira sub-county hospital where the complainant was treated. She stated that she told the police all that the person did to her. She identified her clothes; a petticoat-black, camisole and a badly torn black and white pant which were all marked and later produced in evidence as exhibits.
17. PW1 identified the Appellant in court as the man who tore her panty. She also identified her white T-shirt with blue prints and skirt with luminous green white and light blue panty. She further identified her treatment notes from Rangala Mission Hospital and Ambira sub-county hospital as well as a P3 form. She further identified the Appellant as the person who inserted his 'dudu' in her 'thing for urinating'. She stated that she physically knew him since November 2016 when she went to her grandmother's home in Rangala. She denied that her grandparents were relating with him and stated that the incident took place at 5.00 pm which was still during daylight.
18. In cross examination by the accused person, PW1 stated that she had 2 jerricans, a ten-litre on her head and a 5-litre in her hand. Further, that she carried the small jerrican all by herself. She denied the suggestion by the Appellant that he carried for her the small jerrican. She denied carrying any slasher.
19. **PW2, Charles Odhiambo** testified that he was a security guard at Rangala Boys Primary School. That on 5/12/2016 at around 5.00 pm which was a Monday he was from a church *Harambee* and on reaching home, he found his mother alone. He asked her where PW1 had gone and he took a 10-litre jerrican and proceeded to the stream to fetch water. On his way to the stream and from a distance of 10 metres ahead of him, he could see two people lying on the ground. He stopped and that at that time the said 2 people lying on the ground could not see him. He then moved closer to them and saw the man lying on top of PW1, PW2's daughter, J.A. He stated that he saw the man fucking PW1 on the ground. He then stood at 4 metres away from them and watched what was going on. When the Appellant (identified in court) saw PW2, he ran away with something like a slasher (witness was then recorded as having broken down and cried in court). That PW2 called the Appellant to return but he refused and kept running. PW2 then took PW1's jerrican, held her hand and lifted her from the ground where she was and told her to accompany PW2 home. PW2 saw the clothes of PW1 were dirty with mud, dusty and bloody. PW1 then asked her father to wait for her to remove her pant because it was completely torn and so it was not holding her waist. That PW1 told PW2 that the man tore her pants before defiling her.
20. On reaching home, PW2 took PW1 to Rangala Mission Hospital. That the Doctor examined her and confirmed that she was defiled and that she had scratches on her genitalia. She was given medication including ARVs to prevent HIV infection and pregnancy and they were referred to Ambira Sub-county Hospital the following day where she was re-examined and confirmed that she was indeed defiled and that she had bruises in her genitalia. The doctor then gave them a referral letter to take to Ugenya Police Station where they recorded statements and later they availed to the police the clothes that PW1 had been wearing on the day and time that she was defiled. PW2 identified the said clothings and P3 form and treatment notes.
21. PW2 also stated that PW1 was a school girl aged 13 years. He also identified her birth certificate S/No. 2127624 issued on 14.4.2014 indicating her date of birth as 2.9.2005. He also identified the Appellant as the person he found defiling his daughter and stated that he knew

him since the beginning of 2016 although they were not relatives but that some of the appellant's relatives were distant relatives of PW2.

22. PW2 further restated that he saw the two people from 10 metres away because he was on a hilly place and the Appellant and the Complainant were on a road that is bushy on both sides so he could see them clearly. That he then moved closer to a distance of 4 metres and stood, seeing them clearly as there was nothing that could have prevented him from seeing them. According to PW2, later the same day the Appellant went to the home of PW2 armed with a panga, accompanied by his wife and claimed that PW2 had spoilt his name by alleging that the Appellant had slept with PW2's daughter, which the Appellant claimed was a lie; but that PW1 answered back and told him that the Appellant had slept with her. That the Appellant then threatened PW1 that he could slap her with a panga. PW2 stated that the Appellant was his neighbour albeit they were not next door neighbours.

23. **PW3, No. 105274 PC Faith Ngetich** attached to Ugunja Police Station performing general duties testified on oath and recalled that on the morning of 6/12/2016, she was at her house when she was called by her OCS Chief Inspector Mutungi and told to go to the station to deal with a defilement case. That she proceeded to the station where she found the Complainant herein and her father and recorded their statements and issued her with a P3 form which was later filled at Ambira Sub-county Hospital. She learnt that the Complainant had already been treated at Rangala Mission Hospital.

24. PW3 also produced the exhibits which had been identified by PW1 and PW2 except the medical notes and P3 form which she only identified. She also testified that the Complainant and her father took the police to the house of the person who defiled the Complainant and they managed to arrest him, after three weeks as he had allegedly gone underground after the incident. The police officer charged the Appellant with the offence after confirming the age of the Complainant from the Birth Certificate produced as PExhibit 3. The witness also identified the Appellant in court as the person she arrested and charged in connection with the defilement of the Complainant, whom she did not know before.

25. In cross examination by the Appellant, PW3 stated that she did not go to the scene of defilement and that she was told that the Complainant had left for the stream at about 5.00 pm and that both the Complainant and her father saw the Appellant defile the Complainant on the way from the stream. She also stated that she carried out investigations.

26. **PW4, Victor Odhiambo Achaya**, a Clinical Officer working at Ambira Sub-county Hospital testified and produced a treatment card for the Complainant issued at the Rangala Mission Hospital on 5/12/2016 with a history of being raped by a person well known to her. He testified that the Complainant on specular examination was found with cervical opening, the hymen was not intact, there was fresh blood discharge noted, her abdomen was tender with no swelling of any organ; and a diagnosis of rape was made. That the Complainant was later referred to Ambira Sub-county Hospital for Hg vaginal swab which was not done due to an ongoing strike by doctors. At Rangala, a HIV test was done and found to be negative. The Complainant was given **Postinor 2** to prevent pregnancy and **PEP** to prevent HIV infection. On 7/12/2016, the Clinical Officer received a call from OCS Ugunja Police Station to facilitate them in filling the P3 form for the complainant because of the strike at that time. The witness filled the P3 form on 7/12/2016 and produced it in court as an exhibit.

27. PW4 stated that the Complainant's clothes were found to be stained with dry dirt, a torn pant and that the history was that she was taken to hospital by her father following defilement by a person known to her at their house on 5/12/2016. All other systems examined were fine save for the defilement and that she was given medication for HIV prevention and pregnancy prevention including **Erythromycin** to prevent STI.

28. On the extent of the defilement, the genitalia had freshly broken hymen, vaginal wall lacerated and *labia majora* and *minora* were inflamed. Epithelial cells and blood were noted on the urinalysis test. HIV and pregnancy tests were negative and there was evidence of recent vaginal penetration evidenced by freshly broken hymen and the lacerated vaginal wall with inflamed *labias*. The witness signed the P3 form on 7/12/2016 and produced it as exhibit together with treatment notes issued to the Complainant from Rangala and Ambira Sub-county Hospitals.

29. In cross examination by the Appellant, PW4 stated that he also relied on the records from Rangala. That they gave actual reports and are not actuated by malice. That the blood group of the victim was not captured as it was not necessary in the case. That he was seeing the Appellant for the first time and that the victim knew the assailant whereas the Investigating Officer did investigations. He maintained that he was only giving the medical report of the victim and that the P3 form was filled at the Ambira Sub-county Hospital.

30. In re-examination, the witness reiterated that the P3 form contains the information about the Complainant and that the witness did not even know the Appellant.

31. At the close of the Prosecution case, the trial court found the Appellant with a case to answer and placed him on his defence. The Appellant gave sworn testimony as DW1 and stated that he was Martin Richard Oduor resident of Rangala and that he understood the charges facing him after the charge sheet was read and explained to him in *Kiswahili*. He stated that on 5/12/2016 he was from work and did his house chores. At about 5.00 pm he left his home for the farm to check where the people he had hired were slashing. He left the farm at about 5.20 pm and passed the lower part and passed a ditch with water where people did their laundry. He was carrying a panga and a slasher and when he reached the stream, he met the daughter of his neighbour. The Appellant called PW1 by her first name (J). He then walked with her and that she was carrying a 10-litre jerrican on her head and a 5-litre jerrican in her hand. He therefore gave her his slasher to carry as he helped her carry the 5-litre jerrican and that when they reached near the road leading to her home, he received a phone call from his fellow mason and that as he was still talking on phone and they had reached the junction leading to the Complainant's home, in two minutes, her father arrived and found the Complainant holding his slasher while the Appellant was still talking on phone. That when he tried to give PW1's father a handshake greeting, the latter refused. That the Appellant then disconnected the phone and that the Complainant's father asked her why she had taken too much time at the stream. That the Appellant explained to the complainant's father how he had met her until that moment but that the Complainant's father took the slasher from the Complainant and as he was about to leave with it, the Appellant told him that it was his and so the Complainant's father left and the Complainant walked ahead of her father who carried the two water jerricans for her.

32. The appellant further testified that when he reached his home, he sat outside and after about 20 minutes, the grandmother of the Complainant went to his home in the company of the Complainant and found him with his elder brother and she called out **Owino aka Oria**. That his elder brother Martin asked the said grandmother of the Complainant whether there was any problem and that she stated what the complainant's father had told her. That the grandmother stated that the complainant had left home at noon and that she wondered where the girl had been until 5.00pm. That the Appellant's elder brother suggested that the Appellant and the complainant be taken to hospital to determine whether anything had happened but that the grandmother said there was no need of going to hospital as she only wanted to know whether anything had happened.

33. That at that time, that the Appellant was still holding his panga and his wife came and inquired on what had happened and she asked him to accompany her to the Complainant's parents which they did.

34. That the grandmother doubted if the Complainant had been defiled since she still had on her a pad as she was in her menses and that in any case the Appellant's trousers had no mud.

35. That the Appellant and his wife left at about 7.00 pm, and he called by phone his other brother and told him what had happened and the brother came and escorted the Appellant to the Complainant's home at around 8.00 pm and they found the complainant's grandmother who told them to wake up the Complainant's father who had issues with them and not her.

36. That the appellant's brother saw the Complainant's father escape through the fence to avoid talking to his brother and so they went away until the following morning when they returned to the Complainant's home and were told that she had been taken to Rangala Hospital. That they went to Rangala Hospital where they met Tobias, a lab technologist who denied seeing the Complainant as a patient in their facility so he went back home and continued with his work until 27/12/2016 at 1.00 pm when police officers went to his home and arrested him and took him to Ugunja Police Station, where he stayed until 29/12/2016 when he was arraigned in court. He denied the charges and stated that they were untruthful and that he was shocked to see torn clothes in court. He denied tearing anything.

37. In cross examination by the Prosecutor, the Appellant stated that the Complainant and her grandmother went to his home past 5.30 pm and that Oria was his step brother. Further, that the Complainant stated that it was the appellant who had defiled her and not Oria. That he was born out of wedlock and only came to his father's home after he married and had 3 children. That his father had died but was a distant relative of the Complainant's relatives. That the Complainant's home was the third from his home. He stated that later he learnt that there had been family disputes between his grandfather and the Complainant's grandfather. That the Complainant's grandmother wanted to know how the pads never left her inner pant yet she alleged that she was defiled.

38. **DW2, Martin Oduor Onyango** testified for the Appellant and stated that he was a resident of Rangala and knew the charges facing the Appellant. He recalled that on 5.12.2016 he was at home and so was the Appellant until 5.00pm when the Appellant told him that he was going to the farm to check on it. That the Appellant returned at 5.20pm and at about 6.00pm, the witness saw the grandmother of the Complainant enter their compound accompanied by the Complainant and that the said grandmother told him that someone had cut her green maize and when she was questioned by DW2 as to whether there could be green maize in the farms during that period, she said, **"wait you will see."**

39. That the grandmother called out the name of Owino, DW2's younger brother and when she saw the Appellant seated on a chair outside his home, she told the appellant that he was the one that she was looking for and questioned him on what he had done to the child. That the Appellant inquired to know what the grandmother to the Complainant was saying that he had done to the child and she responded that how could the Appellant take such a young child and sleep with her. That DW2 stood and moved to where the complainant and her grandmother were and inquired what the matter was and that when she told PW1 to say what had been done to her, PW1 kept quiet and looked down and refused to talk.

40. That when DW2's daughter asked whether the Complainant had bathed, her grandmother denied and said that she was in her menses and that the grandmother said that she had given PW1 Sh. 50/= to buy pads. That when DW2 suggested that they go to hospital to establish what had happened to the Complainant, the latter's grandmother told the Complainant that they leave.

41. That the Appellant called DW2's younger brother and informed him of what had happened. That later, DW1 told DW2 that DW1 had gone to the Complainant's home and that the latter's father had disappeared and that when he returned there the following morning he found when PW1 had already been taken to hospital at night. That they met a lab technician who denied seeing such a patient. That matters went quiet until 27/12/2016 when police went to arrest the Appellant at about 10.30 pm and were in the company of the Complainant. He followed them to Ugunja Police Station and the following day the Appellant was arraigned before court.

42. **DW3**, a boy aged 17 years was taken through *voire dire* examination and found to be intelligent enough to understand the importance of swearing and telling the truth. He therefore gave sworn testimony and stated that he was **Benedict Ochieng**, a student at Sihai Secondary School. That he knew the charges facing the Appellant. That on a date he could not remember at 5.00 pm heading to 6.00 pm he left his home and went to the stream to bathe and on his way, at a corner, he realized that he had forgotten the face towel, so he started going back to collect it. That on the road leading to the stream, he saw the Appellant coming while carrying a slasher but he never bothered to greet him. He proceeded home, took his face towel and went to the stream to bath. That it is when he met the said Appellant having reached the route leading to DW3's home and that the Appellant was standing there with a lady who was carrying a slasher and pretending as if she was slashing and the Appellant was making a phone call.

43. That as he approached the two, DW3 saw the Complainant's father also come and on arrival, he picked jerricans and started hurling insults at the Appellant. That DW3 greeted the Appellant and proceeded to the stream to bath and that when he returned home, he heard of the issue of rape.

44. On being cross examined, DW3 stated that his home was a 5 minute walk to the stream and that the first time that he saw the Appellant, the latter was close. That the appellant was alone that time with a slasher, wearing an orange top and jeans trousers. That before he realized

that he had forgotten his face towel at home, he had seen the girl standing by the roadside with 2 jerricans. That when one is at his home they cannot see where Martin was because the area is bushy. That he could not tell what happened when he went to collect the sponge.

45. In her judgment delivered on 25/4/2017, the trial magistrate reiterated the testimonies of the prosecution witnesses and the defence and found that the testimony of PW1 was corroborated by that of PW2 her father who found the Appellant in the act of defiling his daughter on the road and that when the Appellant saw him, he ran away while carrying a slasher. That the circumstances under which the Appellant was identified were favourable as it was at 5.00 pm in daylight and that PW2 had seen the act taking place from a distance of 10 metres but moved closer about 4 metres and saw clearly what was happening hence PW1 and PW2 were close to the suspect as to identify him since he was a person who was well known to them before the incident and that nothing impeded the two witnesses from identifying the suspect. The trial court found that PW1 and PW2's identification of the Appellant was reliable.

46. Further, that PW4 testified that he examined PW1 and confirmed that she had been defiled. That PW1 was also treated at Rangala Mission Hospital and Ambira Sub-county Hospital where it was confirmed that she had been defiled.

47. According to the trial court, the Prosecution witnesses were consistent and credible,

48. On the defence, the trial magistrate considered it and found it to be a mere denial which did not shake the testimony of the prosecution witnesses in any way. Further, that the defence witnesses did not see the offence being committed and that there was no evidence of framing him up or that the Complainant was in her menses as PW4 did not confirm that and that even if that were to be the case, menses cannot cause hymen to break or *labias* to be lacerated or inflammation of the vaginal walls.

49. Albeit, the trial court found that the charge sheet was defective, it held that the defect was not fatal to the prosecution's case as the Appellant was able to understand the charge facing him and that there was no prejudice occasioned to the Appellant due to the defects on the charge sheet. She convicted the Appellant and after hearing out his mitigation, she sentenced him to serve life imprisonment in accordance with **Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006** as the Complainant was aged 11 years old and below.

50. It is the above judgment, conviction and sentence that prompted this appeal.

DETERMINATION:

51. I have carefully re-assessed and considered the evidence adduced by both the prosecution and the defence before the trial court, the findings and the holding by the trial court and the grounds of appeal together with the submission for and against this appeal.

52. In my humble view, the issues that flow for determination are: -

(1) Whether the charge sheet was fatally defective to sustain a conviction of the Appellant.

53. The charges facing the Appellant were the main charge drafted as follow: Defilement contrary to **Section 8(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence attendant thereto are that **Martin Richard Oduor**, on the 5th day of December 2016 at around 17.30 hours at Rangala sub-location, Ugunja sub-county within Siaya County intentionally caused his penis to penetrate the vagina of (name withheld) initialized (JA) a child aged 11 years.

54. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with a child contrary to **Section (1) of the Sexual Offences Act No. 3 of 2006**. Particulars were that Martin Richard Oduor on the 5th day of December, 2016 at Rangala sub-location in Ugunja sub-county within Siaya County intentionally touched the vagina of J.A.O aged 13 years with his penis.

55. The trial court in her judgment found that the charge sheet was defective because the maker of the charge sheet in the main charge did not quote the section of the **Sexual Offences Act** that creates the offence of defilement. That he ought to have indicated that the accused is charged with the offence of defilement contrary to **Section 8(1) as read together with Section 8(2) of the Sexual Offences Act No. 3 of 2006**.

56. Further, the trial court observed that in the alternative charge, the author of the charge sheet quoted a non-existent section of the **Sexual Offences Act No. 6 of 2006**. He indicated, "*Committing an indecent act with a child contrary to Section (1) of the Sexual Offences Act No. 3 of 2006 instead of Section 11(1) of the Sexual Offences Act No. 3 of 2006.*"

57. Further, it was observed that the age of the Complainant in the Main charge is different from the age of the Complainant indicated in the alternative charge in that in the main charge the Complainant is stated to be aged 11 years whereas in the alternative charge she is stated to be aged 13 years.

58. In other words, the trial court found that the charges facing the Appellant were defective in three main ways:

(i) In the main charge, the subsection that provides for punishment for the sexual offender was omitted only the Section creating the offence (Sec 8(1) of Sexual Offences Act) was cited.

(ii) In the alternative charge, the Section (1) quoted is non-existent. The charge sheet ought to have read Section 11(1) not (1) of the Sexual Offences Act.

(iii) The age of the Complainant in the main charge was indicated as 11 years whereas in the alternative charge, her age is

59. To both charges, the Appellant pleaded not guilty. The prosecution never sought to amend the charges and neither did the trial court nor the Appellant point out to the Prosecution the defects in the charges prior to or during the hearing.

60. In her finding of the guilt of the Appellant (pg 79) of the record, the trial court found the Appellant guilty of the main charge of defilement and observed that her finding and holding was not withstanding the defects noted in the charge which was not fatally defective as the Appellant was able to understand the charge facing him and that there was no prejudice occasioned to the Appellant due to the defect in the charge sheet.

61. On the question of the age of the Complainant, the trial magistrate was persuaded that the Complainant was aged 11 years and 3 months as per the birth certificate produced as an exhibit showing that she was born 2.9.2005.

62. According to the Appellant, he was convicted on a fatally defective charge sheet and albeit I have found that his submissions in the form of affidavit was not signed, having re-evaluated the evidence and charges facing him, I am inclined to decide on this issue which is a serious issue of law and which issue was also raised by the trial court and a determination reached on the same.

63. As stated above, the main charge only cited the subsection creating the offence of defilement of a child aged 11 years and not the subsection that provides for punishment to be meted out on conviction.

64. That being the case, the question that must first be answered in this issue is whether failure to state the provision for punishment in the charge is a fatal error which goes to the root of the charge and which error could not lead to the conviction of the Appellant.

65. **Section 214 of the Criminal Procedure Code** stipulates that where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case.

66. In other words, if it appears to the court that the charge should be amended, the court can move itself and require the prosecution to amend the charge. Alternatively, the prosecution can make an application to the court to amend the charge, in which case, a new charge is brought with red underlinings to show that it has been amended.

67. On the other hand, where the court proceeds with a defective charge, like was the case herein before the trial court, the question is what effect that defective charge has on the conviction of the Appellant.

68. As earlier stated, the Appellant was convicted of the main charge not the alternative charge which latter had the age of the Complainant indicated as 13 years hence I shall not concern myself with the defects in the alternative charges since no court of law can convict on both the main and alternative charge. As far as the main charge is concerned, the trial magistrate considered the defect and observed that the said defect was not fatal to the case as the Appellant understood the charge facing him and that more so, no prejudice had been occasioned to him by the defective charge.

69. The Court of Appeal while addressing itself to the question of a defective charge stated as follows in the case of **Obedi Kilonzo Kevero vs Republic [2015]eKLR (CA at Nairobi) per Koome, G.B.M. Kariuki & Sichale JJA**.

“The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an Appellant’s conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the Appellant. In the case of J.M.A v R[2009] KLR 671, it was held inter alia that:

“It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the Appellant is not discernible.”

70. Applying the principles above to this case, I am satisfied that in the instant case, the drafters of the main charge inadvertently left out the subsection to **Section 8 of Sexual Offences Act** that provides for punishment for a convicted offender charged under **subsection (1) of Section 8 of Sexual Offences Act** and that this was an omission and discrepancy which did not prejudice the Appellant and that no miscarriage of justice was as a result of the said defect. The said defect, in my humble view, was and is curable under **Section 382 of the Criminal Procedure Code** which provides that:

“Subject to the provisions hereinabove contained, no finding, sentence or order passed by a court of competent jurisdiction shall be revised or altered on appeal or revision on account of an error, omission or irregularity in the complaint, proclamation order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

71. The above statutory curative position is also replicated in **Section 214(2) of the Criminal Procedure Code** which I have reproduced above. Accordingly, I am of the view that the failure to state the subsection for punishment in the charge sheet was not prejudicial to the Appellant as he understood the charge facing him and participated in the trial without raising it at the earlier stage in the proceedings, having pleaded not guilty to the charge and a full trial having taken place.

2. The second issue for my determination in the appeal is whether the age of the Complainant was conclusively determined.

72. The charge sheet states that the Complainant J.A. was aged 11 years. The P3 dated 6/12/2016 has an overwriting on the first page with 11 and beneath it is 13 years. *Section C* of the P3 Form shows that the estimated age of the person examined was 13 years. The treatment notes from Rangala Mission Hospital dated 5/12/2016 states that the age of the patient J.A. was 11 years.

73. PW1 in her testimony on oath stated that she was in Class 5 and aged 13 years old. PW2 the father to the Complainant stated in his evidence that PW1 was a school girl aged 13 years old. He is the same witness who identified a birth certificate of JA being Serial No. 2127624 issued on 14.4.2014 showing that PW1 was born on 02.09.2005. PW3 testified that the Complainant was aged about 12 years when she was defiled and she produced a birth certificate SNo. 2127624 issued on 14.4.2014 indicating the Complainant's date of birth as 02.09.2005. PW4, a clinical officer who examined PW1 and filled the P3 form on 7/12/2016 stated on oath that the Complainant was aged 11 years.

74. The Appellant in his cross examination of the witnesses who testified on the age of the Complainant did not question them on the discrepancies apparent on the age of the Complainant and has only raised the issue before this court on appeal.

75. In the view of this court, a birth certificate is a public document. In this case, the birth certificate produced in evidence was issued in 2014 and not during the trial. That being the case, and in the absence of any evidence to the contrary, the trial court and therefore this court had and or has not been given any reasons why it should doubt the authenticity and or credibility of the birth certificate which shows that the Complainant was born on 2.9.2005 and therefore as at 5th December 2016 when she was allegedly defiled, she was 11 years and 3 months old.

76. In so finding, this court is alive to the fact that the younger the age of the Complainant in sexual violation, the harsher the sentence provided for in law but in the instant case I am persuaded beyond doubt that the discrepancies in the evidence by PW2 and documents such as P3 and the treatment notes on the age of the Complainant were resolved by the production of a birth certificate S/No. 2127624 dated 4.4.2014 that showed that J.A the Complainant herein was born on 02.09.2005 at Rangala in Siaya District to her father C.W.O and mother R.A.O.

77. Accordingly, I find and hold that the age of the Complainant was conclusively determined by the said birth certificate to be 11 years and 3 months.

78. The third issue for the this court's determination is whether the Appellant's conviction for the offence of defilement of a child aged 11 years was based on sound and consistent evidence proving his guilt beyond reasonable doubt.

79. In his petition of appeal, the Appellant alleges that the evidence adduced before the trial court was inconsistent and could not sustain a sound conviction. Secondly, that the medical evidence relied upon did not ascertain conclusively the evidence of defilement hence there was lack of sound corroboration.

80. There are several questions or sub-issues for determination under this third issue. These are:

(a) The first question is whether there was inconsistent evidence adduced by the prosecution.

In his written 'affidavit' and oral submissions, the Appellant claims that the evidence given and the medical report are different because the charge sheet says the child was 13 years but the Appellant was jailed for defiling an 11 year old child.

81. On this aspect, I have already found and held that the defect in the charge sheet in the main count and the alternative count were resolved by application of **Section 214 and 382 of the Criminal Procedure Code** and as such discrepancies did not go to the substance of the charge and that the same were curable by **Section 382 of the Criminal Procedure Code** since they did not occasion any prejudice to the Appellant who in any event should have raised them at the trial. Nonetheless, the trial magistrate correctly appreciated the defects and found them not fatal to the conviction of the Appellant and as such, I have no reason to interfere with the findings of the trial court.

82. The other discrepancy which I have found was not fatal relates to the age of the Complainant which I have found and held was conclusively determined.

83. The third discrepancy submitted by the Appellant is that PW1 stated that she did not know who defiled her but that the P3 stated that she was defiled at her home.

84. I have reassessed the evidence of PW1 in her testimony on oath wherein she clearly stated that she was defiled on the road on her way back from fetching water from the stream and that the person who defiled her, came from behind her. That he held her and forced her to the ground, and lay on top of her, she tried to scream but he held her throat and using his right hand he removed his penis and inserted it in her vagina and defiled her and when he saw her father he escaped. She stated that the person who defiled her was well known to her as she used to see him in a house close to their home but since she was new in that area, she could not tell the name of the owner of the compound. She stated that it was at about 5.00 pm and that her father found when the person was in the act of defiling her. This is the same person PW1 states followed them later to her home that evening and said that her father had lied against him. She stated that he tore her pant when he pulled it off. She knew him from November 2016.

85. The above detailed evidence by PW1 was never challenged as the Appellant never asked her any question that tended to discredit her testimony on whether or not she knew her defiler. The P3 produced as an exhibit shows that on 6/12/2016 the Complainant reported to police that she had been defiled by someone know to her. She was taken to hospital by her father for examination following defilement by a

person known to her at their house. The underlined words were written by the clinical officer Victor Achayo who examined her on 7/12/2016 and he replicated them in his testimony in court. This was not the testimony of PW1 or her father who found her being defiled on the road.

86. PW1 stated that she was defiled on her way from the stream not at their house. In addition, PW2 the Complainant's father stated in his testimony on oath that he was on his way to the stream and saw ahead of him 2 people lying on the ground 10 metres from where he was. He stopped. The said people were not seeing him. It was around 5.00 pm on 5/12/2016. He moved closer and stood 4 metres from them and watched what was going on. He confirmed that the persons lying on the ground was his daughter PW1 who was being defiled by the Appellant and when the appellant saw PW2, he ran away with a slasher. He called the Appellant to return but he refused and kept running away. PW2 identified the dirty muddy and dusty clothes that his daughter wore that day including a torn pant which his daughter was wearing and which was falling off her waist because it was torn. He stated that he knew the Appellant from the beginning of 2016 as he was related to some of his relatives. That the defilement was taking place on a road which is bushy on both sides so he could see them clearly.

87. That later in the evening the Appellant went to home of PW2 with a panga accompanied by his wife alleging that PW2 had spoilt his name that he had slept with PW2's daughter and that which was a lie. That PW1 answered him back saying it was the Appellant who slept with her and he threatened to slap her with her panga. PW2 stated that the Appellant was a neighbour but not a next door neighbour.

88. What emerges from the above evidence which the trial court found to be consistent is that whereas PW1 and PW2 stated in their sworn testimonies that PW1 was defiled on the road leading to and from the stream, PW4 the clinical officer recorded in the P3 and testified that the Complainant was defiled at their house.

89. In my humble view, PW4 was not an eye witness and it is therefore possible that he may have understood the narrative by PW1 and PW2 to mean at their house and not at the road.

90. That discrepancy in the testimony of PW4 and on the P3 Form when weighed against the evidence of PW1 and PW2 as narrated to PW3 who received the report of defilement and investigated the case, in my view, is a minor discrepancy which is not fatal to the conviction as contended by the Appellant. Furthermore, PW4 was able to note on examining PW1 that defilement had taken place.

91. This court agrees that the trial court should have considered that contradiction and any other contradiction noted, however, the evidence of PW1 on where she was defiled was corroborated by the testimony of PW2 her father who found the Appellant in the act of defiling his daughter PW4 confirming that indeed PW1 was defiled on the road and not at the house.

92. Under **Section 124 of the Evidence Act**, the court can convict on the basis of evidence by the Complainant alone if satisfied that she was telling the truth.

93. In the present case, the evidence that led to the conviction of the Appellant is direct evidence of an eyewitness not just circumstantial evidence. The trial court found that the testimony of PW1 was corroborated by that of PW2 her father who found PW1 being defiled on the ground and stood 4 metres away watching what was happening after noticing them 10 metres away. The trial court stated that the identification of the Appellant by PW1 and PW2 was that of recognition of a person well known to them not that of a stranger hence their visual identification of the Appellant was reliable and met the threshold in **R Vs Turnbull & Others (1976) 3 ALL E.R 549**. The trial court also found the evidence of PW1 and PW2 corroborated by an expert witness PW4, the clinical officer.

94. In my humble view, therefore the inconsistency or contradiction of where PW1 was defiled is immaterial as the evidence of PW1 and PW2 irresistibly points to the road leading to and from the stream as the place where PW1 was defiled and she positively identified and recognized the Appellant as the assailant who was caught red handed by PW2 while defiling her.

95. The other question is on the discrepancy on the distance where PW2 stood, as he observed the scene of crime of defilement, and whether it was 10 metres away or 4 metres away. The appellant claimed that it was not clear whether the distance was 10 meters or 4 meters from where the complainant's father stood and observed the defilement taking place.

96. The evidence of PW2 was clear that as he proceeded to the stream, he saw 2 people lying on the ground, 10 metres ahead of him. He stopped. The people lying on the ground could not see him. He then moved closer to them and that is when he saw the appellant lying on top of PW1 and defiling her. He stood at 4 metres from them and watched what was going on and that when the Appellant saw PW2 is when the appellant ran away.

97. The trial court observed PW2 break down and weep as he testified on how he watched his daughter being defiled. That it was at about 5.00 pm and that it was in broad daylight. The 4 metres is the distance the PW2 moved between him and the people lying on the ground after seeing them first at 10 metres away. Therefore, I find no inconsistency or contradiction in the testimony of PW2 on where he saw the act of defilement taking place and by who. The evidence is clear that he stood 4 metres close to them watching what was happening after seeing them at a distance of 10 meters.

3. The other issue is whether PW1 was defiled by the Appellant.

98. As stated above, PW2 and PW1 were close to the Appellant and in broad daylight at 5.00 pm. They knew the appellant prior to the incident. He was their neighbour and the appellant too confirmed in his defence that he met the two witnesses on that day at the material proximate time and place. The evidence of PW1 and PW2 was never challenged. They saw what took place. Accordingly, I have no difficulty in finding and holding on the basis of the evidence adduced, that the Appellant defiled the complainant which defilement was further proved by PW4 who examined the complainant within 24 hours of the act.

99. On the ingredients of defilement being established and proved by the prosecution, I have found and held that PW1 was aged 11 years and

3 months which is in the bracket of 11 years. On penetration, PW4 who examined the Complainant and also produced her initial treatment notes testified that the Complainant's hymen was freshly broken, lacerated vaginal walls, *labias* were inflamed and he concluded that there was evidence of recent vaginal penetration evidence by freshly broken hymen and lacerated vaginal walls and *labias* inflamed. The above evidence corroborated PW1's evidence that the Appellant inserted his penis in her vagina and defiled her; and the evidence of PW2 who found and watched the Appellant defile the child from the ground. The assailant was recognized and identified without a shadow of doubt as the appellant herein.

100. Although there was no medical evidence connecting the Appellant to the offence as DNA test was not done, in my view, DNA test was not necessary where there was clear direct evidence by PW2 who found the Appellant in the act of defiling PW1.

101. There was sufficient evidence that the Complainant was defiled which evidence was not displaced by the Appellant's defence and testimonies of his witnesses which defence was not helpful as it did not locate him outside the scene of crime and neither is there material on record to suggest that the Complainant and her father PW2 could have framed the Appellant with such a serious offence.

102. In the end, I find and hold that the conviction of the Appellant by the trial court was safe and sound. It was based on evidence that proved the guilt of the Appellant beyond reasonable doubt.

103. Accordingly, I find the appeal against conviction devoid of merit. The same is hereby dismissed.

4. On whether the sentence meted out on the Appellant was lawful and appropriate:

104. I note that **Section 8(2) of the Sexual Offences Act** deprives the court of the discretionary power to mete out any other lesser sentence than the minimum sentence which is life imprisonment.

105. The trial court in sentencing the Appellant considered the nature and gravity of the offence committed, mitigation and the fact that he was a first offender and in accordance with **Section 8(2) of the Sexual Offences Act**, and sentenced him to life imprisonment as the child was aged 11 years and below. The trial court also stated that the offence is prevalent hence the Appellant deserved a deterrent sentence. She further noted that the accused abused the trust placed upon him by the society hence the need for him to be rehabilitated before he can be released to the society.

106. Whereas the life imprisonment is long term and indefinite sentence and therefore the trial court was deprived of any discretion to mete out any other sentence, she considered all the circumstances surrounding the commission of the offence and the mitigations by the appellant before sentencing the appellant. There are no new mitigating factors that would persuade this court to reduce the lawful sentence meted out on the Appellant who defiled a very young child of 11 years. Accordingly, I shall not interfere with sentence meted out on the appellant as he had not even complained that the sentence was harsh or excessive.

107. On the whole, this appeal on conviction is dismissed. The conviction and sentence of the trial court is upheld.

Dated, Signed and Delivered in open court at Siaya this 28th Day of January 2019.

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

Mr. Okachi Senior Principal Prosecution Counsel for state

Brenda and Modestar Court Assistants