REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 45 OF 2017

(DEFILEMENT)

CORAM: R.E. ABURILI – J.)

KOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and sentence dated 27.4.2017 in Criminal Case No. 627 of 2016 in Siaya Law Court before Hon. C.A. Okore –SRM).

JUDGMENT

1. The Appellant, **KOO** was charged with the offence of **Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**.

2. He also faced the alternative charge of **Committing an Indecent act with an Indecent act with a child contrary to Section II(1) of the Sexual Offences Act No. 3 of 2006.**

3. The offences were allegedly committed on 1.7.2016 at [particulars withheld] and Rubiye sub-location in Siaya District of Siaya County and on diverse dates of December 2015 to 1st July 2016 at the same place to a Child PAO. aged 14 years old.

4. The appellant pleaded not guilty to the two charges and the trial commenced. Initially, the appellant had pleaded guilty to the charges on 6.7.2016 but upon the facts being read to him he stated that "***I did not take the girl to Samia***" and the trial Court rightly entered a plea of not guilty and granted him bond pending trial.

5. After the prosecution had called 5 witnesses including the complainant child, the appellant gave sworn statement of defence denying the offence and claiming that the victim was his girlfriend, that her father framed him and that he was 17 years old when he was charged in Court with the offence.

6. The trial magistrate after hearing the prosecution and defence case found the appellant guilty of the offence of defilement of a child aged 14 years and sentenced him to serve 20 years imprisonment. This was after considering the mitigation put forward by the appellant on 27.4.2017.

7. Dissatisfied by the said conviction and sentence the appellant filed his petition of appeal on 4.5.2017 within 14 days stipulated by law claiming that:

1) The trial magistrate did not consider that the evidence adduced was conclusively corroborated.

2) I cannot recall all that transverse hence pray for trial proceedings to adduce s sufficient grounds;

3) I pray for orders of *Habeas Corpus*.

8. At the hearing of this appeal, the appellant acting *Pro se* (in person) argued his grounds of appeal orally relying on his written submission presented to court at the hearing asserting that;

1) The trial court misdirected itself in law and facts by stating failing to warn itself over the dangers of recording a plea of

not guilty and father instructing the prosecution to read the facts of the same case against the accused (appellant) which contravened the provisions of Article 50 (2), (a), (b) as read with Articles 48, 28, 27 (1) and (2), 25 (c) and 21 (1) (c) and 21 (1) of the Constitution of Kenya.

2) That the trial Magistrate erred in law by failing to appreciate that during the plea taking of the accused there was no "*substance of the charge(s) and every element thereof read or stated by the Court to the accused person, in the language he/she understand ….*" thus resulting to unfair trial which was unsafe and unsatisfactory to base a conviction.

3) That the trial Court erred in law and fact by failing to appreciate that the preferred charge sheet is materially defective in its particulars as none of the prosecution witnesses has disclosed from which source was "*December, 2015 obtained from ….*" thus their failure to comply with the provisions of Section 214 of the CPC renders the said charge sheet fatally defective null and void to justify a conviction, never (sic) can it be said that the said charge corroborated the age of the said complainant herein when the charge sheet reads 14 years and the alleged medical evidence indicated between 15-16 years. That no exact age was therefore disclosed to spill the beans in this case, never was there any documentary evidence other than the age assessment report produced to corroborate the age of the said complainant;

4) That the trial court misdirected itself in law and fact by failing to take Judicial Notice over the evidence of PW1 in Chief, the reason why accused took me to his grandfather was because I was pregnant for him" That no scientific test (DNA) was conducted as per the provisions of Section 36 (1) of the Sexual Offences Act No. 3 of 2006 to ascertain whether or not the appellant committed the present offence which was unsuitable to base a conviction;

5) That the learned trial magistrate misdirected himself in law and facts by failing to appreciate that the prosecution case (sic) not only insufficient but also unconstitutional, incredible, unreliable, fabricated, speculated, conjecture and lacked probative values to justify a conviction.

6) That the decision of the trial court was made without proper jurisdiction and thus based on belief and anticipations not warranted by the evidence on record.

7) That the trial court misdirected itself in law by rejecting any alibi defence which sufficiently created a reasonable considerable amount of doubt as to the prosecution's case.

8) That the present case was shoddily, beyond reasonable doubt to justify a conviction.

9. In his oral arguments, the appellant added that when he asked for a birth certificate the same was not brought to Court and that the age assessment report shows that the complainant was between 15 – 16 years of age.

10. In opposing the appeal, the prosecution counsel Mr. Okachi orally submitted that the prosecution proved its case against the appellant beyond any iota of doubt. That the complainant's age was proved to be underage, that there was no error in the lower Court's decision hence the same should be upheld.

11. In a rejoinder, the appellant urged the court to reduce for him the 20 years imprisonment so that he returns home because 20 years was too harsh.

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

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

13. The prosecution evidence as laid out in the trial Court was that PW1 the complainant PAO. testified after a *voire dire* examination that she was aged 14 years old and a pupil at [particulars withheld] Primary School in Standard 7. She recalled that on 17.6.2016 she was at the home of the grandmother of the appellant herein K. She recalled that she knew the appellant when he worked at a video shop and they became friends and she became his girlfriend. Later, he asked her to go and visit his grandmother at Rumbiye village in Samia Busia County. They went to K's grandmother's home.

14. The appellant's grandmother prepared a meal for the duo, they ate and went to bed. She slept with the Appellant's sisters while the appellant went to sleep in his grandmother's house.

15. She testified that the Appellant took her to his grandmother's home because he had impregnated her and that she had had sex with him earlier on and she had missed her menses so he took her to his grandmother's place to deliver from there. She was kept there for 2 weeks and her father went there in the company of the area Assistant Chief and arrested her together with the appellant and took them to the Police Station.

16. She stated that she had had sexual intercourse with the appellant during the month of February and April 2016 so she got pregnant and

that she was the Appellant's girlfriend from December 2015. PW1 identified the appellant in Court and stated that she aborted the baby after he was arrested and she ceased being his girlfriend. She stated that the appellant never asked her of her age when they were in the sexual relationship.

17. The Appellant had no questions for the complainant and simply stated. ***"I have no question to ask P. since she has spoken the truth."*** and the trial court noted.

18. PW2 JOON testified that he was the father to PW1 and that on 17.6.2016 at 5.00 p.m. he was at home and that on 16.6.2016 his daughter had disappeared from home so on 17.6.2016 he reported to the area Assistant Chief Paul Kamuri and they started searching or her. On 29.6.2016 he reported to Rwambwa Police Station and on 1.7.2016 he found her in Samia Rumbiye Village. She was with the Appellant in his grandmother's homestead. When PW1 saw PW2, she ran away and the appellant was arrested after a chase. He stated that PW1 was aged 14 years, in class 7 and that he had not obtained a birth certificate for her.

19. On being cross-examined by the appellant, PW2 stated that the appellant was found inside the appellant's maternal grandmother's home at 9.00 a.m. and that even his grandfather was there. He stated that the age of the complainant was assessed at the Hospital.

20. PW3 Paul Onyango Karoli testified that he was the area Assistant Chief of Sumba Sub-Location.

21. That on 17.6.2016 he was in his homestead when PW2 reported to him of his missing daughter PW1. They started a search and were informed that a man called K had met the Appellant and the complainant heading to Samia.

22. That PW3 and PW2 searched for the complainant and traced her in the Appellant's maternal grandmother's home in Samia. She was with the Appellant. They were arrested by Police from Nyadorera Patrol Base. That the two were found living as husband and wife.

23. On being cross-examined, PW3 stated that Ken (*the man who tipped PW3 of the whereabouts of the Appellant and PW1*) had told PW3 at 5.00 p.m. and that he was from Samia but worked at a posho mill in the sub-location of PW3.

24. PW3 stated that the appellant used to work in a video shop and that villagers in Rumbiye Village told him that the appellant had gone there with a wife.

25. PW4 No. 70205 P.C. Isaac Matoke attached to Nyadorera Police Patrol Base recalled that on 26.6.2016 he was in the office when PW2 went to report that PW1 his daughter had disappeared from home, and that he had suspected the appellant. PW2 and PW3 searched for the duo and found PW1 in the company of the Appellant. They arrested them and took them to PW4 who rearrested the Appellant and charged him. PW4 produced PW1's age assessment report as well as the age assessment report for the Appellant as Ex 1. (a) and 1 (b) respectively.

26. On being cross-examined by the appellant, PW4 stated that the complainant went missing on 17.6.2016 on the same day that the appellant had left his place of work and that he was traced in Samia in Western at his grandmother's home. He stated that the Complainant was aged between 14 – 15 years.

27. PW5 Sila Omondi Oluoch testified that he was attached to Siaya County Referral Hospital. He produced a P3 form for PW1 aged 14 years which he had prepared and signed on 6.7.2016. He testified that she was first treated at Rwambwa Health Centre and re-examined on 6.7.2016 at Siaya Referral Hospital vide O/P No. 11887/16, accompanied by Police Officers on defilement allegations between 17.6.2016 and 17.7.2016 by a person known to her. That on Examination, the Complainant was found as follows:-

- **Hymen was absent**

- **Normal cervix, labia**

- **No bruises**

- **No tear, lacerations noted.**

- **Foul smelling vaginal discharge was noted.**

- **No bleeding**

The Laboratory test revealed:

- **Pregnancy test was negative**

- **UD RL was negative**

- **Pus cells noted with urine**

- **No spermatozoa noted**

- **Trychomanos virginals were seen.**

28. PW5 also produced P3 form for KO said to be aged 17 years and on examination the appellant had:-

- No abnormalities on the penis,

<u>Lab tests revealed:</u>

- no syphilis,

- HIV Negative

- Urinalysis – pus cells noted

- No spermatozoa noted

29. On being cross-examined by the appellant, PW5 stated that PW1 had a fungal infection and that the appellant had pus cells in his urine and were the same ones noted in the complainant's urine. He denied knowing the appellant.

30. On being placed on his defence, the appellant gave his testimony on oath and stated that he stays at Samia and worked at [particulars withheld]. That he worked for COO at his video shop and did the showing videos to revelers.

31. That he knew the charge of defilement. He admitted knowing the complainant at the video shop, as she used to go and watch videos. That she became his girlfriend. That while working at the said video shop, PW3 area Assistant Chief told him to stop working there since he was underage, and that he stopped. He denied defiling the complainant and stated that PW2 the father of the Complainant hated him since he, PW2 was forced to refund the appellant the things pw2's employee stole from the appellant's house.

32. He denied that he impregnated the complainant. He stated that the complainant fixed him because her father hated him (Appellant) and he PW2 had threatened to teach the appellant a lesson. He stated that he was 18 years old and had been 17 years the previous year, 2016.

33. On being cross-examined by the prosecution the appellant stated that the complainant was his customer at the shop. He stated that he did not call his grandmother and sisters to testify and that he had stated the truth.

34. On being questioned by the court, the appellant stated that PW2 had a grudge with him. He stated that PW2's employee was not the appellant's witness.

35. In her judgment delivered on 27.4.2017 the trial magistrate Hon. Okore restated the evidence on record by the prosecution witnesses and the defence tendered by the appellant and framed 4 issues for determination:

1) Whether the complainant's age was properly proved.

36. On this issue the trial court held that albeit the charge sheet stated that PW1 was aged 14 years and the Age Assessment Report showed that she was aged between 14 – 15 years, there was no contrary evidence, that the complainant was held to be 14 years old.

2) **On the second issue of whether consent was obtained,** the trial court held that the complainant was a child aged 14 years hence she had no capacity to consensual sex or intimate relationship described in the case and that it was therefore immaterial that she consented directly or indirectly as she was a child.

3) **On whether the accused was properly identified,** the trial magistrate found and held that PW1, PW2 and PW3 clearly stated in their testimonies that they knew the appellant and when PW2 and PW3 searched for him they found him at his maternal grandmother's home in the Company of PW1.

Further, that the PW1 also knew the appellant well as they were lovers for several months and she could therefore not mistake him for someone else. Further, that the appellant had stated that PW1 had stated the whole truth hence he had no questions to put to her.

In addition that the appellant in his defence admitted meeting PW1 at the video shop.

4) **On whether penetration occurred,** the trial court found and held that PW1 had testified that between the months of February and April 2017 she had had sexual intercourse with the appellant and that she became pregnant but she ceased being his girlfriend and even aborted the baby she was carrying which evidence of penetration was corroborated by PW5 a clinical officer who found the hymen absent.

37. On the defence of being fixed and hated by PW2, the trial Court dismissed it stating that the Appellant failed to cross-examine PW2 on it and only raised it in his defence.

38. On his age, the trial Court found that the appellant was aged between 18 – 19 years of age as per his age assessment report produced in evidence hence he was an adult.

39. The trial court convicted him upon satisfying herself that the prosecution had proved their case against the appellant beyond reasonable

doubt.

DETERMINATION

40. Having carefully considered the appellant's grounds of appeal, the detailed submissions which introduced new grounds of appeal and the opposition to the appeal herein by the Prosecution Counsel Mr. Okachi, in my humble view, the main issues for determination in this appeal are:

1) Whether the appellant was underage at the time he allegedly committed the offence.

41. According to the Appellant, he was under the age of 17 years old when he was charged with the offence. If that be the case then the trial court ought to have sentenced the appellant in accordance with Section 8 (7) of the Sexual Offences Act which invoke the Borstal Institutions Act and the Children's Act (*Section 19 thereof*).

42. In other words the trial court could not sentence an underage person to prison term. This court observes that the trial record shows that the Appellant was arrested on 1.7.2016 and arraigned in Court on 4.7.2016. On 6.7.2016 age assessment was done on him by Dr. Cyprian Owegi which showed that the appellant KO was aged between 18-19 years as the last molars (third) were fully emptied. The Report was produced as P Exhibit 1 (b).

43. Accordingly, it is the view of this Court that if the appellant was not satisfied with the Doctor's assessment of his age, he had the opportunity to dispute it by availing other evidence to the contrary including his birth notification or birth certificate to show that he was under age at the time of his arrest and arraignment in court. He did not do so.

44. I therefore find and hold that the appellant was aged over 18 years as at the time that he allegedly committed the offence, albeit he gave his as 17 on the P3 form which was discounted by age assessment report.

2) The second issue is the age of the Complainant.

45. According to the appellant, he asked for the birth certificate of the complainant but it was not brought to Court. He claims that the age of the complainant was not fully ascertained because albeit the charge sheet claims that she was aged 14 years, the age assessment report produced as exhibit showed that she was aged between 15 – 16 years which is contradictory.

46. I have examined the charge sheet dated 4.7.2016 and it states that the complainant was aged 14 years. The complainant testified on oath that she was aged 14 years. The complainant testified on oath that she was aged 14 years and in class 7. PW2 the complainant's father testified that the complainant was aged 14 years in standard 7 and that he had not acquired a birth certificate for her.

47. On being cross-examined he stated that the complainant's age was assessed at the hospital. PW4 the Police Officer who investigated the case and took both the complainant and the appellant for age assessment produced her age assessment report as an exhibit and it shows that the complainant was aged between 14 – 15 years as at 26/1/2017. He reiterated the same age in cross-examination by the appellant.

48. PW5 the Clinical Officer who filled P.3 form for the complainant testified that the complainant was aged 14 years. Albeit the initial treatment book shows that the complainant's age was indicated as 16 years, the P3 form shows that she was 14 years old and so does her age assessment report which were produced in court as exhibits.

49. This Court understands where the appellant got the information that the complainant was aged between 15 – 16 years I say so because when he appellant first appeared in court for plea taking and which plea was recorded as not guilty because he qualified some facts as read out to him by saying that he did not take the girl to Samia, the prosecutor had stated in the facts that the complainant was aged between 15 – 16 years according to the Age Assessment Report. However, the said age assessment report which was produced in Court as P.Ex. 1 (a) dated 26.1.2017 shows that the complainant's age as assessed was between 14 – 15 years as her last molars had not erupted, canines had not achieved full eruption length and the second premolars are not fully erupted.

50. Accordingly, I have no reason to interfere with the trial magistrate's finding that the complainant's age was 14 years at the time of the alleged commission of the offence as there was no contrary evidence that she was that age of 14 years.

3) **The 3rd issue that I must determine is whether the trial magistrate erred in law and fact in recording a plea of not guilty and whether such action violated Articles 50(2) (a) (b), 48, 28, 27 (1) & (2) 25 (C) and 21 (1) of the Constitution.**

51. First and foremost is that this was a new ground of appeal which was never raised in the Petition of appeal. It was only raised in the submission.

52. Nonetheless, I find no substance in this ground because I have compared the typed and handwritten proceedings before the trial court as made on 6.7.2016 and I note that albeit the typed proceedings state that when the appellant first took the plea he pleaded not guilty before the facts were read out to him, the handwritten proceedings clearly show that the trial Magistrate "Plea of Guilty entered." Furthermore, the fact of entering a plea of not guilty when it ought to have been a plea of guilty does not prejudice the appellant in anyway as he was accorded an opportunity to plead to the facts which were read out to him and to which he denied and as a result the plea became equivocal and he was accorded a full trial.

53. For the above reason, I find that the appellant's claim that the trial Magistrate failed to warn herself of the dangers of entering a plea of not guilty is a petty and unsubstantiated claim which makes no sense as a ground for Complaint.

4) The fourth issue for determination is whether the charge sheet was defective. Again this is a challenge raised in the submissions and not as a ground of appeal.

54. I shall however give the Appellant the benefit of doubt and consider it since he was unrepresented not only at the trial but also before this court on appeal hence everything that he raised in his submissions shall be considered on their merits. According to the Appellant, during plea taking, the trial court erred in law and fact in failing to appreciate that there was no "substance of the charges and every element thereof read or stated by the court to the accused person in the language he/she understood" thus resulting to unfair trial which was unsafe and unsatisfactory to base a conviction. To resolve this issue, I have read both the typed and handwritten proceedings of the trial court and the trial court in the typed proceedings stated:

"Charge read over and explained to accused in Kiswahili."

55. In the handwritten proceedings, the trial Magistrate stated: **"Charge Read Over and Explained to accused in Kiswahili:"**

56. Nonetheless, there was no plea of guilty entered against the appellant to warrant such a complaint as the manner in which the plea was taken did not prejudice him and no such prejudice was demonstrated.

57. Accordingly, I find the challenge petty and lacking in substance.

5) **The fifth issue is whether the charge sheet was defective in its particulars as none of the prosecution witnesses had disclosed from which source was 11 December 2015 obtained from" and that a failure to comply with Section 214 of the Criminal Procedure Code renders the said charge sheet fatally defective, null and void to justify a conviction. Further, the Appellant claimed that never can it be said that the said charge corroborated the age of the complainant when the charge sheet reads 14 years and the alleged medical evidence indicates between 15 – 16 years. That therefore no exact case was disclosed to corroborate the age of the complainant.**

56. Again, this ground of an alleged defective charge sheet was not filed in the petition of appeal and was only raised in the written submissions by the appellant.

57. As I have stated in issue No.2, albeit there was no birth certificate produced to prove the actual age of the complainant, and albeit the charge sheet shows her age to be 14 years and her age assessment report shows she was aged between 14-15 years and not 15-16 years and whereas the trial magistrate believed that the complainant was 14 years old, that in itself cannot render the charge sheet defective.

58. The Courts have held severally that conclusive proof of age in cases under the Sexual Offences Act does not necessarily mean a birth certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases. **(See Machakos H.C. C.R. A. 296/2010 Fappylon Mutuku Ngui V R).**

59. Therefore, whereas proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction (*see Gilbert Miriti K Vs. R [2013] eKLR*, where there is an age assessment report clearly stating that the complainant was in the age bracket of 14-15 years, it is my humble view that the charge sheet stating that the complainant was aged 14 years is not defective to warrant an amendment under Section 214 of the Criminal Procedural Code. This is because the age assessment report was not discredited or at all, being an approximation of the age of the complainant. **In Joseph Kieti Seet V R [2014]** the court held that ***"It is trite Law that the age of a victim can be determined by medical evidence and other cogent evidence.***

60. **In Francis Omuroni Vs. Uganda, CR. A 2/200 it was held:**

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by a birth certificate, the victim's parents or guardian and by observation and common sense. …."

61. In the instant case, the trial magistrate who had the advantage of seeing the complainant as she testified believed that she was aged 14 years as per her testimony, the testimony of her father and the P3 and age assessment report which approximated her age to be between 14-15 years were not challenged at all. The trial Court did not doubt the age of the victim. I have no reason to doubt the complainant's age of 14 years, the basis upon which the sentence of 20 years was founded on conviction of the Appellant.

62. Accordingly, I find and hold that there was no defect and/or material defect on the charge sheet capable of amendment under Section 214 of the Criminal Procedure Code to embrace the age of the Complainant to the benefit/advantage of the appellant.

6) **The sixth issue is whether there was evidence beyond reasonable doubt to prove defilement of the victim.**

63. The Appellant further claimed that there was no evidence that proved that he defiled the complainant in December, 2015. That is so. However, the charge sheet states that***: "On the diverse dates of December 2015 to 1st July 2016." I have examined the evidence on record and I find no defect in the charge sheet as the prosecution witnesses testified (PW1) that "During the month of February and April 2016 I had sexual intercourse with accused. We had sex severally during that time and I got pregnant. I became accused's girlfriend in December 2015."***

64. From the above evidence the period December 2015 and 1st July 2016 was covered. The last day is when the appellant was arrested

having taken the Complainant to his material grandmother's home in Samia.

65. Accordingly, I find no defect or material defect in the charge sheet.

> **7) The Seventh issue for consideration is whether the trial Court failed to take into consideration the fact that no DNA test was conducted on the complainant who alleged to be pregnant and on the appellant as required under Section 36 (1) of the Sexual Offences Act to ascertain whether or not it was the appellant who committed the alleged offence of defiling the complainant and therefore whether there was sufficient evidence to sustain a conviction against him.**

66. In determining this issue, I will also consider whether the prosecution case against the appellant was insufficient, unconstitutional, incredible, unreliable, fabricated, speculated, conjecture and lacked probative value to justify the conviction of the Appellant.

67. On whether failure to take a DNA test on the complainant and appellant to determine whether the appellant was the person who defiled the complainant was fatal to the prosecution case and contrary to **Section 36 (1) of the Sexual Offences Act No. 3 of 2006**, first and foremost is that the complainant testified that after she had had several sexual encounters with the appellant, she became pregnant and that is when the appellant took her to his maternal grandmother's home to give birth from there but that upon him being arrested in connection with the offence of defiling her, she ceased being his girlfriend and that she terminated the pregnancy.

68. The appellant did not cross-examine the complainant to challenge her assertion, and in addition, the doctor who examined her and filled the P3 form confirmed that pregnancy test was negative.

69. The appellant lend credence to the evidence given by PW1 by stating that what he had told the court was the whole truth hence he had no question for her and the court noted that statement. It follows that it is without question that the complainant was not pregnant as at the time of testify in court because she had already terminated the pregnancy and that testimony on oath remains unchallenged.

70. However, on whether DNA test should have been carried out on the appellant to establish whether he was the person that defiled the complainant, **Section 36 (1) of the Sexual Offences Act** Stipulates:-

> ***"36. (1). Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the Court may direct that an appropriate sample or samples be taken from the Accused person, at such place and subject to such condition as the court may direct for the purpose of forensic and other testing, including a DNA test, in order to gather evidence and to ascertain whether or not the Accused person committed an offence."***

71. The above provision was considered by the Court of Appeal in the cases, among them- Robert **Mutungi Mumbi V. R Cr. App. No. 52/2014 (Malindi)** and **Williamson Sowa Mwanga V. R Cr. App. No. 109/2014** (Malindi) .

72. In the former case, the Court of Appeal stated:

> ***"Section 36 (1) of the Act empowers the Court to direct a Person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."***

73. And in the latter case the Court of Appeal stated as follows on the issue of paternity and defilement:

> ***" …. It is patently clear to us that whilst paternity of PM's child may prove that the father of the father of the child had defiled PM. that is not the only evidence by which defilement of PM. can be proved. The fact, as happens in many cases that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the Appellant would at mot determine whether he was father of PM's child, which is a different question from whether the Appellant had defiled PM. As the court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured. (See Twehangare Alfred V. Uganda CR. APP No. 139 of 2001." It is partly for this reason that Section 36(1) of the sexual offence Act is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence to order that samples be taken from him for forensic, scientific or DNA testing."***

74. With the above authority from the Court of Appeal and by which this court is bound and having regard to the circumstances of this case, the question is whether the trial Court should have ordered for a DNA test on the appellant to determine whether he committed the offence in question.

75. To answer the above question, it is worth noting that the evidence of PW1 the complainant which was given on oath to the effect that she knew the appellant after meeting him at the video shop and that she had become his girlfriend and that she had had several sexual encounters with the appellant until she became pregnant and then the appellant took her to his maternal grandmother in Samia to give birth there, was never challenged and instead, the Appellant stated that what PW1 had spoken in court was the truth.

76. That evidence of PW1 was further supported by the appellant's own testimony, on oath when he stated that he lived in Samia and that he worked in a video shop at Nyadorera where he knew the complainant at the video shop as she used to go and watch videos. That she became

his girlfriend. Albeit the appellant stated that he did not defile the complainant, PW5 the Clinical Officer who examined the complainant found her hymen absent and that she had foul smelling vaginal discharge. Urinalysis revealed epithelial cells present, pus cells present, tychonomas vaginalis were seen. On examining the appellant he found pus cells, which were same as what was noted in the complainant's urine.

77. The trial court which had the opportunity to see and hear PW1 testify made it clear in her findings that she had no reason to find that the complainant was lying to the court and that the appellant had even admitted that what PW1 had stated in court was the truth and therefore he could not cross-examine her.

78. PW2 the complainant's father and PW3 the Assistant Chief who accompanied PW2 to trace the complainant in Samia testified that they found the complainant living with the appellant at his maternal grandmother's home in Samia and arrested him with the help of Police who had accompanied them from Nyadorera patrol base and that the appellant and complainant were living as husband and wife. That evidence was never challenged/shaken in cross-examination by the Appellant.

79. With the above uncontroverted evidence, and authorities I am persuaded that the trial Court did not err in failing to order for a DNA test on the appellant to determine whether the Appellant committed the offence of defilement on the complainant as there was sufficient evidence adduced by the prosecution to prove that it was the appellant who had sexual intercourse with the complainant between 17.6.2016 and 1.7.2016 when he was arrested and charged with the offence.

80. Furthermore, **Section 124 of the Evidence Act** (a proviso thereof) is clear that a trial Court can convict the accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (***See George Kioyi V R Cr. App. No. 270/2012 (Nyeri) and Jcob Odhiambo Omumbo V. R. Cr. App No. 80 of 200 (Kisumu).***

81. In the instant case, the trial court convicted the appellant not on the sole evidence of PW1 the complainant, but which evidence was corroborated by the evidence of PW2 and PW3 as well as PW5. The trial Magistrate also believed the testimony of PW1 and discounted the allegations by the appellant that he was being framed by PW2 since PW2 hated him and that he had a grudge against him, which grudge was never brought out by the appellant when he cross-examined PW2 but came out in defence hearing hence she found the defence an afterthought and that his defence was a mere denial. I agree.

82. Moreover, an alibi defence which is raised at the defence hearing or during submissions on appeal without indicating where the appellant was during the period it is alleged he defiled the complainant is no defence at all. The Court of Appeal has stated over and over that it is desirable that an alibi defence be raised at the earliest opportunity to give the prosecution time to investigate its truth or otherwise.

83. The said Court of Appeal has also held that nevertheless, even when the defence is raised late in the day, it must still be addressed. See (**Ganzi & 2 Others vs. R [2005] 1 KLR 52**. However, in the present case, and as already observed above, the appellant's belated alibi defence during submissions on appeal is weighed against the evidence adduced by the prosecution which was accepted by the trial court and which I wholly concur with, the conclusion I make is that the alibi defence is and was effectively displaced.

84. Having reexamined the evidence by the prosecution witnesses leading to the arrest of the appellant *Vis a vis* the defence, I am persuaded that the prosecution proved their case against the appellant beyond reasonable doubt and that the defence of alibi and grudge was farfetched.

85. The evidence by the prosecution witnesses as a whole displaced the allegation by the appellant that PW2 hated him because PW2 was forced to refund the things his employee stole from the appellant's house.

86. Accordingly, I am unable to find any evidence that the evidence by the Prosecution against the appellant was insufficient unconstitutional, incredible, unreliable, fabricated, speculated, conjecture and/or that it lacked probative value to justify the conviction of the appellant with the offence of defilement of the complainant herein.

8) **On the eighth issue of whether the decision of the trial court was made without jurisdiction and thus based on belief and anticipates not warranted by the evidence on record,**

87. the appellant does not elaborate on what kind or type jurisdiction the trial court lacked in convicting and sentencing him. Nonetheless, that is a new ground of appeal which was never raised in the petition of appeal and no material was placed before this court to enable me investigate on the issue of jurisdiction of the trial court. I therefore dismiss the complaint on jurisdiction as being farfetched and baseless.

88. In conclusion, this court has already determined that the trial court convicted the appellant on the basis of cogent, credible and reliable evidence adduced by prosecution witnesses, which evidence was never watered down in cross-examination and neither was there evidence that the appellant was framed of the charges.

89. On the alleged defence of alibi, this court has re-examined the evidence by the appellant in his defence and it does not reveal any alibi. Denial that he committed the offence does not amount to raising the defence of alibi, especially with the appellant informing the court that what PW1 the complainant had spoken in her testimony was the truth.

90. That evidence by PW1 as corroborated by PW2 and PW3 placed the appellant at the centre of the crime with which he was charged. He was found in Samia at his maternal grandmother's home, with the complainant whom he had taken there as his wife upon her becoming pregnant with his child.

91. The appellant in his defence also confirmed that PW1 was his girlfriend and he never denied being found with her at his maternal grandmother's house and being arrested while with the complainant. He simply claimed that PW2 hated him and had a grudge with him over

some items he was forced to refund the appellant and also denied defiling the complainant.

92. In my humble view, that defence did not displace the truth spoken by PW1 and which the appellant acknowledged. Accordingly, I would not belabour delving into the defence of alibi which was never raised before or during the trial of the Appellant. It was only raised during the hearing of this appeal which I shall not hesitate finding it to be an afterthought and a made up defence to escape justice.

93. I am satisfied that the trial court properly directed her mind on proof of the offence of defilement with which the appellant was charged and that even without DNA or corroboration of PW1's evidence, there was other evidence upon which the appellant could be properly convicted for defiling PW1.

94. I am equally satisfied that the appellant's constitutional right to fair trial was not violated in any way as the appellant never raised any issue to do with access to witness' statements, or other matter and he told the court on 8.7.2016 that he was ready to proceed and on 16.11.2016 he prayed for a speedy trial, never objected to a request for adjournment sought by the prosecution on 13.12.2016 as doctors were on strike, and on 26.1.2017 when the prosecutor did not have a police file.

95. In addition, in his mitigation after he was convicted, the Appellant stated: "*Pardon me. I will never do it again*."

96. On the whole, I am satisfied that the prosecution evidence as adduced left no doubt that the appellant herein committed the offence charged and that he was accorded a fair trial. In **Francis Macharia Gichangi & 3 Others V R. Cr. Appl. No. 11 of 2004**, the Court of Appeal stated that it is to be reasonably expected that an Accused person who claims that his rights have been violated will at the very least raise the issue with the trial court. The appellant herein never raised any issue regarding violation of his rights with the trial court.

97. In the end, I find the appeal herein against conviction of the appellant not merited. I uphold the conviction of the appellant by the trial court which I find sound and dismiss the appeal challenging conviction.

9) On the ninth and last issue of whether the prison sentence meted out on the appellant was too harsh and excessive,

98. I note that before sentencing the appellant, the trial court considered his mitigations which showed remorse and regret. He also pleaded for a non-custodial sentence. However, the trial magistrate noted that her hands were tied since the law does not provide for an alternative sentence in such a case and she sentenced the Appellant to serve 20 years imprisonment as provided by law.

99. The question is whether this court should interfere with the said prison sentence.

100. The Sexual Offences Act provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is life imprisonment. Defilement of a child of between 12-15 years attracts a minimum prison term of 20 years while defilement of a child aged 16 years to 18 years is punishable by a minimum of 15 years imprisonment.

101. In **Hadson Ali Mwachongo VR [2016] eKLR C.A. (Mombasa)** per **Makhandia, Ouko & M'inote, JJA** the learned Judges of the Court of Appeal stated; and concur that:

> ***"Rarely will the age of the victim be exact, say exactly 8 years, 10 years, 10 years, 13 years etc, as at the date of defilement. It will be a few days or months above or below the prescribed age. The question then arises, is at victim who is, for example, 11 years and six months old at the time of defilement to be treated as 11 years old or as more than 11 years old? If the victims treated as 11 years old, to what term is the offender to be sentenced since the victim has not attained 12 years for which a sentence is prescribed? In the same vein, in the present appeal where the victim was aged 15 years and a couple of months old, but was not yet 16 years old, is the appellant to be sentenced as if the victim was exactly 15 years or as if she was 16 years old?***
>
> ***On the face of it, an attractive argument is that there is doubt as to the age of the victim and that the benefit of the doubt ought to be given to the accused person, so the less severe sentence is imposed. Thus, where the victim is say, 15 years and 2 months, she would be treated as 16 years so that he accused person is sentenced to 15 years imprisonment, as though the victim was aged between 16 and 18 years, instead of 20 years, for a victim of 15.***
>
> ***Indeed, in Alfayo Gombe Okello V. R. (supra) this court went about the issue as follows:-***
>
> ***"The evidence of the mother was that she (the victim) was born in 1992. No month or date is mentioned. If she was born between January and July 1992, she would obviously have been above 15 years of age but below sixteen when the offences was committed. It seems to us that there is an obvious lacuna in the Act as there is no provision for punishment where the child is between the age of fifteen and sixteen years.***
>
> ***Section 8(4) caters for the age of sixteen to Eighteen years we must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child as at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant we so find."***

102. However, in the **Hadson Ali Mwachogo V R (supra**) case, the appellate court differed/with its own decision in **Alfayo Gombe Okello V. R.** and stated:

> ***"We are of a different mind for the following reasons. Section 2 of the interpretation and General Provisions Act defines "year"***

to mean 9 years reckoned according to the British Calendar Act, (75), a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years and not 11 years old. That approach entails not taking into account the period above prescribed age so long as it does not amount to 9 years.

Back to the Sexual Offences Act, a victim who is days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age. On the same reasoning, the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 years rather than 16 years old we have come to the conclusion that the trial court did not err in convicting and sentencing the appellant as it did and that the first Appellate Court did not err rather in upholding the conviction and sentence. This appeal is accordingly dismissed."

103. The above decision was rendered on 27.5.2016 and is relevant to this case with regard to sentence meted out on the appellant.

PW1 testified that she was aged 14 years and her father too testified that she was 14 years old and in standard 7. PW5 who assessed her age testified that the victim was aged between 14 and 15 years and the age assessment report gave reasons for arriving at such an estimation of her age. Her birth certificate or notification were not produced to ascertain the exact age.

104. However, it is clear that the victim's age was not beyond 15 years as she was between 14-15 years old. Taking into account the holding in the **Hadson Mwachongo VR case (supra) by the Court Appeal**, I am persuaded that the victim was age 14 years and therefore the sentence to be meted out upon conviction of the appellant was 20 years as the victim was aged between 12 and 15 years.

105. Accordingly, as the 20 years imprisonment is the minimum and not the maximum sentence, this court agrees with the trial magistrate that she did not have the discretion to mete out a lesser sentence than the minimum set out in the law. And until that law is amended, it remains the law.

106. I find the sentence of 20 years imprisonment meted out on the appellant lawful and decline to interfere.

107. **On the whole, I find this appeal both on conviction and sentence devoid of merit. I dismiss it and uphold the conviction and sentence meted out on the appellant by the trial court.**

108. **Orders accordingly.**

Dated, Signed and Delivered at Siaya this day of 28th January, 2019

R. E. ABURILI

JUDGE

In the presence of:

Appellant: present in person

Senior Principal Prosecution Counsel: Mr Okachi

Court Assistants: Brenda and Modestar