REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

HC.CR. APPEAL NO. 4 OF 2017

JOM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant **JOM** was initially charged with the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No.3 of 2006. The charge before the trial court alleged that on the 10th Day of May 2016 at [particulars withheld] in Isinya Sub County with Kajiado County the Appellant intentionally caused his penis to penetrate the vagina and anus of I.N a child aged 12 years. The Appellant was further charged with alternative charge of committing an Indecent Act with a Child Contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were such that the Appellant on the 10th day of May at [particulars withheld] in Isinya Sub County within Kajiado County intentionally touched the buttocks, breasts, anus and vagina of I.N a child aged 12 with his penis.

The appellant was aggrieved by the trial court's decision and elected to prosecute this appeal to challenge both conviction and sentence on the basis of written submissions on 7 grounds couched in his written submissions. The same is as follows:

1. ***THAT the Learned Trial Magistrate failed to abide by the provisions of Article 25 (c) and 50 (a) of the Constitution.***

2. ***THAT, the Learned Magistrate erred in law and fact by considering that the prosecution did not discharge one of the elements of the offence that is whether the alleged act was committed.***

3. ***THAT, the Learned Trial Magistrate erred in law and fact by not considering that the whole evidence was procured by undue influence due to circumstances which were surrounding hence buttressing my cogent defense.***

4. ***THAT, the Learned Trial Magistrate failed to evaluate and analyze the entire record and improperly rejected my alibi defense thereby shifting the burden of proof.***

5. ***THAT, the Learned Trial Magistrate erred in law and in fact by failing to realize that there was evidence of bad blood/grudge which was sufficient to justify a frame up.***

6. ***THAT, the Learned Trial Magistrate erred in law and in fact by failing to recognize the explicit contradictions apparent in the prosecution evidence in favor of the defense.***

The brief facts are as follows; PW1 the complainant in the matter was subjected to voire dire examination and the court found her sufficiently intelligent and proceeded to give a sworn testimony. She remembers on the 10th of May 2016 when her father sends her to buy some tomatoes. She the Appellant that she was doing her homework but he forced her to go with him to the shops. He told her to wait for him as he buys cigarettes till around 7 pm and at around 8 pm when she requested to go home but he still told her to wait for him. He finally left the shop headed home with complainant and on the way he pushed her into the bush "(kichaka)". She asked him where he was taking her to and he shut her up and threatened her with a beating. She tried to run away but he managed to chase and catch her, he then dragged her to the bush where he removed her clothes a dress, a biker and underwear and inserted his penis into her vagina. She tried resting but he slapped her and further threatened to strangle her. He also turned her and inserted his penis into her anus while visiting more violence on her by way of slapping her and he injured her.

She asserted that the Appellant and Complainant stayed in the bush till 4 am. They went back to their home, her mother inquired on where they were and he told her that they were coming from the shop where they had gone to buy vegetables. She stated that her mother further questioned why she was laying and the Appellant told her that she fell down and why the Appellant's zip was open and he said it was like that. That is when she went to her room and did a sign expression to her mother telling her what the Appellant had done to her. It was the caretaker who then asked her why her face was swollen and she told her that she had fell down. She further stated that the caretaker inquired the complainant teacher's name whom she later reported the matter to who then placed the matter in the hands of the police. That is when the

Appellant was arrested and later charged with the present offence. She was taken to the hospital where her age was assessed and estimated at 14. She also mentioned that he was not her biological father.

PW2 GM, the complainant's mother testified that she came back from work at around 6 on the material date to find nobody at home. She stated that she indeed inquired about the Appellant's zip as mentioned by PW1 and he told her that it was spoilt. She also stated that PW1 had a swollen face and she was bleeding and her clothes were dirty. It was her testimony that she told PW1 to change her clothes so that they could go to the hospital but the accused took her to some house where he denied her a chance to leave for hospital. She stated that he even visited violence on her and stayed in that house until 1pm. She produced the clothes that PW1 was wearing on the material date in court as exhibit (MT-4), a blue dress with mud and a green sweater she was wearing marked as (MP 12). She also mentioned that the child could explain what had transpired but the Appellant couldn't give her a chance to do so. She later learnt that the child had been defiled by him. She also went to the scene of the crime were she saw some onions and she could see a track. She said that PW1 was aged 12 and that the Appellant is not the biological father of the minor.

PW3, AGNES NAICOIS RISIE, was the clinical officer who examined the complainant pursuant to the alleged offence of defilement against the Appellant. She stated that the complainant's clothes were dirty, her face was swollen and her back had bruises. Upon examining the complainant's genitals, she found bruises on the anal area and a yellow greenish discharge on both the vagina and anus. Further that she had bruises on her knees. HIV status of the child was done and she was given drugs and post exposure procilaxy. She prepared a Medical Examination Report which she produced in court (P Exh 3), she signed and sealed the same. It was her testimony that there was penetration of the child's genitals. She also did bodily examination of the Appellant and found him HIV Positive, she prepared the P3 form, signed and sealed it which was produced in court as exhibit (P Exh.7).

PW4, NO.88875 CONSTABLE GRACE MUNGA was the investigating officer in the matter. She was the one who took the complainant and the Appellant to Isinya District Hospital. She also took the child for age assessment where she was estimated at 14 years of age. She also produced the clothes that the child was wearing during the ordeal before court.

DW1, JOM, denied having committed the alleged offence. He purportedly pointed out that there was a grudge between him and his wife (PW2) which emanated from the fact that he had taken his other wife upcountry but he had not taken PW2 there. He stated that he left for his wife's place where he slept. The next day he was arrested and later charged with the present offence.

ANALYSIS AND DETERMINATION

As this a first Appeal, this court is required to re-evaluate the evidence tendered in the trial court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. The role of the Court of the first instance is well settled in the case of ***OKEMO VS. REPUBLIC (1977) EALR 32*** and further buttressed in the Court of Appeal decision in revisit the evidence tendered before the trial Court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter. This task must have regard to the fact that I never saw or heard the witnesses testify thus the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence.

In the determination of the appeal at hand, this court is to satisfy itself that the record is in compliance with the law and that the ingredients of the offences herein were proved. For the purposes of this Appeal, the issues of determination are as follows:

1. *Whether the Appellant's right to a fair trial was violated and whether there are any material contradictions, inconsistencies and discrepancies in the prosecution case which rendered the prosecution case unproved.*

2. *Whether or not the evidence of the minor required corroboration, if so, whether the lack of it is fatal to the prosecution case.*

3. *Whether or not the prosecution proved its case beyond reasonable doubt.*

4. *Whether the prosecution failed to call crucial witnesses.*

On the first issue, the Appellant the Appellant submitted that his right to a fair trial was violated. In his own words he humbly submitted that the principles of Natural Justice as enshrined in the constitution under Article 25 (c) Fundamental Rights and freedoms that may not be limited states:-

> ***25.*** *Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited— (c) the right to a fair trial; and*
>
> ***50.*** *(2) Every accused person has the right to a fair trial, which includes the right—*
>
> *(a) to be presumed innocent until the contrary is proved;*

In that respect he argued that the trial court failed to comply with the abovementioned provisions. His contention is that despite lots of inconsistences and contradictions, which go to the root of the whole trial and that is a breach of his right to fair trial due to the fact that he was found guilty as charged by evidence that do not add up. He asserted that the same can be gleaned from the evidence of PW1 which was the basis of conviction. In demonstrating the inconsistencies and contradiction the Appellant quoted PW1's evidence upon cross examination by the Appellant himself which states as follows:

> ***"I am your daughter. You have never beat me before. You have disagreed with me before. I am not bringing this issue because of the issues you have with my mother. We left the bush at 4.00 a.m. we slept outside in the bush up to 4.00 a.m. That was first***

time when you did that bad manners, sex to me. I was injured. When you came from work you asked if there were vegetables. I said there was no vegetables."

The Appellant further quoted a portion of PW1's evidence upon examination by the prosecution which states as follows:

"We stayed in the bush up to 4.00 a.m. We went back with my father to my house and he found my mother in the house. My mother inquired where we were. He said we were from buying vegetables. She inquired why I was laying and my father said I had fallen down. My mother inquired from my father, she asked why his zip was open and he said it was like that. I went to the room and I did a sign expression to my mum. My mum took all my clothes. I did signs to my mum and told her my father had done bad manners to me. My mum cooked for my Dad. My dad said we go sleep. The house one belongs to my mother and the other to another lady. I was in the other house. The caretaker came to where I was. He asked me why my face was swollen and I said I had fallen down. The caretaker inquired my teacher's name and I said it was "Josephine". The caretaker later went and reported to my teacher. The police came that day at around 10.00 a.m."

The Appellant argued that having looked at the above evidence the trial court ought not to have arrived to the decision to convict him. He further contended that it beats logic that a man who has two wives would engage in such an act and sleep in a bush for a whole night. He urged this Court this court to take judicial notice of the same and evaluate the above evidence afresh.

It was his contention that PW1's evidence contradicts the evidence of all other witnesses hence the evidence of the minor cannot be relied upon to arrive to a fair and just decision.

Under article 50 (2) as rightly put by the Appellant guarantees the right to a fair trial. Article 25 (c) on the other hand provides that a right to a fair trial cannot be limited. The right to a fair trial comes in many facets and it does not begin and end with the trial itself but it runs through the whole trial process. It is also noteworthy at this juncture that an accused or appellant alleging a violation of the right to a fair trial must precisely point out the particular right that was violated from those outlined under Article 50 (2) of the Constitution. The Appellant in this case has not cited the precise right that was violated from violated to make his trial short of Article 50 of the Constitution regarding fair trial.

In the Appellant's view, his right to fair trial was violated because there exist discrepancies and contradiction regarding the time of the commission of the offence, with PW1 testifying that the offence was committed between 8pm and 4 am. The evidence on record particularly that of PW2 suggest that she (PW2) reached home at 6.pm from work on the fateful day and found the Appellant and complainant absent. She then said she went out in search of them and when she went back home at 5pm, they went back.

The law as regards the issues of contradictions and discrepancies is very crystal clear. It is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. ***(See Uganda vs Rutaro {1976} HCB; Uganda vs George W. Yiga {1979} HCB 217).*** In trying to shade light as to why there might be minor discrepancies between two witnesses testifying on the same case, the High Court of Kenya in ***Philip Nzaka Watu v Republic (2016) CR APP 29 OF 2015****, had this to say:*

"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

Again the court, in ***Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993,*** held, *inter alia,* that:-

"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences"

I'm also guided by the Court of Appeal decision in ***Erick Onyango Odeng' v. Republic [2014] eKLR*** citing with approval the Uganda Court of Appeal case of ***Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6*** in which it was held as follows:

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

The role of an appellate court in the circumstances as spelt out in numerous cases is to assume the role of the trial court, reconcile these and then determine whether they were prejudicial to the appellant and therefore fatal to the prosecution case or were inconsequential to the appellant's conviction and sentence. See the case of ***Josiah Afuna Angulu versus Republic, Nakuru CR Appeal No.277 of 2006 (UR) and Charles Kiplang'at Ngeno versus Republic Nakuru CR. Appeal No.77 of 2009 (UR).***

It is also important at this point to examine the nature and meaning of the word contradiction. I'm persuaded by the definition rendered by the Court of Appeal of Nigeria in the case of ***David Ojeabuo vs Federal Republic of Nigeria {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.*** Where the court stated as follows:-

> ***"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."***

In light of the above decisions I now endeavor to make a determination on the above issue. The main contradiction is as regards the time when the offence was committed. Considering the circumstances of the case as well as all the evidence on record, what is depicted from it without doubt whatsoever is that the offence was committed at night. The record on the evidence of PW2 says she came home from work at 6pm, went out in search of the two and came back at 5 p.m. after which she found them home is clearly by use of common sense a clerical error. In view of the above testimonies and the cases I have cited above, I find that the discrepancies and contradictions which I admit their existence in this case are not prejudicial to the Appellant and therefore not fatal to the prosecution case.

The second issue raised by the Appellant herein is as regards corroboration. It is his contention that the position of law under section 124 of the evidence Act Cap 80 Laws of Kenya the evidence of the minor required some sort of corroborative evidence other than the P3 Form which he alleged to be tainted with discrepancies and that it contradicts other evidence.

It is indeed the correct position of the law that corroboration of evidence tendered by a child of tender years is required in criminal proceedings pursuant to section 124 of the Evidence Act notwithstanding the *voire dire* examination of the child under section 19 of the Oaths and Statutory Declarations Act. It follows that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the proviso under section 124, the court is allowed to sorely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded that the child is being truthful.

In the instant case, the Learned Magistrate conducted a *voire dire examination* after which the complainant (minor) was found sufficiently intelligent and her evidence was considered truthful and honest. The complainant's narrative is very clear on who defiled her, when she was defiled and how the act was occasioned on her by the Appellant. In her testimony she narrated how the Appellant took her to some shop in the name of going to get some tomatoes and how the Appellant took long at the shop which made the two of the them to leave the shop a bit late (8:pm). She remembers how the accused dragged her in the bush and forcibly have sexual intercourse with her while occasioning physical violence on her. Indeed the doctor's report confirms not only that the child was defiled but there is also evidence upon examination of her head and neck showing puffiness of her face, bruises and bruises on the lob which entails that some kind of violence was indeed visited upon her. The fact that the minor had bruises on her back is further evidence that the act of defilement was occasioned at a place without enough comfort and such can only be in the bush as the evidence of the minor is pointing.

Nevertheless, I wish to note that there is a myriad of decisions that affirms the position that corroboration is no longer necessary as a matter of law, in sexual offences where the victim is a minor and has been found sufficiently intelligent to testify for the prosecution. This position was taken in ***Mohamed v Republic*** [2006] 2 KLR 138 where the court stated:-

> ***"It is now settled that the courts shall no longer be hamstrong by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."***

The same position was also taken in the case of ***J.W.A. v Republic*** [2014] eKLR, the Court of Appeal observed:-

> ***"We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."***

In the premises I take the view that the evidence of the minor was plausible enough to explain the evidence that unfolded on the material date hence I have no reason whatsoever to go by the Appellant's argument. This court finds no reason to disturb his conclusion hence the ground on corroboration should fails.

The Appellant also urged the court to evaluate the evidence on record afresh in line with ***OKENO VS REPUBLIC (1952)*** to establish whether or not the prosecution proved its case to the required standard of proof beyond reasonable doubt. In that respect he cited the well-known Landmark case of ***WOOMINGTON V DPP (1935) AC 462*** at page 481 where Viscount Sankey L.C in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that juries are always told that if conviction there is to be, the prosecution must prove the case beyond reasonable doubt. The Appellant further offers the definition of the phrase, "beyond reasonable doubt" as captured in the case of ***MILLER-VS-MINISTER OF PENSIONS (1947) 2 ALL ER 372,*** where Lord Denning J held that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt but the evidence should be as strong as to leave only remote possibility in the defendant's favour. He also relied on the case of ***WALTER V R (1969) 2 AC 26,*** which was approved in ***R V GRAY 58 Cr. App. R.177*** at 183, to further support his argument. In that case the Privy Council stated that a reasonable doubt is that quality and kind of doubts which, when you are dealing with matters of importance in your own affairs, will allow you to influence you one way or the other. The 1997 Supreme Court of Canada case of ***R-V- LIFCHUS (1997) 3 SCR 320*** was also relied upon in his submission to advance the proposition that reasonable doubt is a doubt which can be given or assign reason as opposed to speculation.

The Appellant was also inclined to cite William Blackstone's formulation (in his seminal work, Commentaries on the laws of England, published in 1765) where he stated that it is better ten guilty persons escape that one innocent suffer. Blackstone hold a thesis that all

presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent party suffer. The same was echoed by other commentators for instance, Benjamin Franklin, Works 293 (1970), Letter from Benjamin Vaughan (14 March 1785), who holds a similar thesis echoes Blackstone and states that it is better 100 guilty persons should escape than that one innocent person should suffer.

I now endeavor to analyze whether or not the instance matter was proved beyond reasonable doubt as required by the law. To secure conviction in defilement matters, the prosecution ought to prove three important ingredients which are the minority age of the complainant, penetration of the complainant's genitals by the Appellant and lastly the prosecution must positively identify for the perpetrator or the author of the complainant's misfortune. The same is envisaged in the case of **CHARLES KARANI VS REPUBLIC, Criminal Appeal No. 72 of 2013** where the court stated as follows:

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

As regards the age of the complainant as one of the critical ingredients of the offence of defilement, the onus of proof resides with the prosecution. Under section 8(1) of the Sexual Offences Act a person is deemed to have committed defilement if he or she does an act which causes penetration ***with a child.*** Under Section 2 (1) of the Sexual Offences Act, the definition of a child is the one assigned in the Children Act. This entails any human being of less that eighteen (18) years. The onus of proving age resides with the prosecution. ***Mwilu J (as she then was) in the case of HILLARY NYONGESA VS REPUBLIC (Eldoret Criminal Appeal No.123 of 2000)*** stated that:

> ***"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved….And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."***

Similarly, in **KAINGU ELIAS KASOMO VS REPUBLIC; Malindi Court of Appeal Criminal Case No. 504 of 2010**, ***the court emphasized on the importance of proving the age of the victim of defilement as the sentence imposed upon conviction depend on the victim's age.***

In the instant case, the age of the minor is not in dispute. The PW1 and PW2 in their narratives stated that the minor was 12 years of age at the time the offence was perpetrated on her by the Appellant. An age assessment was also done on the complainant which indicates that the complainant was 12 years of age. The same was not controverted by the Appellant and neither did he took an issue regarding age hence this ingredient was proved beyond reasonable doubt.

As regards penetration of the complainant's genitals, PW1 was succinct on how the Appellant dragged her in the bush and forcibly had sexual intercourse with her. The fact of penetration was corroborated by the Medical Examination Report marked as (P. exhibit 3). The clinical officer Mrs. Agnes Nailos Risie, the clinical officer who examined the complainant found that the minor had bruises on the vagina and anal area, bruises on the perineal area and labia minora. There was also discharge from vaginal canal and anus. In conclusion the Clinical officer was of the view that the minor was defiled. Again the defense did not in any manner controvert this evidence hence I take the view that this limp was proved beyond reasonable doubt by the prosecution.

On whether the accused was positively identified as the perpetrator of the offence, the Appellant is the stepfather to the complainant and that means he is well-known to the minor. This is therefore a case founded upon recognition as opposed to identification by a stranger. This entails that there is a difference between recognition and identification by a stranger in the sense recognition was held to be more favorable to positive identification than identification by a stranger. The above point was well dealt with in the case of **ANJONONI & OTHERS VS REPUBLIC, (1976-1980) KLR 1566,** ***it was held that when it comes to identification, the recognition of assailant is satisfactory, more assuring and more reliable that identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.***

This court therefore finds that the accused was well-known to PW1 and PW2 hence the risk of mistaken identity was rendered very minimal. Again the position in **ANJONONI CASE(supra)** was also entrenched in the case of **R VS TURNBULL & OTHERS (1973) 3 ALL ER 549,** where the Learned Judge stated that:

> ***"Recognition may be more reliable that identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

In the instant case, PW, the complainant in her testimony points fingers the Appellant as far as the author of her misfortune is concerned. It is not in dispute the Appellant and the Complainant went to and came back from the shop together. It is also not in dispute that they left the shop when it was dark. PW1's testimony is that on their way back home the Appellant dragged her into some bush where he physically assaulted and have sexual intercourse with her. It was the appellant who reached home at night on the material date. PW2 testified that the complainant's clothes where dirty with mud when she reached home with the Appellant and when she asked the Appellant what had happened he just brushed it off by saying she had fallen down. The said clothes were produced in court as exhibit. Upon medical examination of the minor following the defilement, the clinical officer found that she had bruises on her body including the head, neck, back as well as her genitals. The child was indeed defiled. There is no evidence of an intervening circumstance tendered to show that some other person who is not the Appellant defiled the minor on her way to or from the shop they had gone to buy tomatoes. The actions of the Appellant to deny the mother of the Complainant's mother to go with the minor for treatment to the hospital where calculated to conceal the truth of what had transpired since he knew that had they gone to the hospital, the truth would have come out at that point. In the premises, I have no reason disturb the trial magistrate on this limp and I find that the Appellant was positively identified as the perpetrator the heinous Act.

On the issue failure to vital witnesses, the Appellant argued that in contravention of Section 150 of the Criminal Procedure Code, the trial court failed in its duty to summon crucial witness (es). He referred to Mark Kibor, the complainant's neighbor who PW2 asked the

whereabouts of PW1 on the material day and Moffat the caretaker who reported the matter to the Complainant's teacher (Josephine). In that respect he argues that these two ought to have brought to court to authenticate the prosecution case and the reason why they were not brought to adduce evidence before court in his view is that the prosecution new that their evidence would have been adverse to its case. He alleged that had the said witnesses been brought to court they would have been shaded as to what could have led to his arrest. In support of his argument, the Appellant relied on the case of ***DONALD MAJIWA ACHILWA AND 2 OTHERS – VS – REPUBLIC (2009) eKLR,*** where the court stated that:

> ***"The law as it presently stands is that the prosecution is obliged to call witness who are necessary to establish in the case even though some of those witnesses evidence may be adverse to the prosecution case. In appropriate case the court is entitled to infer that had that been called his evidence would have tendered to be adverse to the prosecution case."***

The Appellant therefore argued that the failure by the prosecution to bring vital witnesses was a blatant technique to evade the evidence that was adverse to its case and therefore to conceal the truth of the matter. On the issue of Vital Witnesses, the Appellant cited the Ugandan case of **BUKENYA-VS-UGANDA** where the court in that case held that it is not the duty of the court to stage manage the case for the prosecution, nor is it the duty of the court to endeavor to make a case where there is none to an accused person. The duty of the court is to hold the scale to see that justice is done according to the law on evidence before it.

Reliance was also put on the case of ***NGANGA-VS-REPUBLIC CA.CR.APP NO.50 0F 1981*** where the Court of Appeal held that the prosecution may elect not to call a material witness but they do so at the risk of their own case. Further reliance was placed on the cases of ***WENDO- VS- R (1953) 20 EA 166 AND RAMSON AHMED-VS-REPUBLIC VOL 22.*** In the latter case the court stated that the prosecution must make available all witnesses necessary to establish the truth even if the evidence may be inconsistent. In the former case the court stated that it is the burden of the prosecution to avail all the material evidence to the court to enable the court to arrive at a fair and impartial decision. The prosecution must avail or summon all material witnesses and present the court with all facts or those whose evidence may have been unfavorable to it. The Appellant also cited section 144; 150 of the Criminal Procedure Code and Section 107 of Evidence Act in support of his update.

I now endeavor to comment on the issue of failure to avail crucial witnesses. In criminal matters the prosecution has to avail to the court all relevant evidence to aid the court in making a proper determination based on the available evidence. It has always been this court's finding that there is no legal requirement in law on the number of witnesses to prove a fact. The same is envisaged under **Section 143 of Evidence Act (Cap 80) Laws of Kenya** which provides as follows:-

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

In respect of the prosecution's discretion over the issue of witnesses, in the case of ***Keter v Republic (2007) 1EA 135***, it was held that:-

> ***"The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witness. But should the said witness fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse interference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witness as are sufficient to establish the charge beyond any reasonable doubt."***

In ***Julius Kalewa Mutunga v Republic***, ***Criminal Appeal No.32 of 2005***, and stated:-

> ***"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless, for example, it is shown that the prosecution was influenced by some oblique motive."***

The Court of Appeal again addressed that issue in the case of ***Benjamin Mbugua Gitau v Republic*** [2011] eKLR thus: -

> ***"This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 of the Evidence Act Cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys"***

In light of the above decision, I hold the view that the prosecution in this case was well within the exercise of its discretion to avail witnesses which it thought to be enough to prove its case. The evidence of PW1, PW2 and that of the Clinical Officer was enough to establish the cardinal ingredients of the offence of defilement as I have determined earlier on the issue as regards whether or not the prosecution proved its case beyond reasonable doubt. The two witnesses that the Appellant vehemently thought to be crucial and to have ability to change the outcome of this case are not in my view vital and their absence in this case cause no prejudice to the Appellant. This is because none of them witnessed the defilement being committed by the Appellant hence their evidence can only be circumstantial if not of little or no weight to this matter.

In the premises it is the court's view that the evidence tendered by the prosecution witnesses was sufficient to prove that the offence was committed by the appellant on the complainant.

The learned trial magistrate imposed a sentence of 40 years' imprisonment. I do not find any compelling reasons that would justify the decreasing of that sentence. I therefore uphold the decision of the trial court.

I affirm the conviction and the sentence.

Dated, delivered and signed in open court this 20th February, 2019

……..

R. NYAKUNDI

JUDGE

Representation

Mr. Meroka for State

Appellant present in person