



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL APPEAL NO. 22 OF 2018**

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

**MOO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being An Appeal from the conviction and sentence in Judgment dated 29/3/2018*

*delivered at Bondo Law Courts vide Criminal Case S.O. No. 38 of 2017*

*before Hon. M. Obiero, PM)*

**JUDGMENT**

1. The Appellant **MOO** was on 1/9/2017 charged before Bondo PM's court with the offence of defilement of a child contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**.
2. He was also charged with the alternative offence of committing an indecent act with a child contrary to **Section 11(c) of the Sexual Offences Act**. The victim of the offence was EAA full (name withheld). The offences were allegedly committed on 19/8/2017 at around 9.00 pm at Bondo Sub-county within Siaya County.
3. The appellant pleaded not guilty to the charges.
4. As required by law, this court as the first appellate court must reassess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion having regard to the fact that, unlike the trial court, it never heard nor saw the witnesses as they testified hence I may not comment on their demeanor. **See Okeno Vs. Republic [1972] E.A 32** where it was held 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 (**see Pandya Vs. Republic [1957] 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.
5. Revisiting the evidence adduced before the trial court, EAA the complainant gave evidence on oath after a **voire dire** examination and stated that she was aged 13 years and was a class 7 pupil at W (name withheld) Primary School in Gem. She recalled that on 2/8/2017 at about 12.00 pm, she was with her grandmother at home when one E. (name withheld) went visiting her grandmother and when E was returning to Bondo, she requested that EAA accompanies her (E) to Bondo which request was acceded to by EAA's grandmother. That when they reached Bondo, they found E's husband by the name M, the appellant herein and they lived together for one (1) month without any issue.
6. That the second month, when E had gone to the salon, E's husband returned home and took PW1 to bed and started touching her breasts and her private parts telling her that he wanted to have sex with her which she refused.
7. She further testified that on 19/8/2017 when E and her brother went to visit her sick sister, leaving PW1 behind with the appellant and one, P, PW1 stayed home, prepared dinner and went to sleep that is when at about 10.00 pm she realized that somebody was touching her back. He removed her pant, pulled her skirt and started having sex with her. She felt pain as it was her first time to have sex and she did not scream because he threatened to kill her and even hit her with a belt on the head.
8. PW1 stated that she was sleeping in the same bed with P who was 9 years old. That the appellant had sex with PW1 twice that night. She

stated that when E returned on 20/8/2017, PW1 did not tell her and that instead the appellant informed E that PW1 was epileptic so she should be returned to her grandmother's home. Enroute, to her home, E quested PW1 whether the latter was epileptic which PW1 denied.

9. On reaching her home, PW1 told her mother of the incident of 25/8/2017. She was escorted to Bondo District Hospital and later reported the matter to the police where a P3 form was issued to her and it was filled by a doctor and she recorded her statement upon which the appellant was arrested and charged with the offence. **PW1 recognized the appellant in court. She stated that when E left for her sister's home, the appellant asked PW1 and P. to go and sleep in his bed with him and that she recognized him as he spoke to her and that he told her not to scream.**

10. In cross examination, the complainant reiterated her testimony in chief and added that E was her cousin. She also stated that the appellant had told her not to go and play with A on 18/8/2017. She admitted that the appellant had told her not to go and play with boys in the bush. She stated that the appellant threatened her not to tell anybody what had happened that is why she did not tell her grandmother immediately.

11. In re-examination, PW1 stated that the appellant warned her to stop playing with boys because they used to play with boys. She however denied ever having sex with any of the boys. She maintained that it was the appellant who had sex with her. She also stated that P woke up when the appellant whipped PW1 with a belt but that P did not record a statement with the police.

12. PW2 JAN (name withheld) gave evidence and stated that she was a business lady and lived at Gem. She recalled that on 11/8/2017 at 5.00 pm she arrived at her home from Nairobi but did not find her daughter in the house and her son SO informed her that E had gone with PW1 to E's home. PW2 went and informed E's sister in-law to inform E to bring PW1 back home. That on 21/8/2017 E returned with PW1 and when PW2 looked at her, she observed that EAA looked sick so when she inquired from her, she stated that she was sick. She escorted PW1 to Bondo District Hospital on 26/8/2017 for examination and that is when she was told that PW1 had been defiled and on inquiring from PW1, PW1 told her (PW2) that she had been defiled by E's husband on 19/8/2017. PW2 escorted PW1 to Bondo Police Station where they were issued with a P3 form which was later taken to the Doctor and filled. She identified PW1's Birth Certificate and the P3 form. In cross examination, PW2 reiterated her evidence in chief.

13. PW3 PC(W) Deborah Mose stationed at Bondo Police Station testified that she investigated the case, received the complainant and her mother PW2 on 25/8/2017 and recorded her statement then referred her to Bondo District Hospital. She later issued PW1 with a P3 form which was filled by a doctor. She produced PW1's Birth Certificate as an exhibit 1. The witness reiterated her evidence in cross examination.

14. PW4 PAO (name withheld) gave unsworn evidence after voire dire examination and stated that she was aged 9 years and in Class 3 at W Primary School (full name withheld) and that she lived in Gem. She stated that on 19/8/2017, she was at Bondo where she had gone to visit her aunt EAO and that she was with PW1 and **MOO** the appellant, who was E's (husband). She stated that at night after dinner, prepared by PW1 as E was away that day as she had gone to Alego, the appellant told them to leave the floor where they used to sleep and go to sleep on his bed. That he ordered them to remove their clothes and that he slept on top of PW1. That when PW1 wanted to scream, the appellant blocked her mouth with clothes and switched off lights.

15. PW5, Maurine Achieng a Clinical officer testified and stated that she was based at Bondo Sub-County Hospital. She produced a P3 form for PW1 which she filled on 29/8/2017 after examining the victim of alleged defilement on 19/8/2017 by a person well known to her. She stated that there was delay in reporting the case, for 10 days, she found that there was no hymen, normal genitalia, no physical bruises and no spermatozoa. In cross examination, she stated that the patient (PW1) had not been treated elsewhere and that she filled the P3 form based on the history and physical examination. She denied being paid to fill the P3 form. She reiterated her evidence in chief that she had been a clinical officer for 6 years.

16. On being placed on his defence, the appellant gave unsworn statement of defence and stated that he lived in Bondo and worked as a casual labourer and a businessman. The appellant stated that on the material day of 19/8/2017 at night he slept with his wife in his house, the complainant and two other children. He denied ever defiling the complainant. He stated that he only learnt from his wife on 21/8/2017 when she told him that the complainant's mother wanted her to return to her home and that his wife escorted the complainant to her home. He stated that he had been living with the complainant at her home and that PW4 was also returned to her home. He claimed that he disciplined the complained on 18/8/2017 against bad company of boys hence the reason for being framed up.

17. The trial court after considering the prosecution and defence case found the appellant guilty of the offence of defilement and sentenced him to serve 20 years imprisonment.

### **The appeal**

18. The appellant filed six grounds of appeal challenging his conviction and sentence and stated as follows in his petition of appeal filed in court on 9<sup>th</sup> April, 2018 ad dated 14<sup>th</sup> March, 2018:

**1. That I did not plead guilty to the preferred charges and still maintain the same.**

**2. That the learned trial magistrate erred in facts and in law by failing to consider the defence statement of the accused person which did not connect him to the alleged offence**

**3. That the learned trial magistrate erred in law and facts by not observing that the medical examination herein fell flatly short of the required standard of proof**

**4. That the learned trial magistrate erred in law by failing to consider that the prosecution failed to prove all the ingredients of**

*defilement*

**5. That the learned trial magistrate erred in law and facts by not considering the glaring inconsistencies from the prosecution witnesses**

**6. That I cannot recall all that was adduced before the court and pray for copies of the proceedings to adduce more grounds.**

19. The appellant prayed that his appeal be allowed.

#### **Submissions**

20. In his written submissions which he adopted orally and highlighted the same, the appellant also filed supplementary grounds of appeal claiming that the trial magistrate and prosecution failed to comply with section 200(3) of the Criminal Procedure Code and that the prosecution failed to summon very crucial witnesses in the case namely, the appellant's wife, E.

21. On ground one, the appellant submitted that he pleaded not guilty to the charge and therefore he maintains his innocence in the matter.

22. On ground two, the appellant submitted that the trial court failed to consider his defence statement which clearly detailed how he had spent his time on the material day of alleged defilement and how he was with his wife and that he had given the dates when his wife was away but that the trial court ignored all that evidence. He maintained that on 18<sup>th</sup> August he had disciplined the complainant for keeping bad company of boys and that, that was the source and the genesis of this frame up hence he was innocent.

23. On ground three, the appellant submitted in reiteration that medical findings were not proven beyond required standard on circumstantial evidence. He submitted that the medical findings did not attract the interest of justice whatsoever, in that, the expert, PW5 was not sufficient (sic) on his results and that his evidence was contradictory and not truthful.

24. According to the appellant, the provisions of the Sexual Offence Act is clear on the hours or days that a victim in a sexual act must be examined. In this particular case, it was submitted that the doctor received the patient after a delay of "10 days" hence the only direct evidence could have been circumstantial.

25. The appellant also submitted that the doctor did not specify the degree of injury sustained or any exhibit presented to support the Complainant's allegation e.g. any material evidence like stained blood pant hence forceful penetration that amounts to torn hymen, blood was not proved. In his view, the tear of perineal (sic) orifice must be noted in view of the complainant's age and virginity status.

26. The appellant submitted that sexual offences cases must be handled diligently to arrive at the just decision, to ensure that the evidence is free from error. In his view, the evidence of PW5 was doubtful and lacked credibility in that she noted discharge without clear clarification, that there was no spermatozoa and no physical bruises and that in any event, PW5 had noted that due to the delay of the reporting of the case, and with no pregnancy, the evidence was destroyed and therefore she did not appear a credible and trustworthy witness. Further, that the complainant did not establish the ingredient or essential aspect of **penetration** as required by the Sexual Offences Act.

27. On ground Five, the appellant submitted that the prosecution failed to consider the glaring inconsistencies among witnesses. According to the appellant, the prosecution witnesses' testimonies were inconsistent and full of contradictions. He submitted that PW1 clearly stated that after disclosing the evidence to her mother on 25.8.2017, her mother took her to Bondo District Hospital on the same day (line 17 page 4), but that her mother contradicted this by stating that she took her to the same hospital on 26.8.2017 (line 2 Page 8)).

28. In addition, the appellant submitted that the medical report which is the P3 Form indicates that they received the patient on 29.8.2017 in the same Bondo Hospital, yet the investigating officer testified that she recorded the statement from the complainant on 25.8.2017 and referred her to Bondo District Hospital.

29. The appellant further claimed that the charge sheet has no O.B. number and the reporting date to distinguish the contradiction on when the report was made and when the complainant was escorted to hospital to clear the doubts.

30. The appellant further submitted that PW2, when cross-examined by the accused, at line 7 page 9, denied that she was in company of PW1, but PW3, the investigation officer stated that on 25<sup>th</sup> August 2017, while on duty, both PW1 and PW2 reported the matter on 19<sup>th</sup> August 2017 (page 10 line 26, 27 and 28). He maintained that there were contradictions in the prosecution's case. He relied on the case of **NDUNG'U KIMANI VS. P 1972 (KLR 282.)**

31. He also submitted that even the trial magistrate appreciated the contradictions on whether PW1 and PW4 slept on the same bed but he failed to determine the contradictions in favour of the appellant.

32. On the supplementary grounds of appeal filed together with these submissions, the appellant claimed that the trial court violated section 200(3) of the Criminal Procedure Code. He submitted that under Section 207 of the Criminal Procedure Code, the process (plea) was conducted by an SRM while the hearing was conducted by a PM without following the procedure set out in in **Section 200 (3) of the CPC** in the interest of justice. He relied on the matter of this provision, see **ALBANUS MWASA MUTUA vs Republic CA NO 120 (2004)**.

33. On the supplementary ground of appeal No. 2 the appellant submitted that the trial court failed to comply with section 150 of the CPC to call all crucial witnesses, and that therefore the **prosecution did not prove its case against him beyond reasonable doubt. Further, that the trial magistrate in his judgment shifted the burden of proof onto the defence.** He submitted that the calling of the Accused's wife (Esther)

was both for the benefit of the prosecution and the defence as stated by the trial magistrate on page 5 line 8 – 11 of the judgment.

34. Further submission was that Esther was related to PW1 and PW4 respectively therefore, she was the one to shade the light on this matter for the truth to be unveiled, on whether she was there on the said dates to prove whether the complainant or the accused were wrong. It was submitted that failure to call her as a witness was a fatal omission which rendered the trial flawed. The appellant relied on the case of **KINGI OLE YENKO V R CA 1121(1971)**.

35. The appellant prayed that his appeal be allowed and that he be set at liberty.

36. The Respondent through Mr Okachi Senior Principal Prosecution Counsel opposed the appeal and submitted orally. He contended that the prosecution evidence was unshaken and that they had proved their case against the appellant beyond reasonable doubt.

37. He submitted that the complainant and the appellant were not strangers to one another and that the appellant took advantage of the victim of the crime in the absence of his wife and defiled her. That the defilement was confirmed by PW5. On sentence it was submitted that the same was lawful. Counsel urged the court to uphold the conviction and sentence by the trial court and dismiss the appeal herein.

## **DETERMINATION**

38. I have considered the Appellant's grounds of appeal, reviewed and reassessed the evidence adduced before the trial court and written and oral submissions for and against the appeal.

39. In my humble view, the main issues for determination flow from the appellant's grounds of appeal namely: -

### **(1) Whether the trial court failed to comply with the provisions of Section 200(3) of the Criminal Procedure Code.**

40. The appellant claimed that the trial was commenced by the Senior Resident Magistrate and concluded by the Principal Magistrate without complying with **Section 200(3) of the Criminal Procedure Code** which requires that where a matter is partly heard by one magistrate and concluded by a different magistrate, the accused person must be given an opportunity to choose to either have the trial commence *de novo* or for the incoming magistrate to conclude the trial from where the previous magistrate had reached. In the case of the latter, the accused person would also have the right to have witnesses who had testified before the previous magistrate to be recalled for further cross examination.

41. Albeit the Respondent did not challenge this ground of appeal, I have perused the trial court record. It shows that when the appellant was arraigned, he appeared before Hon. E.N. Wasike SRM on 1/9/2017 and a plea of Not guilty was entered after the appellant denied the charge. The honourable Magistrate then fixed a hearing date to be 24/10/2017 before the Principal Magistrate in Court No. 1. On 24/10/2017 and on subsequent dates the hearing was conducted by Hon. M. Obiero, Principal Magistrate who also concluded the trial, convicted and sentenced the appellant to serve 20 years in prison. That being the case, it is not true to say as the appellant has stated that **Section 200(3) of the Criminal Procedure Code** was not complied with. There was no part hearing by Hon. E.N. Wasike and part hearing and conclusion of the case by Hon. M. Obiero. The Hon. SRM only took a plea which was within his jurisdiction and reallocated the file to the Head of Station to conduct the trial which was in order. He did not take any evidence from any of the witnesses hence there was no part hearing by the magistrate who took the plea. Accordingly, I find and hold that the ground of appeal is devoid of merit. The same is hereby dismissed.

### **(2) Whether the Prosecution failed to summon very crucial witnesses in the case to testify.**

42. In this regard, the appellant attacked the prosecution for failure to call his wife E. to testify to confirm whether or not she slept at the appellant's house on the material night of 19/8/2017 when it was alleged that he had defiled the complainant. In **Bukenya Vs. Uganda [1972]EA 549**, the Court of Appeal held that a failure to call crucial witnesses by the Prosecution entitles the court to make an adverse conclusion (inference) against the Prosecution case, and acquit the accused person. However, in **Keter Vs. R [2007] IEA 135**, the court held that: -

***“The Prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”***

43. Thus, the onus is on the Prosecution to adduce evidence against an accused person beyond reasonable doubt. Nonetheless, once the Prosecution has satisfactorily discharged the burden of proving the main elements of proving the main elements of a charge, then there is no need to unnecessarily burden the court by availing many witnesses whose only effect would be to reiterate, add or exaggerate what has already been stated. The court would only be bound to make an adverse inference if the evidence called is barely adequate, whereas the Prosecution had the opportunity to call more witnesses to fill the gap in their case.

44. In addition, **Section 143 of the Evidence Act** provides: -

***“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.”***

45. In the instance appeal, it is apparent that the appellant testified that on the material night of 19/8/2017, his wife slept in his house and that she was only away on 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> August, 2017 as she had gone to attend a funeral on 9/8/2017. He also stated that PW1 and PW4 were in his house on that night. On the part of the prosecution, PW1 and PW4 recalled in their evidence that on 19/8/2017 they slept in the

appellant's house. PW4 stated that she had gone to visit E. but that on the material day, E was not present so she remained with PW1 and the appellant. She stated that on that night, the appellant instructed her and PW1 to go and sleep with him on his bed instead of going to sleep on the floor where they used to sleep. He then instructed them to remove their clothes and that as they slept, she realized that the appellant was sleeping on top of PW1 and when PW1 attempted to scream, the appellant covered her mouth. This witness was clear that E. the appellant's wife was not present in his house on that night as she had gone to attend a funeral. This witness was consistent even during cross examination.

46. PW1's evidence was similar to the testimony of PW1 who was firm that she had gone to stay with E on 2/8/2017 and that she lived with her and her husband for one month without any issues but in the second month while E. had gone to the salon, the appellant took PW1 to his bed and touched her breasts and private parts telling her that he wanted to have sex with her but that she declined. She further stated that later on 19/8/2017 when E and her brother went to visit their sick sister, E did not return and so, PW1 spent the night with the appellant and PW4. Further, that while they were sleeping the appellant removed her skirt and pants and had sexual intercourse with her and threatened to kill her. That when E. returned on 20/8/2017, PW1 did not disclose to her the issue but that the appellant claimed that PW1 had epilepsy hence she should be returned to her home. ***She stated that when E left for her sister's home, the appellant asked PW1 and P to go and sleep in his bed with him and that she recognized him as he spoke to her and that he told her not to scream.***

47. With the above clear evidence from PW1 and PW4, this court is not persuaded that failure to call E as a prosecution witness is fatal to the prosecution's case. In addition, it is the appellant who claimed that E was at his home on that material night. Nothing prevented him from calling E as his witness since she was his wife, and was a competent witness.

The trial magistrate who has the opportunity to hear and see PW1 and PW4 give evidence was satisfied that they were telling the truth. He stated at page 8 of the judgment.

***"I had the opportunity of observing her demeanor. I did not note anything that would have suggested that she was not telling the truth."***

48. I am satisfied on the evidence that E was not at home on the material night.

49. On whether there was material contradictions in the Prosecution's case which created doubt that should have gone to the benefit of the appellant, the appellant submitted that the trial magistrate despite appreciating the existence of contradiction in the prosecution's case, he did not consider them in making the decision to convict the appellant, the trial record shows that the trial magistrate found that PW1 and PW4 contradicted one another on whether or not they slept on the same bed with the appellant on the material night and therefore he found that they did not sleep in the same bed. However, in his holding, he determined that the evidence of PW1 and PW4 on whether they were all sleeping in the bed of the appellant, though contradicting, did not go to the root of the case regarding the identity of the person who defiled the complainant because from the evidence on record, only the appellant was in the house with the PW1 and PW4 and that as the PW4 testified after 3 months, considering her age, she may have forgotten about what exactly took place between the complainant and the appellant on that material night. The trial court also observed the demeanor of the complainant and believed that she was telling the truth.

50. The appellant also claimed that there were material contradictions in the evidence of PW1, PW2, PW4 and PW5. He pointed out that PW1 stated that after disclosing the incident to her mother on 25/8/2017 her mother took her to Bondo District Hospital on the same day where as her mother contradicted her by saying that she took PW1 to hospital on 26/8/2017 hence there was inconsistency in their testimonies.

51. The appellant further complained that the medical report P3 form indicates that the hospital received the patient on 29/8/2017 in the same Bondo Hospital whereas the investigating officer, PW3 stated that she recorded the statement on 25/8/2017 and referred the victim to Bondo District Hospital. In addition, the appellant claims that there is no OB number on the charge sheet. He also claimed that PW2 in cross examination denied being in the company of PW1 but that PW3 the investigating officer stated that PW1 was in company of her mother.

52. On whether the trial magistrate should have considered the contradictions noted in favour of the appellant, I have examined the prosecution evidence as a whole from the testimony of PW1, and PW4, PW5 and I find that the trial court analyzed the evidence adduced by these witnesses and found that there were contradictions which were nonetheless not material as to affect the trial and conviction of the appellant. The trial magistrate believed the testimony of PW1 who was much older than PW4 in age and the fact that the trial was taking place over 3 months from the date of the incident. He found that the fact that PW1 and PW4 contradicted one another on whether they slept in the appellant's bed or whether the appellant followed them where they went to sleep in the same house and defiled the complainant does not diminish material evidence of whether or not PW1 was defiled.

53. I have reevaluated the evidence of PW1 and PW4 on whether they contradicted themselves regarding where they slept on the material night. Indeed PW4 from the commencement of her testimony was clear that she slept with PW1 on the same bed of the appellant after he asked them to leave the floor where they used to sleep and go to sleep on his bed and that is when he slept on top of PW1. On the part of PW1 at the beginning of her testimony it appeared not clear whether she slept in the appellants' bed but as she was concluding her testimony she stated that ***that when E left for her sister's home, the appellant asked PW1 and P to go and sleep in his bed with him and that she recognized him as he spoke to her and that he told her not to scream.***

54. The above notwithstanding, in ***Dickson Elea Nzamba Shapwata & Another Vs. Republic Cr. A 92/2007, and Joseph Maina Mwangi, Vs. Republic Cr. Appeal No. 73 of 1993***, in both cases, the Courts of Appeal of Tanzania and Kenya respectively dealt with the question of discrepancies in the evidence of the Prosecution and observed.

***"The legal principle is that an Appellate Court in considering any alleged discrepancies and contradictions should be guided by the fundamental question, whether such discrepancies or inconsistencies, or contradictions caused prejudice or miscarriage of justice to the appellant on both conviction and sentence."***

55. The courts have thus appreciated that minor contradictions which are bound to happen in any given case due to human nature are not to be given more weight than they actually deserve especially if the court is satisfied that the bearer of the pain itself is saying the truth. Further, the court ought to correlate the evidence as a whole and must apply its reason so as to see things for what they are not as we would like them to be seen. If the answer as to whether the inconsistencies make the victims' deposition unbelievable is in the negative then the perpetrator must be brought to book.

56. In the *Shapwata Vs. Republic (supra)* case, the Tanzania Court of Appeal addressed the issue of discrepancies in evidence, which position was in my humble view, correctly adopted by the Court of Appeal in *Joseph Maina Mwangi Vs. (supra)* as follows: -

***“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.***

***Furthermore, we need to consider the age of the minor in question as relates to the proper recollection of events as their thought process is not sufficiently built to make coherent and well-coordinated statements.***

***Another issue of consideration is the circumstances/situation which the minor finds themselves in as it has the tendency of being so devastating that the only recollection the minor/victim may have in proper detail is what happened to them.”***

57. In *State of U.P.V Naresh & Others SC India Cr. App. No. 674 of 2006*, the Supreme Court of India persuasively stated: -

***“In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely errors of memory due to mental disposition such as shock and horror at the time of occurrence.***

***Where omissions amount to a contradiction, creating a serious doubt the truthfulness of the witness and other witnesses also make material improvement while depositing in the court, such evidence cannot be safe to rely upon.***

***However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the Prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.”***

58. Further in *Philip Nzaka Watu Vs. Republic [2016]eKLR* the Court of Appeal observed: -

***“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 inconsistencies 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.”***

59. Applying the above established principles of law on the effect of inconsistencies and discrepancies in a criminal trial especially where children are involved, to the instant case, I am in agreement with the trial court that despite the alleged discrepancy in the evidence of PW1 and PW4 on whether they slept in the same bed with the appellant on 19/8/2017 or whether the two child slept in one bed and were invaded by the appellant at night leading to the defilement of PW1, I find and hold that PW1 being the affected person had better recollection than PW4 who woke up and found the appellant on top of PW1. But as I have stated above, their evidence was clear that they slept with the appellant in the same bed after he asked them to do so.

60. Accordingly, I find that there were no material contradictions in the evidence of PW1 and PW4 as to render the entire Prosecution evidence void or worthless.

61. On the alleged discrepancies in the evidence of PW1, PW2 and PW5 on when PW1 was taken to Bondo Hospital, PW1 stated that she was taken to hospital on 25/8/2017 whereas her mother PW2 stated that she escorted PW1 to Bondo District Hospital on 26/8/2017. PW3 the Investigating Officer stated that she received PW1 and her mother on 25/8/2017.

62. I have perused the P3 form dated 25/8/2017 issued by Bondo Police Station and referring PW1 to MOH Bondo for 29<sup>th</sup> August 2017. It shows that the report was lodged at the police station on 25/8/2017 at 2.55pm vide OB No. 39. However, the complainant was examined on 29/8/2017 at Bondo District Hospital as referred.

63. From the documentary evidence which included the laboratory request report form, it would appear that PW2 PW1 to Bondo District Hospital on 25<sup>th</sup> August 2017 for treatment before the filling of the P3 form on 29<sup>th</sup> August 2017. I therefore find no discrepancy or inconsistency in her evidence but I find failure to recollect the exact date to be immaterial as it does not go to the root of the case; to render the prosecution evidence worthless since documentary evidence on record in the form of P3 form is clear that the complainant was received at the police station on 25/8/2017 and escorted to Bondo District Hospital on 29/8/2017 for examination and a P3 form filed. Accordingly, I find and hold that the discrepancies on the dates is immaterial.

64. On the alleged inconsistencies in the evidence of PW3 who stated that she recorded the statement on 25/8/2017 and referred the victim to Bondo District Hospital, yet the P3 form shows that the patient was examined on 29/8/2017, I find no contradiction disclosed as the P3 form

is clear. It was issued on 25/8/2017 by the police also referred the victim to Bondo District Hospital and the victim was examined on 29/8/2017. The challenge by the appellant is therefore for the sake of it. It is devoid of any substance and is hereby dismissed.

65. The other alleged contradiction is that PW2 in cross examination denied being in the company of PW1 but that PW3 the Investigating Officer stated that the complainant came with her mother, I have reviewed the testimony of PW2, she told the court what she had done as a parent upon receiving information from PW1 that the appellant had defiled her. She stated how she reported to the police and how her daughter was issued with a P3 form which was filled at Bondo District Hospital. The question whether the victim was in the company of her mother when they reported to Bondo Police station on 25/8/2017 is immaterial and trivial. It cannot under any circumstances, affect the quality of evidence whose substance is whether or not PW1 was defiled and by who.

66. Similarly, the inconsistencies in the dates when PW2 took PW1 to Bondo District Hospital are in my humble view too minor. PW1 recalled and her evidence was that she was escorted to hospital on 25/8/2017 while PW2 stated that she took PW1 to hospital on 26/8/2017. PW3 who received the complainant in the company of her mother issued a P3 form dated 25/8/2017 and referred her to hospital on 29/8/2017. If PW2 took PW1 to hospital on 25/8/2017 or 26/8/2017, what is documented is 25/8/2017 on the laboratory request report form No.1091 which also has a date of 25/8/2017 and hospital stamp of 29/8/2017 of the results of the test. What this court gathers is that the victim may indeed have been taken to hospital on 25/8/2017 for examination and laboratory tests and as soon as the results were out, she went for examination and filling of the P3 form on 29/8/2017. This is so because PW2 was clear in the testimony that she took PW1 to Bondo District Hospital on 26/8/2017 where she was treated and examined.

67. In my view, PW2 may have forgotten the exact date when she took PW1 to hospital which was 25/8/2017 but there was no question put to her in cross examination on when exactly she took the child to the hospital, whether it was on the same day they reported to the police station or a day after. Accordingly, I find and hold that the discrepancy in dates is too minor to affect the quality of prosecution evidence on record as a whole.

68. In the same vein, the alleged inconsistency on when the patient was referred to Bondo District Hospital is in my view, immaterial. It does not go to the root of the prosecution case.

69. Similarly, the allegations that the charge sheet had no OB number is trivial as the same is not material since the P3 form has OB No. [XXXX]. Furthermore, failure to indicate OB number on the charge sheet is not prejudicial to the appellant's trial and he has not demonstrated how he was prejudiced by such omission.

70. The appellant also claimed that despite giving his statement of defence on the events of the night when he allegedly defiled the complainant but that the trial court did not give his defence much weight. He also claimed that he was framed after disciplining the complainant against bad company of boys.

71. I have perused the trial court's record and specifically the judgment by the trial magistrate. The trial magistrate after considering all the evidence for the prosecution and defence analyzed it and found that the evidence by the appellant that his wife was at home contrary to the evidence of PW1 and PW4 was an afterthought. In saying so, the trial magistrate was alive to the legal principles on the burden of proof and where it lay throughout the trial. Such burden never shifts irrespective of the defence raised by the accused person.

72. Nonetheless, the trial court observed quite correctly that where an accused person alleges the existence of a certain fact which is within his personal knowledge, then it was upon him to prove it. See **Section 109 of the Evidence Act**. I am in total agreement with the trial court that Esther being the wife of the appellant though a competent and a compellable witness as against him, under section 127 (3) (b) of the evidence Act, since it is the appellant who raised the defence of E having slept with him in the house on the material night, he should therefore have availed her to testify in his favour, if at all he believed that had she been called by the prosecution, she would have given adverse evidence. In my view, this is not shifting of the burden of proof to the accused person.

73. Accordingly, I find and hold that the trial magistrate considered the merits of the defence put forward by the appellant and made a correct finding on its merit.

74. The idea that the appellant disciplined PW1 that is why she allegedly framed the case against him is not supported by any evidence on record or even by inference. The appellant tried to fake the child's epileptic but the trial court correctly rejected that insinuation and I reject it too as a cover up.

75. On the fact that the clinical officer stated that there was a delay in reporting the defilement case hence evidence must have been interfered with, that is so but PW1 and PW4 were clear in their testimonies that the appellant defiled PW1 on the night of 19/8/2017 and threatened to kill her when she attempted to scream. In addition, PW5 was clear that there was penetration in PW1's vagina albeit laboratory tests were taken long after the incident hence certain laboratory tests could not reveal anything.

76. On allegations that the doctor did not ascertain the degree of injury, the P3 form filled on 29/8/2017 clearly states that based on the history and physical examination, the Clinical Officer confirmed that penetration/sexual intercourse must have taken place. In my view, that finding of penetration of the vagina of PW1 is sufficient evidence of injury to the complainant that did not require any other classification of whether it was harm, grievous harm or maim as sexual offences fall in their own special category of offences. Further, the fact that defilement had taken place about 10 days prior to the examination and as reasons for the delay were due to the fact that the child was not with any other adult in the home other than the appellant defiler and the fact that there were no discharge, as spermatozoa lasts for only 72 hours and by the 10<sup>th</sup> day, bruises could have healed.

77. The allegation that the trial magistrate shifted the burden of proof and that he failed to comply with Section 150 of Criminal Procedure Code is not supported as the judgment by the trial court summarized all the evidence on record both for the prosecution and defence witnesses and analyzed it before making a determination and giving reasons thereof. Furthermore, section 150 of the CPC has nothing to do

with shifting of burden of proof but on summoning and examination of witnesses by a court.

78. On the whole, I find and hold that the evidence on record proved beyond reasonable doubt all the essential elements of defilement namely;

(i) That the complainant was defiled and that she was defiled by the appellant who was positively identified by PW1 and PW4 as he was the only adult who was left in the company of the two children in the home on the material night of 19<sup>th</sup> August 2017. In addition, the appellant conceded that indeed the children were with him in his house on that day and night only that he denied defiling PW1.

(ii) PW5's evidence supported the evidence of PW1 that she had sexual intercourse hence she was penetrated. PW4 saw the appellant sleep on top of PW1 on that material night. PW1 also stated that prior to the material date, the appellant had shown the intention of having sex with her by fondling her breasts and private parts when the appellant's wife was away. Accordingly, I find and hold that there was sufficient evidence to prove penetration and by the appellant.

(iii) On the age of the complainant, there was no dispute about it that she was born on 20.10.2004 as per her original Birth Certificate No. [XXXX] issued on 4/12/2015. Accordingly, I find and hold that she was aged 12 years and 10 months as at 19/8/2017. Therefore, I find that the complainant was a minor child as defined in Section 2 of the Children's Act and therefore the offence was proved under Section 8(1) as read with Section 8(3) of the Sexual Offences Act, beyond reasonable doubt. On the whole, I find the conviction of the appellant by the trial court to be sound in law. I refuse to interfere with the same.

79. On sentence, the Sexual Offences Act provides for minimum sentences not maximum sentences. The appellant in his submissions claimed that he did not mitigate. He urged the court to have mercy on him as he has a family and his health was not good. That he is HIV positive and asthmatic and diabetic. He urged the court to consider that and give him a chance to go back home.

80. I have considered the sentence which was meted out on the appellant. It was lawful sentence. However, the same was mandatory minimum hence it is amenable to review by this courts in view of the recent Court of Appeal pronouncements in HCRA 93/2014 applying *Francis Karioko Muruatetu Vs. Republic SC Cr. Petitions nos 15, 16 of 2015*, that mandatory sentences are unconstitutional because they deprive the trial court of the discretion in sentencing and deny the convict an opportunity to mitigate before appropriate sentence is meted out.

81. In the premise, and having regard to this case, I order that the Respondent obtains Victim Impact Statement and summons the complainant and her next friend(s) to appear in court on a date when this court shall give the appellant an opportunity to mitigate before considering whether to resentence him and if so, what appropriate sentence to impose, as the appellant did not mitigate in the lower court. The appeal against conviction is declined and dismissed. Mention on 23<sup>rd</sup> October for victim impact statement before considering resentencing.

**Dated, signed and delivered at Siaya this 17th day of August 2019.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

The appellant in person

Mr. Okachi SPPC

Ca: Brenda and Modestar