



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 40 OF 2018(SOA)

(CORAM: R. E. ABURILI J.)

JULIUS ODUOR APONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against sentence delivered on 13/8/2018 at Ukwala SRM's Court vide

Cr. Case SO No. 20 of 2018, before Hon. G. Adhiambo, SRM)

JUDGEMENT

1. The appellant herein **Julius Oduor Apondi** was charged before Ukwala SRM's Court with the offence of defilement contrary to **Section 8(1) as read with Subsection 2 of the Sexual Offences Act No. 3 of 2006**. He also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. Particulars of the main Charge are that on 12/6/2018 the appellant while at [particulars withheld] Trading Centre Sifuyo East Sub location in Ugenya Sub county within Siaya County intentionally caused his penis to penetrate the vagina of AA a child aged 9 years. In the alternative charge, it was alleged that the appellant herein on 12th day of June 2018 while [particulars withheld] Trading Centre Sifuyo East Sub location in Ugenya Sub County intentionally touched the vagina of AA a child aged 9 years with his penis.

2. After the trial, the appellant was found guilty of the main charge and was convicted and sentenced to serve life in prison as provided for in section 8(2) of the Sexual Offences Act. Dissatisfied with the conviction and sentence imposed on him, the appellant herein filed this appeal on 24th August 2018 setting out the following grounds of appeal:

1. That I pleaded not guilty to the charge.

2. That the learned trial magistrate erred in law and facts by not observing that the Prosecution failed to bring vital witnesses to prove their case.

3. That the Learned Trial Magistrate erred in law and facts by convicting the Appellant herein on uncorroborated evidence.

4. That the Learned Trial Magistrate erred in law and facts by convicting me despite the glaring infringements of the rights of appellant on fair trial.

3. The appellant also prayed for Lower court proceedings to allow him adduce more grounds and urged this court to allow his appeal, the conviction be quashed, the sentence set aside and the Appellant be set at liberty.

4. This being a first appeal, this court is expected to reassess and reevaluate the evidence adduced before the trial court and arrive at my own independent conclusion bearing in mind the fact that I never saw nor hear the witnesses as they testified. **In Okeno Vs. Republic [1972] E.A. 32** 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 Versus Republic [1957] E.A. 336** and to the Appellate Courts own decision on the evidence, the first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.

5. In **Shantilal M. Ruwala Versus Republic [1957] East Africa 570** it was held that it is not the function 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 Versus Sunday Post [1958] East Africa 424.**

6. Revisiting the evidence before the trial court, 1 PW1 AA (name withheld) a minor was taken through *voire dire* examination and the trial court found that though she was a minor she understood the effect of making an oath. She therefore gave sworn evidence. And stated that she came from Ratado and was a class 2 pupil at [particulars withheld] School. She recalled that on 12/6/2018 while she was at school, her teacher sent her back home to have her hair shaved it was about 8.30 am. She found her grandmother **N at [particulars withheld] Centre**, who gave her ten shillings for shaving her hair. As she headed to the barber shop, the appellant called her and she hesitantly went to where the appellant, was outside his carpentry shop.

7. On the complainant reaching where the appellant was, the appellant showed her a fifty shilling note and told her to enter his workshop so that he could give her the fifty shillings for shaving. She said that she told the appellant that she had the money that her grandmother had given her for shaving.

8. Further, that the appellant then pulled her into the workshop and when she tried to scream, he covered her mouth with his palm. She said that after that, the appellant urinated in her and did bad manners to her by lifting her uniform up, pulling her skirt that she had worn underneath the uniform and removed her inner pant. She said that the appellant made her to lie on the floor and the appellant unzipped his trouser, removed his penis and inserted it into her vagina. She said that at that time the appellant was still covering her mouth with his palm. She said that after that the appellant dressed her up by assisting her to wear her skirt and inner pant. That as she was about to leave the workshop, the appellant asked her to wait first. She said that at that time the appellant had locked the workshop from inside, and he told her to wait first because the appellant told her that he was going to check if someone was coming and thereafter he let her out of the workshop through the rear door and told her to pass a certain direction but she stated that she passed the opposite direction.

9. PW1 narrated to court that the appellant did not give her the fifty shillings or anything. That when she left the workshop, she found someone peeping through the window of the workshop and identified him as Odhiambo Sadia. She said that at that time the appellant had threatened to kill her in case she told anyone what the appellant had done to her. She stated that at first when Odhiambo Sadia asked her where she was coming from, she said that she was from urinating and that when Odhiambo Sadia told her that he was a police officer she said that she told him that she was going to shave her hair.

10. PW1 further stated that at that time, another person called her and took her to the police officers who then took her to hospital. She said that before a police officer called Onyango took her to hospital, she told him what the appellant had done to her. She said that she used to know the appellant by his common name that is **fundi**. She said that she was given medication at the **Ratado Health Centre** and that a vehicle took the appellant, Odhiambo Sadia, Onyango and herself to the Ukwala Police Station where they recorded their respective statements.

11. She was later taken to the Ukwala Hospital again under the escort of Onyango and Odhiambo Sadia. She said that the appellant was well known to her as **fundi** and that the appellant previously used to work with her father where they used to harvest sand. She insisted that the appellant was well known to her and said that she was sure that it was the appellant who did bad manners to her. She stated that she knew the appellant since she was in class one. She stated that the appellant only covered her mouth so she was able to clearly see him well. She went on to state that the appellant did bad manners to her during the day and that the workshop had two windows made of wood so the person who was peeping was peeping through the spaces in the wood.

12. On being cross examined by the appellant, the complainant responded by reiterating her testimony in chief. She denied the suggestion that the appellant greeted her, adding that she only went to where the appellant was because the appellant called her. She said that when she entered the appellant's workshop the appellant locked the front door and that after the incident, there were women nearby who interrogated her.

13. PW2 **EAO** the mother to the complainant testified that the complainant was aged nine years and that she was born on 2/5/2009. She identified the birth notification slip serial no. [xxxx] of A.A. (PW1) indicating the date of birth as 2/5/2009 as PMFI 1. She stated that on 12/6/2018 she was at the farm and that she went back home at around 10am. As she was taking breakfast, N went to her and told her that her daughter the complainant was at [particulars withheld] and that she had been raped by a carpenter. She immediately proceeded to the [particulars withheld] Shopping Centre and later at the Ratado Health Centre where she found her daughter the complainant in the company of a police officer. She said that by then the carpenter that is the appellant had escaped. It was her testimony that at the said hospital her daughter the complainant was treated and given post exposure prophylaxis for HIV that is Anti-retroviral. She stated that following the directives of the police, she went with her daughter to the Ratado AP Camp after her daughter was treated and found the appellant having been arrested. She said that after that they were all carried in a police vehicle and taken to the Ukwala Police Station where she recorded her statement. She said that after that both the appellant and the complainant were taken to the Ukwala Sub County Hospital where they were both examined and statements of the witnesses were recorded. She identified the complainant's P3 Form dated 12/6/2018 as PMFI 2a and the laboratory request report dated 12/6/2018 for the complainant as PMFI 2b. She stated that the appellant who the complainant identified as the person who raped her is commonly known as **fundi** because he is a carpenter and that the appellant was not only well known to her but also well known to the complainant as **the appellant used to do mining with her husband** who is the father of the complainant, in November 2017. She stated that in November 2017 the complainant was 8 years old and that the complainant used to pass by the stream where her father and the appellant that is, **fundi**, used to engage in sand mining so the complainant knew **fundi** quite well. She stated that when she found the complainant at the hospital the complainant told her how she had been send from school to go and be shaved and on her way home she met her grandmother who gave her ten shillings and that when she reached Ratado, **fundi** called her as if he wanted to send her. She said that the complainant told her that fundi called her to where he was, telling her that he wanted to give her fifty shillings but the complainant told her that she told him that she already had money for shaving. She stated that after that the complainant said that **fundi** pulled her into the workshop, covered her mouth, held her neck, lifted her uniform, removed her skirt and did bad manners to her. She stated that the complainant elaborated further and said that **fundi** lay on top of her and inserted his penis into her vagina.

14. PW2 stated that she was present as the doctor examined her daughter's vagina and she said that she saw sperms coming from her

daughter's vagina and further that the doctor told her that there were tears deep inside her daughter's vagina. She stated that she also saw fresh blood and noted that the complainant was in pain. She said that the doctor instructed her on how she would be cleaning the complainant's vagina and that the complainant's vagina used to make some sound whenever she used to clean it.

15. On cross examination by the appellant, PW2 stated that PW1 was walking and that it was not abnormal for her to walk after being defiled. She denied meeting N.

16. PW3 **Stephen Odhiambo Sadia** testified that he lived in a rental house adjacent to the appellant's carpentry workshop at Ratado Centre. He referred to the appellant as **fundu** and stated that when one is in his bedroom one can see any person leaving the workshop through the rear door by looking through his bedroom window. He stated that he started living in the aforesaid house in February 2018 and the appellant started using the workshop later and so he had known the appellant for a period of four to five months. He stated that the appellant was the only **fundu** in that building.

17. PW3 recalled that on 12/6/2018 at around 10:20am he was in his bedroom when through his bedroom window, he saw and heard fundu the appellant telling a child called A. to move where he was, take fifty shillings and then the child would return forty shillings to him that is after the child told him that she was going to shave her hair. He stated that the child who was in a light blue school uniform entered the workshop through the rear door and then **fundu** locked himself and the child inside the workshop. That out of curiosity, he moved towards the door of the workshop and rung a police officer from Ratado AP Post but the police officer did not pick the call. He ran towards Ratado AP Post and on his way he met the AP officer he had earlier called and told the AP officer about what he had seen. He then ran back to the workshop and found the complainant leaving the workshop of the **fundu** through the rear door. He said that he realized that the complainant was weeping and when he asked the complainant where she was coming from, she did not respond. He handed over the child to the women who were sweeping nearby and told them what he had witnessed.

18. PW3 stated that shortly thereafter, the AP officer arrived with people, proceeded to the workshop but found the **fundu** had disappeared. He stated that they were brought to Ukwala Police Station where they recorded their statements. He identified the appellant herein as the **fundu** he was talking about.

19. On cross examination by the appellant, PW3 reiterated his earlier testimony and stated that he never saw the appellant covering the child's mouth. He also stated that he did not check the front door of the workshop and he confirmed that he did not accompany the child to hospital.

20. PW4 **Julius Onyango Ong'ongo** testified and recalled that the appellant **Julius Oduor Apondi** was known to him. He stated that he knew the appellant in the course of his work at his (the appellant's workshop) where the appellant used to work as a carpenter and that people used to refer to the appellant as **fundu** because he is a carpenter. He said that he got to know the complainant on the date of the incident that is on 12/6/2018 when at around 10:20am he was from the shop and he passed near the workshop of **fundu** which is close to the **road and he saw the complainant leaving fundu's workshop while weeping** and she was in school uniform that is a white and light blue school uniform. He said that after that he saw the said child talking to a woman who was cooking chips and another who was sweeping. He asked the women what had happened to the child and that they told him that '**wonders had happened.**' That when he asked the child on what had happened to her, she told him that she had been defiled by **fundu**. He stated that he immediately took the child to Ratado AP Post where he found the Chief, AP Officer Ben and a lady AP Officer. He reported to them what had happened and the child also reported the incident to the AP officers.

21. PW4 stated that while in the company of the lady AP Officer, they went to the appellant's workshop with the child and the child showed them the place where the incident occurred. He stated that he saw some fluids at the place where the child pointed as being the place where the incident occurred and on further enquiry, the complainant stated that she urinated as the appellant was defiling her while squeezing her mouth. He said that after that while in the company of the Chief and the lady AP Officer they took the complainant to the Sifuyo Health Centre then they left the complainant under the care of the lady AP Officer as they went to search for the suspect. He said that they went to the home of the **fundu** but they did not find the fundu. That in the course of the search for the said suspect, the Chief was rung and informed that the suspect had gone back to his workshop. He said that the AP Officer Ben rung him and told him that the said fundu had already been arrested. He stated further that they found the appellant at the Ratado AP Post and on the complainant seeing him the complainant identified him as the person who had defiled her. He further testified that after that they were all taken to the Ukwala Police Station where they recorded their respective statements. He said that the women whom he found talking with the complainant did not want to associate themselves with the incident and that is why he decided to take up the matter with the view of helping the child. He identified the appellant herein as the **fundu** he was referring to.

22. In cross examination by the appellant, PW4 reiterated his testimony in chief and stated that he was not present when the appellant was arrested. He stated that he was not bribed to testify against the appellant.

23. PW5 **George Otieno Ombwak** a Clinical Officer working at the Ukwala Sub county Hospital testified that he had worked as a Clinical Officer for a period of seven years. He stated that he filled the P3 Form of A.A. a girl aged 9 years who was given a medical reference number [xxxx]. He said that at the time of the examination, the patient was in school uniform which was neither torn nor blood stained but which was stained with dirt on the back. He said that the said patient was taken to the hospital under the escort of the police on 12/6/2018 with a history of having been defiled on the same day at around 10am at [particulars withheld] Centre by a person well known to her in a carpentry workshop. He said that the girl said that he was lured by the defiler who then dragged her by the arm into the workshop stripped off her clothes, lay her on the floor and defiled her.

24. On general physical examination, the patient was found to be a young girl with altered gait meaning that she was not walking in the normal gait but with a painful gait. She was emotionally unstable but not intoxicated. On physically examining the patient, head and neck were normal, thorax and abdomen had tenderness on the right and left pectoralis. Major muscles including the abdomen and the upper limbs as well as the lower limbs were normal. The Clinical officer approximated the age of injuries sustained to be about five hours and that the probable type of weapon causing the injury was the human body that is, the trunk which caused pain on the patient's thorax and abdomen, and the penis. The patient was given erythromycin, brufen and antiretroviral for post exposure prophylaxis. He stated that the immediate

clinical results of the injuries sustained by the said patient were grievous harm because the patient sustained severe injuries on the genital and the tenderness on the pectoralis major muscles which was as a result of the weight of the perpetrator which could possibly cause fractures. He said that the nature of offence is defilement and that the estimated age of the person examined was 9 years.

25. Further examination of the child's genitalia revealed an inflamed and *oedematus* vulva, tender labia majora and minora, the hymen was freshly broken and was still bleeding, there were tears on the labia minora which were still bleeding and further, blood was noticed on the *endroits*. He said that a clear stick fluid was also noted on the perineum and that the fluid was flowing freely towards the anal sphincter which fluid was found to be semen.

26. Laboratory tests were done on specimen collected from the complainant which results showed the HIV test was negative, the Hepatitis B surface antigen was negative, the haemoglobin level was 10.5 which was low, the VDRL test was negative and on urine microscopy the urine was deep amber and non-tabled which finding he said was normal. He stated that on urine chemistry a PH of 6.0 which is normal was noted, there was no glucose and no protein which was a normal finding.

27. On microscopy, numerous blood cells were noted in the urine as well as numerous epithelial cells. He said that on high vaginal swab it was found to be mucoid, numerous blood cells were noted, numerous epithelial cells were noted and numerous spermatozoa cells were also seen on microscopy.

28. PW5 additionally stated that the child required psychosocial support and psychological counselling to recover from the trauma. He stated further that the tenderness on the pectorals major muscles is as a result of the adult weight of the perpetrator who lay on the victim during the act. He produced the P3 Form filled on 12/6/2018 as Exhibit 1.

29. PW5 also testified that he filled the P3 Form of **Julius Oduor Apondi** a male aged 48 years who was given a hospital reference number [xxxx]. He said that the said person was taken to hospital in a black trouser and a long sleeved shirt. He said that the said person was taken to the hospital under the escort of the police on allegations that he had defiled a school girl who was about 9 years old at around 10am at [particulars withheld] Centre in a carpentry workshop.

30. When he examined the said person (appellant), he found him to be a male adult of sound mind who was not intoxicated. The head, neck, thorax, abdomen, upper limbs and lower limbs were normal. That the genitalia of the suspect was found to be normal with a normal penile shaft and normal pubic hair distribution. There was semen noted on the opening of the urethra and there were no injuries noted around the anus. Lab tests done on the specimen collected from the suspect revealed: HIV test was negative, VDRL test was negative, Hepatitis B surface antigen was negative, urine was tabled with foul smell, it had a PH of 5.0 and it had no glucose or proteins but it had leucocytes. He said that epithelial cells were also seen in urine but there were no sperm cells in urine. Additionally, PW5 remarked that it is possible to miss sperm cells in urine microscopy since the appellant could have urinated and cleared any traces of spermatozoa from the urethra especially now that he escaped and was arrested later. He however stated that sperm cells can be found on vaginal swab if the victim is taken to hospital within 72 hours. He stated that in this case, the victim was taken to hospital early enough and that is why spermatozoa was noted on high vaginal swab. He produced the P3 Form for the appellant herein **Julius Oduor Apondi** dated 12/6/2018 as Pexhibit 2.

31. On cross examination by the appellant, PW5 reiterated his evidence in chief and stated that the first time the complainant was taken to hospital he saw her from 4 metres away and noted that the complainant was walking with an altered gait, that is, with legs apart suggesting that she was in pain. He insisted that the appellant had no injuries and said that it is not possible for an adult erect penis to sustain injuries from a child.

32. He stated that the complainant was not bleeding as a result of puberty but as a result of trauma on the hymen and labia minora. He said that the discharge on the complainant's genital was not a normal discharge and that all the features described of the discharge showed that the discharge was semen. He said on further cross examination that the World Health Organization described an adolescent as a person between the age of 10 years and 19 years and further stated that at an early stage of 10 years they do not expect discharge from the vagina but vaginal discharge is expected within the age of 14 years and 19 years. He said that he did not report anything on DNA and further stated that it was obvious that there was an act of forceful penetration from the injuries on the **genitalia as the hymen was freshly bleeding and there was semen noted.**

33. PW6 NO. [xxxx] **Corporal Nixon Lukwa** of Ukwala Police Station testified that on 12/6/2018 at about 11am he was at the said police station when he received a report from Ratado AP Post that a person who had defiled a minor who was coming from school had been arrested. He said that with the station vehicle, he went to the Ratado AP Post and on arrival, he found the appellant herein having been arrested by the APs of the aforesaid post. He said that he also found a huge crowd baying for the appellant's blood but they managed to contain the situation.

34. According to this witness, while still at the post, he talked to the victim who told him that she was coming from school after she was sent home to shave her hair and on the way the appellant lured her into the appellant's workshop with a promise of giving her fifty shillings and that on the complainant entering the workshop, the appellant defiled her and that after she reported the incident to the APs, that the complainant took the APs to the scene of the incident which was the workshop of the appellant. He said that the complainant even showed him the floor where she was defiled and showed them some fluid on the floor telling them that that is the spot where she urinated at the time she was being defiled.

35. PW6 stated that he took both the appellant and the complainant to the Ukwala Police Station where he said he recorded the statement of the complainant and the witnesses. He said that he issued the appellant and the complainant with P3 Forms and escorted them to Ukwala Sub County Hospital where their respective P3 Forms were filled. He said that he learnt that the parents of the complainant had not obtained the birth certificate of the complainant but only had her birth notification which showed that the complainant was born on 2/5/2009 which birth notification he produced as exhibit 3. He said that at the time he was dealing with the complainant, she appeared disturbed.

36. On cross examination by the appellant, PW6 reiterated his testimony in chief and stated that the crowd wanted to break into the cell and

burn the appellant. He further stated that the appellant was happy to see police officers' vehicle because his life was in danger.

37. At the close of the prosecution's case, the appellant was placed on his defence and he opted to give unsworn evidence and not to call any witness. He gave evidence as DW1 and stated that he was **Julius Oduor Apondi a resident of Ratado and a carpenter**. He confirmed that he understood the charges preferred against him and recalled that on 12th (sic) he left the workshop through the rear to answer a short call then he heard someone calling him from behind only to see that it was the complainant in a school uniform. He said that he enquired from the complainant as to where she was coming from and why she was not in school. He stated that the complainant told him that she had been sent from school to go and shave her hair and further that her grandmother had given her ten shillings for shaving her hair. He said that he asked the complainant if ten shillings was enough and then he told the complainant to get where he was so that he would give her fifty shillings then the complainant would return the change of Kenya shillings 30. He said that when the complainant entered the workshop he pulled the rear door because he rarely uses the rear door. He said that he only gave the complainant fifty shillings and told her to go shave her hair. He stated that he did not do anything to the complainant. He stated that he gave the complainant the money because the parents of the complainant were known to him.

38. Further, that when the complainant was leaving the workshop, there was a woman who was peeling potatoes at the main gate and that the complainant told him that the woman would disturb her by asking her what she was doing at the workshop. That he opened the rear door for the complainant and when the complainant left the workshop, the woman called her. He said that he thought that the woman was only having an ordinary talk with the girl and he continued with his work at the workshop. He said that he was waiting for the girl to return his thirty shillings but he saw the girl seated where the women were and that the women talked with the girl for around thirty minutes.

39. He said that at that time he was called by a lady called Nyalalo to assist her in breaking her door and he went to Nyalalo's home to do the job. That on his way back to the workshop, he went to look for the man who was to paint a bed for him and that on reaching near the gate of Oimb Orango, an AP officer stripped him and asked him why they were searching for him and he was escaping. He said that the AP officer also told him that he was ill mannered. He said that when he asked the AP what offence he had committed, he was handcuffed and told that he would know later. He said that he was taken to cells and told that he raped a child but he denied committing the offence. He stated that he was later taken to the Ukwala Police Station and that even though many people gathered there, nobody touched him. He said that he had lived in Ratado well and that he had never disagreed with anyone. He then said that he is a respected person. He went on to state that when he was arraigned for plea, he was not thinking straight. He then closed his case.

SUBMISSIONS

40. In support of this appeal, the appellant opted to submit orally despite being given the opportunity by this court on several occasions to file written submissions with the help of paralegals in prison.

41. In his oral submissions, the appellant opposed the sentence imposed on him by the lower court and complained that he was not given bond. He submitted that he wanted to get bond because he was a carpenter and had customers' furniture to surrender. He further submitted that the witnesses' statements that he was given could not be understood or comprehended. He lamented that the handwritings were not good such that he could not read well. He also submitted that PW3 and PW4 were not eye witnesses and that they were false witnesses. That Nyakisumo was the first witness who saw and called the victim after he gave the child Sh. 50/= to go and share and bring back Sh. 30/=. He submitted that he did not know why she called the child.

42. Further submission by the appellant was that the doctor took his DNA but the results were not availed to the Court as evidence. The appellant urged that should this court find him guilty, he should be given custodial sentence because his children had dropped out of school and that he had debts to pay to his customers. He submitted that he had a quarrel with Nyakisumo over the working space and that she told him that he would see.

43. Opposing the appeal, Senior Principal Prosecution Counsel Mr. Okachi submitted that the Prosecution had proved the case beyond reasonable doubt against the appellant. Counsel submitted that the victim was defiled during the day in a workshop and that she was immediately taken from the scene of crime to the police station. Further, that the Expert witness corroborated the penetration evidence.

44. On DNA evidence, counsel submitted that DNA evidence is not necessary in defilement cases hence failure to avail it is not fatal to this case. He maintained that the appellant was lawfully convicted.

45. On sentence, it was submitted that the appellant was given the opportunity to mitigate hence the sentence is lawful considering the age of the victim of defilement being 9 years and the trauma she went through. He submitted that the offence called for a deterrent sentence and urged this court to dismiss the appeal.

DETERMINATION

46. I have carefully considered the appellant's grounds of appeal, the opposition thereto, the evidence adduced before the trial court and the applicable law. In my humble view, the issues that flow for determination are derived from the main grounds of appeal and submissions by the appellant who was unrepresented namely:

- 1. Whether the prosecution failed to call crucial witnesses and if so, the effect thereof.***
- 2. Whether there was corroboration of the evidence adduced by prosecution witnesses***
- 3. Whether DNA evidence was necessary and if so, the effect of failure to adduce DNA evidence***
- 4. Whether the appellant's rights were violated and the effect thereof***

5. *Whether the prosecution proved its case against the appellant beyond reasonable doubt.*

47. *On the first issue of whether the prosecution failed to call crucial witnesses*, unfortunately, the appellant did not make any submission in support of this ground. Nonetheless, failure to call crucial and competent witnesses by the prosecution to establish the truth, even if that evidence may be inconsistent, entitles the court to make an adverse inference against the prosecution that had such witness been called, his or her evidence would have been adverse to the prosecution's case. This is the principle espoused in *Bukenya & others v Uganda [1972] EA 549*.

48. However, in *Keter v Republic [2007] 1EA 135*, the Court held:

“The prosecution is not obliged to a superfluity of witnesses but only such witnesses that are sufficient to establish the charge beyond reasonable doubt.”

49. In addition, **Section 143 of the Evidence Act** Cap 80 Laws of Kenya stipulates:

“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.”

50. In the instant appeal, the prosecution called 6 witnesses including the complainant and the Clinical Officer who examined the complainant after the incident. The Clinical Officer produced treatment notes and P3 Form dully filled showing injuries sustained by the complainant. The prosecution also called two other witnesses, PW3 and PW4 who saw the complainant emerge from the appellant's workshop at about 10.3a am, in broad daylight. The investigating Officer too testified and produced exhibits relating to the age of the complainant being 9 years.

51. I observe that there were some 2 women whom the complainant, PW3 and PW4 and the appellant mentioned as having been nearby at the market one sweeping while the other was making chips and that they called the complainant and talked to her after she left the appellant's workshop. These women were never called as witnesses and the explanation given was that they refused to be involved in the matter.

52. In *Julius Kalewa Mutunga v R, CRA No. 32 of 2005*, the court 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?”

92. 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”

93. Further in *Aden Dahir Nuno v Republic [2015] eKLR* the court in support of the above view stated:

“... Provided the evidence on record is sufficient to sustain a conviction, the failure of an investigating officer to testify cannot vitiate a conviction”

53. In this case, it is my humble view that the evidence of PW1, 2,3,4,5,6 was sufficient to establish a case against the appellant and therefore the evidence of the two women who spoke to the complainant at the Ratado Centre after the incident and who refused to get involved into this matter is immaterial. That evidence was not that crucial as to warrant them being called and more so, I find no prejudice was occasioned to the appellant by the failure to call those women. Had they been called, in my view, they would simply have told the court what the complainant had told them but not that they saw the appellant defile the complainant.

54. The fact that the complainant was found by the trial court to have been truthful and honest in her testimony is within the proviso in section 124 of the Evidence Act. See also *Kakamega HCCRA 17 of 2016 George Muchika Lumbasi v R [2016] e KLR*.

55. In the premise, I find and hold that the appellant's allegation that crucial witnesses were not called is misplaced and devoid of merit and is therefore dismissed.

56. *On the second issue of whether the trial court convicted the appellant on the basis of prosecution's evidence which was not corroborated*, again the appellant did not advance any submission supporting this ground. That notwithstanding, PW1 testified after voire dire examination and vividly narrated how at about 8.30 am she was sent from school to go and be shaved and as she went home she met her grandmother who gave her Kshs 10 and as she proceeded to the barber, the appellant herein whom she knew as fundi called her and showed her Kshs 50/- and led her into his carpentry workshop at Ratado Centre, removed her clothes and removed his and held her mouth and inserted his penis in her vagina and defiled her. That she felt pain but could do nothing as he covered her mouth with his hand and after the heinous act, he led her out of the workshop and told her to go away.

57. PW3 who was an immediate neighbour of the appellant saw the complainant child enter the appellant's carpentry workshop and became

curious. He went to call the police nearby. PW4 saw the child emerge from the workshop crying. The complainant told PW2, PW3, PW4, PW5 and PW6 all that the appellant had done to her. The evidence of all these prosecution witnesses as to what the child told them immediately after the act was similar in all material particulars with no material contradiction.

58. The fact of defilement was corroborated by PW5 the Clinical Officer who examined the child and found fresh injuries on her genitals which had been penetrated. Her vagina had continuous discharge which was said to be semen and there were lacerations and blood. He denied a suggestion by the appellant that the child could have been in her menses at that tender age.

59. In my humble view, based on the evidence adduced by prosecution witnesses PW3, PW4, albeit they did not find the appellant in the act of defiling the complainant but they were the first people to meet the complainant who was crying and emerging from the appellant's carpentry workshop. In my humble view, their evidence and the evidence of PW5 corroborated PW1's evidence albeit in sexual offences corroboration is not mandatory.

60. Thus in the case herein, what was to be proved are the ingredients of the offence of defilement and in the case of **George Opondo Olunga v Republic [2016] eKLR**, it was stated that the ingredients of an offence of defilement are: - **identification or recognition of the offender, penetration and the age of the victim.**

61. In **Mohamed Vs. Republic (2006) 2KLR 138**, it was held:

“It is now settled that the courts shall no longer be hamstring by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful and on the provisions of 124 of the Evidence Act in respect to evidence of a child in sexual offences to state that it believed the child was telling the truth.”

62. Thus under **Section 124 of the Evidence Act**, the court in sexual offences, where the only evidence is that of the alleged victim of the sexual offence, shall receive the evidence of the alleged victim and proceed to convict the accused, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

63. In the instant case, the complainant was aged 9 years old as proven by her birth notification card produced in evidence as an exhibit. The trial court which had the opportunity to see and hear her as she testified against the appellant believed her testimony as the offence occurred in broad daylight and that she knew the appellant who had been her father's coworker in mining as confirmed by PW2 and PW3.

64. Furthermore, the appellant in his defence though denied committing the offence but placed himself at the scene of crime. He confirmed that he knew the child, that he met her on that material day and time on 12/6/2018 and that he gave her 50/- to shave go her hair and for her to return change of Kshs 30/-, by which time her grandmother had given her ten shillings to shave her hair. The appellant stated in his defence that he entered his workshop with the complainant and that after that he pulled the rear door.

65. He stated that he gave the complainant money because the parents as well as the grandparents of the complainant were well known to him. He further stated that the complainant feared leaving the workshop because she believed that a woman who was peeling potatoes outside the workshop would ask her what she was doing inside the said workshop and that for that reason he opened the rear door and the complainant left the workshop through the rear door.

66. He also stated that after the complainant left the workshop, the said woman called her and that he saw the complainant talking to the women who were there for around 30 minutes.

67. The question that I must ask is, why would the appellant be worried about the child being asked by the women outside the workshop as to what the child could have been doing in the appellant's workshop with him inside?

68. Although the rest of the prosecution witnesses never found the appellant in the act of defiling the complainant, it is an undisputable fact that sexual offences are usually committed in secrecy and so it is highly unlikely that a victim of sexual offence would always get an eye witness to corroborate their testimony. In addition, the trial court having conducted a *voire dire* examination on the complainant and being satisfied that she was a truthful witness, I see no reason to differ with the findings of the trial court that the complainant was credible. See **J.W.A v R [2014]e KLR and Mohamed v R [2016]2 KLR 138**.

69. The evidence of PW3 and PW4 was that the offence took place at around 10.30 am which was early morning hours. PW1 stated that she was defiled at around 8:30am meaning that she viewed the alleged offender under sufficient light that is in broad daylight. From PW1's vivid narration of the incident, the incident did not take place abruptly. There is a sequence of events that took place before she was defiled and after she was defiled.

70. In my humble view, there was no mistaken identity of the complainant by PW1 who was able to view the offender as she spent a substantial amount of time with the offender.

71. The complainant stated that she was able to see the appellant clearly, a person she knew very well, and that he did not cover her eyes but only covered her mouth to prevent her from screaming.

72. From the description of the appellant by the complainant, the offender was very close to the victim.

73. In addition, not much time had lapsed between the time the complainant was defiled and the time she identified the suspect to the police, which was in a span of minutes as PW3 ran to the AP Camp to get a police officer to come and rescue the complainant after failing to get the police officer on phone and when they returned, they met the complainant and took her away and she was able to tell them exactly what the

appellant had done to her.

74. The appellant himself told the trial court that the complainant used to refer to him as ***fundi meaning carpenter***. PW2 the mother of the complainant also confirmed to the trial court that the appellant was known to her and the complainant as ***fundi***. She stated that her daughter the complainant knew the appellant since November 2017 when the appellant used to harvest sand with her husband and further, that the complainant used to pass by the stream where her father used to harvest sand with the appellant.

75. Accordingly, I find and hold that PW1 overwhelmingly and positively identified and recognized the appellant as her defiler. The trial court observed that the appellant was not a stranger to the complainant and ***that her evidence was reliable***. I have no reason, based on my analysis above, to differ from the findings of the trial court on identification by recognition of the appellant by the complainant.

76. ***On whether the appellant's rights were violated***, the appellant alleged that he was not accorded a fair trial. He stated that he was not granted bond and that the witness' statements that he was supplied with were not legible and neither could they be comprehended. I have perused the trial court record. When the appellant first appeared in court for plea on 13th June 2018, he pleaded guilty to the charge of defilement of the complainant but after the facts were read out to him the following day which was 14th June 2018, he stated that he did not defile the child hence a plea of not guilty was entered and the trial magistrate immediately issued an order that the appellant be supplied with the charge sheet and witness statements. She set a mention date for 18th June to confirm compliance and also ordered for a pre-bail report for 25th June 2018 and a hearing date set for 28th June 2018.

77. On 25th June 2018, the pre-bail report was ready and it was read to him by the court and he stated that he did not know how his life would be in danger. The trial court then ordered that in view of the pre-bail report, the appellant to remain in custody for the time being and she ordered for the hearing of the case on a day today basis.

78. When the matter came up for hearing on 28th June 2018 the appellant told the court that he had not been supplied with witness/ statements hence he was not ready to proceed and the trial court adjourned the hearing to 16/7/2018 to enable the prosecution supply the appellant with witness' statements but later that same day at noon, trial court the record shows that the appellant's case file was recalled and he stated that he had received copies of charge sheet, witness statements and P3 Form. He never complained that the statements were not legible or that they were incomprehensible. Neither did he appeal the decision by the trial magistrate to deny him bond for his personal security. The trial court adjourned the hearing to allow the appellant to prepare for the hearing.

79. On 16th July when the case was fixed for hearing, the appellant stated that he ***was ready to proceed*** and the hearing commenced in earnest up to 17th July 2018 with all prosecution witnesses testifying and the defence set for 31/7/2018. Again the appellant never complained that he had issues with the witness statements.

80. From the above analysis of the trial court record, the appellant was accorded an expeditious hearing and was supplied with the charge sheet and witness statements. He was denied bond for his own personal security following a pre-bail assessment report which showed that the public was baying for his blood. He did not raise the issue of the witness statements being illegible. I do not find any violation of his rights. The ground of appeal is found devoid of merit. It is hereby dismissed.

81. ***On whether failure to carry out DNA testing and availing results of DNA to court was fatal to the prosecution's case***, the appellant claimed that DNA test was done but no evidence was adduced in court on the results thereof.

82. I have perused the evidence of PW5. He did not mention anything to do with DNA test in his evidence in chief but in cross examination, he denied reporting anything about DNA in his report. It is obvious that DNA test was not carried out to establish any link between the semen which was found on the vagina of the complainant and the appellant. The question is whether such failure to carry out DNA testing was fatal to the prosecution's case. In ***AML v Republic [2012] eKLR*** the court held:

"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

83. The above position was taken in the case of ***Kassim Ali v Republic, [2006] eKLR*** that-

"The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim or by circumstantial evidence."

84. A similar view was taken in the case of ***Benjamin Mbugua Gitau v Republic*** where the court stated that ***there was no necessity of DNA test as penetration which is the main element of the offence was proved***.

85. It is noted that based on PW2's narration of the report made to her by her daughter, PW3's narration of what the complainant told him, PW4's narration of what the complainant told him and other women, PW5's the clinical officer's narration of the history given by the complainant at the time of examination for purposes of treatment and filing of P3 Form and the report made to PW6 the Investigating Officer, it is evident that at no time did the complainant change her version of what transpired between her and the appellant commonly known as ***fundi*** for his carpentry trade on the 12/6/2018.

86. The issue now for determination is whether this court will be relying on the uncorroborated testimony of PW1 since PW1 was the only one who witnessed the alleged act of defilement. **Section 124 of the Evidence Act Cap 80 Laws of Kenya** provides:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act where the evidence of alleged victim

admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the appellant shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.”

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the appellant if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

87. The trial court, guided by the above provisions of the law found PW1, the only eye witness was a reliable witness in that her testimony was corroborated by PW3, and PW5, the Clinical Officer.

88. I have no reason to differ with the above finding. Accordingly, the appellant’s claim that no DNA test results were produced in court to link him to the case of defiling the complainant is found to be devoid of merit and is dismissed.

89. **On whether the prosecution proved its case against the appellant beyond reasonable doubt**, having analyzed all the evidence on record, I find that the evidence of PW1 who was proven by birth notification card produced as an exhibit to be a minor aged 9 years and the evidence of all the prosecution witnesses established, beyond reasonable doubt that the appellant who was well known to the appellant as per the appellant’s own admission, defiled the complainant on 12/6/2018 at about 10.30 am. The complainant was found to be bleeding from fresh injuries in her broken hymen. PW5 gave a detailed report on what he found upon examining PW1 within 5 hours of the occurrence of the offence and produced the P3 form as exhibit.

90. In my humble view, the defence tendered by the appellant did not shake the testimony of the prosecution witnesses. It was a mere denial.

91. For the above reasons, I find and hold that the conviction of the appellant by the trial court was sound and safe. I uphold the appellant’s conviction and dismiss this appeal against conviction.

92. On sentence, I note that the appellant was given an opportunity to mitigate before he was sentenced. However, as there was only one sentence to be meted out by the trial court which was mandatory life imprisonment under section 8(2) of the Sexual Offences Act, the trial magistrate did not have any discretion in sentencing the appellant. The situation has since changed and the appellant can benefit from the new jurisprudence set by the Court of Appeal in **Jared Koita Injiri v Republic CA CRA No 93 of 2014[2019]e KLR**, applying the principles laid down in **Francis Karioko Muruatetu v R. SC Pet No. 15 and 16 of 2015**.

93. Accordingly, I shall consider the appeal against sentence after receiving a social inquiry report on the appellant from the Siaya County Probation Officer.

Dated, signed and delivered at Siaya this 29th day of October, 2019.

R.E. ABURILI

JUDGE

In the presence of:

Appellant in person

Mr. Okachi SPPC

CA: Brenda and Modestar