REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO 23 OF 2017

J G N .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant, **J G N** was convicted of the offence of defilement contrary to section 8 (1) & (3) of the Sexual Offences Act No.3 of 2006 and sentenced to 20 years imprisonment. It had been alleged in the charge sheet that the Appellant on 23rd day of February, 2014 at ***[particulars withheld]*** Shopping Centre in Kajiado County, intentionally and unlawfully did an Act which caused penetration with his genital organ namely penis into the genital organ namely vagina of JW a child aged 14.

The Appellant was further charged with an alternative offence of committing an indecent Act with a child contrary to section 11 (1) of the sexual offences Act. It was alleged that the Appellant on 23rd day of February 2014 at ***[particulars withheld]*** Shopping Centre in Kajiado County, intentionally touched the vagina of JW a child aged 14 with his penis.

After a full trial, he was convicted of the main charge which he have herein appealed against both conviction and sentence.

As this is a first Appeal, I'm obliged to subject the evidence on record to my own evaluation and assessment and come up with an independent decision on the issues raised before me. I shall also give due regard to the findings and determinations arrived at by the Learned Trial Magistrate who had the added advantage of physically seeing and listening to the witnesses testify before him. (See OKENO V R (1972) EA 32). The appeal is anchored on eight grounds of Appeal which came as an amendment through the submissions filed on 23rd July 2018. The said grounds are as follows:-

1. THAT, the* Honorable *Trial Magistrate erred in matters of law and fact in failing to find that the major elements of defilement were not conclusively proved hence the same resulted in prejudice on the part of the Appellant.

2. THAT, the Learned Trial Magistrate erred in matters of law and facts in convicting the Appellant in an unfair trial.

3. THAT, the Learned Trial Magistrate erred in matters of both law and facts by failing to find that the prosecution evidence was contradictory and unsafe to sustain a conviction.

4. THAT, the Learned Trial Magistrate erred both in law and fact by failing to find that the prosecution was vitiated by its failure to procure vital witnesses, necessary to prove basic facts.

5. THAT, the Learned Trial Magistrate erred both in law and in fact by failing to find that the charge sheet was defective in nature and was not curable under section 382 of the Criminal Procedure Code.

6. THAT, the Learned Trial Magistrate erred both in law and in fact by failing to conclusively consider my defence.

7. THAT, the prosecution case did not meet the required threshold i.e. proof beyond reasonable doubt.

8. THAT, the Learned Trial Magistrate violated section 169 (2) & (3) of the criminal procedure code.

The brief facts are as follows; PW1 the complainant stated that she stays with her aunt CW (PW2) ever since the passing on of her mother in 2012. The Appellant is the husband to PW2. The Appellant came home from Tanzania in 2013 where he was in jail. It was on 23rd day of February 2014 when her auntie left home for a training seminar and the accused stayed behind with the minors. It was her testimony that the accused touched her while she was asleep which woke her up, made her scared and cry. The Appellant ordered her to follow his in

instructions or else he would kill her and she obliged. He removed her clothes as well as his, inserted his penis into her vagina and she felt pain in the process. He had sexual intercourse with her for several hours. During the time of the ordeal, he had taken PW1's cousin whom she sleeps with to his bedroom and she came to notice that when he had already finished the intercourse. He switched on the light and brought PW1's cousin to her bed.

The following morning she prepared the child for school and she also put on her uniform and she went to her friend's home whom she told everything the Appellant had done to her. She then proceeded to her grandmother's home (RN) whom she told that the Appellant had defiled her. She also communicated the same to her uncle by the name NN who then took her to Entarara Health Centre. At the hospital, they were advised to take the matter to the police which they did and were later referred back to Loitoktok hospital.

She was examined and given medicine. Due to injuries that were sustain during the ordeal, she stayed at home for two weeks recovering. Upon cross-examination by the Appellant, she stated that her mother died in 2010 and she did not tell her cousin about the incident because she was too young to comprehend anything when the offence was committed. She also reiterated that after the Appellant had finished defiling her he warned her that if she reveal anything concerning the defilement he was going to kill her. Upon re-examination she asserted that when the Appellant knocked at the door, she recognized his voice.

PW2; CW basically confirmed what PW1 narrated in her testimony. She had gone for a training seminar and left the children in the accused's custody when the incident happened. When she learnt of the same from her brother N and her colleague (name not provided) she instructed them to take her to Loitoktok for medical checkup. PW2 confirmed that when she finally saw the minor she was in pain. She also mentioned that the accused went underground for about a month before he got arrested. PW2 was recalled by the prosecution to produce the minor's birth certificate which shows that she was born on 7th May 1999 marked as exhibit 3.

PW3; RN is the complainant's grandmother. She confirmed that on the fateful day, the Complainant came to her house and told her that the accused had defiled her using threats that he would kill her if she had refused to comply. On cross examination, she insisted that the accused has been staying with the PW1 and PW2. PW4; NO.64043 CPL VINAL MUTINDA was the investigating officer in this matter. He was given witness statements and the P3 form for the complainant which was filled and signed at Loitoktok District Hospital.

PW5; DR ISA MOHAMMED was the one examined the minor pursuant to the alleged defilement. He found injuries which were 24 to 48 hours old. She had visible lacerations on the labia, and vagina which showed penetrative sexual assault. She had milky vaginal discharge which upon re-examination was coursed by sexual intercourse. He also stated that the degree of injury was grievous harm. The minor was put on P.E.P and emergency pill for penetration of pregnancy. He filled and signed the PW3 form on the 24th/2/2014 which he produced in court as exhibit 1.

DW1; the Appellant stated that on the 24th he woke up and prepared his child for school since the mother had gone for seminar. He was surprised when he learnt that the complainant was around as she was not supposed to sleep at his wife's place the previous night. He asked PW1 why she had not slept at his mother's home and she told him that they had arranged with his wife. He prepared tea for the minors and they left for school and he also left for work. He wife called him to enquire if they had slept well and he responded in the affirmative. At around 6:30 am, his wife PW2 called her again with an allegation that he had defiled the complainant which surprised him. Earlier, PW2 had threated to put him in trouble because he had a grudge with her for having been married a new wife. He has gone to his second wife at 8pm and he was there since the incident on 23rd day of February 2014 until the day he was arrested on 30th day of March 2014 at 2pm. He denied having committed the crime.

FINDINGS AND DETERMINATION.

The issues for determination in this case are as follows:

> ***1. Whether or not the ingredients of the offence of defilement were conclusively proved to the required standard of proof beyond reasonable doubt.***
>
> ***2. Whether or not the Appellant's right to fair trial guaranteed under Article 50(1), 2(b) (c) & (j) of the Constitution of Kenya.***
>
> ***3. Whether or not there exist contradictory testimonies in the prosecution case, if so, whether they are fatal to the prosecution case.***
>
> ***4. Whether or not the prosecution failed to avail essential witnesses, if so, whether the same affected the credibility of the prosecution case.***
>
> ***5. Whether or not the charge sheet was defective, if so, whether or not it is curable.***
>
> ***6. Whether or not the Appellant's defence holds water.***
>
> ***7. Whether or not the Trial Court violated Section 169 (2) & (3) of the Criminal Procedure Code.***

On the first issue, the complainant's contention is that the major ingredients that constitute the offence of defilement were not conclusively proved. What the Appellant is bringing to the fore is that the essential ingredients of the offence of defilement were not proved to the required standard of proof beyond reasonable doubt. In criminal cases, the onus of proof is discharged by the State to a standard of proof beyond reasonable doubt. In considering the standard of proof in criminal cases and the principle that the burden of proof lies with the prosecution, I wish to place reliance to Landmark English case of ***Woolmington v. DPP (1935) A. C 462*** where the court stated:-

> ***"Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject (to the qualification involving the defence of insanity and to any statutory exception). If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."***

In the same respect, Denning J in the case of ***Miller Vs. Minister of Pensions (1947)***, stated:-

> ***"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to defect the course of justice. If the evidence is too strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

Lord Diplock in the case ***WALTER– V- REPUBLIC [1969]*** explained reasonable doubt as that quality and kind of doubt which when you are dealing with matters of importance in your own affair, you may allow to influence you one way or the other. It also can be said that it is a doubt that can be given or assign reason as opposed to speculation.

I now endeavor to determine each of the ingredients of the offence of defilement so as to establish whether the same was to the required standard of proof beyond reasonable doubt as captured in the abovementioned cases. As rightly put by the Appellant in his submissions, the essential ingredients forming the offence of defilement are as follows:

> **i) The minority age of the complainant;**
>
> **ii) Proof of penetration of the complainant's genitalia; and**
>
> **iii) Positive identification of the assailant, thus the appellant as the perpetrator of the act of defilement.**

The above ingredients are envisaged in the case of **CHARLES KARANI VS REPUBLIC, Criminal Appeal No. 72 of 2013** as follows:

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

The same was restated by the High Court in Nairobi in the case of ***Philip Maingi Mueke vs. Republic [2015] eKLR*** as correctly cited by the appellant. In that case the Court held that:-

> ***"It is now trite that for the prosecution to establish the charge of defilement, it must establish, firstly, the age of the complainant, secondly, penetration and thirdly, the identity of the perpetrator. In the present case, the prosecution established the identity of the perpetrator."***

As regards the age of the complainant in Defilement Cases, the prosecution bears the onus of proving the minority age of the victim/complainant beyond reasonable doubt. Age is indeed one of the crucial elements of the offence defilement as it determines the sentence the court is to impose on the assailant upon conviction in sexual offences. Under Section 8(1) of the Sexual Offences Act a person is deemed to have committed defilement if he or she does an act which causes penetration ***with a child.*** Under Section 2 (1) of the Sexual Offences Act, the definition of a child is the one assigned in the Children Act. This entails any human being of less than eighteen (18) years. ***Mwilu J (as she then was) in the case of HILLARY NYONGESA VS REPUBLIC (Eldoret Criminal Appeal No.123 of 2000)*** stated that:

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

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

In the instant case the appellant's contention is that the age of PW1 was not conclusively proved by the prosecution. He brought to the attention of the court that this case was brought for trial on the 22nd day of November 2016, and therefore on a fair calculation, the child was aged seventeen (17) and a half years on the Court date. Going back two years, it is clear that the child was aged fifteen (15) at the time the offence was committed. In the Appellant's view, it means that the sentence of 20 years was not correctly founded upon the law and he therefore argued that the minor's age was not accurately proved and therefore the sentence that was met on him was harsher than that provided by the law. He also challenged the authenticity of the birth certificate pointing no explanation was given as to why it was produced before court at a later stage and not at the beginning of the trial hence PW2 being a medical officer might have prepared the same for the purposes of this trial. On the other hand, the State counsel, Mr. R. Meroka contended that the age of the minor was conclusively proved at the trial court. He stated that the evidence of PW2 and that of the P3 Form was enough to prove the same beyond reasonable doubt.

The question to ponder is as to how then the prosecution can be said to have proved the age of the victim to the required standard of proof as per the law. The best evidence in that regard may be a birth certificate, an immunization card, birth notification and in some cases the court may consider a baptismal card issued shortly after the birth of the child. However, in the absence of best evidence, the prosecution may resort to other documentary evidence such as medical report and the P3 form. The testimony of the parent is also credible evidence that can also be

relied upon as well as the apparent age of the victim as the court visually satisfy itself. ***(See Francis Omuroni –Vs- Uganda, Court of Appeal No.2 of 2000; Evans Wamalwa Simiyu Vs. R (2016) eKLR).***

Another reference may be the Sexual Offences Act promulgated some rules towards the achievement of its objectives which came into force on 11th/07/2014 under legal notice no.101. By dint of Rule 4 of the Sexual Offences (Rules of Court) 2014, it is provided that:

> ***"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."***

Under section 2 of the Children Act, "age" is defined as; "***Where actual age is not known means apparent age"***

I have had a privilege to look at the birth certificate (marked as exhibit No.3) tendered as proof age in this case which shows that the minor was born on the 7th day of May 1999. In light of the above precedents, a birth certificate is one of the best evidence to proving the age of a person. I have not seen any issue with the Birth certificate. Neither did the Appellant point out some kind of irregularity on the birth certificate. The offence was committed on the 23rd of February 2015 which means that the minor was aged 15 at the time the offence was committed. That means the Appellant would still be liable to imprisonment for a term of 20 years if this court finds him upholds the trial court's decision. This is so by dint of Section 8(3) of the Sexual Offences Act No.3 of 2006, which stipulates that ***a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years***. The contention that since PW2 is a medical officer she might have prepared the document for purposes of this trial will remain conjecture as it is not proved to the required standard. It is trite law that he who alleges the existence of a fact must prove. The Appellant alleged forgery hence he ought to have given sufficient proof of forgery not merely alleging the same without giving ample proof to that effect.

On the ingredient of penetration, it must established that the Appellant caused an act of penetration on the complainant's genitalia. Section 8(1) of the Sexual Offences Act states that:-***"A person who commits an act of penetration with a child is guilty of an offence termed defilement".***

By dint of Section 2 of the same Act "penetration" is defined to mean, ***"the partial or complete insertion of the genital organs of a person into the genital organ of another person."***

In that respect, the prosecution must prove that penetration was occasioned on the minor's genital organs by a particular assailant at a particular time. Penetration must be proved by evidence; in ordinary cases by medical evidence as well as by evidence of another witness including but not limited to the complainant. ***(See Francis Murangiri Mboiya v Republic (2017) eKLR).*** This position was fortified in the case of ***Mark Oiruri Mose Vs R (2013)*** eKLR, when the Court of Appeal stated thus:-

> ***"Many times the attacker does not fully complete the Sexual Act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ……"***

This means there that it is not necessarily a must that medical evidence be availed to prove penetration, but as long as there is evidence tendered suggesting that partial penetration was occasioned, the ingredient of the offence is demonstrated. Usually the courts take a firm position that an allegation by the complainant of defilement ought to be supported by evidence of physical examination to establish penetration with a view to sustaining a watertight case at the trial.

In the instant case, the appellant contended that the evidence of PW1 was not corroborated by the doctor who states that the object was used to commit the injury was a blunt hard object and in his view the same is not the description of penis that has soft tissues. He argues that the description of an object other than a penis and that the presence of the vagina discharge is normal to a girl of such an age. He also stated that Dr. Nduati who was the first to see the minor did not appear in court to give his testimony and the only doctor who appeared in court was Dr. Issa who had only filled the P3 form and that the same P3 form was unstamped. The state counsel on the other hand opposed the Appellant's contention pointing out that the minor was graphic detailing the incident happened on the night of 23rd February 2014. He argued that her narrative of what took place was very clear and consistent and the same was supported by the medical evidence as depicted in the P3 Form prepared by Dr. Issa.

PW1 the complainant in her testimony asserted that she was defiled by the appellant. She gave a very consistent narrative of what transpired on the fateful day. It was her testimony that the accused caused an act penetration by inserting his penis into her vagina. She also told the Court that she was in grave pain and she couldn't walk properly. PW1's testimony is corroborated by the testimony of PW5; Dr. Issa who examined, filled and signed the P3 form for the complainant. He stated that the injuries were 24 to 48 hours old, she had visible lacerations on the labia, and vagina which showed penetrative sexual assault. She also had milky vaginal discharge and the degree of injury was grievous harm. She was put on P.E.P and emergency pill for prevention of pregnancy. He produced a P3 form before the trial court which I had the privilege to go through. The above evidence show clearly that the child was defiled. There is overwhelming evidence of penetration on the minor's genitalia. This court finds that the minor was indeed defiled and the appellant's contention on this limp fails.

On whether or not the accused person was the author of the complainant's misfortune, the courts have set out what constitutes favorable circumstances for correct identification by a sole testifying witness. The same was established in Maitanyi vs Republic, (1986) eKLR 196 where it was stated that:-

> ***"subject to well-known exceptions it is trite law that a fact maybe proved by the testimony of a single witness but his rule does not lessen the need for testing with the greatest care the evidence of the single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other***

evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error"

As observed by the Court of Appeal **in Karanja & another v Rupublic (2004) 2 KLR 140, 147 (Githinji JA, Onyango Otieno & Deverell Ag JJA)**-

The wall as regard identification under difficult conditions is now well settled. In the case of **Cleophas Otieno Wamuka vs Republic Court of Appeal No. 20 of 1989 at Kisumu**, the Court stated as follows:-

"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognised the appellant among the robbers who attacked and robbed them……What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Wherever the case against a defendant depends wholly or to a great extent on the correctness of one identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well-known case of R vs Turnbull (1976)3 All ER 549 at page 552 he said:-

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

It was also said in the case **Titus Wambua v Republic (2006)eKLR Crim. App No. 23 of 2014** that:

"We have considered the evidence of PW1 and PW2, who claimed to have known the attackers they claim to have seen. They did not in their report to police give the names of the attackers but they told PW2 that they had identified one of the attackers and did not give the name of the alleged attacker. It is of great significance

We did not find any evidence linking the appellant to the offence of robbery. We are, accordingly, not convinced that the identification of the accused by the complainant in the circumstances of this case was free from possibility of error. That the complainant could not recognize possibility of error: in the same way he was unable to identify the other attacker, he could be mistaken of his recognition of the accused. Moreover, no basis of recognition, by way of long association and dealings with accused was adduced to support the claim to recognition"

In the instant case, the Appellant asserted that positive identification of the perpetrator is essential. He relied on the evidence adduced by Dr. Issa which states that the alleged offence happened within 24-48 hours. His argument is that 24 hours were not nearly over when the child was examined hence he was not the perpetrator of the offence.

He also contended that since the room where the offence was committed was dark since the lights was off, the minor couldn't have seen that he removed his clothes. He therefore argued that the Learned Trial Magistrate erred in convicting him on such evidence alone. This Court notes that the Appellant was well known to Complainant hence this is a case of recognition as opposed to identification of a stranger. What this means is that in the instant case the risk of mistaken identity was rendered very minimal. The minor was very candid in her narrative that it was the Appellant who defiled her. She explained that when the Appellant came home the fateful night, he knocked and she recognised his voice after which she switched on the light and open for him. She saw him enter the house and she went back to sleep. The Appellant came to her room later in the night, took his daughter to his room, came back to the complainant's room and have sexual intercourse with her after threatening to kill her if she would have tried to resist. After sex he switched on the light and the minor saw him properly. The Court also notes that since the minor knew the accused very well, she was also able to recognise his voice during the time he issued death threats her.

Further, the Appellant upon learning that the minor had made the incident known to PW2, PW3, he did not do anything to try and give any explanation regarding the allegations which were being made against him. Instead, according to PW2 the Appellant went into hiding for a month till the day he was arrested by the police.

In the premises, I'm of the view that the Appellant was positively identified by the minor before, during and after the offence was committed on the fateful day. The Appellant's contention on this limp fails.

The second point of determination in the case is whether or not the Appellant's rights to a fair trial under article 50(1), 2(b), (c) and (j) of the Constitution of Kenya 2010 were violated. The said articles states that:-

"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(e) to have the trial begin and conclude without unreasonable delay;

(j) to be informed in advance of the evidence the prosecution intends sorely depend on, and to have reasonable access to that evidence;"

The above cited constitutional provision imposes a duty of disclosure of all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This is the position that was taken in the Landmark decision of ***R v Stinchcombe [1991] 3 S.C.R. 326***, where the Supreme Court of Canada concluded that, in criminal cases, the state has a constitutional duty to disclose to the defence all evidence in its possession and control that could be relevant to the case. This duty does not depend upon whether the state will call that evidence at trial, whether the state thinks a witness is not worthy of credit, or whether the evidence helps or hurts the state's case. It was also observed in the same case the obligation to disclose is a continuous one, arising pre-trial and continuing throughout the trial and is to be updated whenever additional information is received. ***In R v Ward [1993] 1 WLR 619, 674B-C,*** the Court of Appeal in England was unanimous that***:-***

"The prosecution's duty at common law is to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses."

The Appellant contends that he was not furnished with the requisite witness statements as required under the law. To elaborate his argument the Appellant, quoted page 8 of the trial record which states as follows:

"Court: hearing on 2/7/2014 Loitoktok accused to be supplied with copies of charge sheet and witness statements."

2/7/14; Court: I seek for statements. I am not ready to proceed.

Court Prosecution: I have the statements of the witnesses.

Court: Matter to Proceed.

He therefore stated that the above may suggest that he was supplied with the same, which is not the case. He stated that the prosecutor did not handover the statements to him and the matter proceeded. In other words he asserted that the trial Magistrate proceeded with the matter even though he was aware that the Appellant did not have witness statements and without being given time to prepare his defence hence his right to fair trial was violated. He therefore argued that the right to pre-trial disclosure of material statements and exhibits is part and parcel of the right to fair trial. He further argued that in an open and democratic society of our type, courts cannot give approval to trial by ambush, and in criminal litigation the courts cannot adopt a practice under which an accused person be ambushed. Further that the nature of the fundamental right to a fair hearing requires that there be equality between the contestants in litigation. The Appellant relied on the Court of Appeal decision in ***Republic v Daniel Chege Magotho (2014)eKlR*** in support of his contention.

What I have deciphered from the above evidence is that the Appellant requested to be supplied with witness statements after-which prosecution told the court that it had the requisite witness statements. This was never revisited and the matter proceeded. Since then, Appellant never protested that the witness statements he had requested for were never supplied to him. The court presumed that the same was supplied. It must be borne in mind that trial courts are well aware of the duty of prosecution to disclose all the material evidence that it seeks to rely on during the trial. There is no formal endorsement in form of a signature to show that indeed the witness statements were supplied. In the premises, I'm of the view this Article 50 of the constitution being the most frequently litigated Article of the Constitution especially on appeal, it is now paramount that the trial record should demonstrate that indeed the Accused person was supplied with witness statement and any other material evidence the prosecution relied upon.

I have not seen how the Appellant was prejudiced herein. This ground is without merit.

On the third issue of determination, the Appellant contended that the evidence upon which he was convicted and sentenced was tainted with contradictions and inconsistences in totality. He highlighted the contradictions which include those that concern the exact day that he was arrested, the time that the girl spent at home before resuming to school, the age of the complainant and the inability of the little girl K comprehend anything but the complainant told the court that she asked her why she was crying at night hence her evidence ought to be treated with caution. The Appellant placed reliance in the case of Steven Njoroge Kigochi where the court held that contradictory evidence cannot be used to convict and such evidence has been held to be a monumental hotchpotch and a prevarication of lies which becomes hard to separate truth from untruth. On that note, he referred the Court to the case of ***Ramkisha Pandya v Republic (1957) EA 336 & Charles Seda Otieno v Republic (2015) eKLR.*** He therefore asserted that there is clear proof that the case was framed up and his defence that there was a plan to implicate him of the offence is worth of belief.

The law as regards the issues of contradictions and discrepancies is very crystal clear. It is trite law that inconsistencies unless satisfactorily

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

> ***"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.***
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> ***However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

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

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

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

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

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

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

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

In light of the above decisions I now endeavor to make a determination on the above issue. I have not seen any major contradiction as far as the prosecution is concerned. As regards the issue of age, I have mentioned earlier that the disparity is minor and cause no prejudice to the Appellant. The birth certificate of the minor suggests that the minor was born on the 7th of May 1999 and the offence was committed on the 23rd of February 2015 and a fair calculation of her age gives us fifteen years and nine months. This means that the offence is still within the category of a sentence of 20 years imprisonment. The disparity that was brought by PW2 and the Medical report which suggested that the minor was 14 at that time was a mere miscalculation and the same was not fatal. In the premises, I'm of the view that this ground is without merit.

On the forth issue, the Appellant contends that non-procurement of essential witnesses was fatal to the prosecution case. On that score, he cited the Court of Appeal decision ***in Juma Ngodia –vs- Republic (1982-88) (KAR 454)*** where it was held that the prosecutor has in general, a discretion whether to call or not to call someone as a witness. If he does not call a vital witness without satisfactory explanation, he runs the risk of the court presuming that his evidence which could be and is not produced, if produced have been unfavorable to the prosecution. He question why the arresting officer and his daughter aged 6 years was not brought before court to give evidence since she was the only witness that was present in the same house where the offence was committed. He resorted to Section 31 of the Sexual Offences Act 2006 which provides that the court may declare a witness vulnerable due to the age but however the same provides protection to ensure that the witness testifies. In his view, the failure by the prosecution to avail the said minor as a witness in court caused prejudice to his case.

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

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

any fact"

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

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

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

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

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

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

In the instant case, I have gone through the trial record and I'm satisfied that there is overwhelming evidence of defilement. The evidence produced by PW1, PW2 and Doctor Issa's medical report was able to clearly depict the ingredients of the offence of defilement to the satisfaction of the court. I don't think the witnesses that the Appellant argues that they are vital to this case would prove the prosecution case otherwise. I therefore find that the witness brought before the trial court as per its discretion were enough to prove its case beyond reasonable doubt. The Appellant's contention therefore fails.

On the fifth issue the Appellant argues that the charge sheet was defective. His contention is that the date of arrest contained in the charge sheet (30/3/2014) is not correct according to the evidence on record by Corporal Mutinda (PW4) which state that on 24th day of February 2014 while PW2 states that he was arrested after a month. He contended that the said date is important because it was relied upon by the Court in dismissing his defence that he has been at his second wife's home at the time of his arrest. He contended that the matter is worsened by the fact that the Officer who arrested him was not brought to the court to clear this doubt which left a gap in the prosecution case. He placed reliance on the case of Jason Akumu Yongo v Republic (1983) where the court held that:-

> **"In our opinion a charge is defective under Section 214 (1) of the criminal procedure code where:**
>
> **a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence, which the evidence in the committal proceedings discloses: or**
>
> **b. It does not, for such reasons, accord with the evidence given at the trial: or**
>
> **c. It gives a misdescription of the alleged offence in it particulars."**

The question as to what constitutes a defective charge sheet was spelt out in the case of **YOSEFU AND ANOTHER -VS- UGANDA (1960) E.A., 236**. The East Africa Court of Appeal held:-

> ***"The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act."***

And in **SIGILANI -VS- REPUBLIC (2004) 2 KLR, 480**, it was held that:-

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

On the other hand, Section 134 of the Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitute as follows:-

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

The underlying principle governing charge sheets is that an accused person ought to be charged with an offence known or recognized in law. The offence that the accused is charged with must be disclosed and stated in clear terms and unambiguous manner so as to enable the accused

plead to a specific charge in which he understands. This enables the accused in preparation of his defence. The Appellant has not demonstrated how exactly the charge sheet is defective. His argument is that the evidence tendered by the prosecution was inconsistent with the charge hence it is defective. This cannot in law constitute a defective charge sheet. Despite that, there is no question in my mind that the Accused person clearly understood the charges facing him (to wit, defilement) well enough to understand the ingredients of the crime charged so that he could fashion his defence. The particulars of the offence were properly and clearly spelt out in the charge sheet which captures the date the offence was committed, the place it took place, the act that constitute the alleged offence and the names of the victim and that of the Appellant. This in my view, he understood it well enough to offer an explanation when the facts were read out to him.

As regards the Appellant that the Trial Court failed to consider his defence that what is before court is nothing but a framed up case and the reason for it is that he married a second wife. He argued that the existence of a grudge between him his family and PW1's family caused her not to go to his parents' home after the incident. He further contended that the time that the injuries were said to have been inflicted on the complainant was not within the range that was given by the medical examination report hence this shows that the incident was pre-planned. He also stated that there existed divorce proceedings which may be used as evidence of the grudge between him and PW2. He relied on the case of ***Michael M'maranya vs Republic, CA. No. 126 of 2004 (Nyeri)*** where the court stated that where the first appellate court does not adequately consider the defence, an appellant is entitled to an acquittal. He cited that case of ***Uganda vs. Sebysala & Others*** where the Learned Judge citing relevant precedents has this to say:

> ***"The accused does not have to establish that his alibi is reasonably true. All he has to do is create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."***

As regards the Appellant's defence herein, it is trite that by setting up an alibi defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case. ***(SSENTALE V. UGANDA[1968] EA 365).*** The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution ***(WANG'OMBE V. REPUBLIC [1976-80) 1 KLR 1683). The prosecution always bears the burden of disproving the alibi and proving the appellant's guilt (Wang'ombe v. Republic [1976-80) 1 KLR 1683).***

In the Court of Appeal decision in ***VICTOR MWENDWA MULINGE VS REPBLIC [2014] eKLR,*** the court held that even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with Section 309 of the Criminal Procedure Code to rebut the appellant's defence.

Section 309 of the Criminal Procedure Code provides:-

> ***"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."***

In the case of ***KIARIE VS REPUBLIC [1984] KLR*** the Court of Appeal held:-

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons".***

Further, the Supreme Court of Uganda, in ***FESTO ANDROA ASENUA V. UGANDA, CR. APP NO 1 OF 1998*** made a similar observation when it stated:

> ***"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage, the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."***

It is true in this case that the Appellant raised his alibi defence late in the trial but the same does not warrant the trial court to ignore his defence. The correct approach is to consider the defence against the evidence adduced by the prosecution. That is the position taken in ***GANZI & 2 OTHERS V. REPUBLIC [2005] 1 KLR 52,*** where the Court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence. In the circumstances of this Appeal, a consideration of the Appellant's defence against the evidence of visual identification of the assailant tendered by the prosecution witnesses, the defence is completely dislodged. The evidence of recognition was very consistent and watertight, as I have clearly demonstrated herein above. In the premises, the Appellant's contention cannot hold water.

On the last issue raised in this Appeal, the Appellant contended that the Court violated section 169 (2) & (3) of the criminal procedure code which states that:-

> ***"(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.***
>
> ***(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."***

In trial court's judgement, the Learned Magistrate had this to say:

> ***"Accused is guilty as charged and this court proceeds to convict him accordingly pursuant to section 215 of the criminal procedure code. It is so ordered."***

The Appellant claims that the above finding violates the law. He cited the case of Dancan Mawi Gichuhi (2015) eKlR, where the Trial Magistrate had stated as follows:-

> ***"I find the accused guilty of the offences as charged contrary to Sexual Offences Act no. 3 of 2006. I will find him guilty on county 1 and 11 and convict him under section 215 CPC on both counts"***

On appeal, the case held that:-

> ***"I note that the Learned Magistrate did not comply with the above section, even though I hold the view that the said omission is not fatal. In my view it is a requirement under the said section that ought to be complied with"***

I agree with the Appellant on this issue. It is indeed the requirement of the law that whenever a conviction is sustained, the trial court is required under law to particularize the offence with which the accused is charged with, the section of the law which the conviction is based on and the punishment imposed to that effect in compliance with section 169(2). Further, in the event that the accused person is found not guilty and is acquitted, the Court's verdict must be able to state the offence which the accused was facing and unambiguously pronounce that he is set at liberty as required under section 169(3). However, in this appeal, I find the omission by the Learned Trial Magistrate not fatal.

For the above reasons the appellant was correctly charged, convicted and sentenced by the trial court. The impugned judgement of the lower court is therefore affirmed and the appeal on both conviction and sentence dismissed.

Dated, signed and delivered in open court at Kajiado this 23rd day of October, 2018.

.....

R. NYAKUNDI

JUDGE

Representation:

Mr. Meroka for the DPP

The appellant