



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL APPEAL NOS 17 AND 20 OF 2017(CONSOLIDATED)**

**SOL.....APPELLANT**

**VERSUS.**

**REPUBLIC.....RESPONDENT**

*(Appeal arising from the judgment, conviction and sentence by Hon. G.Adhiambo SRM in Ukwala SRM Criminal Case No. 595 of 2016 on 5/10/2017)*

**JUDGMENT**

1. This is an Appeal against Judgment (conviction and sentence of 20 years) in respect of Ukwala Senior Resident Magistrate's Court Criminal case number 595 of 2016, R. vs. **S O L** delivered on 27/1/2017.

2. The Appellant - **S O L** was charged under **Count 1**: with the offence of Defilement contrary to **Section 8 (1) as read with 8 (3) of the Sexual Offences Act No. 3 of 2006**, an **Alternative Charge**: of Committing an Indecent Act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006** and **Count 2**: Deliberate Transmission of HIV contrary to **Section 26(1) (a) of the Sexual Offences Act No. 3 of 2006**.

3. The facts as per the charge sheet respectively are that, **S O L**: on 8<sup>th</sup> day of September, 2016 within Siaya County, intentionally caused his penis to penetrate the vagina of **MAO.**, a child aged 13 years.

AND

4. **SOL**: on 8<sup>th</sup> day of September, within Siaya County, intentionally touched the vagina of **MAO** a child aged 13 years.

AND

5. **SO L**: on 8<sup>th</sup> day of September, 2016 within Siaya County having actual knowledge that he was infected with HIV intentionally had unprotected sexual intercourse with **MAO** which he knew or ought to have reasonably known was likely to lead to **MAO** being infected with HIV.

6. Aggrieved and dissatisfied with the judgment, conviction and sentence of 20 years, **SOL** – the Appellant filed a Petition of Appeal raising the following grounds:

**1. That, the Learned Trial Magistrate erred in law and fact by convicting in a case that age was not conclusively proved.**

**2. That he cannot recall all that transverse during the trial hence prays for the trial proceedings to assist raise sufficient grounds.**

**CASE SUMMARY**

7. In determining this Appeal, the court must fully understand its duty as the first Appellate court as stated in the case of **Okeno v. R** which is to subject “*the evidence as a whole to a fresh and exhaustive examination* and for this court to arrive at its own decision on the evidence, it must weigh evidence and draw its own conclusions and its own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

8. On what transpired during the pendency of the case in lower court. **PW1- George Oduor Ochieng** testified that he was a resident of Kagonya and a farmer, and told the court that on 9/9/2016 in the morning he was at home when his niece the complainant who was then living with him left home for school but contrary to her usual practice on that day she never went back home for lunch or even in the

evening. He testified that on the following day, he embarked on searching for the complainant at the home of her fellow students and their relatives but he did not find her so on Monday he reported to the teachers of the school where the complainant used to study that the complainant had disappeared.

9. He stated that the classmates of the complainant said that they last saw her on 8/9/2016. It was his testimony that he reported that matter at Segal Patrol Base and later the elder sister of the complainant rung him and informed him that the complainant had resurfaced at her parents' home in Alego. He stated that on 19/9/2016 he travelled to Alego where he found the complainant who told him that someone who sells goods at Bumala and whose home is near Ugenya Primary School took her to his home and locked her in the said home. That the person locked her in the house from 9/9/2016 to 13/9/2016 and that whenever the person used to leave the house the person would lock her in the house.

10. PW1 stated that on further interrogation, the complainant told her that the person also gave her Kshs. 300. He stated that the complainant relayed the information to him in the presence of her mother MO. He also stated that the complainant refused to disclose what happened to her in the aforesaid house of the accused for the period of five days she was in that house. That he relayed the information to the police at the Segal Patrol Base and later availed the complainant at Segal Patrol Base where he said they recorded their respective testimonies.

11. He also stated that the complainant told him that the person who locked her in, sells sweets at Bumala and that his home was near Ugenya Primary School so he managed to recognize the particular person the complainant was referring to as LO the accused person. He stated that he had known LO since the year 1974.

12. on **cross examination**, he reiterated his earlier testimony and stated that the accused was the only person who lived in that home that was described to him by the victim because all the family members of the accused died. He stated that the accused's other brother lived in a different compound.

13. **PW2- MAO** a minor was taken through *voire dire* examination and the court found that she was not only intelligent but she also understood the importance of telling the truth and the effect of making an oath and was thus found suitable to give sworn evidence.

14. PW2 testified that she is a student of U. Primary School and was in class 5. She stated that on 8/8/2016 she left home for school at around 7.00 am and that as she was about to reach where there was a compound, she saw the accused person emerging from a house in that compound. She stated that as she was about to reach where the accused was, the accused called her and pulled her. She said that the accused forced her into the house. It was her testimony that at that time it was not dark and that she saw the accused well. She said that after that the accused told her to place her school bag on the floor.

15. She then stated that the accused ordered her to remove her school uniform but she refused and the accused then removed his long trouser and placed it on the bag. She said that since her uniform was a skirt and blouse, the accused pulled her skirt downwards and told her that he wanted to sleep with her. She said that she asked the accused what the accused meant and the accused told her that he wanted her to be his wife and he wanted to keep her there so that her parents would not know that she was there. She said that at that time they were both seated on the bed and that the accused told her that he wanted to do with her what adults do.

16. It was her testimony that after that the accused inserted his penis into her vagina. The trial court noted that she mentioned the word penis and vagina in English and she said that the incident took place on the accused's bed. She then stated that after that, the accused locked her in the house and told her that he was going to the road to check whether she was being searched for. The complainant stated that later at 4.00pm the accused went back to the said house and told her that in the compound where he had gone to buy cigarettes a school girl asked him to alert her in case he saw a tall dark lady.

17. It was her further testimony that the accused told her that he wanted to give her money so that she could travel to her parents' home in Alego. She stated that the accused only allowed her to go to Alego on Tuesday and yet the accused had pulled her into the aforesaid house on Thursday. She stated that when she was leaving for Alego the accused gave her Kshs. 300 and told her to go home because the accused feared that he would be arrested if he was to be found with a school girl. She stated that the accused took her to the Ukwala stage at 5.00 am and left her there waiting for a vehicle that would take her to her home in Alego.

18. It was her evidence that at the time that the accused pulled her she was living with her Uncle GO at Kagonya. She stated that when she reached Alego she told her mother what transpired. She stated that on the following week, her Uncle GO rung her mother and told her that they were needed at the Segal Police Station. She stated that her uncle told her mother that the man who pulled her (PW2) had locked her in the house for around one week. She stated further that was her elder sister who informed her uncle of where she was. That she was later taken to the Ukwala Hospital where she was examined.

19. It was the complainant's testimony that when the accused was tested, the accused was found to be HIV positive while she was found to be HIV negative. She also identified her health passbook dated 26/9/2016 and P3 form dated the same day as PMFI 1a and 1b respectively.

20. She further testified that from the time she went to Alego to the time she was taken to the Segal Police Station one week had lapsed. She also stated that by the time the accused inserted his penis into her vagina she had known the accused well and that she knew the accused since January 2016 as she used to see the accused at his compound on her way to and from school. She stated that all that time she was in the accused's house, only the accused was in that compound.

21. She also stated that the accused had sex with her on 8/9/2016 at around 6.00 am and that the accused had sex with her on 8/9/2016 which was on a Thursday, then also had sex with her on Friday, Saturday, and Monday. She stated that when the accused went back home on 8/9/2016 the accused only left his home again on 10/9/2016 while going to Bumala to look for Omena. She stated that the accused sells *Malimali* in Bumala and that the accused told her that he was going to Bumala to see if her uncle would ask her if he had seen her (the complainant). She went on to state that the accused knew her uncle very well.

22. The complainant further stated that there used to be light in the house of the accused both during the day and at night. It was her testimony that at night they used to use a tin lamp. She stated that even though the accused used to lock windows and doors during the day there still used to use light inside the house. She stated that the accused is SO L.

23. On **cross examination**, PW2 reiterated her earlier testimony and stated that nobody saw the accused as the accused pulled her and that there was nobody else on the road. It was her testimony that the accused's door was made of iron sheet and that the accused used to be with her in the house during the day. She said further that the accused harvested bananas which they ate and that the accused also had *omena* in the house.

24. **PW3- Patrick Okere** testified that he was a clinician working at the Ukwala Sub County Hospital and produced the treatment sheet and P3 form for the complainant MAO as well as the lab results and P3 form of SO. It was his evidence that the complainant was seen at their facility on 26/9/2016 by him having been brought by her mother and a police officer. He stated that the complainant gave a history of having been kidnapped by a person well known to her as she was on her way to school on 8/9/2016 and that the said person who kidnapped her locked her in a house where he defiled her four to five times in a day and even threatened to harm her in case she made any noise.

25. He stated that the complainant gave a history of having been defiled from 8/9/2016 to 13/9/2016 and that the man did not use any protection. He stated that the complainant was of fair condition and was sober. He said that on vaginal examination the hymen of the complainant was found to be absent and there was a whitish vaginal discharge. He stated that when lab tests were conducted on the samples collected from the complainant the HIV tests was non-reactive, the pregnancy test was non-reactive and the syphilis test was also non-reactive. He however said that when urinalysis was done, numerous epithelial cells, leucocytes and pus cells were noted and that the patient was given antibiotics.

26. He also stated that the P3 form of the complainant had the same history and findings as the treatment notes aforesaid. He testified that the findings had a connection with the history. He stated further that he examined the patient 2 weeks after the incident but he said that he did not fill the post rape care form because it was then out of stock. He produced the treatment notes of the complainant lab results and P3 form of the complainant dated 26/9/2016 as P exhibit 1a, 1b and 1c.

27. PW3 also produced the treatment notes of SO aged 32 years and said that he was seen at their facility on 26/9/2016 by him and had been taken to the said hospital by a police officer. He stated that the history given was that the said SO had defiled a minor from 8/9/2016 to 13/9/2016 at his house in Ligingio village. He stated that he found that the said patient was in fair general condition and was sober, that they sent the patient to the lab and they found the following results; the syphilis tests was non-reactive, the HIV test was reactive and when urinalysis was done numerous pus cells, epithelial cells and leucocytes were noted. He stated that they sent the patient to the support centre for HIV care to be initiated and it was his finding that there was correlation between SOL's findings on the lab tests with the victim's lab results which suggested that there must have been sexual intercourse between SOL and the complainant. He then produced the treatment notes, lab results and P3 form of SOL all dated 26/9/2016 as P Exhibit 2a, 2b and 2c.

28. On **cross examination**, he reiterated his earlier testimony. He stated that the period between the date of sexual intercourse and the time for examination was 2 weeks which is a short time for antibodies to be seen in the blood of the complainant if she was HIV positive and that is why they recommended that the complainant goes for another test after a further 2 weeks.

29. **PW4, No. 97009 -PC George Oduor Oyile** of Segga Patrol Base told the court that on 24/9/2016 he was discharging his duties at the report office when one GOO of Kagonya Sub-Location reported that his niece the complainant who was then living with him had gone missing. He stated that the said GOO reported that his niece was aged 13 years and was a class 5 student at U. Primary School.

30. He stated that the uncle of the complainant claimed that the complainant went to school on 9/9/2016 and then she disappeared. He stated further that they recorded the report and on 26/9/2016 and the reportee went back to Segga patrol Base where he reported that his niece had been found at her parent's home in Uranga -Alego.

31. He further stated that the uncle of the complainant also told him that the complainant told him that she was abducted by a neighbour of his uncle who defiled her from 8<sup>th</sup> to 13<sup>th</sup> of September 2016 by engaging in forceful sexual intercourse with her. He said that while in the company of PC Wasike and PC Felix Subya as well as the complainant's uncle who then identified the suspect to them, they arrested the suspect.

32. He stated that the suspect was taken to the Segga Patrol Base and that they interrogated the suspect who confirmed that he knew the victim very well but he did not confess that he was the one who had confined the girl.

33. PW4 stated said that on 26/9/2016, the victim identified the accused as the person who confined her in his house for 5 days and defiled her. He stated that the complainant said that when the accused suspected that the victim could be found in his house he escorted the victim to Ukwala and gave the victim Kshs. 300 for bus fare so that she could board a vehicle to Uranga. That they then took the suspect and the victim to Ukwala sub-county hospital for medical examination and a doctor prepared the respective treatment notes as well as P3 forms which were produced as P exhibit 1a, 1b, 1c, 2a, 2b and 2c respectively. He stated that after analysis of the evidence they decided to charge the suspect SOL with the offences before the court.

34. It was his testimony further that they charged the accused with the offence of defilement and they took the victim to the Siaya County Referral Hospital for Medical Assessment as well the Age Assessment which found that she was between 13 and 14 years old. PW4 then produced the treatment book issued to the Complainant as well as the age assessment report of the complainant both dated 30/9/2016 as exhibit 3a and 3b respectively. He also identified the accused/appellant as the suspect he arrested and charged and stated that he never knew the accused person before.

35. On **cross examination**, he reiterated his earlier testimony and stated that he was not the one who effected the arrest but PC Wasike and

PC Felix Bosire did.

## JUDGMENT OF THE LOWER COURT

36. The lower court in its judgment reiterated the charges that the accused now appellant was faced with and the particulars thereof as stated above. It also stated that the accused person denied all the 3 charges and the prosecution in a bid to prove its case called 4 witnesses.

37. The court went on to give a summary of what each of the witnesses said both in examination in chief and in cross-examination and in the end when the prosecution closed its case, the court made a ruling that the prosecution had established a prima facie case against the accused to warrant the accused being put to his defence.

38. The court however noted that when the accused was given an opportunity to defend himself he opted to remain silent and did not call any witness. The trial court then framed the following issues for determination:

***(a) Whether on 8/9/2016 the accused person herein while in Siaya County did intentionally case his penis to penetrate the vagina of MAO, the complainant, a child aged 13 years.***

In the alternative:

***(b) Whether the accused person herein did on 8/9/2016 within Siaya County did intentionally touch the vagina of MAO, a child aged 13 years.***

***(c) Whether the accused person herein did on 8/9/2016 while within Siaya County while having knowledge that he was infected with HIV knowingly and willfully had unprotected sexual intercourse with the complainant an act which he knew or ought to have reasonably known was likely to lead to MAO being infected with HIV.***

39. The trial court stated by outlining the provisions of each of the sections that the accused was charged with and observed that out of all the prosecution witnesses, it was only the complainant who witnessed the alleged incident and stated that the **issue for determination** was **whether the alleged visual identification of PW2 the complainant could be relied on by the court**. In its determination, the court was guided by the decision in **R v Turnbull[1979] 3 All ER 549** where the court stated that some of the factors to be considered before determining on whether or not to rely on visual identification evidence of a single eye witness are as follows:

***a. Whether the viewer viewed the suspect from a close position and under sufficient lighting.***

***b. Whether the viewer had ample time to view the suspect and it was not just a fleeting glance.***

***c. Whether the viewer was sober.***

***d. Whether there was any difference between how the viewer described the suspect and the actual appearance of the suspect.***

***e. Whether much time had lapsed between the time the viewer identified the suspect at the time of the offence and the time the viewer identified the suspect to the police. The court further drew a distinction between recognition evidence and identification of a stranger where the court stated that recognition evidence is more reliable than identification of a stranger.***

40. The trial court then restated the evidence as adduced by the complainant and PW1 her uncle. The court stated in its judgment that in as much as PW2 stated that the accused defiled her repeatedly from 8/9/2016 to 13/9/2016 that is for 5 days, the accused was only charged with the offence of defiling the complainant on 8/9/2016 and therefore restricted itself to the charge facing the accused and chose not to delve on what transpired on 9/9/2016, 10/9/2016, 11/9/2016 and 13/9/2016 as it was a non-issue in the case.

41. The court then noted that PW2 stated that the accused pulled her in broad daylight that is at 7.00 am. Adding that in ordinary days, there is usually sufficient light at 7.00 am and the court also observed that PW2 never stated that she was blind folded or that the accused wore a mask thus found that she viewed the offender under sufficient lighting and there was nothing which could have impeded her proper identification of the offender. Further, that according to PW2, she spent a substantially long period of time with the offender at the house which she confirmed to have recognized as that of the accused. That the incident did not occur to her abruptly but there is a sequence of events that took place before she was defiled hence the court found that she had ample time to view the offender and it was not just a fleeting glance.

42. The court further observed that PW2 confirmed that at the time of the incident, before the incident and after the incident of the defilement, she was very close to the offender and even had bodily contact with the offender and as such the court found that PW2 viewed the offender from a close position.

43. The court stated further that there was no evidence that PW2 was not sober on 8/9/2016 and thus safely presumed that she was sober. It further observed that PW2 identified the accused/offender to the police around 2 weeks or less from the time of the alleged defilement, therefore not much time had lapsed between the time the offender saw the suspect committing the offence and the time PW2 identified the suspect to the police. That PW2's description of the offender according to the PW1 was not different from the actual status of the accused. That they both stated that the accused indeed used to sell goods at Bumala and was a neighbour of PW1 hence both PW1 and PW2 confirmed that the accused was a person well known to PW1. That in fact, PW2 told court that she had known the accused since January 2016 meaning that as at the time of the aforesaid offence, she had known the accused for a period of around 9 months which led the court to make a finding that PW2 identified a person she recognized and not a stranger and in the circumstances, found that the circumstances of the visual

identification met the threshold set in the case of **R V Turnbull [1976]3 All ER.**

44. The court also noted that PW1's narration of what PW2 reported to him was consistent with the testimony that PW2 made before the court stating that it therefore meant that at no time did PW2 change her version of what transpired.

45. The court however noted that while PW1 stated that PW2 disappeared from home on 9/9/2016, PW2 stated that the defilement ordeal started from 8/9/2016 and held the view that when more than one persons are explaining incidences that arose from a similar transaction honest differences are deemed to occur, because the powers of observation, the memory and explanation of different people is different adding that since PW2 was the victim, she chose to go by her testimony and considered PW1's difference in dates as an honest mistake.

46. The court observed that both PW1 and PW2 told the court that after PW2 was released from the house of the accused where she was defiled by the accused for 5 days, the matter was reported at Segal Patrol Base and that the complainant was taken to the Ukwala Sub County Hospital for treatment together with the accused. The court thus opined that the testimony of PW1 and PW2 was corroborated by an expert witness (PW3) who examined both the accused and the complainant at the Ukwala Sub County Hospital for treatment and for filling of P3 form on 26/9/2016. That PW3's narration of the history given to her by PW2 is consistent with the testimony of PW2 in terms of what transpired to PW2 from 8/9/2016 to 13/9/2016 and it still confirmed that PW2 did not at any time change her version of what transpired to her.

47. That PW3 stated that part from physically examining PW2, lab tests were also done to both the accused and PW2 which showed that there must have been sexual intercourse between the accused and the complainant. He stated that on lab tests being done particularly urinalysis, numerous pus cells, epithelial cells and leucocytes were noted on both samples collected from the accused and the complainant and that was a confirmation of the history given by PW2 and it made him (PW3) conclude that PW2 and the accused must have engaged in sexual intercourse just as stated by PW2.

48. The court also observed that even when the accused attended court for plea taking, he admitted of having inserted his penis into her vagina of the complainant on 8/9/2016 but his only contention was that act was not unlawful because the complainant according to him consented to the aforesaid act and stated that the response in its view corroborated not only the testimony of PW2 but that of the expert witness. Besides that, PW3 the expert also noted that the hymen of PW2 was absent on examining the genitalia of PW2 and further noted a whitish vaginal discharge.

49. The court further stated that it looked at the treatment notes, lab results and P3 forms of PW2 and of the accused produced as PExhibit 1a, 1b, 1c and PExhibit 2a, 2b and 2c respectively and found that the contents thereof were not only consistent with the testimony of the maker but also that of PW1 and PW2.

50. Further that PW4, the Investigating Officer in the court's view did independent investigations into the matter and did not just rely on what PW1 and PW2 told him but he also engaged an expert (PW3) who examined PW2 and confirmed that PW2 was indeed defiled. That he did not just stop at that but he went ahead to look for evidence that would prove that indeed the complainant was a minor and this he did by again engaging an expert who did an age assessment for the complainant and prepared an age assessment report for the complainant and the accused did not object to the production of the said age assessment report by the Investigating Officer and as a result the treatment book issued to PW2 when she was taken for age assessment as well as the age assessment report both dated 30/9/2016 were produced as exhibit 3a and 3b.

51. The court then stated that it had looked at the contents of the age assessment and noted that the same confirmed that PW2 was aged between 13 and 14 years. This meant that the accused had carnal knowledge of a minor aged between 13 to 14 years and that even though the accused while taking plea said that he inserted his penis into the vagina of the complainant with the consent of the complainant, the said age assessment report confirmed that as at that time the accused was inserting his penis into the vagina of the complainant, the complainant as a minor was not able to consent to a sexual act. The court also stated that the argument of the accused that the complainant consented to the sexual act could not hold any water and proceeded to find the accused guilty of defiling a minor aged 13 to 14 years on 8/9/2016 contrary to **Section Offences Act No. 3 of 2006 as read together with Section 8(3) of the Sexual Offences Act No. 3 of 2006.**

52. On Count 2 where the accused was charged with deliberate transmission of HIV or doing an act which he knew would likely cause PW2 to be infected with HIV, the trial court stated that one of the prerequisites for one to be found to be guilty of an offence under **Section 26(1) (b) of the Sexual Offences Act No. 3 of 2006** was that the offender must be proved to have had knowledge that he was infected with HIV. That during plea taking the accused stated that he was not even aware that he was infected with HIV and the court opined that the prosecution was unable to prove the contrary beyond reasonable doubt hence found that the accused could not be found to be guilty of Count 2 and acquitted the accused under **Section 215 of the Criminal Procedure Code.**

53. The court then stated that its decision was made after noting that the accused's questions on cross examination and after noting that the accused when given a chance to defend himself opted to remain silent and in the end found the accused/ appellant herein guilty of Count 1 and convicted him under **Section 215 of the Criminal Procedure Code** but acquitted him under **Section 215 of the Criminal Procedure Code in relation to Count 2.**

#### **APPELLANT'S SUBMISSIONS**

54. The Appellant opted to submit orally and in submission he started off by stating that his two appeals No. 20 and 17 of 2017 be consolidated into one and the court chose the lead file to be HCRA no. 17 of 2017.

55. He submitted that he did not commit the offence as the victim is his relative. That he first escorted her to Seme only to later hear people saying that he had defiled her. He also submitted that he spent two nights outside his home and on the third day he saw people come for him.

56. That although he told the police that he knew nothing of the incident, the police said he was the last person to be seen with her and he should explain himself. He also submitted that the sentence imposed on him is too harsh and that the evidence was not fairly considered and reiterated that he is concerned of the sentence.

57. Counsel for the prosecution Mr Okachi opposed the appeal and urged the court to uphold the conviction, stating that the Appellant was allowed to cross examine the witnesses and mitigation was done though the appellant in answer reiterated that the trial was not fair and that it was a lie as he locked the girl in the house.

### **DETERMINATION**

58. The following are the issues I consider to flow from the foregoing evidence adduce, the grounds of appeal and the appellant's submissions thereof;

- 1. Whether the trial at lower court was fair;**
- 2. whether the age of the complainant was properly ascertained;**
- 3. Whether the sentence meted out against the appellant was appropriate;**

**61. On issue 1**, the rights of an accused under **Article 49** include inter-alia; to be informed of the reason for arrest, (f) to be brought before a court as soon as reasonably possible, but not later than—

*(i) twenty-four hours after being arrested; or*

*(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;*

59. While fair hearing as envisaged by Article 50 requires among other things that one be tried by an impartial body, be presumed innocent until the contrary is proved, be informed of the charge, with sufficient detail to answer it, to have adequate time and facilities to prepare a defence, to have the trial begin and conclude without unreasonable delay, to be present when being tried, to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence and to adduce and challenge evidence.

60. In the instant appeal, the Appellant does not specify exactly which right of his or entitlement under any provision of law or the constitution was violated or not accorded to him. If anything, counsel for the prosecution in the appellate submissions while opposing the appeal herein stated that the Appellant was allowed to cross examine the witnesses and mitigation was done, which goes to show that the appellant was given a chance to challenge the evidence adduced against him in the trial court and the record does show that he cross-examined witnesses. He however opted to remain silent in defence which is his rights stipulated in the Constitution and in section 211 of the Criminal Procedure Code.

**61.** The trial of the accused commenced on 27/9/2016 and judgment delivered on 27/1/2017, precisely four months for the case to be concluded. One of tenets of fair trial as set out in **Adan vs. Republic [1973] EA LR 445** include inter-alia that the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands which was the case in the trial court at page 1 of the proceedings and even in the present appeal where the accused/Appellant stated that he understands Luo and the substance of the charge(s) and element thereof stated to the accused in Luo and even his Appellate submissions were done in Dholuo and even his earlier plea of guilt was changed to not guilty when in mitigation he stated that he did not insert his penis into the vagina of the girl which proves that the court guided itself to the requirements and rights of the accused, thus conducted itself fairly.

62. Further the appellant was present during his entire trial that he even had opportunity to cross-examine the prosecution witnesses and examining the record, he was also informed in advance of the evidence the prosecution intended to rely on. At page 7 of the proceedings, the accused/ appellant confirmed that he had received statements and a copy of the charge sheet. Moreover, he was given an opportunity to defend himself from a reading of page 32 of the proceedings where the court stated that section 211 of the CPC was explained to the accused in Luo on the options available for giving evidence and he chose to remain silent and not call any witnesses. Thus from the foregoing, I opine that the trial by the lower court was conducted in a fair manner. Accordingly, the appellant's ground that he was not accorded a fair trial fails and is dismissed.

**63. On issue 2**, this being the appellant's main ground of appeal ought to be discussed at length. In cases falling under the sexual offences act, the ascertainment or conclusive proof of age is a necessary ingredient that must be proved beyond reasonable doubt as it is used in establishing the sentence to be meted out to the accused. In the case of **KAINGU ELIAS KASOMO -V- R MALINDI CR. APP. NO. 504 OF 2010** the Court of Appeal stated that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence. Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defilement victim is carried out by dentists.

**64.** On proof of age, in the case of **GILBERT MIRITI KANAMPIUS -V- REPUBLIC (2013) e KLR, H.C. AT MERU, CRIMINAL APPEAL NO. 97 OF 2009**, Gikonyo J. while relying on the case of **FAPPYTON MUTUKU NGUI -VS- REPUBLIC, H.C. AT MACHAKOS CR. APPEAL NO. 296 OF 2010** observed thus:

***“Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction. But see the decision by Prof. Ngugi J. in MACHAKOS HC. CR. APPEAL NO. 296 OF 2010 FAPPYTON MUTUKU NGUI -VS- REPUBLIC: “... that “conclusive” proof of age in cases***

*under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.*

65. Further in the case of **JOSEPH KIETI SEET -VS- REPUBLIC [2014] e KLR, H.C. AT MACHAKOS, CRIMINAL APPEAL NO. 91 OF 2011**, the learned Judge held:

*“It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:*

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

66. **In the present case though** the birth certificate for the complainant was not produced, medical evidence tendered was the P3 form for the complainant showing that she was 13years and the age assessment report which gives the estimated age of the victim as 13-14 years. The trial court also observed that the accused/ appellant did not object to the production of the age assessment report and the treatment book. The complainant (PW2) also stated that she was 13years old and goes to school at U. Primary school and was in class 5. PW1 also stated that she was a primary school going child and she went missing on a day she was supposed to be in school; and PW4 stated that PW1 described the complainant as aged 13 years and in class 5.

67. In my humble view, the age assessment report dated 30/9/2016 bearing the stamp of Siaya County referral hospital which was produced as exhibit 2 indicating the age of MAO as between 13-14 years was evidence of proof of the complainant's age and was corroborated by PW1 and the complainant herself (PW2). I am thus satisfied that the age of the complainant was ascertained in light of the holding in the Ugandan case of **Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** cited above that: **“Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ....”**

68. Accordingly, I hold and find that the complainant's age was ascertained satisfactorily to be between 13 and 14 years of age.

69. **On issue 3**, in his submissions the Appellant kept stating that the sentence imposed on him was too harsh and further reiterated that he was concerned of the sentence. However, having established that the age of the complainant was in between 12- 15 and the **Sexual Offences Act** which places a minimum sentence for a person convicted of the offence of defilement between ages 12-15 at 20 years imprisonment, it follows that the sentence of 20 years is the only plausible sentence in the circumstances as such the trial magistrate was proper in so doing.

70. The upshot is that the appellant's does not succeed and is thus dismissed. The conviction and sentence meted out on the appellant is hereby upheld. The appellant to serve the lawful sentence imposed on him by the trial court.

Dated, Signed and Delivered in open court at Siaya this 27<sup>th</sup> Day of November, 2018.

**R.E.ABURILI**

**JUDGE**

**In the presence of:**

Appellant in person

Mr Okachi Senior Principal Prosecution Counsel for the State

CA: Brenda and Modestar