



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO 19 OF 2017

CORAM: R.E.ABURILI J.

WANDERA PETER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment conviction and sentence passed by Hon M. Obiero,

Principal Magistrate in Bondo Principal Magistrate's Court

Criminal Case number 667 of 2016 on 15th January 2017).

JUDGMENT

1. This Appeal is against both conviction and sentence of 20 years in respect of Bondo Principal Magistrate's Court Criminal case number 667 of 2016, R. vs. **WANDERA PETER** delivered on 15/1/2017.

2. The Appellant - **WANDERA PETER** was charged with the offence of Defilement contrary to Section 8 (1) as read with 8 (3) of the Sexual Offences Act No. 3 of 2006 and 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.

3. The facts as per the charge sheet are that, **WANDERA PETER**: on 21st day of May, 2016 in Rarieda Sub-County within Siaya County, intentionally and unlawfully caused his penis to penetrate the vagina of FA a child aged 12 years. In the alternative charge, it was alleged that the appellant **WANDEREA PETER** on the 21st day of May, 2016 in Rarieda Sub-County within Siaya County, intentionally and unlawfully touched the FA a child aged 12 years.

4. After full trial the Appellant was found guilty of the charge and sentenced to 20 years imprisonment.

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

1. *That the trial magistrate erred in law by failing to reach a finding that the charge sheet was defective.*

2. *That the learned trial magistrate erred in law and in fact by failing to address the fact that the appellant had been kept in police custody for more than 24hours against his constitutional right.*

3. *The learned trial magistrate erred in fact by ignoring the evidence of the complainant indicating that she had been coached by her grandmother to give false testimony against the Appellant.*

4. *The learned trial magistrate erred in fact by ignoring the material contradictions and inconsistencies between prosecution witnesses which would have materially affected the trial magistrate's ultimate finding.*

5. *The Trial Magistrate erred in law and fact by failing to consider the evidence adduced by the appellant yet it was not controverted by the prosecution.*

6. The appellant filed further **Grounds of Appeal** alongside his Appellate submissions, which are that:

- 1. That the learned trial magistrate erred in law and fact by failing to note that the appellant's right was violated. In that the appellant was detained in a police custody for more than twenty hours.**
- 2. That the learned trial magistrate erred in law and fact by not appreciating that the entire records was with full of contradiction among the prosecution witnesses.**
- 3. That the trial court erred in law and fact by failing to appreciate that the case was inconsistency and inaccurate and lacked probative value**
- 4. That the learned trial magistrate erred in law and fact by failing to appreciate that very crucial witnesses and evidence were not available in court to the existing doubt.**
- 5. That the court erred in law and fact by failing note that the medical evidence and the clinical officer (PW3) did not support the defilement charges.**

7. In determining this Appeal, the court must fully understand its duty as the first Appellate court as stated in the case of **Pandya vs. R (1957) EA 336** and **Ruwala vs. R (1957) EA 570** 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 only the trial court had the advantage of hearing and seeing the witnesses.

8. On what transpired in the trial court, **PW1-FA** testified on oath after *voire dire* examination that she was 11 years old in class four at O Primary School. That she lived with her grandmother at O Village. She recalled that on the 21st day of May 2016, at around 2.00pm she was going to the Lake when she met with the accused person who was from the Lake. The accused person who was well known to her requested her to go and cook for him ugali. She accepted and she accompanied the accused to his house. She stated that she cooked ugali and eggs and after eating, the accused person removed her clothes and also removed his pair of trousers. The accused person took a condom and put on his “**thing**” and inserted between her thighs and she felt pain. She further stated that after that, the accused person gave her Kshs. 20/= and told her to go back to his house the following day.

9. It was her further testimony that when she went to the accused person's house, she was in the company of her younger brother. She stated that she knew the accused person as a fisherman and she used to see him at the shores of the Lake. She explained that when she reached home, she explained to her grandmother who took her to O Health Centre for treatment. The following day, she was taken to M Hospital where she was examined and the P3 form was filled. She stated that it was her first time to experience such incident. She identified the accused in court.

10. On cross examination by the accused person, PW1 stated that she knew the accused very well as a person from Manyala and that the incident occurred at 2.00pm. She stated that she had met the accused near the shop and that at that time he was alone and without a bicycle. She maintained that he had done to her “**tabia mbaya**”-Bad manners. She could not recall any of her relatives who was married to his brother.

11. **PW2-AAO** testified that on the 22nd day of May 2016, at about 8.00 pm, she received a phone call from the complainant's mother who informed her that her son had told her that the complainant went to the accused person's house and the accused person defiled her. After that, she took the complainant to the hospital where she was examined, but the doctor told her that there was nothing unusual. She stated that the complainant was in her custody as at the time of the alleged incident.

12. **PW3 –TO a minor testified after voire dire examination that** he was 10 years old in class one and lived with his parents. He recalled that on the 21st day of May 2016, he was with PW1 his cousin and went to the accused person's house in the company of the complainant. When they went there, the complainant cooked ugali and eggs and they ate. After that, the accused person removed the complainant's skirt and did to her “**tabia mbaya**”- **bad manners**. When they went home, he explained to his brother by the name Yuga what happened and he also explained to the police. He identified the accused in court.

13. On **cross examination**, he stated that it was on a Friday and that his grandmother had told him to say what he had stated. He however maintained that they went to the accused person's house. He could not remember the time. He stated that they were total of four people in the accused person's house and that there was another person who witnessed the incident although he could not recall his name. He maintained that he saw the accused do “**tabia mbaya**” –bad manners to the complainant.

14. **PW4 - CPL BAHATI JUMA** testified that on the 23rd day of May 2016, at 6.00 pm. He was on duty when he received the complainant who was in company of her grandmother. He stated that the complainant reported that WANDREA PETER defiled her on the 21st day of May 2016, in the house at 2.00 pm. He stated that the complainant explained to him that at the time of the incident, she was in the company of her brother by the name T.

15. It was his further testimony that at that time, the accused person had been arrested. He stated that he issued the complainant with a P3 form which was subsequently filled by a doctor at Madiany Hospital. He further stated that during the investigation he obtained a certificate of birth in respect of the complainant and he produced the same as his exhibit.

16. **PW5 -COLLINS OMONDI OUMA**– the Clinical Officer testified that on the 23rd day of May 2016, he examined the complainant and filled a P3 form. He stated that on examination, he noted that there were lacerations on the vagina and the hymen was absent although there was no active bleeding. He produced the P3 form as exhibit 2 herein.

17. **PW6 – JRO** testified that at the time material to this case, he was a teacher at OPrimary School (name withheld) where the complainant was a pupil. He stated that on the 23rd day of May 2016, at 4.00 pm, he was in the office when the complainant's grandmother went and reported that the complainant had been defiled by one WANDERA. The complainant's grandmother requested him to write for her a letter which he told her to take to the leader of the beach. After that the beach leader came with the grandmother of PW1 to school with the request for him (PW6) to assist him go and arrest the suspect and he accepted and they went and arrested the accused person.

18. At the close of the prosecution case, the accused testified and called one witness who testified on his behalf. **DW1-PETER ANDEREA** testified that on the material day he met with the complainant who was in the company of his brother and he was also in the company of his colleague. They went to his house where he prepared lunch. After taking lunch, the complainant and her brother went away and he went to the lake with his colleague. He denied having defiled the complainant.

19. In cross examination he stated that the complainant had given false testimony after being told by people to give false testimony against him and that they were many people in the house.

20. **DW2-JOSEPH ODONGO** testified that on the 21st day of May 2016, he was in the company of the accused person herein and they were from the Lake. In the process, they met with the complainant who was in company of another boy. Then DW1 asked them what they were carrying and they told them they were carrying eggs. The two asked them whether they could accompany them and they accepted and they went to the house. The prepared lunch and after taking lunch the complainant and the boy went away and they also went to the Lake. He denied the allegations that the accused person defiled the complainant. He stated that the children were his relatives.

Judgment of the lower court

21. The trial court in its judgment reiterated the charges that faced the accused now appellant and stated that the accused person denied the charges and the prosecution called six (6) witnesses who testified in support of their case. After carefully considering the evidence on record together with the circumstances of the case, the trial court found that there was no dispute that the complainant and the accused person were well known to each other prior to the date of the incident. That it was also not in dispute that on 21st day of May 2016, the complainant who was in the company of her cousin went with the accused person to his house where lunch was prepared and they ate.

22. He observed however that there were a few issues which were in dispute and were mainly as follows.

1. Whether there was an accused person's colleague in the house on the material day.

2. Whether the prosecution has demonstrated and or provide the essential elements of the offence of defilement.

23. In its analysis and findings, the court stated that on the issue as to whether the accused person was with the colleague, that is DW2 on the material day, according to the accused person, when he met with the complainant and her brother, he was in the company of DW2 and they went to the house together and they were a total of four (4) people in the house and this included the complainant and her brother. That according to DW2, when they met with the complainant and her brother, he was together with the accused person and they went together to the house where they prepared lunch and they took together.

24. But that according to the complainant, they were only three (3) people in the house and the people were herself, the accused person and her brother. According to PW3, when they met with the accused person, the said accused person was with his colleague and they went to the house which they were four people. The trial court in considering the evidence of PW1 and PW3 against the evidence of DW1 and DW2, stated that it was clear that DW3, DW1 and PW2 were in agreement that when they went to the accused person's house, they were a total of four people. However, the complainant was firm that they were only three (3) people in the house.

25. The trial court in its opinion stated that the evidence of PW3, DW1 and DW2 was well corroborated and the same clearly demonstrated that the accused person was in the company of his colleague and when they went to the house they were four (4) people.

26. On the issue as to whether the prosecution had been able to prove and or demonstrate the essential ingredients on the offence of defilement, the trial court stated that the issues to be proved were now well settled and are the following three:

1. Whether the complainant was a minor as at the time of the alleged incident.

2. Whether there was penetration.

3. Whether the identity of the perpetrator has been demonstrated.

27. On the issue as to whether the complainant was a minor as at the time of the incident, the trial court observed that according to the charge sheet the complainant was 12 years old as at the time of the incident and that it used the birth certificate in respect of the complainant which was exhibit 1 showing that she was born on the 22nd day of December 2005.

28. The court further stated that from the charge sheet and the evidence on record, the incident occurred on the 21st day of May 2016 and that from the certificate of birth, the complainant turned 10 years on the 22nd day December 2015, and turned 11 years on the 22nd day of December 2016. It then stated that that implied that PW1 was about 10 years and 7 months as at the time of the incident and found that she was a minor as at the time of the incident.

29. On the issue as to whether there was penetration of the complainant's genitalia, the court stated that according to the complainant, the

accused person put a condom on his “thing” and inserted his “thing” between her thighs and she experienced pain. While PW5 in evidence stated that when he examined the complainant, he noted that there were lacerations around the vagina area with a torn or absent hymen, although there was no discharge or actual bleeding.

30. In light of the foregoing the trial court was of the view that the evidence of PW1 and PW5 was well corroborated and that the same clearly demonstrated that there was penetration of the complainant’s genitalia.

31. On the issue as to whether it was the accused person who was the perpetrator, in that he caused the penetration, the trial court stated that although the accused person and DW2 denied that the accused had any sexual intercourse with PW1 thus did not cause the penetration, the complainant and PW3 maintained that it was the accused person who caused the penetration.

32. The trial court magistrate stated that having considered the evidence of PW1 and PW3 against the evidence of DW1 and DW2 with the defence claiming that there was no sexual intercourse, however, the court stated that it took note that the complainant was a young child of about 10 years while PW3 was also of the same age, had the opportunity of observing their testimony and accordingly did not note anything which would have suggested that they were not telling the truth hence found that they were credible witnesses and as such it was his finding that the accused person caused the penetration.

33. The trial court concluded that the prosecution had proved the charge of defilement against the accused person beyond reasonable doubt and convicted him in terms of **Section 215 of the Criminal Procedure Code**.

Appellant’s written submissions on appeal

34. The appellant filed written submissions which he highlighted under the following headings:

i. violation of Article 49(i) (f)

35. on this ground, the appellant submitted that the law states that any arrested person should appear in court within a period of 24 hours after arrest, however, he (the appellant) was arrested on 23/5/ 2016 and was arraigned in court on the 25/5/2016, which was against the Constitution of Kenya which states that- Article 49(I) (F) that any arrested person to be brought to court as soon as is reasonably possible, but not later than twenty four hours after being arrested.

36. It was therefore submitted that the trial magistrate overlooked/ignored the same and went on to convict the appellant notwithstanding what is stated in the Constitution yet Article 2(I) states that the Constitution is the supreme law of the Republic of Kenya and binds all persons and all state organs of the government.

ii. Contradictions

37. It was submitted that all the six prosecution witnesses contradicted themselves and as such the prosecution failed in proving the charges against him beyond reasonable doubt. That PW1- the complainant- said that after taking lunch she went to the Lake and that he the appellant also went away. He referred to page 5 line 14, of the proceedings and submitted that upon PW1 realizing that she had not implicated the appellant with defilement, she changed her statement and said that, **“when we had eaten, Anderea removed my dress and my pant. He removed his trouser. He took a condom which he put on his thing. After that he inserted his thing between my thighs.”**

38. He thus submitted that the foregoing statement could be taken as an afterthought, in that, in the first place PW1 said after taking lunch everybody went away which he submits is the only true statement[[HPJ1](#)] and that the first statement was supported by DW1 at page 12 line 18-19 and also supported by DW2 on page 14 line 20-22 thus the second statement given by PW1 was as a result of being coached.

39. The appellant submitted further that the person[[HPJ2](#)] who was defiled was PW1 and not PW3 but the report was made by PW3, further that when PW1 was defiled, she said she felt pain so she should have been the first person to report and not PW3 who is said to have witnessed PW1 being defiled. It was submitted further that PW3 also contradicted himself at page 8 line 1 and 2 by saying that, “Fenian did not say that you did to her “tabia mbaya” (bad manners[[HPJ3](#)]).

40. It was also submitted that if PW3 witnessed the appellant defiling PW1 why then would PW1 have to inform him, and that this goes to show that PW3 was not at the scene of crime and that he was[[HPJ4](#)] giving false evidence.

41. That PW1 said that after the incident they informed their grandmother and that it is the grandmother who was the one who took action to help the granddaughter yet on the other hand PW2 stated that she received a call from PW1’s mother about the incident but the record does not show how or from whom PW1’s mother got[[HPJ5](#)] the report from. Thus states that this goes to prove that PW2 also gave false statement/testimony.

iii. insufficient inaccurate and inconsistent evidence

42. the appellant submitted that evidence on record according to PW6 was that the appellant was just suspected to have defiled PW1 as at page 10 line 16 and that it was the responsibility of PW4 as the investigating officer to prove the allegation of defilement beyond reasonable doubt and to ensure that both PW1 and the appellant were taken for medical[[HPJ6](#)] examination to ascertain the same. But in the presents case the appellant was not taken for medical examination.

43. That at page 9 line 15 PW5 stated that the complainant had changed clothes which he submits was against the Sexual Offence Act and that this meant that they could not detect any reliable information[[HPJ7](#)] from PW1.

iv. Crucial witnesses and evidence not produced

44. It was submitted that PW3 the cousin to PW1- the complainant stated that he informed his brother Yuga yet the said Yuga was not called as a witness to prove the same. In addition, it was submitted that another very crucial witness who is said to have witnessed the said defilement act by the name T as mentioned by PW4 the investigation officer hence making him a crucial witness, was never called as a witness. It was further submitted that the chairman of BMU [HPJ8] was a very crucial witness so as to explain how he arrested the appellant and that the letter w [HPJ9] written by PW6 from PW1's school informing the beach leader was not produced in court and that further PW6 is said to have accompanied him to arrest him (the appellant) but the beach was not called to satisfy.

v. insufficient medical report

45. The appellant further submitted that PW5 the clinical officer is said to have examined the complainant several times but all his results say that everything was negative adding that PW5 said that PW1 was in a fair general condition and that PW2 who escorted the complainant [HPJ10] to the hospital was informed three times that nothing unusual was seen. The appellant further submitted that if the girl (PW1) was without any sign of defilement then how comes the P3 form shows defilement took place and that this was just an afterthought.

46. On the part of the Republic, Mr. Okachi Senior Principal Prosecution Counsel submitted opposing the appeal that there was sufficient evidence which proved beyond reasonable doubt that the appellant committed the offence with which he was charged and therefore the conviction was sound and sentence lawfully meted out as the appellant's mitigations were considered bearing in mind the seriousness of the offence and its effect on the victim, the society and her family. In a rejoinder the appellant submitted that he did not commit the offence.

DETERMINATION

47. I have considered all the foregoing record in detail together with the submissions in support of and against the grounds of appeal. In my view, the following issues flow for determination:

1. *Whether the charge sheet was defective;*
2. *Whether the accused /appellant's constitutional right was violated that is was there unreasonable delay in police custody.*
3. *Whether there were contradictions and inconsistencies in the prosecution case and if so were they material to the case?;*
4. *Whether the evidence of Yuga, BMU chairman and the beach leader should have been availed and whether failure to call them was fatal to the prosecution's case;*
5. *Whether the medical evidence was inconclusive*

48. On issue 1, the appellant does not elaborate on his ground that the charge sheet was defective. I have however examined the charges facing the appellant and the particulars thereof and I find no defect therein.

49. Section 134 of the Criminal Procedure Code provides:

“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 particulars as may be necessary for giving reasonable information to the nature of the offence charged”.

50. Thus, an Accused Person is entitled to know which crime they are alleged to have committed so that they can adequately prepare a defence or plead thereto and that there is no possibility of confusion of two offences being charged. In this case, the charge of defilement of a child and her age was clearly spelt out and the relevant sections in the charge of defilement were properly cited. There is nothing to show that there could be any defect or technical defect capable of curing under section 382 of the Criminal Procedure Code which stipulates that ***“... no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice”.***

51. The proviso to Section 382 provides that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

52. On when a charge sheet is fatally defective, the case of *Yosefu v. Uganda [1969] E.A. 236* in the Court of Appeal and the High Court decision in *Sigilani v. Republic [2004] 2 KLR 480* are clear that ***a charge sheet is fatally defective if it does not allege an essential ingredient of the offence***, and in *Sigilani v. Republic [supra]*, it was held:

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

53. Whether a charge sheet is fatally defective is a substantive question in my considered view in that if the accused was charged with an offence known to law and was it disclosed in a sufficient fashion to give the accused ample opportunity to answer to the charge, one cannot

say in any way other than a cooked/ contrived one that the charge sheet was defective.

54. Accordingly, I find the ground of appeal deficient in substance and the same is hereby dismissed.

55. **On the second issue on whether the appellant's rights were violated for allegedly being taken to court after 24 hours of his arrest, the appellant alleges that** the learned trial magistrate erred in law and in fact by failing to address the fact that the appellant had been kept in police custody for more than 24 hours against his constitutional right thereby violating his rights as under **Article 49(I) (F)**, which fact is extensively submitted on his appellate submissions.

56. He stated claims that he was arrested on 23/5/2016 and was arraigned in court on the 25/5/2016, which was against the constitution of Kenya which states at Article 49(I) (F) that **any arrested person to be brought to court as soon as is reasonably possible, but not later than twenty four hours after being arrested** and that the trial magistrate overlooked/ignored the same and went on to convict the appellant notwithstanding what is stipulated in the Constitution yet Article 2(I) states that the Constitution is the supreme law of the Republic of Kenya and binds all persons and all state organs of the government.

57. It is the duty of the court to enforce provisions of the Constitution, otherwise there would be no reason for having those provisions at all thus an unexplained violation of a Constitutional right in this regard of the failure to bring the accused/ appellant to court in time would result in his trial not being held within a reasonable time and is entitled to damages as it is a civil claim as was stated in the case of **Julius Kamau Mbugua V Rep CRA No. 50/2008** that:

“A trial court can take cognizance of pre-charge violation of personal liberty, if the violation is invoked and affect the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial of where an accused has trial related prejudice as a result of death of an important witness in the meantime and the witness has lost memory, which cases the trial court could give appropriate protection like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil rights, thought Constitutional in nature, which is beyond the statutory duty of a criminal trial court and which is by Section 72 (6) expressly compensable by damages”.

58. The question is whether the holding of the accused beyond 24 hours was unlawful and whether the delay was inordinate. However it should be noted that this question or statement **ought to be qualified with the time the issue was raised** so as to give the prosecution ample time to explain as the burden to explain the unlawful/ unreasonable delay or otherwise lies on them.

59. In **Patrick Kirimi M'bura v Republic [2015] eKLR CRIMINAL APPEAL NO. 4 OF 2014** where the appellant stated that the Court failed to consider that he was kept in police custody for more than 24 hours, the court stated that **it is trite law that where there is a violation of any Constitutional right, it must be raised at the earliest opportunity possible**. This was stated in reference to the case of **Mwalimu V Rep (2008)KLR 111**, where the Court of Appeal, when considering Section 72 (3) and 84 of the retired Constitution, stated:

“4. Section 84(1) of the Constitution suggested that there had to be an allegation of breach before the Court could be called upon to make a determination of the issue and the allegation had to be raised within the earliest opportunity.

5. The appellant did not complain in the trial Court that he was not brought to Court as soon as was reasonable practicable. Therefore, there was no merit in the ground of appeal alleging a breach of his constitutional right.”

60. The court of appeal further stated:

“We have perused the trial court's record and note that the appellant never raised that issue before the trial court. Had he raised it, the police would have been called upon to explain the delay just in the event that the case fell under the exception given under Article 49 (i) and (ii) that is, if the 24 hours ended outside the ordinary court hours or on a day that is not a court day, then he would have been produced on the next day. The delay may have been caused by some good reason. The complaint is made rather late in the day because this court cannot call for that explanation. In any event, even if this court were to find that a violation was committed, it would not have any bearing on the innocence or guilt of the appellant as that can be vindicated in a separate petition in the High Court under Article 22 of the Constitution (enforcement of Bill of Rights). This is not the correct forum to raise the said issue and that ground must fail.” [emphasis added].

61. On the basis of the above holdings which are post 2010 Constitution, I hold that whereas under Article 49 of the Constitution, the appellant should have been produced in court within 24 hours and as he was not, he should have raised that complaint in the trial court to enable an explanation to be tendered by the prosecution but he failed to do so.

62. Further, assuming that the delay in producing him to court was inordinate and unexplained, thereby violating his constitutional right, the Appellant would be entitled to damages in a civil suit and the same has no probative value to his innocence. Accordingly, the ground fails and is hereby dismissed.

63. **On the third issue of the appellant's** grounds of appeal, the appellant claimed that the learned trial magistrate erred in fact by ignoring the material contradictions and inconsistencies between prosecution witnesses which would have materially affected the trial magistrate's ultimate finding.

64. In his appellate submissions, he went to greater lengths to allege that there were inconsistencies and contradictions under various headings. His first example was that PW1- the complainant- said that after taking lunch she went to the Lake and that he the appellant also went away and made reference to page 5 line 14, he then submits that upon PW1 realizing that she had not implicated the appellant with

defilement, she changed her statement and said that, “when we had eaten, Andrea removed my dress and my pant and submits that the only true statement was the first statement which was supported by him and DW2. The appellant further submitted that PW2 stated that she received a call from PW1’s mother about the incident but the record does not show how or from whom PW1’s mother got the report from. He submits further that the person who was defiled was PW1 and not PW3 but the report was made by PW3. He also contended in submission further that PW3 also contradicts himself at page 8 line 1 and 2 by saying that, “Fenian did not say that you did to her “tabia mbaya.” It is also his contention that if PW3 witnessed the appellant defiling PW1 why then would PW1 have to inform him, and that this goes to show that PW3 was not at the scene of crime and that he was giving false evidence.

65. Under the heading of insufficient inaccuracies and inconsistencies in evidence, the appellant submitted that evidence on record according to PW6 was that the appellant was just suspected to have defiled PW1 at page 10 line 16 and that it was the responsibility of PW4 as the investigating officer to prove the allegation of defilement beyond reasonable doubt and to ensure that both PW1 and the appellant were taken for medical examination to ascertain the same. That in the presents case the appellant was not taken for medical examination.

66. While under the heading of insufficient medical report he also adds that PW5 the clinical officer is said to have examined the complainant several times but all his results say that everything was negative adding that PW5 said that PW1 was in a fair general condition and that PW2 who escorted the complainant to the hospital was informed three times that nothing unusual was seen. He contends that if the girl (PW1) was without any sign of defilement then how comes the P3 form shows defilement took place and that this was just an afterthought.

67. He further stated that at page 9 line 15, PW5 the criminal officer said the complainant had changed clothes which he submits was against the Sexual Offence Act and that this meant that they could not detect any reliable information from PW1.

68. My view of the alleged inconsistencies is that the evidence on record leave an irresistible inference that the appellant had the opportunity to commit the offence, as stated firmly by PW1 and PW3. Further medical evidence confirmed that the complainant was defiled. The trial magistrate who had the opportunity to test the demeanor of PW1 and PW3 accepted that they were reliable and told the court the truth. Their evidence was sworn testimonies which were subjected to cross examination.

69. The evidence of PW1 was corroborated with that of PW3 and PW5 the medical doctor who said there were lacerations on the vagina of PW1 suggestive of penetration. Thus the trial magistrate convicted the appellant on the strength of the prosecution case which was proved beyond reasonable doubt. There were minute inconsistencies as stated by the appellant in his submissions but those inconsistencies did not go to the root of the case for the prosecution. They were not material contradictions that can render the prosecution case void. In other words, I find no material irregularities or contradictions in the evidence pointed out which could have caused a miscarriage of justice. Although the appellant claimed that PW3 who is said to have witnessed PW1 being defiled contradicted himself at page 8 line 1 and 2 by saying that, “Fenian did not say that you did to her “tabia mbaya” (bad manners [HPJ11]), this court find the evidence of PW1 and PW3 consistent that the appellant defiled the complainant in the presence of PW3.

70. In the cases of **Dickson Elea Nzamba Shapwata & another v Republic, criminal appeal no. 92 f 2007, Joseph Maina Mwangi v. Republic, Cr. Appeal no. 73 of 1993**, both courts dealt with discrepancies in trials of defendants and observed as follows:

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

71. Further, minor contradictions which are bound to happen in any given case due to human nature are not to be given more weight than they actually deserve especially if the court is satisfied that the bearer of the pain itself is saying the truth, as was in this case.

72. The court ought to correlate the evidence as a whole and must apply its reason so as to see things for what they are not as we would like them to be seen. If the answer as to whether the inconsistencies make the victim’s depositions unbelievable is in the negative then the perpetrator must be brought to book.

73. In the **DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC**, [supra] the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view i respectfully adopt as did the Court of Appeal in **Joseph Maina Mwangi v. Republic** adopt that:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter. Furthermore, we need to consider the age of the minor in question as relates to the proper recollection of events as their thought process is not sufficiently built to make coherent and well-coordinated statements. Another issue of consideration is the circumstances/situation which the minor finds themselves in as it has the tendency of being so devastating that the only recollection the minor/ victim may have in proper detail is what happened to them.

74. In **State Of U.P vs. Naresh And Others on 8 March, 2011-IN THE SUPREME COURT OF INDIA, CRIMINAL APPELLATE JURISDICTION- CRIMINAL APPEAL NO.674 of 2006** the Supreme Court of India stated quite persuasively at paragraph 25 that:

“In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. [emphasis added]. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.”

75. While in **Philip Nzaka Watu v Republic [2016] eKLR CRIMINAL APPEAL NO. 29 OF 2015**, the Court of Appeal stated that:

“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.”

76. Therefore, despite a few cited inconsistencies, the colour of PW1’s evidence did not change where it mattered most, that is the inconsistencies such as from whom a report was made to PW2 or how many people there were in the house where the child was defiled or whether they were going to the Lake or coming from the Lake or how PW3 relayed the matter does not in any way displace or shake off the fact that there was penetration of a minor by a known assailant bearing in mind PW5’s evidence that there was laceration of the PW1’s vagina and the medical examination having been done within 72 hours as per his evidence during cross examination.

77. Taking cognizance of the fact that it is for the Prosecution to prove each and every element of its case beyond reasonable doubt and the trial court in its judgment correctly satisfied itself that the ingredients necessary to sustain a charge of defilement against the accused person were proved i.e. that there was penetration, that the victim was a minor and that there was proper identification of the perpetrator.

78. I find no material discrepancy going to the root of the case on either of the witnesses to occasion prejudice or failure of justice on the part of the appellant and in my view, in light of the foregoing, the contradictions and inconsistencies cited by the Appellant do not change the character of the evidence adduced by the prosecution witnesses. Accordingly, this ground lacks merit, the same is hereby dismissed.

79. **On the 4th issue** the appellant claimed that the brother to PW3 by the name Yuga whom PW3 told of the incident that happened to (PW1), the BMU Chairman that PW2 talked to and the beach leader who was assisted by PW6 in arresting him be called to explain how they arrested the appellant and that the letter written by PW6 ought to have been produced.

80. **This court does not** fathom the value these witnesses or evidence were to add to either side of the case. As earlier stated it is for the prosecution to adduce evidence beyond reasonable doubt in any given case. Once the prosecution has satisfactorily discharged the burden of proving the main elements of a charge then there is no need to unnecessarily burden the court by availing as many witnesses as possible whose only effect would be to reiterate, add or exaggerate what has already been stated.

81. In stating so, this court is alive to the fact that the prosecution is bound to call witnesses even if their testimony may be adverse to their case, as was stated in **Bukenya vs Uganda (1972) EA 549**, that failure to call a crucial witness by the prosecution entitles the court to make an adverse conclusion against the prosecution’s case and acquit the accused person. In the said case the court expressed itself thus:

“The prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent with its case.”

82. The court further stated:

“(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.

83. However in this case, the BMG Chairman and beach leader were only coming to explain how they effected the arrest of the appellant and nowhere does the appellant contend that the arrest was unlawful or that it violated his rights. In addition, what Yuga would say is what PW3 told him that he witnessed PW1 being defiled by the appellant. **Section 143 of the Evidence Act** clearly stipulates:

“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”

84. The legal principle in the case of **Keter v Republic 2007 EA 135** is particularly appropriate to the circumstances of this case where it was stated:

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

85. **On the fifth issue**, the appellant claims that the medical evidence adduced by the prosecution was not conclusive I find that PW5’s evidence was conclusive in that he gave the age of the complainant, averred that there were lacerations on the victim’s vagina being suggestive of penetration and went further to state how much time had passed at the time of examination from the time the complainant was defiled which was within 72 hours. In my view, these details were more crucial in proving the case as against the appellant as they touched on the elements of the charge.

86. On allegations that PW5 did not do a medical examination on the accused/appellant, that in itself does not discard the findings of PW1's evidence as the perpetrator was a person well known to the victim and he (the appellant) did not dispute being with the appellant on the material day.

87. Accordingly, I find and hold that the conviction of the appellant was sound. It is hereby upheld.

88. On sentence, I find that the same was lawful and there are no mitigating factors to warrant interference with the same. I uphold sentence meted out on the appellant. The upshot is that the appeal herein lacks merit and the same is hereby dismissed in its entirety.

Dated, Signed and Delivered in open court at Siaya this 27th 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

[\[HPJ1\]](#)A witness statement must be taken as a whole not piecemeal or as to what was said first and what came last

[\[HPJ2\]](#)Simplistic... PW3 witnessed the incident and told the brother to PW1

[\[HPJ3\]](#)The evidence is that PW3 witnessed the defilement therefore the idea of PW1 saying to PW3 that the appellant did tabia Mbaya to her does not arise

[\[HPJ4\]](#)The PW3 did not say that PW1 told him she was defiled simply because the PW3 was an eye witness to the defilement and maintained so in his evidence and cross examination

[\[HPJ5\]](#)All these are immaterial statements that do not go to the root of the core evidence that PW1 was defiled in the presence of PW3 and that PW3 reported TO HER BROTHER ON WHAT HAD TRANSPIRED

[\[HPJ6\]](#)Failure to take the appellant for medical examination was not fatal to the case

[\[HPJ7\]](#)Whether changing clothes by a victim of sexual offences is fatal to the case

[\[HPJ8\]](#)Evidence of BMU not adding value

[\[HPJ9\]](#)Not essential to prove anything other than showing the process that was followed in the arrest of the appellant

[\[HPJ10\]](#)P3 and PW5 are clear that there was penetration. Being in general fair condition is not evidence of there being no penetration.

[\[HPJ11\]](#)The evidence is that PW3 witnessed the defilement therefore the idea of PW1 saying to PW3 that the appellant did tabia Mbaya to her does not arise