REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO 10 OF 2017

BERNARD ODONGO OKUTU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(***Appeal arising from the Judgment/conviction and sentence in respect of Ukwala Resident Magistrate's Court Hon C.N Wanyama RM in Criminal case number 643 of 2016, R. vs.*** **Benard Odongo Okutu delivered on 26/1/2017).**

JUDGMENT

1. This is an Appeal against Judgment/conviction and sentence in respect of Ukwala Resident Magistrate's Court Criminal case number 643 of 2016, R. vs. **BENARD ODONGO OKUTU** delivered on 26/1/2017.

2. The Appellant - **BENARD ODONGO OKUTU** 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 respectively are that, **BENARD ODONGO OKUTU**: on 8th day of October, 2016 at [particulars withheld] Primary school in [particulars withheld] Sub-County within Siaya County, intentionally caused his penis to penetrate the vagina of **J A**, a child aged **13 years**.

AND

4. BENARD ODONGO OKUTU: on 8th day of October, 2016 at [particulrs withheld] Primary school in Ugenya Sub-County within Siaya County, intentionally touched the vagina of **J A**, a child aged **13 years**.

5. Aggrieved by the judgment, conviction and sentence of 20 years imprisonment, the Appellant filed a Petition of Appeal on 10/7/2017 and a subsequent **Supplementary Petition of Appeal** which was relied upon at the hearing of this appeal and in which the following ten grounds were raised:

> **1. That the Learned Magistrate misdirected himself in not finding that the charge sheet was defective as to be a nullity in law by convicting and sentencing the appellant wrongfully and illegally.**
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> **2. The appellant's conviction and sentence for the offence of defilement was against the weight of evidence presented by the prosecution witness, to wit:-**
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> > **i. There was no scientific evidence to prove the actual age of the complainant as required by law.**
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> > **ii. There was no evidence of actual penetration by the appellant on PW2 (complainant).**
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> > **iii. There was no medical evidence to prove that the Appellant defiled PW2 as alleged or at all**
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> > **iv. There was no evidence to prove the actual age of pregnancy of the complainant to determine if at all it was consistent with the date of the alleged defilement.**
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> **3. The learned magistrate erred in law and in fact by failing to call the two (2) prosecution key witnesses mentioned by the complainant to have been present at the crime scene on the date alleged.**

4. The learned trial magistrate erred in fact and in law by failing to critically analyze the evidence adduced by the prosecution witnesses thereby arriving at a decision not backed by concrete evidence and the law.

5. That the learned trial magistrate erred in failing to find and hold that the prosecution had failed to prove its case beyond a reasonable doubt as required in law thereby arriving at a decision unsustainable in law.

6. The learned trial magistrate erred in fact and in law by dismissing the evidence tendered by defence DW2 and DW3 respectively being the Appellant's two alibis.

7. The learned trial magistrate erred in fact and in law by failing to neither consider the evidence of the Appellant, the Appellant's written submissions, nor give any reasons for disregarding the Appellant's evidence.

8. The learned trial magistrate erred in failing to give due weight to the evidence of the Appellant

9. The learned trial magistrate erred in fact and in law in relying on extraneous matters to convict the Appellant.

10. The learned trial magistrate erred in fact and in law by imposing on the Appellant a harsh, oppressive and excessive sentence totally disregarding the Appellant's past record.

6. 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 the trial court had the advantage of hearing and seeing the witnesses.

7. On transpired before the trial court, the Prosecution called 6 witnesses in support of its case against the appellant herein.

8. PW1-PATRICK OKERE clinician at Ukwala Sub-county Hospital for 2 years testified that he had the P3 Form for J. A., a child aged 13 years old which he filled on 25/10/2016. That the patient went to the Hospital on 24/10/2016, vide OP No. 6407/16 and she was dressed in school uniform with her parents. That she said she was defiled by her teacher on 8/10/2016 between 4-5:30pm.

9. It was the testimony of PW2 that J.A. was examined 2 weeks after the alleged defilement and his findings were that her hymen was absent with mild bleeding from vulva, she had white vaginal discharge but not foul smelling and that he took lab tests for Syphilis, HIV, and pregnancy and found that she was pregnant and that HIV was not determined at the time hence she was to return 2 weeks later for retesting.

10. PW1 further stated that the injury was maim and that there was evidence of sexual intercourse although he stated that the delay in going to Hospital had caused the primary evidence to be distorted. He produced a P3 Form as exhibit 1, Medical notes dated 24/10/2016 as exhibit 2 and the Lab request form dated 24/10/2016 as exhibit 3.

11. In **Cross Examination** by the accused person, PW1 stated that it was not possible for him to tell how long the hymen had been absent and that the pregnancy lab test could not tell the age of the pregnancy.

12. In **Re-examination, PW1** stated that the information in P3 was from treatment notes. And that he personally saw the patient.

13. PW2–**J.A**, the complainant in her testimony stated that she was a pupil at [particulars withheld] Primary School, in Class 7 and that she was 13 years old, born in 2003 and her mother was R A. She stated that on 8/10/2016 (here the court noted that she was shy to speak) she returned to school to collect a book when it began to rain. That Mr. Odongo i.e. Bernard was in the staffroom with a paper bag in his hand and asked her to put some vegetables which were in the staffroom in the paper bag for him. He asked her to move to where he was (the court noted that she wiped her face with a handkerchief. That she looked down and spoke looking down covering her face) and when she did he held her jacket, and at that point she told him that she wanted to go home and the court again at this stage observed that she began to cry/sob. She testified further that he held her, removed her panty and he put her on the table and as she continued to sob she stated that he removed his penis and put it in her vagina, at this point also the court noted that the accused was looking down. She went on to state that he took his *'mboro'* (Luo name for penis)from his body which he uses it to urinate. That it was not for long and she felt pain. That she then went home and did not tell anyone. Later her mother was called by the Deputy Head teacher about her condition and she was then taken to Ukwala Hospital. She then went to the Children's Office then reported at the Police Station.

14. In **Cross Examination** by the appellant, PW2 stated that Bernard was at school on 8/10/2016 as well as two students namely; L B and A. She stated that she had gone back to take a book from V but she did not find him, and that at the time, the watchman had not arrived. That the two boys did not talk to her. That one Ms. M is the one who raised the issue and said that she was told of the incident by the two boys. She testified further that Mr. Odongo had a checked black and white shirt which had some red (the trial court noted that the complainant continued to cry) and asserted that she did not have a boyfriend and reiterated that she did not tell anyone and only told Ms. M who had called her after 2-3 days. That Ms. M said that the boys had told her what happened and she added that the boys were in class when she left the staffroom and added that the standard 8 class and staffroom had doors next to each other.

15. PW3-TOM VITALIS OCHIENG, the Children's Officer testified that he was at his office on 24/10/2016 at 4pm when the child and her parents arrived and told him that they were from the hospital and found out the child has been defiled and was pregnant. They told him that it was Benard her teacher who had defiled her. The mother gave him the number of the Head teacher of [particulars withheld] Primary who confirmed that Benard was a teacher at the school and the child was a student there. That the next day on 25/10/2016, he went to the Children's Office *with Benard who was aware of the case and wanted to have an amicable settlement*. = school and confirmed that the birth certificate of the child was issued on 19/11/2014 and that the accused arrested on 25/10/2016.

16. PW4- R A O, testified that the child (PW2) was her daughter and that she was born in 2003 and her birth certificate is serialized as xxxxxxx. She stated that on 17/10/2016 she was called to school by the head teacher who read her child's results for August. She went back home after being told to return after two weeks. That on 20/10/2016, she went to see the Deputy Head teacher to find out why she had been summoned to school and was told that Benard had defiled her daughter.

17. She further testified that she went back to school on 21/10/2016 but the head teacher was out. On 23/10/2016, she, her husband, the child, the head teacher, the deputy head teacher and the Chair of the Board met but Benard was absent. They were advised to take the child to hospital which she did on 24/10/2016 and then went to the Children's Officer and gave the officer the Head teacher's number. Benard was at the Children's Office on 25/10/2016.

18. During Cross examination, she stated that neither the child nor her sister told her anything and that it was the Deputy head teacher who informed her.

19. PW5- PC LYDIA ADHIAMBO received the report on 25/10/2016 at about 8.am when the child in the company of her parents reported that she was defiled on 8/10/2016 at about 5.30 pm. She then recorded their statements and issued a P3 form. The Children's Officer then arrived with Benard who was placed in the cells. She also summoned the head teacher, recorded his statement and added that J.A had told the deputy what had transpired through a letter.

20. In **cross examination** she stated that she did not visit the school and that the incident occurred on a Saturday 8/10/2016 and that no one else apart from PW1 told her that the accused was in school. That 2 boys were sitting for KCPE exams. She stated that tests showed that PW1 was pregnant.

21. In **re-examination**, she stated that Bernard was not examined as it was after two weeks but that the laboratory samples were taken in the hospital.

22. PW6- J O O, the Head teacher [particulars withheld] Primary School testified that he heard from a bodaboda rider that Bernard Odongo had had an affair with a student child in Class 7 North. He interviewed the child in the evening and she kept quiet. Bernard Odongo denied the allegation. He called the mother to the child who said the child was unwell with a stomach ailment and had taken her to a herbalist then to a clinic. The mother went to school on 17.10.2016 and confirmed having heard the rumour in the village. He called the child with the parents, the deputy head teacher and Chairman to the Board of Directors for a meeting. The child was hesitant to speak. On 24/20.2016 he was called from the Children's office and asked to go with Bernard which he did and Bernard was arrested.

23. In **cross examination**, he stated that on 8/10/2016 he had attended a burial near the school and Bernard had escorted the students to the funeral. That he had not spoken to the two boys.

24. At the close of the prosecution case the accused testified on oath and called two witnesses to support his case. DW1 testified that he was - BENARD ODONGO OGUTU. He recalled going for a burial on 8/10/2016 with his fiancée and a bodaboda (motorcycle) rider. That they left at 11.00 am and retuned at 4.00 pm. That he did not go to school that day, and that he heard of the defilement from the head teacher. That he refused to meet the parents to the child. On 25/10/2016 he had been summoned to the Children's Office when he went in the company of the head teacher. He was then arrested. He stated that he was with his fiancée the whole time and did not know whether the child was at the funeral or school. He stated that they do not go to school on Saturdays.

25. In **cross examination**, he stated that he was at the burial with his fiancée and the child was one of his pupils. He stated that he did not attend the meeting since he did not know the outcome.

26. DW2- I A O testified that she travelled on 7/10/2016 from Siaya. On 8/10/2016 at about 11 am, she attended a burial with Bernard. They left the funeral at about 4pm and Bernard was at home after that he did not leave.

27. On **cross examination**, she stated that she used the motorcycle from Siaya to Sega.

28. DW3- C O a motorcyclist recalled that he was called by Bernard to pick him from Kogere to Ukaka at 11am. He picked Bernard and another lady and took them to the burial and returned them to Sega at about 4pm.

29. In **cross examination**, he stated that he picked the lady from Sega to Bernard's home and not from Siaya.

JUDGMENT OF THE LOWER COURT.

30. The trial court reiterated the offences that faced the accused now appellant-Bernard Odongo Okutu and the particulars thereof. It further stated that Bernard pleaded not guilty to the offence and the prosecution called 6 witnesses then the accused gave a sworn defence and called 2 witnesses. The trial court then gave a summary of the evidence adduced by the two sides that is the prosecution and defence and framed issues for determination as follows:

- The age of the victim
- Whether there was an act of penetration by the accused person.

31. The trial court stated that from the evidence contained in the birth certificate number 3137700, the child was born on 8/9/2003. The certificate of birth was issued on 19/11/2014 thus, on 8/10/2016, she was 13 years old as stated in her testimony. The court went on to state that **The Children's Act** defines a child as any person who is below the age of 18 years and that there was sufficient proof that she was 13

years old at the time of assault and thus a child.

32. The trial court stated that the testimony of the clinical officer was that the child was defiled and was pregnant as per the laboratory results although it was not possible to tell the age of the pregnancy. That the doctor confirmed that the hymen was not present and there was mild bleeding adding that she reported to the facility at about 2 weeks after the assault and most of the evidence had been destroyed.

33. The trial court stated that it looked at the submissions by Bernard's advocate who was challenging the laboratory results and that an exhibit memo form for urine samples was not made, however the court stated that he had an option to ask for another test to be done which he did not and that the samples were taken by the laboratory technician and not the police. To this end, the court relied on the case of **Geoffrey Kioji vs. Republic CA 270 of 2010 (Nyeri)** where the court held that, **"where available, medical evidence arising from examination of the accused person and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can be properly convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt."**

34. The trial court observed that there was a delay in reporting the case to the police, that the child was silent until when she was questioned by the mother but also considered the evidence by the head teacher Joshua Oduor that showed that the father to the child was quick tempered and that this would have made it difficult for the child to report to her parents for fear of being punished severely.

35. The trial court also considered Section 124 of the Evidence Act and the proviso in regard to evidence of children and also the case of **Chilla vs Republic (1967) EA 722** where it was held that, ***"The Law of East Africa on corroboration in sexual cases is as follows; the judge should warn the assessors and himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful."***

36. Having looked at the evidence by the child, the trial magistrate found it to be consistent.

37. On the defence, the court stated that the evidence by the head teacher was that there was a burial on 8/10/2016 near the school which is also what Bernard stated in his defence. The court then proceeded to state that the point of departure is when Bernard said he went to the burial with his fiancée while the head teacher's testimony is that Bernard had escorted the children to the burial and thus stated that it was obvious that the children were to assemble somewhere to be able to go to the burial and as the school was near the home, then it would have been the ideal place.

38. The court stated that I A said that she was the fiancée to Bernard and she was with him the whole day on 8/10/2016. The trial court relied on the case of **Ndungu Kimanyi vs Republic (1979) KLR 283** where the Court stated that;

> **"we lay down the minimum standard as follows; the witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not straight forward person or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence."**

39. And the trial court found that in the present case, I told the court that she called the bodaboda rider who went to pick her up in Siaya and took her to Bernard's home. But that when the said Bodaboda rider was cross examined he stated that he did not pick I at Siaya but in Sega. Thus the trial court found it unsafe to rely on her evidence since she was not trustworthy and that she lied on oath. The trial court further found that the bodaboda rider was honest in his testimony and that the bodaboda rider dropped the 2 off at 4pm at Bernard's home which was 30 minutes away from the burial and may not have known any other incident after that time.

40. The court then stated that going back to the evidence of the child, she stated that she went back to school when Bernard defiled her in the staffroom and the incident was disclosed by the 2 boys who were in school that evening. That the mother of the child followed up the matter as soon as she heard of it, that the head teacher also did a follow up and that it was not clear why Bernard said he feared the outcome of the meeting that is why he did not attend.

41. And in considering the defence put by the accused, the court found that it did not shake the evidence by the Prosecution and the child was truthful and consistent in her testimony.

42. The trial court held that the prosecution proved its case beyond reasonable doubt that, it is the accused person Bernard who defiled the child on 8/10/2016 and therefore found the accused person Bernard Odongo Okutu guilty of the offence of defilement contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006** and convicted him according to **Section 215 of the Criminal Procedure Code** and sentenced him to serve 20 years in prison.

APPELLATE SUBMISSIONS

43. The Appeal was canvassed by way of oral submissions and Mr. Mugoye for the Appellant chose to rely on the amended grounds dated 19/2/2018 and a supplementary petition dated 16/10/2018 and submitted that the trial court proceeded to hear convict and sentence the Appellant in a trial process that was a sham.

44. That the trial court erred in convicting and sentencing a wrong person. That the appellant is not **Bernard Odongo Okutu** but is **Bernard Odongo Ogutu** hence there was a miscarriage of justice. He submitted further that **Section 24 of the CPC** is clear that if the prosecution failed to identify the accused, the court should ask the Prosecution to call the correct person, hence he submitted that the charge sheet was defective. That the charge, particulars and evidence tendered were at variance and the actual time of the alleged offence was not stated in the charge sheet.

45. It was further submitted that PW1 stated that he was informed that the offence was committed at 4.00 - 5.30 pm whereas the complainant says the offence was committed around 6.00 pm. It was submitted that as PW5 testified that the offence was committed around 6.00 pm, the charge sheet flies in the face of the law.

46. On ground 2, it was submitted that there was no DNA test or medical evidence tendered by the prosecution in support of the offence and that the prosecution relied on the P3 form, which the trial court relied upon to convict and sentence the accused. He added that the clinical officer examined the complainant 2 weeks after the offence and did admit that the evidence was distorted by the delay hence there was no reason why the trial court was in a rush to convict the appellant.

47. He further submitted that there was no evidence of age of the complainant and that the same should have been assessed and that during cross examination, PW1 confirmed that there were no treatment notes, hence the question is, what was he relying on, adding that the offence of defilement was serious and as such there should have been noise and immediate reporting to parents and even bleeding if the hymen was destroyed.

48. It was submitted that in defilement, actual penetration must be proved and that there was no evidence of penetration and there was need for medical evidence to test if the semen of the appellant was found on the complainant and that according to PW1, the complainant was found to be 2 weeks pregnant and that no medical evidence was laid to link the appellant to the acts of defilement. in addition, it was submitted that there should be proof that the baby was of the Appellant's since this was a one off incident.

49. That the trial court failed to find that the 2 witnesses who alleged to have seen the act of defilement being committed were not availed and that the only excuse was that the 2 witnesses were sitting for examinations, yet they could have corroborated the allegations of the complainant. Further, counsel took issue of the fact that PW5 stated that she never recorded statements from the 2 alleged witnesses.

50. It was submitted that PW1 stated that there were no complaints by the complainant at the time of examination and that when PW2 was presented for examination it was only at the request of PW4, the complainant's mother.

51. It was submitted that the trial court failed to analyze the evidence presented and wrongfully convicted the appellant without proof beyond reasonable doubt.

52. It was further submitted that PW1 testified that the alleged date was a Saturday but no evidence was laid to show that the complainant was at school at the material time. In addition, it was submitted that the evidence convicting the Appellant lacked evaluation.

53. On ground no. 3, it was submitted that the 2 critical witnesses allegedly present when the offence was committed were not called. That **L B** and **A T** were never called. And that their evidence was critical and material to enable the court reach a correct finding.

54. Further submission was that the Appellant raised an *alibi* and his witnesses corroborated his evidence but that the trial court ignored the evidence which was given on Oath by DW3 who was a fiancée of the Appellant.

55. On other grounds of appeal, counsel submitted that they were self-explanatory and urged the court to look at them. He relied on the authorities filed and emphasized George Opondo Olunga v Republic Siaya **HCCR 37/2015** where Makau J. defined penetration at page 3 and analyzed the evidence before him. Further reliance was placed on Mohammed **Farah Vs Republic [2018] eKLR** by **Dulu J**.

56. On the need for DNA test. The case of **Dominic Kibet Mwareng v Republic [2013]eKLR** was relied on the ingredients of the offence of defilement. Counsel for the appellant urged the court to allow the appeal and the conviction be quashed and sentence set aside.

57. Mr. Okachi, Senior Prosecution Counsel opposed the appeal and submitted that the authorities supplied did not address the same circumstances as those faced by the victim in the instant appeal and that **DNA** test is not primary evidence. He thus urged that Primary evidence is adduced by the victim and here he submitted that a in the case of **George Opondo Olunga Vs Republic**, there was no documentary evidence to establish age of the victim unlike in the case.

58. On the *Alibi Defence*, the prosecution counsel submitted that the burden of proof shifts to the accused to persuade the trial court that indeed he was not at the scene of crime and that the defence witnesses were scape goats. He stated in addition that the victim's evidence was concrete, that she knew the appellant her teacher whom she had trusted and also that she was with the appellant at the time and place of the crime.

59. On the issue of 2 "key witnesses" who were not called, the prosecution counsel submitted that it was in the prosecution's discretion to invite them or not and that the defence had an opportunity to invite them to testify in his favour and that the evidence adduced in court was sufficient, consistent and without contradictions. It was not shaken.

60. On medical evidence allegedly not adduced, it was submitted in contention that PW1 gave sufficient evidence to confirm that the offence took place. He confirmed that the victim's hymen had been broken. He examined the victim and gave expert evidence. That the Appellant's counsel questioned evidence of PW1 but the trial court considered the alleged contradictions and indicated that if the defence had any doubt by evidence of PW1 they should have called for a second opinion which they did not.

61. He added that Semen or DNA is not the issue on the charge sheet and that what is the issue is the age of the victim and proof of penetration which were not controverted adding that the age of the complainant falls within the bracket of definition of a child.

62. On the question of penetration, it was submitted that PW2 was very clear that there was penetration and the victim had clear knowledge of the person who penetrated her.

63. On the issue of name of the accused person and the alleged defective charge sheet, it was submitted that there was no defect. That an error on a name cannot make the charge defective and cause miscarriage of justice and that the Appellant never protested that he was not the person recorded in the charge sheet. He further submitted that what was being dealt with is an individual's identity which is not in doubt, reiterating that a mistake or error on the name is not fatal to the trial. That the minor error, technicality in legal proceedings is cured by the **Constitution**.

64. On the issue of time, it was submitted in reference to *page 7*, that PW1 stated that the offence was committed between 4.00-5.30 pm according to the information received by the Doctor.

65. That on page 9, the victim stated that it was at 6.00 pm, which timing does not vary for a child and that 5.30 pm - 6.00 pm is time that cannot be widely differentiated time.

66. In a brief rejoinder, Mr. Mugoye counsel for the appellant submitted that in the defence of *alibi*, the burden does not shift; that it does not oust the burden of proof on the part of the prosecution, adding that DNA, is a primary evidence that the Prosecution or the Court requires to link an accused person with the offence and that in this case, there was no evidence adduced to enable the trial court rely on to convict the Appellant.

DETERMINATION.

67. I have carefully considered the grounds of appeal as amended and he supplementary grounds of appeal, the written and oral submissions by the appellant and his counsel and the prosecution counsel and the authorities relied on. In my view, the following issues flow for determination:

1. Whether the prosecutions' case was investigated

2. Whether the charge sheet was fatally defective.

3. Whether there was conclusive evidence of penetration and therefore whether the prosecution case was proved beyond reasonable doubt, whether DNA, medical evidence was conclusive;

4. Whether the failure to call the two boys in school was fatal to the prosecution's case;

5. Whether the prosecution evidence was riddled with material contradictions.

6. Whether the defence of alibi was cogent.

7. Whether the trial court did not accord the appellant a fair trial on account of letting his counsel mitigate on his behalf.

8. Whether the sentence meted out on the appellant was excessive.

68. On issue 1, the appellant claims that the case for the prosecution was not investigated and that the evidence of PW2 should be expunged from the record because she was coerced to give evidence. However, the record shows that **PW5-** PC L A recorded statements of witnesses and the appellant was only charged after the complainant recorded her statement and taken to hospital for medical examination. The complainant did not retract her statement made to the police and being a child, this court finds that in the circumstances of this case where her father was a very harsh person, she feared giving information to her parents on what had transpired to her in school on the material day. Accordingly the complaint that the prosecution case was not investigated is baseless and is hereby rejected.

69. On issue 2, of whether the charge sheet was fatally defective, the appellant claims that the charge sheet was defective because his last name was **Ogutu** and not **Okutu. The charge sheet names the accused person as Bernard Odongo Okutu. The appellant in his defence introduced himself as Bernard Odongo Ogutu. Throughout the trial the appellant did not raise any objection as to how his name was written or pronounced. In my humble view,** the purported defect as to the name of the accused is one that is not fatal and is an error that is curable as it does not substantially affect the charge in any way by lack of essential ingredients. Two cases are pertinent: the case of ***Yosefa v. Uganda [1969] E.A. 236*** – *a* decision of the Court of Appeal – and ***Sigilani v. Republic [2004] 2 KLR 480*** – a High Court decision by Justice Kimaru. Both hold that **a charge sheet is fatally defective if it does not allege an essential ingredient of the offence.** In ***Sigilani v. Republic [2004] 2 KLR*** 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."

70. Section 382 CPC provides that:

"Subject to the provisions hereinbefore contained, 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:

Provided that in determining whether an 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 proceeding."

71. Based on the above provisions of the law and case law cited, I hold that the error on the third name of the accused was curable and did not occasion any injustice to the appellant.in my humble view, the error was one of spelling and pronunciation of Okutu instead of Ogutu which is a common error on names depending on the person who authored the charge sheet. In some dialects K is written and pronounced as G and G is written and pronounced as K. furthermore, the appellant knowing that his name was Ogutu and not OKUTU never altered it in his petition of appeal. Accordingly I find that there was no material defect in the charge sheet that would vitiate the trial of the appellant herein.

72. On issue 3, the question of concern is whether the prosecution discharged the burden of proof of beyond reasonable doubt against the accused person and in so doing, the court has to consider the ingredients of the offence vis a vis the evidence. The court must satisfy itself the chain of events and statements thereto must be such as to rule out a reasonable likelihood of the innocence of the accused. The court has to judge the total cumulative effect of all facts before it which reinforce the conclusion of the guilt of the accused person and should the combined effect of evidence adduced be conclusive in establishing the guilt of the accused the conviction would be justified. The court in Republic **v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR** further stated that:

> **"The burden of proof:**
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> It **is the law in Kenya as entrenched in the constitution under Article 50 (2) (a) that an accused person is presumed to be innocent until the contrary is proved. The evidence Act Cap 80 of the Laws of Kenya at section 107 (1) provides thus: "whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist."**
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> **As to what constitutes the burden of proof beyond reasonable doubt the case of Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373 provides as flows in a passage alluded to me considered the greatest jurist of our time Lord Denning:**
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> **"That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."**
>
> **"In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. <u>That burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person.</u> So likewise at the close of the prosecution case under section 307 (1) of the Criminal Procedure Code the prosecution must satisfy by way of the evidence presented so far that a prima facie case exist to warrant the accused person to be called upon to answer."**

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

74. In the case of **Mohamed Vs. Republic (2006) 2KLR 138**, it was stated:

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

75. As such if that be the case, this court must always remember that it is the trial court that had the benefit of seeing the demeanour of the complainant and all other witnesses including defence witnesses and made an evaluation as to the complainant's truthfulness. The trial court in its judgment stated that it was convinced that the child was telling the truth and that her evidence was consistent. PW2 stated in evidence that the accused person removed her panty and he put her on the table, the Accused/ Appellant then removed his penis and put it in her vagina, (his *'mboro'* (Luo word for penis) from his body which he uses it to urinate), which evidence was corroborated by PW1 who stated that the hymen of PW2 was absent and there was minor bleeding from vulva thereby asserting that there was penetration.

76. On recognition, it is not disputed in evidence that the accused/appellant was known to the complainant as her teacher and as such the identification was by way of recognition and not identification of a stranger. In addition, the offence took place between 4pm and 600pm which was not in darkness hence the complainant had the opportunity to see the offender very well and knew that it was her teacher. The said offence also took place in school. In **R vs. Turnbull [1976] 3ALL ER 549** the court drew a distinction between recognition evidence and identification of a stranger and stated that recognition evidence is more reliable than identification of a stranger. Accordingly I find and hold that the complainant positively identified by recognizing the appellant as the [person who defiled her.

77. On the age of the victim, a birth certificate serialized as No. 3137700 was produced, having been issued in the year 2014 and which confirmed that the victim was 13 years of age.

78. In the premise, the ingredients of defilement were sufficiently proved and thus I concur with the contention by the prosecution counsel that D.N.A was not a mandatory requirement and further it has also been held severally that- in the case *of **AML v Republic*** [2012] eKLR where the court held the same position stating:-

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

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

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

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

81. In addition, the fact that a victim was not a virgin or that their hymen had long been broken does not absolve an accused person of the crime he committed. In **Mohamed v Republic [2006] 2 KLR 138** the court stated:-

"It is now settled that the courts shall no longer be hamstrung by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

82. The trial court believed the evidence of PW2 and there is nothing in cross examination or in other evidence adduced that suggested that the appellant could have been framed for the offence accordingly, I find that there was proof beyond reasonable doubt that the appellant defiled the complainant.

83. Albeit the appellant's counsel submitted that there should be proof that the baby was of the Appellant's since this was a one off incident, the view of this court is that the trial took place and the complainant testified before the gestation period was over and therefore the issue of the baby being proved to be that of the appellant could not have arisen at that time. Moreover, the appellant did not seek to adduce additional evidence on appeal to prove that the baby was not his and that therefore he could not have been the person who had sexual intercourse with the minor complainant.

84. On Issue 4, of whether failure to call the two boys who were said to have been in school when the incident occurred was fatal to the prosecution case, while it is the duty of 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 as the trial court correctly held that the prosecution had proved the charge facing the Accused/Appellant beyond reasonable doubt, then there is no need to unnecessarily burden the court by availing as many witnesses as possible this is bearing in mind that the tenets of trial provide that a trial begin and conclude in a timely, reasonable and just manner.

85. Section 143 of the Evidence Act states: **"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"**

86. The legal principle in the case of ***Keter v Republic 2007 EA 135*** is particularly appropriate to the circumstances here: The court held:-

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

87. While the law still requires corroboration of evidence by minors as per ***Section 124*** of the ***Evidence Act***, there is a proviso to that section that there need not be corroboration if the court believed the minor told the truth and recorded its reasons. The section provides;

"Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him."

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

88. And in the case of ***J.W.A. v Republic*** [2014] eKLR, the Court of Appeal observed:-

"We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."

89. Thus, much as the evidence of the two witnesses was to come in to seal the case more, their evidence was not so vital such that their absence would vitiate the conviction of the Accused/ Appellant being that the evidence of PW2 could be relied on and was indeed elaborate and as it is not contemplated that there would be eye witnesses in sexual offences and the only eye witness to such is usually the victim. Furthermore an explanation was tendered as to the unavailability of the two boys which is that they were in the middle of their K.C.P.E examinations.

90. Therefore, it is my humble view that the evidence of PW2 need not be corroborated as so long as the court is convinced that PW2 was truthful, which was an observation by the trial court that PW2 was truthful and consistent.

91. 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."**

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

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

93. Further in **Aden Dahir Nuno v Republic [2015] eKLR** the court in support of the above view stated "**….** ***Provided the evidence on record is sufficient to sustain a conviction, the failure of an investigating officer to testify cannot vitiate a conviction***"

94. In place of investigation officer, insert in the evidence of the supposed witness not called.

95. However, am alive to the fact that the prosecution is bound to call witnesses even if their testimony may be adverse to the 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."**

96. The court addressed itself further that:-

> **"(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.**

97. In the **Bukenya Vs Uganda** case, point (i) above clearly states that the ***prosecution must make available all witnesses necessary to establish the truth,*** the truth here being to prove the charge or test the veracity of the charge. In this case, the trial court correctly dealt with the elements of the charge and was satisfied that they had been proved satisfactorily. In other words it found that the prosecution witnesses were credible and alluded to evidence necessary to answer to the charge that the accused was faced with.

98. The appellant in the supplementary petition of appeal claimed that there was no proof of actual age of the pregnancy of the complainant to determine if at all it was consistent with the date of the alleged defilement. However, as earlier stated, it is not the pregnancy factor that would be critical in determining whether or not the complainant was defiled. The evidence of the Clinician who examined the complainant was clear that the pregnancy was a lab report which cannot tell the age of the pregnancy.

99. On the **5th issue** of whether the prosecution evidence was riddled with material contradictions, the appellant claimed that the trial magistrate erred in law and fact by convicting the appellant based on prosecution evidence that was marred with contradictions hence not consistent making them to be unreliable witnesses thus unsafe for the trial magistrate to base her conviction. Incidents of contradictions were cited vide page 11 line 15 where PW1 stated that he noted an injury on PW2 which was maim meaning the broken hymen but that the same witness later stated at page 12 lines 6-7 that from his examination it was not possible to tell how long ago the hymen was broken or lost. Further, that on page 2 of the P3 Form exhibit 1 he states at section 13(2) that the age of the injury was 2 weeks. In the view of the appellant, the witness was forging the results.

100. The appellant further claims that PW2 stated in her evidence that she did not tell anyone but later she changed her story and stated that she told the Deputy Head teacher Mrs. M who called her after 2-3 days.

101. It was further claimed that PW5 stated that Madam M is the one who raised the issue while at page 23 PW6 stated that she was told by PW4 that she heard rumors from the village about the incident of defilement hence the prosecution witnesses must be unreliable and untrustworthy hence unsafe to use their evidence to convict the appellant.

102. I have examined the alleged contradictions on whether the complainant told anyone about the incident, the complainant was emphatic in her evidence that after she was defiled she did not tell anyone but that later she told the deputy Head teacher Ms M who had called her after 2-3 days and that the said Deputy told the complainant that the two boys told her because they saw what happened as they were in class when PW2 left the staffroom which was next to the Class 8 where the two boys were. In my view, that is no contradiction or at all which answers came in cross examination and which clarified the question of how her issue of being defiled came to be known and action taken, noting that

her father was said to be harsh as stated by PW6 that when the father went to the school he was angry and everyone ran away and therefore she feared disclosing what had happened to her.

103. In addition, the fact that the clinician who examined the complainant could not tell how long ago the hymen had been broken and his assessment on the P3 that the injury was 2 weeks old in my view is not a contradiction which is material. This is so because the Clinician was clear in his evidence that the complainant gave a history of having been defiled 2 weeks earlier and besides the missing hymen he also found that the complainant had white vaginal discharge, mild bleeding from valve and being a child she was pregnant. In my humble view, a child aged 13 years who is pregnant and with the history of being defiled and with the clinician assessing the injuries as maim is no mistake or contradiction or at all. In addition, the fact that the clinician was not able to tell how long ago the hymen was lost does not amount to a contradiction as it is immaterial that the complainant was not a virgin at the time of the defilement.

104. Further, I am in agreement with the prosecution counsel\s submission that the fact that the victim stated that she was defiled at 6.00pm whereas PW5 stated that she was told the defilement took place at about 5.30 pm is not a material contradiction as the child did not have a watch and only estimated the time being the evening.

105. In **TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA, 6** it was held that it is not every contradiction that warrants rejection of evidence. As the court put it:

> **"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's case."**

106. In the case of **Erick Onyango Ondeng' vs. R [2014] eKLR**, the Court held as follows:

> **"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers."**

107. In **DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR. APP. NO. 92 OF 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view I respectfully adopt:

> **"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."**

108. In the circumstances of this case, and considering the prosecution evidence as a whole, I find no material contradiction that would vitiate the trial of the appellant.

109. On Issue 6, the appellant claims that his defence of alibi was not considered in his favour. On the Appellant's defence of alibi, the appellant complained that his defence of alibi was not considered by the trial magistrate. In the case of **Charles Anjare Mwamusi V. R CRA No. 226 of 2002** the Court of Appeal stated:

> **"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."**

110. I thus take cognizance of the principle that by setting up an alibi defence, the accused does not assume the burden of proving the alibi- see **Ssentale vs. Uganda [1968] EA 36-. The foregoing was restated in the case of Wang'ombe vs. Republic [1976-80] 1 KLR 1683** where it was stated "***the prosecution always bears the burden of disproving the alibi and proving the appellant's guilt."***

111. However, this defence should also be raised at the earliest opportune time as was held in the case of **R VS SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6EACA 145 that:**

> **" if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there's naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."**

112. And in the case of **Victor Mwendwa Mulinge vs Republic,** the Court of Appeal rendered itself on the issue of alibi thus:-

> **"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanjavs Republic, this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought"**

113. The appellant stated in his defence evidence that he was not in school at the material time and that he had attended a funeral with his girlfriend (DW2) and that he had been with her the whole day. It was his evidence that they left at 11.00 am and left for home at 4.00 P.M and that as it was raining, he never left the house and was not in school that day. DW2 stated that she travelled to Sega to Bernard's place from Siaya as Bernard had asked her to accompany him to Ukaka for a funeral while DW3 confirmed the same. However the defence witnesses contradicted themselves materially as to the picking point (place) as DW2 stated that she used the bodaboda from Siaya while the Bodaboda (DW3) stated that he picked DW2 from Sega. These contradictions in my view render the defence of alibi raised by the appellant at the trial and on appeal herein unbelievable and a prank.

114. On issue 7 the appellant laments that he was not accorded a fair trial because the trial court allowed his counsel to mitigate on his behalf instead of letting the appellant mitigate by himself.

115. I have read the record of the trial court and the proceedings following the judgment delivered on 25th January 2017 shows that the judgment was delivered in the presence of the appellant and in the absence of his counsel. The appellant stated as follows: "***I pray to mitigate when my lawyer is present" and the trial court fixed 26th January 2017 for mitigation as the trial court was on transfer.. on the latter date, Mr Okuta advocate was present for the accused/appellant herein and he mitigated on his client's behalf. The appellant did not ask for an opportunity to mitigate in person and no such opportunity was denied by the trial court.***

116. In any event the trial court considered the said mitigation before sentencing the appellant to serve 20 years imprisonment which is the minimum sentence provided for in law. The trial court had the discretion to sentence the appellant to serve a longer sentence but considered mitigations and the fact that he was a first offender before meting out the sentence. Accordingly, I reject the allegation that the appellant was denied a fair trial.

117. On the whole this court finds and holds that the appeal herein against conviction of the appellant is devoid of merit and the same is dismissed.

118. On sentence, the trial court meted out the minimum sentence provided for under section 8(3) of the Sexual Offences Act. Accordingly, as the sentence of 20 years is lawful, I shall not interfere with the same.

119. The appellant's appeal against conviction and sentence is dismissed and the judgment of the trial court is hereby upheld.

Dated, Signed and Delivered in open court at Siaya this 19th Day of December, 2018.

R.E.ABURILI

JUDGE

In the presence of:

The appellant Bernard Odongo Ogutu

Mr Ojuro h/b for Mr Mugoe Advocate for the appellant

Mr Ngetich Prosecution Counsel

CA: Brenda and Modestar