



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO 77 OF 2017

JAMES OCHIENG OGOGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(appeal arising from the Judgment Conviction and sentence by Hon E.N.Wasike, SRM vide Bondo PM's Court

Criminal case number 11 of 2016, R. vs. JAMES OCHIENG OGOGO delivered on 4/8/2017)

JUDGMENT

1. This is an Appeal against Judgment/conviction and sentence of 20 years in respect of Bondo Principal Magistrate's Court Criminal case number 11 of 2016, R. vs. **JAMES OCHIENG OGOGO** delivered on 4/8/2017. The Appellant - **JAMES OCHIENG OGOGO** was charged with the offence of Defilement contrary to **Section 8 (1) as read with section (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**.

2. The facts as per the charge sheet respectively are that, **JAMES OCHIENG OGOGO**: on 28th day of December, 2015 at [particulars withheld] village Rarieda Sub-County within Siaya County, intentionally caused his penis to penetrate the vagina of **L A N**, a child aged **13 years**.

AND

3. **JAMES OCHIENG OGOGO**: on 28th day of December, 2015 at [particulars withheld] village Rarieda Sub-County within Siaya County, intentionally touched the vagina of **L A N**, a child aged **13 years**.

4. Aggrieved and dissatisfied with the judgment, conviction and sentence to 20 years imprisonment, **JAMES OCHIENG OGOGO** – the Appellant filed a Petition of Appeal on the following grounds:

1. That the defence adduced before trial court was not duly considered hence the whole trial was marred with gross violation of constitutional rights under Article 50 of the Constitution of Kenya.
2. That the learned trial magistrate erred in law and fact by failing to consider that there were gross contradictions of prosecution witnesses hence the conviction was not safe and sound.
3. That the learned trial magistrate erred in law and fact by relying on the medical evidence to convict and sentence him yet the evidence was not credible to earn a conviction.
4. That the learned magistrate erred in law and in fact by considering the evidence of the prosecution to be credible before warning of the vital evidence required to prove defilement hence there was no certainty that identification was positive.
5. That he cannot recall all that transverse during the trial hence pray for the trial proceedings to adduce more grounds.
6. That I pray for orders of habeas corpus.

5. And a subsequent petition of appeal on other grounds relied upon when the appeal was canvassed. The grounds are as follows:

1. That the trial magistrate erred in law and in fact in convicting and sentencing the accused to 20 years imprisonment despite the fact that the evidence adduced by the prosecution was not sufficient to sustain a conviction.
2. That the trial magistrate erred in law in not considering the fact that the accused was not properly identified by the prosecution witnesses.
3. That the trial magistrate erred in law in not considering the fact that no nexus was established between the victim's injuries and the accused.
4. That the trial magistrate erred in law and fact in failing to consider the numerous contradictions in the testimonies of the prosecution witnesses.
5. That the trial magistrate abdicated his duty by not assessing the evidence of each prosecution witnesses with anxious care before drawing conclusions, rather he glossed over the evidence in his rash judgment.
6. That the trial magistrate misdirected himself in going out of his way to accept the prosecution's case blindly thereby precluding himself from evaluating with anxious care evidence that was so favourable to the appellant to warrant an acquittal.
7. That the trial court erred in law in placing the burden of proof onto the appellant.
8. That the trial magistrate accepted evidence which was contradictory and woefully short of the standard required for conviction.
9. That the trial court did not consider what was glaringly evident, in that the prosecution witnesses had colluded among themselves against the appellant before giving evidence
10. That the trial magistrate did not consider the appellants evidence at all which was on oath and which was not challenged in cross-examination
11. That the trial magistrate erred in law in not considering the fact that the appellant's evidence was not controverted.
12. That the judgment was a travesty and did not conform with principles of law and was essentially totally biased against the appellant.

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 what transpired during the pendency of the case in lower court. **PW1-L A** testified that on the 28.12.15 at about 2.30 am, she was in the house sleeping when she experienced some interruptions in her sleep and that is when she realized that someone was on top of her. She said that she was with E A, PW2 and E A who were sleeping besides her in the same house. The complainant testified that the intruder was defiling her. She stated how the person had removed her pants and inserted his penis into her vagina and defiled her whilst holding her throat. It was her evidence that her elder sister got up and lit a torch and she was able to identify the person as Ochieng (the accused).

8. It was PW1's testimony that after screaming, the person took off and her sister gave him a chase and that's when their grandmother came around. The minor then stated that she realized that she was bleeding from her vagina. She then narrated how on the following morning she was able to see the accused person as she was going to fetch water and even asked him why he had decided to defile her. PW1 then stated that after visiting the accused person's homestead with her grandmother for purposes of trying to interrogate the situation, she was taken to Madiany Health Centre where she received treatment after which she went to Aram Police Station where she reported the matter and thereafter she was issued with a P3 form which was later filled at Madiany Health Centre.

9. On **cross-examination by the accused person, PW1** stated that they were 3 people sleeping on the floor on one mattress and that she was the one closer to the door. She stated that the torch used was a round faced torch and that they usually slept with it. That she met the accused at about 6.00 am when she was fetching water and that during that time her parents were at Awendo. That their screams attracted 6 people and among them was her grandmother Teresia. She also averred that her grandmother had some issues with the accused before the offence.

10. **PW2- E A** stated in her evidence that she was in class 5 and that PW1 was her sister. She recalled that on 28/12/15 around 2.30 am someone got into their house at night and that she heard PW1 shouting and then she lit a torch and she was able to identify the person as Ochieng (the accused) lying on top of L. It was her testimony that after screaming the person took off and she gave a chase while shouting his name and that's when their grandmother came around.

11. PW2 then stated that she came back to the house and found PW1 nose bleeding and there was blood on her clothes. She also said that she had known the accused person before.

12. On **cross-examination**, she stated that she was sleeping in the kitchen and on the floor and that PW1 was sleeping close to the door and on her (PW2's part) she was sleeping close to the wall and the torch was at the top of their head. She also stated that Flora was the first to come out when they shouted and added that the torch she used to see the accused was not so big.

13. **PW3-T H N** stated that on the 28.12.15 at about 2.10 am, she heard PW1 and PW2 shouting from the kitchen and then she heard PW2 saying that Ochieng was killing PW1. It was her evidence that she went to check out and found PW2 standing by the door whereupon she told her to go catch the accused. The witness said that by then PW2 was having a torch and shortly afterwards, PW1 came out of the house nose bleeding and she was crying while holding her private parts saying that the accused person had defiled her. It was her evidence that early on the following morning she saw the accused speaking to PW1 and that is when PW1 asked him why he had defiled her at night. She then said that together with PW2, N and his wife, they went to the accused person's homestead where they found the accused person and his mother and when he was asked about the incident of the previous night, he denied knowledge of the same. It was also her evidence that N and his wife accompanied PW1 to hospital and she later went to Aram Police Station and reported the matter.

14. During **cross examination PW3 stated** that she was the first one to come out and that PW2 was the first person she met outside the kitchen standing while flashing the torch and that they were 5 adults at the home on the fateful night and she said she went to report the matter to the police as the accused and his mother refused to cooperate. That PW1 went to Madiany Hospital twice that is on a Monday and Tuesday (29/12/15 and 30/12/15) respectively.

15. **PW4-VINCENT ONYANGO AKELLO** who was a Clinical Officer at Madiany Hospital testified that he filled the P3 form on 29/12/2015 (P.Exh.3) and he also produced a treatment book for PW1, (P.Exh 2). The clinician stated that upon examining the patient (PW1), he observed that the patient had lacerations on the vaginal orifice and on both *labias*. He also observed that the hymen was absent and there was presence of fresh vaginal bleeding which led him to conclude that there was evidence of forceful vaginal penetration. There was no cross-examination or re-examination of this witness.

16. **PW5- NO. 68479 CPL FRANCIS ODONGO** who was a police officer attached to Aram Police Station testified that on the 29.12.15 he was in the office when the complainant went to the station in company of her uncle and aunt and reported a case of defilement. The officer stated that the complainant had already been examined and treated at Madiany District Hospital and so he issued her with a P3 form which she took to be filled at Madiany Hospital and thereafter he recorded her statement together with those of her witnesses. He further stated that he visited the scene at [particulars withheld] village and he was able to establish that the suspect sneaked into the house that the complainant was sleeping in at night and defiled her. The officer then stated that he collected the skirt that the complainant was wearing at the time of the offence and produced it as P.Exh.1. It was his evidence that the accused person was later arrested by P.C. Ndiwa and escorted to the police station and he was later arraigned in court. The officer then produced a Birth Certificate S/No [particulars withheld], P.Exh.4 for the complainant.

17. On being placed on his defence, the accused person now appellant testified as DW1- that he was JAMES OCHIEN OGOGO. He stated in his sworn defence that on the 28.12.15 at around 7.00 am, he was at home with his mother when PW1, PW2, PW3 and one N O went to their home and alleged that he had defiled PW1, an allegation that he denied. He stated that the people then demanded for some money for medication of PW1 but he did not have and that is when they threatened to report the matter to the police station.

18. The accused further stated that he went to report the matter to the area Assistant Chief so that they could resolve the matter and later a meeting was convened between his family and that of the complainant but the complainant's family stated that they had already reported the matter to the police and on hearing this, the Chief stated that there was nothing much he could do. It was the accused person's defence that on the 4.1.16 at around 3.30 pm, police officers from Aram Police Station went and arrested him at his home on allegations of having defiled the complainant herein. He stated that he was escorted to the police station and placed in the cells and was later arraigned in court and charged accordingly. The accused stated that PW3 had a personal vendetta with him and that the allegations against him were false.

JUDGMENT OF THE LOWER COURT

19. The trial court reiterated the offences that faced the Accused now Appellant- **OCHIENG OGOGO** and the particulars thereof. It further stated that he had pleaded not guilty to the offence and the prosecution called 5 witnesses namely; L A (PW1), E A (PW2), T H N (PW3), Vincent Onyango Akello (PW4) and Corporal Francis Odongo (PW5), then the accused gave a sworn defence.

20. The court then gave a summary of the evidence adduced by the two sides that is the prosecution and defence and stated that having considered the prosecution case *vis-à-vis* the defence, what was left of it to determine was whether basing on the available evidence: -

- i. The salient ingredients of the offence had been established.**
- ii. The accused person has established a sustainable defence.**
- iii. The prosecution has been able to prove its case beyond reasonable doubt.**

i. On the Salient ingredients of the Offence

21. Under this head, the court restated the proviso the accused had been charged under **Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.**

“A person who commits an act which caused penetration with a child is guilty of an offence termed defilement.”

22. He further restated **Section 8(3) of the Sexual Offences Act No. 3 of 2006** which states:

“A person when commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

23. The trial magistrate then stated that from the above provision, it was quite clear that for the offence to suffice, three elements must be established namely:

a. Age of the victim

b. Penetration

c. Identity of the offender

a. Age:

24. On the question of age of the complainant the trial court stated that PW5 who is a police officer produced in court a Birth Certificate, P.Exh.4 in favour of the complainant which showed that the minor was born on 1.6.2003. That the charge sheet stated the date of the alleged offence to be 28.12.15 and stated that simple mathematical computation shows that as at the date of the alleged offence, the complainant was 12 years old. Hence, it stated that the age fell within the age bracket envisaged in the Act and so thus this ingredient was sufficiently established.

b. Penetration

25. On whether there was penetration, the trial court stated that PW1 stated that on the material date and time, the accused person went into the house she was sleeping, lay on top of her and then he took out his penis and inserted it into her vagina and defiled her. That the treatment book, P.Exh.2 and the P3 form, P.Exh.3 were produced in court which basically described the injuries on PW1's genitalia. That the description was that there were lacerations on the vaginal orifice and on both labias, the hymen was absent and there was presence of fresh vaginal bleeding. That the injuries led the Clinician to conclude that there was evidence of forceful vaginal penetration.

26. From the above findings, the court stated that it clearly showed that penetration was achieved and this sufficiently met the requirements of the act.

c. Identity of the Perpetrator

27. On the question of the identity of the perpetrator of the offence of defilement, the court stated here that the evidence of PW1 and PW2 placed the accused person at the Centre stage. That PW1 stated that after realizing that the accused person was defiling her, screamed and that prompted PW2 to wake up and lit a flash-light and that is when she was able to identify the accused. That PW2 affirmed PW1's testimony and indeed stated that she clearly saw the accused person laying on top of PW1. The trial court stated that it was thus clear from the evidence that the complainant and PW2 knew the accused person well and it seems that they were neighbours and were familiar with each other. It added that in fact PW1 stated that when it dawned, she met the accused person and asked him why he had defiled her to which the court stated that it further confirmed the fact that they knew each other.

28. Furthermore that even in his own defence, the accused person stated that he knew the complainant and her family well and he was even able to name them by their respective names. Therefore the court found that the accused was clearly identified by both PW1 and PW2 as the person who had sneaked into the house that they were sleeping and defiled PW1.

29. By and large, the court stated that in its considered view, the ingredients of the main charge had been established and so opted not to belabor to analyze the alternative charge as the same had collapsed in a legal way.

2. Whether the accused had a sustainable defence

30. on the defence mounted by the accused person, the trial court observed that the accused person stated that on the material day the complainant and her family went to his home and alleged that he had sneaked into the house where PW1 and her sisters were sleeping at about 2.30 am and defiled the complainant. That he then stated that they demanded some money for treatment of PW1 but when he could not give them they went and reported the matter to the police station. The court stated that the accused person stated that he went to report the matter to the Area Assistant Chief so that they could resolve the matter and he denied any wrong doing. The trial court concluded that it was quite clear from the defence that the accused had denied ever committing the offence. The court further stated that the Defence counsel also submitted on the case and highlighted some contradictions in the prosecution's case. However the court stated that as much as there may have been some contradictions in the prosecution's case, the same did not go to the root of the matter and that the basis of the said contradictions was basically circumstantial, that is, they were hinged on the reaction of people after the alleged incident occurred and he thus held the opinion that the defence failed to substantially discredit the evidence of PW1 particularly on her evidence of defilement.

31. Further, the court reiterated the fact that the main elements in a charge of defilement were penetration, age and identity of the perpetrator and that the defence failed to rebut these elements with precision but chose to concentrate on matters that had no direct bearing on the case and that were so remote as to discredit the overwhelming evidence adduced by the prosecution.

32. The trial court added that, even the accused person in his own defence, impliedly conceded to the offence and this is when he stated that he went to the area assistant chief so that they could resolve the issue to which the court questioned that that what was the accused's essence of resolving an issue not known to him at the time if at all he was innocent of anything? The trial magistrate thus found that the defence tendered by the accused had failed to discredit the evidence adduced against him by the prosecution that his defence had failed to exonerate him from blame and hence was found not to be unsustainable.

3. Proof beyond Reasonable Doubt

33. On proof the court made the following inferences: -

- That the Prosecution witnesses were firm, consistent and appeared believable.
- That the evidence adduced by the Prosecution was basically unchallenged and that is in as far as the main ingredients of the offence was concerned.
- That the defence failed to mount up a credible and sustainable defence that would have otherwise discredited the Prosecution's case.
- That the accused person came out to be a person who was somehow economical with the truth and this was based on his own defence.
- That the major ingredients of the charge facing the accused were clearly established by the prosecution.

34. And basing on the above, it was the trial court's considered view that the Prosecution had proved its case beyond reasonable doubt and thus **convicted** the accused with 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 pursuant to **Section 215 of the Criminal Procedure Code (Cap 75) Laws of Kenya**.

APPELLATE SUBMISSIONS

35. The Appeal was canvassed by oral submissions and Mr. Ojuro for the Appellant stated that there were 3 issues for determination arising from the 12 grounds of the petition of appeal;

1. Identification of the appellant.

2. Contradictions of prosecution witnesses.

3. Opinion taken by court on the defence raised by the appellant

36. On the first issue of identification, it was submitted that the evidence led was that PW1 the victim and PW2 a sister to PW1 allegedly identified the appellant but the offence took place at 2.00 am and identification was by PW2 using a torch and recognition because the appellant was known to the two. That the torch was never recovered and no evidence of how much light was given, hence the recognition was an afterthought for reasons that they did not go to his home immediately and instead chose to wait till 7.00 am.

37. That PW1 stated that there were differences between PW3 and her grandmother, hence it was submitted that the appellant was framed and was not properly identified by the witnesses as there was no electricity at 2:30 am hence identification was difficult.

38. That further, PW1 and PW2 were in the kitchen and stated that they never saw anybody and PW3 was in a different house and never saw anybody.

39. On issue 2 on contradictions, it was submitted that PW1 stated in cross-examination that PW3 and the Appellant were not getting along. That they had quarreled but PW3 denied any bad blood with the Appellant and the court never took that into account.

40. It was further submitted that the actions taken by PW1 and PW2 after the offence is contradictory. That PW1 stated that she was the first to come out of the kitchen chasing the appellant but PW2 and PW3 say it was PW2 who came out first chasing the Appellant.

41. Further that in defence when the Appellant said he never committed the offence and that After Pw1 and Pw2 went to his home, he reported the matter to the Assistant Chief, a fact which was submitted on that the trial court captured the defence at page 21 as an admission and on this reliance was placed on the authority in *Criminal Case No. 201 of 2007 John Nyaga V Republic [2014] eKLR* on what kind of light is suitable to identify the accused.

RESPONDENT'S SUBMISSIONS

42. Mr. Okachi the Senior Principal Prosecution Counsel opposed the appeal by submitting that the grounds advanced by the defence did not shake the evidence of the prosecution as adduced in the lower court. He submitted that the major argument was on identification and submitted that the accused was clearly identified with the help of the torch lit by PW2; that the attacker was a common fellow they knew by name, appearance and association; that PW1 also identified the assailant as her neighbour. That further, PW2 called out his name and chased after him after realizing what the accused was doing to the sister.

43. It was also his submission that the expert witness confirmed that indeed the offence took place and PW1 and PW2's evidence was properly corroborated and concluded by stating that the Prosecution proved the case beyond an iota of doubt.

44. Mr. Okachi further stated that the authority stated by the appellant basically dealt with the quality of light-sufficient enough to identify and enable one to recognize the image or subject of identification, adding that PW1 and PW2 gave evidence that the torch light had sufficient quality to enable them identify and even recognize the accused.

45. On contradictions, it was submitted that the same were not that material and that the errors are minor. He submitted that what is purported to be an afterthought is not true, adding that when PW1 and PW2 went to the assailant's home. They did so to find out why he (the accused/Appellant) had done what he did to the victim

DETERMINATION.

46. Upon a wholesome analysis of the entire lower court proceedings, the judgment of the lower court, the appeal thereof and the grounds stated alongside the respective submissions by the Appellant's counsel and the Senior Principal Prosecution counsel, the following are the two main issues that I perceive to flow from the foregoing:

- 1. Whether there was proper identity of the perpetrator.**
- 2. Whether there were material contradictions to warrant the setting aside of the Appellant's conviction.**
- 3. Whether the prosecution proved its case against the appellant beyond reasonable doubt.**

47. I will determine issue No1 and 3 together.

48. **On issue 1**, this issue is the turning point of the case as was observed by the Senior Prosecution Counsel Mr. Okachi who stated that the major argument was on identification. To start off however, I am persuaded beyond reasonable doubt that the ingredients of the offence as relates to age and penetration were conclusively ascertained/ proved as there is a birth certificate on record that has not been disputed and there was indeed penetration as the victim PW1 stated that the accused lay on top of her and defiled her and when he ran away she realized that she was bleeding from her vagina and PW2 confirmed that PW1 was nose bleeding and had blood on her clothes while PW3 stated that PW1 came out of the house nose bleeding and she was crying while holding her private parts saying that the accused person had defiled her. Further, the clinician's (PW5) evidence was very determinate on the issue of penetration as he testified that upon examining the patient (PW1), he observed that the patient had lacerations on the vaginal orifice and on both *labias*. He also observed that the hymen was absent and there was presence of fresh vaginal bleeding which led him to conclude that there was evidence of forceful vaginal penetration. Hence the allegation of one being framed is way too preposterous as it is evident that indeed there was penetration of the minor's vagina hence the act of defilement took place.

49. Now as to who committed the offence, it was the evidence of PW1 that her sister got up and lit a torch and she was able to identify the person as Ochieng (the accused). It was further her testimony that after screaming the person took off and her sister gave chase and that's when their grandmother came around. She then narrated how on the following morning she was able to see the accused person as she was going to fetch water and even asked him why he had decided to defile her.

50. **PW2** stated that she heard PW1 shouting and then she lit a torch and she was able to identify the person as Ochieng (the accused) lying on top of L. It was her testimony that after screaming the person took off and she gave a chase while shouting his name and that's when their grandmother came around and further stated that she had known the accused person before. On **cross-examination**, she stated that PW1 was sleeping close to the door while PW2 was close to the wall and the torch was at their head. She added that the torch she used to see the accused was not that big.

51. On this issue of identification, the locus classicus is the case of **R vs. Turnbull [1976] 3ALL ER549** where the court stated that some of the factors to be considered before determining on whether or not to rely on the visual identification evidence of a single eye witness are as follows;

- 1. Whether the viewer viewed the suspect under sufficient lighting and from a close position.**
- 2. Whether the viewer had ample time to view the offender/suspect and it was not just a fleeting glance.**
- 3. Whether the viewer was sober and whether there was anything which could have impeded the viewer's proper identification.**
- 4. Whether much time had lapsed between the time the viewer identified the suspect to the police and the time the viewer initially saw the suspect committing the offence.**
- 5. Whether there was any difference between how the viewer described the suspect and the actual appearance of the suspect.**

52. The court further drew a distinction between recognition evidence and identification of a stranger where the court stated that recognition evidence is more reliable than identification of a stranger. In my humble view, this was a case of recognition, and it is not disputed in evidence that the accused/appellant was known to the complainant as even the accused stated that he knew the complainant very well along with her family members and even knew them by names and as such the identification was by way of recognition and not identification of a stranger and with reference being made to the above cited case of **R vs. Turnbull [1976] 3ALL ER549** where 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.

53. The prosecution counsel reinforced the above in support of recognition in his submissions when he stated that the accused was clearly identified with the help of the torch lit by PW2, and that the attacker of PW1 was a common fellow they knew by name, appearance and association, adding that PW1 also identified the assailant as her neighbour.

54. On the circumstances under which the accused was viewed, PW1 and PW2 stated that they were sleeping and the torch was always with them. PW2 stated that the torch was at the top of their head. PW2 stated that when she heard PW1 shouting, she switched on the torch and saw Ochieng on top of her sister PW1. This evidence was corroborated by PW1 when she stated that when her sister PW2 put on the torch she was able to identify the accused as Ochieng and further stated that the following morning while she was fetching water, she saw the

accused/ Appellant and asked him why he had done that to her. This established that there was no iota of doubt on her that it was the Appellant who defiled her.

55. Furthermore, the unfortunate act was done on the bed, where the victim was and where the torch was and PW2 too was hence the proximity of the persons cannot be gainsaid as such the light from a torch that was stated to be round would be able to illuminate a sufficient surface area despite the fact that PW2 stated that the torch was not very big.

56. From the evidence of PW1 and PW2 there was sufficient surface area covered by the light from the torch and being that the person was in an undistinguishable distance as he was too close for any useful estimation of the view that the proximity and the light allowed the positive identification of the accused now appellant herein and further, the said circumstances under which both PW1 and PW2 viewed the assailant met the threshold set in the case of **R vs. Turnbull & others aforesaid [1976] 3All ER549**. In addition, each of their evidence corroborated the other and it was not possible that two people would be wrong and yet be so convicted in their judgment or observation of what they saw.

57. On issue 2, though counsel for the Appellant submitted that the actions taken by PW1 and PW2 after the offence is contradictory, PW1 stated that she was the first to come out of the kitchen chasing the appellant but PW2 and PW3 say it was PW2 who came out first chasing the Appellant. Indeed there was a contradiction in the said statement. However, I agree with the holding of the trial court when it stated that as much as there may have been some contradictions in the prosecution's case, the same did not go to the root of the case and that the basis of the said contradictions was basically circumstantial, that is, they were hinged on the reaction of people after the alleged incident occurred.

58. 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.”

59. In **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.”

60. 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.”

61. 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. I am further of the view that the contradictions referred to did not relate to the actual incident of defilement but reactions the defilement and as such were not material in that they did not discredit the main action or the evidence adduced in support of the ingredients of the offence of defilement, wherein the appellant was positively identified as the offender/ assailant.

62. The upshot of all the above is that the other elements of the offence of defilement having been proved and thus not in dispute and after having established that the Accused/Appellant was properly/positively Identified, I find the Appeal against conviction to be lacking in merit and is hereby dismissed.

63. On sentence, what the trial court meted out was the minimum sentence provided in section 8(3) of the Sexual Offences Act. Accordingly the sentence though not challenged was lawful and appropriate in the circumstances as the trial court took into account mitigation by the appellant. In addition, the appellant took advantage of a 12 year old child and destroyed her inherent dignity. He violated her body. Sexual offences traumatize the victims for a long period of time. The appellant gratified his appetite for sex. He was a sex pest. He had an opportunity to have sex with consenting adults but chose to violate the young child. In my view the appellant did not deserve any mercy from the court as there can be no excuse for defiling a child. Accordingly the sentence of the lower court is hereby upheld.

64. In the end, I dismiss this appeal both on conviction and sentence and uphold the trial court's judgment.

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

R.E.ABURILI

JUDGE

In the presence of:

Ojuro Advocate for the appellant

Appellant present

Mr Ngetich Prosecution Counsel for state

CA: Brenda and Modestar