REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL CASE NO. 47 OF 2017

(DEFILEMENT)

(CORAM: R. E. ABURILI – J.)

COO.....APPELLANT

VERSUS

STATE.....RESPONDENT

(Being an appeal against both the conviction and the sentence DATED 20.4.2017 in Criminal Case No. 11 of 2017 in Senior Resident Magistrates Court UKWALA Law Court before Hon G. ADHIAMBO – S.R.M.)

JUDGMENT

1. The Appellant herein **COO** was charged with the offence of **Defilement of a Child contrary to Section 8 (1) (3) of the Sexual offences Act No. 3 of 2006**. It was alleged that he defiled **YAO** by intentionally causing his penis to penetrate the vagina of **YAO** (full name withheld for legal reasons) a child aged 13 years between 27th and 28th February 2017 at [particulars withheld]Village, Kagonya Sub-Location, Ugunja Sub-County of Siaya County.

2. The Appellant was also charged with the alternative count of **committing an Indecent Act with a child aged 13 years contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.** The Appellant is alleged to have intentionally touched the vagina of YAO between 27th and 28th February 2017.

3. The Appellant denied the charges before Hon. G. Adhiambo, Senior Resident Magistrate Ukwala, in Ukwala Senior Resident Magistrate Criminal Case No. Sexual Offences 11 of 2017.

4. He was tried and found guilty of the main charge and sentenced to serve 20 years imprisonment on 20.4.2017.

5. Being aggrieved by the said conviction and sentence, the Appellant herein filed this appeal on 4.5.2017 setting out the grounds that:

(a) I was a student and prays that the Honourable Court does find so and allow me go back and complete my education.

(b) I was a Minor at the committal of the alleged offence.

(c) I wish to be present at the hearing of this appeal.

6. On 27.9.2018 the Appellant filed amended grounds of appeal alleging that:

(a) There was no enough evidence in my case that showed that the girl was defiled.

(b) I did my case within one month and a week which was not enough for investigation.

(c) That I am a first offender and also my first time to be arrested.

(d) My appeal has high chances of success.

7. In his written submissions which he adopted as canvassing his appeal, the Appellant claims that:

(1) The judgment of the trial Court was not in accordance with ***Article 50 of the Proposed Constitution*** *in that he was denied a fair hearing, that the trial Court was biased against him, that the judgment was in violation of* ***Article 27 (1) of the Constitution,*** *that the judgment did not comply with* ***Article 149 and see Section 191 of the Children's Act*** *for failure to confirm the age of the Appellant which was 17 years at the time of taking plea but that the trial Court ignored that fact.*

(2) That investigations failed to determine why the Complainant was absconding (sic)

(3) That the Prosecution failed to avail crucial witnesses who found the Complainant stranded on the stage and offered her a place to sleep and later took her to her parent's home, which failure caused doubts as was espoused in the case of ***Kingi One Yenko Versus. Republic Criminal Case 1121 of 1971*** *and that such failure to call crucial witnesses was prejudicial to the Appellants. That there was clear evidence of a grudge between the complainant and her mother who chased the Complainant away from home.*

(4) On the Prosecution's Case it was submitted that the evidence before Court was not conclusive and that the Court relied on a single identifying witness and circumstantial evidence. That no medical or forensic-examination linked the Appellant to the offence. He faults the trial Court for failing to warn itself to the risk of a single identifying witness

(5) On the defence's case, it was submitted that the trial Court erred in terming the defence of alibi as an afterthought yet he was at his Aunt's place when the alleged defilement was taking place.

8. The Appellant urged the Court to allow his appeal and set him at liberty.

9. On the hearing date of 3.10.2018 the Appellant maintained that he was underage hence this court ordered for an age assessment report which was filed dated 11.10.2018 from Jaramogi Oginga Odinga Referral Teaching Hospital and signed by Dr. Jodo P. Dental Officer showing that the Appellant's estimated age is 18 years.

10. The Appellant maintained his innocence and submitted that he did not defile the Child and that her step Brother, a Teacher defiled the Appellant's younger Sister and the Father of the girl (Complainant) told the Appellant that he would ensure the Appellant suffers the same fate as he had caused his brother to be charged in Court for defiling his (Appellant's) Sister.

11. In opposing the appeal, Mr. Okachi Senior Principal Prosecution Counsel, submitted that he left to the Court the issue of age but was emphatic that the conviction of the Appellant was based on sound and sufficient evidence adduced by the Prosecution.

12. In a rejoinder the Appellant submitted that he was born on 2.2.2002 and was being held in Adults Prison.

13. After the Age Assessment Report was availed the Court ordered that the Appellant be isolated from Adult offenders.

14. In determining this appeal, this Court is alive to the principles laid down in the case of **Okeno Vs. Republic [1972] E.A. 32** that an Appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination **(see Pandya Versus Republic [1957] E.A. 336** and to the Appellate Courts own decision on the evidence, the first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.

15. In **Shantilal M. Ruwala Versus Republic [1957] East Africa 570** it was held that it is not the function of a first Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the Lower Court's findings and conclusions, it must make its own findings and draw its own conclusions, only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses. **(See Peters Versus Sunday Post [1958] East Africa 424.**

16. In the trial Court, the evidence of PW1 a minor who was taken through ***voire dire*** examination and found to be suitable to give sworn evidence was that she was a class 6 pupil at B. O. (full name of school withheld) Primary School. She recalled that on 27.2.2017 which was a Monday, her Sisters P and C quarreled because P told C to sleep with C who is the Accused/ Appellant herein but C refused because their Father had warned them that they would not be allowed to stay in his home if they became pregnant and further that C was in her menses.

17. According to PW1, P persuaded C to sleep with C the Appellant and that P promised C that on the morning after having sex with C, she (P), would give C Medicine to prevent her from becoming pregnant. That C turned down the request.

18. That her Stepmother N said whatever was happening was because of the Complainant whom C always wanted to seduce. That the complainant's step Mother chased her from home and ordered her to spend the night at her deceased grandmother's home.

19. PW1 went to her grandmother's home and on 27.2.2017 she went to school as usual and at 9.00 p.m. while at her grandmother's house and alone is when the Appellant herein C went to that house and found her seated at the veranda with the door open and there was bright moonlight hence she saw him very well as he was known to her and that they used to call him C, the short from for C.

20. That C asked her what had happened and after she had explained to him, he said that because she was suffering because of him and as she was sleeping hungry, she should accompany him to his home and have some food, and escort him to Bumala the following day.

21. The Complainant agreed and accompanied the Appellant to his cottage where he used to sleep.

22. In the said cottage there was a tin lamp on. The Appellant then served the complainant with Githeri – a mixture of maize and beans with

tea and after she had eaten the meal, he told her to sleep which she made a place on the floor to sleep and the Appellant also slept on the floor next to her. That in the middle of the night, the Appellant moved close to the complainant and told her that he wanted to have sex with her but she refused. That he forcefully removed her trouser and inner pant and he also removed his trouser and inner short and he inserted his penis in her vagina but it refused to enter at first. She told him that he was injuring her as she was feeling pain in her vagina. She started crying because of the pain and the Appellant left her and went back to his beddings. That the tin lamp was on throughout the night. The complainant sat up the whole night and when the alarm set by the Appellant rang, they left for Sega, at around 6.00 a.m. and reached there at about 7.00 a.m. That they met J a friend to the Appellant and the Appellant requested his friend if he (the Appellant and the Complainant could go to sleep at his (J) house at Bumala but J refused and said that there was a student child who had completed school and who was living in his house.

23. That C called his friend who facilitated their travel to Bumala on a motorcycle. C took the complainant to a hotel where they took tea and they later walked up to Bungoma until night fell and C told her that it was not safe for them to walk at night and he said they should request for a place to sleep.

24. They went to a certain home and met a woman who allowed them in and she caused the complainant to sleep with the woman's daughters while C Slept with the woman's sons until the following morning when C was given KShs 200/= by the woman and that C Mother called him and told him that the Complainant was being searched for and he said that he was aware.

25. After that, the Appellant switched off his phone and they walked back to Ugunja and headed for Bumala where he abandoned her there. A certain woman approached the complainant and asked her if she was the girl being searched for and the complainant answered in the affirmative. The lady took the complainant to her house where she slept and the woman called the mother of the Appellant who went and collected the complainant and took her to her (complainant's) Parent's home.

26. The complainant's father took her to Sega Police Station, where she recorded a statement and was escorted to Ukwala Hospital where she was examined and found not to be pregnant. She was given Medication and told to go back home. She identified her treatment notes dated 2.3.2017 and P3 form dated 3.3.2017 which were marked for identification. She also identified the Appellant whom she said she knew from 2013 but that he was never her boyfriend albeit he had approached her through P and that, that is why P and C quarreled and her step Mother blamed her of being the cause of all the problems.

27. On cross-examination by the Appellant the complainant stated that C Mother rang the woman in Bumala and told her of a missing student of B.O. Primary School and asked her to be on the lookout for her and inform her if she saw the said girl.

28. Further that although she was not in school uniform, the woman checked in her bag and found therein her school uniform. She had no idea where the Accused had gone.

29. PW2 C.O.O. (name withheld) was the father of the Complainant and worked in Nairobi as a contractor. He testified that on 28.2.2017, he arrived at his Rural home at 5.00 p.m. and his Children told him that the Complainant had disappeared from home the previous night and gone to her deceased grandmother's home and that P told him that, previously, C had overhead them quarrel and he said he would disappear with the Complainant and that he bragged that he was a tall man whom girls were fighting over.

30. PW2 was given a long story of how the family of C including his Sister was heard saying C had disappeared with the Complainant. He inquired from C father who was non-responsive so he reported to the Elder of ***Nyumba Kumi*** and also inquired from the Complainant's mother who said she thought the girl had gone to school.

31. PW2 also inquired from the Mother of the appellant who said that he had called the appellant and he said he was in Sega and she told him PW2 would beat him up.

32. PW2 reported the matter to the Head Teacher of B. O. Primary School and the Head Teacher wrote him a letter which he took to Ukwala Police Station. That the following morning C Mother called PW2 at 10.14 a.m. and told him to wait at home and after a short while he saw her came with the Complainant and told her that the Complainant was found at Bumala and that he told them to search for C. He took the Complainant to Sega Police Station and to Ukwala Police Station and took her to Ukwala Sub-County Hospital where she was examined.

33. That C Mother was summoned and prevailed upon to avail C which she did and he was remanded at Ukwala Police Station. PW2 recorded his Statement and identified the Complainant's treatment notes and P3 and produced her Birth Certificate No. xxxxxxx indicating her date of birth as 14.3.2005 and identified the Appellant whom he stated was his Nephew and that he had known him for 19 years.

34. On cross-examination he reiterated his testimony in Chief.

35. PW3 E.A. the Complainant's Mother testified that on 28.2.2017 she was going about her chores when PW2 her husband arrived home at 3.00 p.m. from Nairobi and asked her the whereabouts of the Complainant and she told him that the Complainant was available but he said that she had vanished so he directed PW3 to look for her but that PW3 had no idea where PW1 was so PW2 went to the Police to report and a search for the Complainant ensured and on 2nd March 2017, she learnt that PW1 was found at Bumala.

36. They went to Sega Police Station and the Appellant's Mother availed C who was arrested. She identified the appellant and said they were neighbours and that he was her brother-in-law.

37. PW3 denied knowing whether PW1 had an affair with the Appellant but stated that they were just friends as Children.

38. On being cross-examined by the appellant, PW3 stated that when she left home in the Morning she knew the Complainant was in the

house and that she the complainant would wake-up and go to school and that PW3 took long in the farm that is why she could not notice the complainant's absence or anything unusual.

39. **PW4 PCW S M** of Sega Police Station testified that she received PW2 on 2.3.2017 at Sega Police Station at 3.00 p.m. He was in Company of PW1 his Daughter aged 13 years a Student at B. O. Primary School in Class 6. He reported that she had been missing from 27.2.2017. He reiterated the testimony of PW1 of how the Appellant lured her away from her Grandmother's house.

40. She stated that the Appellant's Mother brought him and he was arrested and charged with defilement after PW1 was examined, P3 form filled and statements of witnesses recorded. PW4 also produced Birth Certificate of PW1 as an exhibit.

41. On being cross-examined by the appellant, PW4 stated that the good Samaritan who picked PW1 took her to the Mother of the Accused.

42. PW5 **Okere Patrick** a Clinical Officer at Ukwala Sub-County Hospital produced P3 Form for PW1 aged 13 years and for the Appellant aged 17 years. He stated that he filled the P.3. Form for the Appellant and produced a P.3. Form for PW1 which was filled by Blessing Ochieng, his collegue at the same Hospital.

43. PW5 stated that the results of examination on PW1 showed that albeit there was nothing significant on her head, neck, thorax, abdomen, upper and Lower limbs, her genitalia had blood around the vulva and labias. The hymen was not intact and there was slight tenderness on the labias . Vaginal swab was done which revealed numerous blood cells. Urinalysis was done and numerous blood cells were noted in the urine. No spermatozoa was detected. HIV and VDRL tests were negative. Pregnant test was negative. The examination was done 3 days after the incident. The degree of injury was assessed to be grievous harm. That although the hymen was not freshly broken, the Complainant was likely to be traumatized psychologically for along time and she needed counselling and reassurance and social support as they noted that this was the second time the girl was being raped but not by the same person and the first rape was never noticed. That they also noted existence of a social difference between PW1 and her Mother which needed to be resolved by Counsellors in the Children's Office.

44. PW5 produced treatment notes for PW1 and her P3 form and P3 form for the Appellant as exhibits. he further testified that the Appellant was examined and his genitals were found to be normal, HIV and VDRL tests and Hepatitis B were negative. Urinalysis showed yeast cells and kelons were noted which were signs of fungal infection and dehydration. That the Appellant gave PW5 a history of how he was a friend to the victim's family as he visited them and helped them study and especially the victim's elder sister who was in Standard 8.

45. That the appellant explained that he meet PW1 on her way on 27.2.2017 carrying a school bag leaviing her home saying her Mother had chased her and that she was going to her father's place.

46. On being placed on his defence, the Appellant gave unsworn evidence and called one witness. He testified as DW1 and stated that he was 19 years a Student at [particulars withheld] Secondary School in F.2 – He denied the charges which he said were not true and recalled that on 27.2.2017 at about 7.00 a.m. he had gone to collect his phone at Sega as he had taken it there for charging when he found the Complainant on the road carrying a bag and he questioned her on where she was going. That the complainant told the appellant that her Mother had beaten her and chased her away so she was going to look for her father. That DW1 escorted the complainant upto Sega and they parted ways. That the appellant then picked his phone and only saw the complainant walk towards the stage so he returned to his Aunt's place and stayed until Thursday is when his Mother rang his Aunt and informed her that there were allegations that the appellant had ran away with a certain girl. That he proceeded home the same evening and reached at 8.00 p.m. and was told that the father of PW1 wanted his daughter who had been allegedly vanished by the Appellant and that the appellant explained himself that he was at his Aunt's place and that he was not with any Child.

47. The appellant further testified that the following day he learnt that his Mother had been directed by the Police to disclose where he was and to take him to Sega Police Station which she did and after a few minutes, he was taken to Ukwala Sub-County Hospital which was closed so he was remanded at Ukwala Police Station and taken to Hospital where his urine samples were taken and HIV and other tests were taken.

48. DW2 M A O from Sega Udauwa testified that she was the Aunt to the Appellant and that on 26.2.2017 she met the Appellant in Sega and learnt that he was on half term so she asked him to go and help her with planting of crops which the appellant agreed and on Thursday his Mother asked her if the Appellant was at her home and that the appellant's mother told DW2 that there were allegations that the appellant had disappeared with a certain girl and that DW2 said that the appellant had not gone to her home with any girl. DW2 confessed that she had lied to the Appellant that his Mother wanted to send him somewhere and he went home and she later heard that he had been arrested. She did not know why he was arrested.

49. In her judgment the trial Court found that the charge sheet was defective as it read **Section 8 (1) (3) instead of Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act** but she nonetheless found that the defect was not material as the Appellant understood what charge was facing him.

50. The trial court also found that albeit only PW1 testified on how she was defiled, it was unlikely that in defilement cases which are committed in privacy there would be an eyewitness but found that the victim knew the suspect very well as he was familiar with her and she knew him for a long time. That she narrated in detail what had transpired right from 27.2.2017 to the time she was abandoned by the Appellant and that the Complainant recognized the Accused who was not a stranger hence the identification of the Accused by PW1 met the standards set In **Republic Versus Turnbull [1976] 3 ALL ER 546.** The trial magistrate concluded that the visual identification evidence of the Complainant was reliable.

51. On whether the Complainant was a minor, the trial Court concluded that the Birth Certificate produced showed that she was born on 14.3.2005 hence she was 12 years less 17 days.

52. On whether PW1 was defiled, the trial Court found that PW1's evidence was corroborated by PW5 an expert witness who noted the injuries on her genitalia, she also held that the testimony of Prosecution witnesses was consistent and that they were credible witnesses.

53. On the defence by DW1 and DW2, the trial Court noted that it was alibi defence which she held was an afterthought as the Appellant never brought to the attention of the Prosecution at the earliest opportune time to enable investigators to establish its truthfulness. She warned herself on the burden of proof and relied on **Kossam Okiro Versus Republic [2083] KLR 501** where the Court made it clear that the defence of alibi may be rejected as afterthought if not raised at the earliest opportunity and when reigned against all other evidence it is established that the Appellant's guilt has been established.

54. The trial Court held that the alibi raised did not meet the threshold set in the cited cases and dismissed it as an afterthought as the Prosecution did not have an opportunity to test its truthfulness since it was not raised at the earliest opportune time.

55. The trial court further found that there was overwhelming incriminating evidence against the Accused/ Appellant and concluded that the appellant gave an evasive defence of alibi which she rejected. She concluded that there was evidence beyond reasonable doubt adduced by the Prosecution which proved the guilt of the Appellant beyond reasonable doubt that he defiled the Complainant. She convicted him accordingly and in mitigation the Appellant maintained his innocence and stated that he needed to go back to school.

56. Before the trial magistrate sentenced the appellant, she asked how old he was and he stated that he was 17 years. He produced a Birth Certificate which showed that he was born on 17.8.1997 but he stated that it was not accurate as it was mistakenly indicated as 1997 instead of 1998 which latter year his Mother told him that he was born. He stated that there was a teacher who looked for a Birth Certificate for him when his parents were in Nairobi and wrote wrong particulars on date of birth.

57. The trial Court concluded that even if the Appellant was born in 1998, he was an adult aged 19 years so she sentenced him to serve 20 years imprisonment for him to be rehabilitated before being released into Society.

DETERMINATION:

58. Having carefully considered the trial Court's evidence, the grounds of appeal, submissions by the Appellant and the Prosecution, the main issues for determination are:

(1) Whether the Appellant's rights to a fair hearing under Article 50 and the right not to be discriminated under Article 27 (1) of the Constitution were violated by the trial Court.

59. Other than stating that his rights were violated, the Appellant never explained how those rights were violated. The allegation that he was denied a fair hearing and/or his fundamental rights and freedoms were violated remains mere allegations which were never substantiated. Accordingly, the submissions is found to be baseless and dismissed.

(2) The second issue for determination is whether Appellant was a minor aged 17 years at the time of alleged commission of the offence.

60. The charge sheet shows that the Appellant's apparent age was a child. The letter from [particulars withheld]Secondary School dated 8.3.2017 shows that he joined Form one on 8.2.2016 and was a Form two student at the time he was arraigned in court. On 7.3.2017 the trial Court ordered for an age assessment of the Appellant but the report was never filed in Court albeit the trial Court ordered that Accused be held at Ukwala Police Station preferably Children cells. The Child Health Card produced by the appellant shows that the Appellant was born on 28.10.2001 and the place which shows year of birth to be 1998 is where siblings are indicated and in this case, the named sibling is Tyson Ochieng a Male who was born in 1998 and not the Appellant.

61. Although the trial Court maintained that the Appellant was born in 1997 or 1998, this Court went a step further by ordering for age assessment report which assessment was done on the Appellant on **11.10.2018** and Dr. Jodo P. Dental Officer at Jaramogi Oginga Odinga Teaching and Referral Hospital stated that the Appellant's estimated age is 18 years.

62. With all the above in mind the Court is persuaded beyond doubt that the Appellant was a Minor as at 27.2.2017 and that his apparent age was 16 years and some months when he was charged in Court with the offence of defilement. In addition, the Appellant was not yet 17 years when he was convicted and sentenced to serve 20 years imprisonment.

(3) The third issue for determination is whether the Complainant was a child as defined in Section 2 of the Children's Act.

63. From the evidence adduced before the trial court which included a birth certificate for the complainant, I am persuaded that there was no dispute as to the age of the victim whose Birth Certificate No. xxxxxx shows she was born on 14.3.2005. The P3 form also shows that she was aged 13 years. The Complainant also testified that she was in class 6 and her father confirmed that she was born in 2005 and had turned 13 years. He identified her Birth certificate No.xxxxxx. Accordingly, I am persuaded that the Complainant was a Child born on 14.3.2005 and that as at the time of her alleged defilement she was aged 11 years and 11 months. Accordingly, the complainant was a child as defined under section 2 of the Children's Act.

(4) The fourth issue for determination is whether the Prosecution failed to avail a crucial witness who found the Complainant stranded on the stage, offered her a place to sleep and later took her to her parents and whether such alleged failure to call a crucial a witness is fatal to the Prosecution's case.

64. To resolve the above issue, it is important to understand the Legal principle espoused in the case of **Bukenya Vs. Uganda [1972] E.A. 549** where the Court held that failure to call crucial witnesses would fatally weaken the Prosecution's case and that where important

Prosecution Witnesses are not called to testify, the Court is in law entitled to draw an inference that the evidence of those important witnesses would have been adverse to the Prosecution's Case.

65. In this case, PW1 gave an elaborate statement on oath on how she was lured by the Appellant from her late Grandmother's house to his cottage, to Sega, Bumala, enroute to Bungoma, to Ugunja, and back to Bumala and how she was abandoned by the Appellant at Bumala Market and a good Samaritan recognized her and suspected her to be the girl who was being searched, inquired from her, and rescued and took her to the good Samaritan's home and called the Appellant's Mother to come for the girl. The victim also narrated her story to PW2 her Father and to the Investigating Officer. Which narration was consistent. The trial Magistrate who had the advantage of seeing and hearing her testify believed her and went further to state that the Prosecution Witnesses were consistent and credible.

66. It is worth noting that **Section 124 of the Evidence Act** does not make it mandatory for corroboration of the Victim's evidence in Sexual Offences. The Court, once it believes that the victim of Sexual Offence is telling the truth, and that the Prosecution has adduced sufficient evidence in support of the charge and that they have proved their case against the Accused Persons as the defiler beyond reasonable doubt, the court can proceed to convict the accused. The Section provides:

> ***"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration Act, Cap 15 Laws of Kenya, where the evidence of the alleged victim is 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 material 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."***

67. Thus, whereas in criminal cases corroboration of the evidence of a child is necessary even where a ***voire dire*** examination is conducted, nonetheless, in Sexual offences, there is an exception to the extend set out in the proviso to Section 124 of the Evidence Act that the Court is allowed to solely rely on the evidence of a children if the Child is the victim, provided the Court first satisfies itself on reasons to be recorded, that the child is being truthful.

68. In the instant case, the trial Magistrate observed that only the Complainant victim was present at the alleged time of crime in other words, no other witness was present when she was being defiled and nobody caught the Appellant in the act of defiling the victim.

69. The trial Magistrate however was satisfied that on the detailed and consistent testimony of the victim, she was telling the truth and that she spent a considerably long period of time with the person she alleged defiled her and that she therefore had ample time to view the person she alleged defiled her and not just a fleeting glance. That at the time she was being defiled the tin lamp was on and that she viewed her defiler under sufficient light and that there was nothing which could impede her proper identification. That the offender was viewed by the victim at close range as he occasioned his penis to enter her vagina.

70. Further, that PW1 viewed the offender from a close position and that her narration of the incident did not take place abruptly but that there was a sequence of events that took place before the Complainant was allegedly defiled. That she even described him by his short name C and that the Appellant did not dispute that name. That she was acquainted with the Accused as they were neighbours and she had known him for a long time hence her recognition of the Appellant met the threshold in **Republic Vs. Turnbull's case**.

71. I have perused through the evidence by PW1 as a whole and as analyzed by the trial Court and I find no reason to depart from the findings of the trial Court. The Complainant's evidence was too detailed and that her identification of her defiler was that of recognition and not identification of a stranger.

72. In my humble view, the evidence of the good Samaritan lady who found the complainant on the Bumala Market could not change the Complainant's version of how she was defiled, who defiled her and how her defiler took her on a long journey before she finally found herself back home and to the Police Station.

73. In addition PW2 the complainant's father to whom the complainant narrated her story reiterated her testimony in Court and so did the investigating Officer. The fact of whether or not the Complainant was defiled was proved by the Clinical Officer who examined her and produced her treatment notes and P.3 form which revealed that she had been penetrated in her vagina and that her genitalia was tender and that she was found to have blood cells in her urine.

74. I am satisfied that the evidence of PW1 as corroborated by PW2 her father and the Clinical Officer who examined her and produced her treatment notes and P.3 form was more than sufficient and proved beyond any reasonable doubt that the Complainant was defiled and the defiler was the Appellant.

75. Furthermore, **Section 143 of the Evidence Act** stipulates that:-

> ***"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."***

76. No doubt, the Prosecution is under a duty to call all witnesses necessary to establish the truth even if their evidence may be inconsistent. In addition, the Court has a duty to call witnessed whose evidence appears essential to the just decision of the case and where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the Prosecution.

77. However, the above Section of the **143 of the Evidence Act** is clear that the Prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, the Court has the mandate to summon witnesses. But should the said witnesses fail to testify and or the adduced evidence turn out to be insufficient, only then can the Court draw an adverse inference against the Prosecution. This is so because as was correctly held in **Keter V. Republic [2007] 1 E.A. 135:**

> ***"The Prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."***

78. In the case herein, this Court is persuaded that the evidence adduced by all the Prosecution witnesses was sufficient to prove that the Complainant was defiled by the Appellant and therefore the situation hardly called for the drawing of any adverse inference with regard to the "good Samaritan" woman who found the Complainant at the stage and took her in and called the Appellant's Mother to go and collect the Complainant form her house at Bumala.

79. Accordingly, I find and hold that the Prosecution's case had no gaps capable of being filled by the "good Samaritan" lady. The evidence was full proof beyond reasonable doubt as against the Appellant's guilt.

(5) **The fifth issue for determination is whether On whether there was any grudge between the Appellant and the Complainant's relatives.**

80. This Court does not find on the evidence adduced that there was any evidence of alleged grudge. The Appellant did not cross-examine the Complainant and her Father on the alleged grudge and even if he did, the evidence by PW1 was so clear that the Appellant took advantage of the Child who had a frosty relationship with her Stepmother as evidenced by the Stepmother chasing her away from home and as was observed by the Clinical Officer, to lure her to his cottage with food only to defile her at night.

81. Accordingly, I find and hold that the theory of a grudge or that the Appellant was threatened by the relatives of the Complainant after his Sister was defiled by one of them is an afterthought and farfetched.

(6) ***On the sixth issue of whether the trial Court did not warn itself of the dangers of relying on the evidence of a single identifying witness,*** page 60 of 75 of the judgment the 2nd paragraph is clear that the trial Magistrate observed that:

> ***"…of all the Prosecution witnesses it is only the Complainant who alleged that she witnessed the incident alleged to be that of defilement."***

82. The trial court however, went further and gave a detailed account of why she believed the Complainant who had spent a substantially long period of time with the alleged defiler hence she had ample time to identify him, that the tin lamp was on, on the night of alleged defilement and that the defiler was no stranger to her. Furthermore, after the incident, the defiler spent days with the complainant outside the home. Further, the trial court observed that PW1's narration of showed that the incident did not take place abruptly as there was a sequence of events that took place before she was defiled and she had known him for a long time. The trial Court also believed the evidence of PW2 the complainant's father and PW3 the Clinical Officer who found that the Complainant was defiled and she found that the witnesses' testimonies were consistent and credible.

83. In my view, from the evidence on record, and the analysis by the trial Court, the trial Court correctly analyzed the evidence on record and arrived at a decision that was well reasoned. She cannot be faulted.

(7) The seventh issue for determination is derived from the Appellant's claim that there was no medical or forensic evidence linking him to the offence as the Clinical Officer only found the 'absence' of the hymen and that there was no sign of penetration.

84. However, PW5 stated that on genital examination of the Complainant, he found blood around the vulva and the labias, hymen was not intact and there was slight tenderness on the labias. Vaginal swab and blood tests revealed numerous blood cells and urinalysis too showed numerous blood in the urine. The hymen was not freshly broken. The Appellant was also examined and he was found with fungal infection and dehydration as his urinalysis revealed yeast cells and ketones. No spermatozoa was found

85. Albeit from PW5 cross-examination, it emerged that the Complainant was previously raped but this went unnoticed owing to the Complainant's social background where PW5 found her to have had issues with her mother who did not pay attention to the **Child, Section 34 of the Sexual Offences Act** ***prohibits adduction of evidence as to any previous sexual or conduct of any person against or in connection with whom any offence of Sexual nature is alleged to have been committed, other than evidence relating to Sexual experience or conduct in respect of the offence which is being tried; unless the Court has on Application by any party to the proceedings, granted leave to adduce such evidence or to put such questions."***

86. In this case the Appellant never sought leave of Court to put such a question of previous Sexual experience of the Complainant. Nonetheless, PW5 the Doctor who treated her observed that the Child had earlier been defiled but the defilement was not followed up owing to breakdown of communication between her and her Mother.

87. That notwithstanding, it is the view of this Court that from the observations made by PW5 of PW1's genitals and from the evidence of PW1, the Appellant put his penis into her vagina and that at first it refused to enter then he forced it to enter her vagina and she told him that it was hurting her as she was feeling pain in her vagina so she started crying because of pain and he left her and moved to his beddings.

88. In the view of this Court, no medical or forensic evidence could have displaced the cogent evidence adduced by PW1 that she was defiled by the Appellant in his cottage. Furthermore penetration in legal terms as defined under **Section 2 of the Sexual Offences Act** does not have

to be complete. The Section provides:-

> ***"Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another Person."***

89. Therefore, the Complainant having testified and proved as was verified by Pw5 that the Appellant inserted his penis in her vagina, that at first it refused to enter and he forced it inside her vagina and that is when she felt pain and cried, and PW5 having confirmed that there was blood around the vulva and the labias and that albeit the hymen was not freshly broken there was psychological trauma and numerous blood cells in her urine, I am persuaded that the evidence proved penetration of the Child's vagina by the Appellant through forceful insertion of his penis.

(8) The next and eigth issue for determination is whether the trial Court erred in law in terming the appellant's alibi defence as an afterthought yet he had testified that he was elsewhere when the alleged offence took place.

90. In his unsworn testimony in Court, the Appellant claimed that he was on half term and was requested by his Aunt, DW2 to go and assist her do some farming over the short holiday at Sega. This was after he took his phone for charging and met his Aunt. It was on a Sunday and that on Monday he left his home at 7.00 a.m. to collect his phone is when he found the Complainant carrying her bag and on asking her she said she was beaten by her mother and that she was going to look for her Father. That he walked her to Sega and parted ways with her and he went to pick his phone which was charging as the complainant walked towards the stage. That he then took his phone and went to his Aunt's home and never heard anything until Thursday evening when his mother called and told his Aunt of the allegations being made back home that he had disappeared with a certain girl and on hearing that he returned to his home that evening and arrived at 8.00 p.m. wherein he was told that PW2 wanted his daughter whom the Appellant had left with. He denied being with her and the following day his mother left for Ugunja and was called by Police to disclose the Appellant's whereabouts. That when his mother called his Aunt the latter told his mother that the Appellant had returned home and so his mother went home and escorted him to Sega Police Post and later he was escorted to Ukwala Sub-County Hospital and to the Police Station.

91. On the part of DW2, she stated that the Appellant was her Sister's son and that she met him on Sunday and she asked the Appellant to go assist her plant crops and he proceeded there on Monday and stayed until Thursday when she received a phone call from his mother asking her if the Appellant was with her and she agreed and when she enquired on what had happened, she was told that there was information that C had disappeared with a certain girl and she denied seeing any girl. DW2 stated that she feared ***telling C because she wanted him to go back home so she only told him that his mother wanted to send him elsewhere and he returned to his home.***

92. From the above evidence by DW1 and DW2 I find material contradictions to the extent that whereas DW1 stated that he was told by his aunt that she had received information on his alleged disappearance with the girl, DW2 stated on oath that she feared disclosing to him the reason why his Mother was asking for him and she further stated that she lied to him that his mother wanted to send him elsewhere, so that he returns to his home.

93. In my humble view, the Appellant's defence of alibi was a total made up story between him and his Aunt to escape justice, but that did not work as it turned out to be quite contradictory evidence which could not assist him escape justice. This in addition to the fact that he only raised the defence of alibi when testifying. As correctly determined by the trial Court, the Appellant ought to have raised the defence of alibi early enough to enable the Prosecution Investigate its truthfulness. This is not to say that he was expected to assist the Prosecution establish his guilt or that, that requirement would shift the onus of proof from the Prosecution to the defence, as the law is clear that the burden of proof remains with the Prosecution throughout the trial to establish the guilt of the Accused beyond reasonable doubt.

94. I hold the same view as espoused in **Kossam Okiro V Republic [2014] eKLR** wherein the Court of Appeal make it clear that:

> ***"The defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and when reigned against all the other evidence it is established that the Appellant's guilt has been established."***

95. In this case and as was held in **Karanja V. Republic [1993]KLR 501** the Appellant's guilt was proved beyond reasonable doubt and therefore the defence of alibi did not displace the overwhelming evidence adduced against him by the Prosecution, taking into account the contradictions in his evidence and that of his witness DW2 as explained above.

96. What that defence of alibi amounts to is an afterthought which did not shake the Prosecution's case. The appellant's alibi was never tested by those responsible for investigations to prevent any suggestion that the defence was an afterthought. I have carefully examined the judgment of the trial Court and I am satisfied that the trial Magistrate took her time to examine the defence of alibi put forth by the Appellant and weighed it with all other evidence to see if the Appellant's guilt was established beyond all reasonable doubt. I therefore find no merit in the Complaint by the Appellant that the trial court erred in law in failing to consider the alibi defence put forth by the appellant.

97. There are other issues raised by the appellant which are determined below.

98. The Appellant in his submissions in writing submitted without elaboration that the trial Court did not comply with **Article 149 of the Constitution and Section 191 of the Children's Act.** However, **Article 149 of the Constitution** is on vacancy in the office of the Deputy President and has nothing to do with rights of Accused Persons.

99. However, assuming that the appellant cited wrong provisions of the Constitution and that he may have been referring to Article 49 of the Constitution, **Article 49 of the Constitution** is on rights of arrested persons. The Appellant did not specify which specific right under **Article 49 of the Constitution** was violated and therefore it is not for this Court to second guess what right was violated. That being the case, the allegation of violation of his rights was not proved. The allegation is dismissed.

100. The appellant also complained that the trial court expeditiously determined his case hence he did not have ample time to prepare. Regrettably, this is the first time this court is hearing of such a complainant that a case was heard and determined expeditiously and therefore offensive to the accused person. The constitutional rights that accrue to the accused persons include the rights to be heard and to a fair trial. On the part of the court, it is obliged by Article 159 of the Constitution to ensure that justice shall not delayed. If the appellant wanted to delay the trial for his own ulterior motive that cannot be a ground of appeal. The record does not reveal any request by the appellant to the trial court to allow him time to [prepare his defence and the trial court refusing to grant him such request. Accordingly, I find the ground of appeal and complaint by the appellant misplaced. I dismiss it.

101. On sentence, this Court has already found that the Appellant was under the age of 17 when he was arrested and charged with the offence of defiling the Complainant as shown by his Postnatal Clinic Card produced in Court and the Age Assessment Report availed to this Court on the orders of this Court, during the hearing of this appeal.

102. This Court has further found that the trial Court erred in failing to conclusively consider whether the Appellant was over 18 years as she never made a follow up on the Age Assessment Report which she had ordered during the trial. Instead, she relied on the testimony of the Appellant which was contradictory. I say contradictory because at one point he stated that he was 17 years and at another point he stated that he was 19 years.

103. In addition, the Appellant did not understand his own exhibit which was the Clinic Card and said he was born in 1998 which is the year his sibling who is named therein was born.

104. The trial Magistrate should have seen that the date of birth of the Appellant on the Clinic Card is written as 2001 and not 1998.

105. That being the case, and this Court having established that the Appellant was under 16 years of age when he was charged and convicted when he was underage, and albeit he has now turned 18 years while in Prison, whether the sentence imposed on him of 20 years imprisonment is lawful and/or what is the appropriate sentence for the Appellant is what this court being the first appellate court must decide.

106. Therefore, on the allegation that the trial Court failed to comply with **Section 191 of the Children's Act, Section 191 of the Children's Act** deals with the manner in which the Court should deal with Children who are in conflict with the law in particular. On the other hand, **Section 190 of the Children's Act** places restriction on punishment for **Children and it stipulates:-**

> **"190** ***(1) No. Child shall be ordered to imprisonment or to be placed in a detention camp,***
>
> ***(2) No child shall be sentenced to death,***
>
> ***(3) No. Child under the age of ten years shall be ordered by a Children's Court to be sent to a rehabilitation school."***

107. Section 191 of the Children's Act concerns Methods of dealing with offenders and stipulates:

> ***(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—***
>
> ***(a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);***
>
> ***(b) by discharging the offender on his entering into a recognisance, with or without sureties;***
>
> ***(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);***
>
> ***(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;***
>
> ***(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;***
>
> ***(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;***
>
> ***(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;***
>
> ***(h) by placing the offender under the care of a qualified counsellor;***
>
> ***(i) by ordering him to be placed in an educational institution or a vocational training programme;***
>
> ***(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);***
>
> ***(k) by making a community service order; or***

(l) in any other lawful manner.

(2) No child offender shall be subjected to corporal punishment.

108. Clause 20:11 of the Sentencing Policy Guidelines of the Judiciary stipulates that:

"Custodial Orders should only be imposed as a matter of last resort when dealing with Children. Committal of Juveniles to rehabilitation schools or to Borstal institutions would be reserved for cases in which non-custodial measures have failed. Section 191 of the Children Act Offers a wide range of rehabilitation Orders that the Court should consider albeit the Sexual Offences Act provides for minimum sentences for offenders who are of having committed various Sexual Offences depending on the age of the Child Complainant or Victim, Article 53 of the Constitution provides that every child has right:

a …….

b. Not to be detained, except as a measure of last resort, and when detained, to be held:

(i) Separate from adults and in conditions that take account of the Child's set and age.

(ii) A Child's best interest are of paramount importance in every matter concerning a child.

109. However, in this case, the trial Court treated the Appellant, throughout the trial, as if he was an adult and could not therefore consider the legal provisions that mandate that all Children offenders be represented by an Advocate during the trial, yet the offence which the Appellant was facing was serious and attracted on conviction, prison term of not less than 20 years.

110. This is notwithstanding the fact that the charge sheet itself provided that the offender's apparent age was a child. The view of this Court is that the Appellant should have been tried and if found guilty, be sentenced as a Child since he was under 18 years.

111. Therefore, albeit his trial was fast-tracked and the Appellant even complains that he was tried and sentenced within a short time hence he did not have time to prepare his defence, **Section 186** of the **Children's Act and Rule 12 of the Child Offenders Rules** his rights should have been safeguarded as stipulated in **Section 8 (7) of the Sexual Offences Act** which provides that a person below the age of 18 years who is convicted of a Sexual offence under the Act should be sentenced in accordance with the Borstal Institutions Act and the Children's Act. And had the trial Court not erred in trying the Appellant as an adult or considered the provisions of **Section 8 (70 of the Sexual Offences Act.** It would have led her to the provisions of the **Children's Act Section 191** thereof which prescribes the lawful sentences that could be imposed on a Child which excludes imprisonment or detention of a Child. The Section provides for non-custodial sentences which include discharge under **Section 35 (1) of the Penal Code,** placement on Probation or in a Probation hostel.

112. Under the Probation of offenders Act, making a Community Service Order, placement in a Borstal Institution or an Approved School depending on the age of a Child, payment of a fine, compensation or costs among other options.

113. For the above many reasons I find and hold that the trial Court fell into error when it tried the appellant as an adult and sentenced him to a prison term of 20 years which sentence I find and hold to be unlawful as it was not in accordance with the relevant provisions of the Law.

114. Accordingly, the appeal against sentence succeeds and it is hereby allowed. The sentence imposed on the Appellant is hereby set aside.

115. Having set aside the illegal Prison sentence imposed on the Appellant by the trial Court and as the Appellant's appeal against conviction has failed and been dismissed, it is therefore upon this Court to exercise its powers under Section 354 of the Criminal Procedure Code, and mete out the appropriate lawful sentence that the trial Court should have meted out on the Appellant, by substituting the trial Court's illegal sentence.

116. Accordingly I order that the Probation Officer, Siaya County shall file a Probation Officer's Report to recommend to Court the sentences under **Section 191 of the Children's Act**, that would be most appropriate for the rehabilitation and reformation of the Appellant herein. In the intervening period, the Appellant shall be taken into Siaya G.K. Remand Prison until 26th February, 2019 when this appeal shall be mentioned for purposes of receiving the Probation Officer's Report and for final Orders on sentencing. Those are the orders of this Court.

Dated, signed and delivered in open court at Siaya this 17th day of December, 2018.

R.E.ABURILI

JUDGE

IN THE PRESENCE OF:

Ngetich for State Present

Appellant Present in Person

Court Assistants:

1. Brenda Ochieng

2. Modestar Mutiamani