**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.179 OF 2014**

**DANIEL AKWEZA SUSA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Arising from conviction and sentence by Hon J.K. Ng'arng'ar, SPM) in Hamisi PM's court Criminal Case No.455 of 2013 dated 11th November 2014)***

**JUDGMENT**

Introduction:

1. The appellant was convicted of the offence of defilement and sentenced to serve life imprisonment. He was aggrieved by the outcome. He has appealed against both the conviction and the sentence on the following grounds of appeal:

> ***"1. That the learned trial magistrate erred in law and facts when he failed to order the prosecution side to bring an eye witness as mentioned by PW2 to positively identify the appellant as the culprit.***
>
> ***2. That the learned trial magistrate erred in law and facts when he failed to recognize that PW3 who is a sister to the complainant testified that she saw PW1 coming from an M-pesa shop but not from the hardware shop of the appellant.***
>
> ***3. That the learned trial magistrate failed to take into consideration the fact that there was no birth certificate or birth notification or any other proof of age that was brought before court to prove the exact age of the complainant.***

***4. That the learned trial magistrate erred in law by failing to supply the appellant with the proceedings and charge sheet as he had requested to facilitate his full preparation to the alleged charges leveled against him.***

***5. That the learned trial magistrate erred in law and facts by denying the appellant witness statements.***

The State opposed the appeal on the grounds that the prosecution had proved the charge beyond all reasonable doubt.

The particulars of the charge against the appellant were that on the 19th July 2013 at [particulars withheld] sub-location within Vihiga County he intentionally and unlawfully caused his penis to penetrate the vagina of JMM (herein referred to as the complainant), a child aged seven and a half years.

Case for prosecution:

2. The prosecution case was that the complainant, PW1 was in the year 2013 an 8 year old class 3 pupil. The appellant was a shop keeper at the village of the complainant. That on the 19th July 2013 at about 6 pm the complainant was sent by her mother, PW3, to the shop of the appellant to buy some tablets. She went to the shop. She found the appellant at his shop. She gave the appellant money and asked for the tablets. He told her to wait. He then took her by the hand and led her to his sleeping quarters within the shop. He defiled her. After he was through he let her out of the house. She met some boys outside the shop including Brian, PW2. Her mother, Pw3, came looking for her. She told her mother what had happened. Her mother reported to the Assistant Chief, PW4. She took the complainant to Mudete Police Station. She was issued with a P3 form. The complainant, was taken Bugina Health Centre and later to Vihiga District Hospital. She was treated. The appellant was arrested by the area Assistant Chief, PW4, who escorted him to Mudete Police station. P.C. Maina, PW6, investigated the case. He visited the appellant's house. He collected blood stained bed-sheets from the house. The clothes that the complainant was wearing on the day of the incident, a pant and a dress, that were blood stained were handed over to him. The complainant was later examined by a clinical officer, PW5, at Vihiga District Hospital. He found the hymen torn and reddish with a minor tear on the inner part of the vagina. The vagina and the labia were swollen and reddish. The age of the complainant was assessed and she was found to

be of 8 years of age. Age assessment report was prepared to that effect. The appellant was charged with the offence of defilement. He denied the charge. During the hearing, the complainant's pant and dress, the accused's beddings, the P3 form, the treatment notes and the age assessment report were produced in court as exhibits.

3. It was the evidence of BM, PW2, who at the time was aged 14 years that on that day at 6:10 pm he went to buy paraffin at the shops. He found the complainant standing next to the shop of the appellant. She was crying. She told him that the appellant had defiled her. Her dress was blood-stained. He started to take her towards her home. The complainant's mother appeared. The appellant then switched off the light to his shop and escaped.

Appellant's Defence:

4. The appellant stated in his defence that he was operating a shop at Mudete Lusui. That on the 10th July 2013 he was attacked at his shop by three young men. The young men were telling him that they did not want him to operate a business within Lusui area. He reported to the area chief.

5. That on the 21st July 2013 at 6 pm the young men went back to the shop. They broke into the shop. He started to struggle with them. They then ran away while claiming that he, the appellant had defiled a child. Members of the public and the Assistant Chief went there. The Assistant Chief arrested him and handed him over to the police. He was later charged with the offence of defilement. He denied the charge.

Trial Court's Judgment:-

6. The trial magistrate found that the complainant was a minor as per the evidence of the witnesses and as shown in the age assessment report. He found that the appellant defiled the complainant as the evidence of the witnesses was corroborated by medical evidence. He stated in his judgment that identification was not an issue in the case since the incident happened at around 6.30 pm and the complainant knew the appellant very well. He found that the prosecution had proved its case beyond all reasonable doubt and hence convicted the appellant of the offence charged.

Submissions:

7. The appellant filed written submissions. He submitted that there was no evidence on identification. That if the evidence of defilement was true the complainant did not scream for help. That there were people who were mentioned in the evidence, Tyson and Kinuthia, who did not testify in the case. That the person who testified as having been at the scene, PW2, was neither Tyson nor Kinuthia. That the fact that the two did not testify leads to the inference that their evidence was adverse to the prosecution – ***Bukenya & others vs Republic*** (1972) EACA 549 referred to.

8. The appellant further submitted that it was not proved that the bed-sheet produced in court belonged to him. That there was no DNA carried out on the complainant's clothes to ascertain whether the alleged blood stains on the clothes belonged to her. That the medical personnel who initially treated the complainant at Budaya Health Centre did not testify. Further that the complainant did not tell the clinical officer PW5, the name of the person who defiled her. The appellant submitted that the prosecution evidence lacked probative value and was full of contradictions. He urged the court to find in his favour and acquit him of the offence.

9. The State opposed the appeal. It submitted that the age of the complainant was proved by her mother and the age assessment report. That the offence was committed at 6.30 pm in broad day-light. That the appellant was well known to the complainant since he used to operate a shop at their village. Therefore that there was no mistaken identity. That the evidence of the complainant was corroborated by the evidence of her mother, by the clinical officer and by the investigating officer. Therefore that the prosecution proved penetration and that the appellant is the one who committed the offence.

10. The prosecution submitted that the appellant did not request the trial court to order that he be supplied with copies of witness statements. That the appellant cross-examined all the witnesses. That the only conclusion is that he was not prejudiced by lack of the statements. The prosecution maintained that the case had been proved beyond all reasonable doubt.

ANALYSIS AND DETERMINATION:

11. This being a first appeal, it is the duty of this court to re-evaluate the evidence on record, analyse it and come up with its own conclusions bearing in mind that it did not hear or see the witnesses testify – see ***Okeno vs Republic*** (1972) EA32.

12. The complainant and her mother PW3 stated that the complainant went to the shop at around 6 p.m. BPW2 stated that he went to the shop at 6.10 pm. B said that he found the complainant crying outside the shop of the appellant. She told him that the appellant had defiled her. That at around 7 pm members of public started to gather at the shop of the appellant. The appellant then switched off the bulb light to his shop and escaped.

14. The appellant was a person well known to the complainant and B PW2. B corroborated the evidence by the complainant that the appellant was at his shop at the time that the complainant said that the appellant had defiled her. The complainant was defiled some minutes after 6 pm. There was still daylight when the complainant went to the shop of the appellant. The complainant talked to the appellant at his shop when she asked him to sell her tablets. Being a person well known to the complainant, the complainant could not have failed to identify him. She was positively clear that the appellant was the person who defiled her. There is no reason to doubt that evidence. That B saw the accused at his shop before he closed the shop and went away places the appellant at the scene of the crime.

15. The complainant stated that when she came out of the appellant's house, she found two boys outside the house – Tyson and Kinuthia.

She said that her uncle was also there. These three people did not testify. The person who testified, B was not mentioned by the complainant to have been at the scene. The appellant submitted that the interference to be drawn in failing to call the said witnesses is that their evidence, if given, would have been adverse to the prosecution case. In ***Bukenya vs Republic*** (supra) the court held that where the prosecution calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of these witnesses, if called would have been or would have tended to be adverse to the prosecution case.

16. However in this case the evidence called by the prosecution was adequate to prove the charge against the appellant. Though Brian was not mentioned by the complainant to have been at the scene, it is clear from his evidence that he was there. There is no need to make the inference referred to in this case as there was other sufficient evidence to prove the charge other than the evidence of witnesses who were not called to testify.

17. The appellant submitted that there was no DNA evidence to prove that the blood stains that were on the dress and the pant of the complainant corresponded with her blood. However, there was no legal requirement to prove that. In the case of ***AML vs Republic*** (2012) eKLR, the Court of Appeal stated that:-

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

There was evidence that the clothes belonged to the complainant. There was no need to prove by DNA test that the blood stains on the clothes belonged to the complainant. It was proper for the court to accept the evidence that the blood stains were from the complainant.

18. The offence was said to have been committed on 19th July 2013. The complainant was initially seen at Bugina Health Centre on the same day as indicated in the treatment notes, PEX2. Though the person who attended to her on that day did not testify, the complainant was seen by a clinical officer PW4 at Vihiga District Hospital on 22nd July, 2017 when the said witness completed the P3 form. The findings of the said witness were that the hymen was torn and the perineum was reddish, swollen and tender. That there was a visible tear on the lower perineum. There were also bruises. These injuries were visible to PW4 even though they were by then 4 days old. The evidence of PW4 was credible. There was sufficient evidence o prove penetration on the complainant. That the medical personnel who attended to the complainant on the initial day did not testify was not fatal to the case as the injuries were clearly visible even after 4 days.

19. The notes taken by the clinical officer PW4 in the P3 form indicate that the complainant told him that she was defiled by a person known to her. The clinical officer does not seem to have asked the complainant the name of the person who defiled her. That the name of the person is not indicated in the P3 form is not the fault of the complainant. It all depends with the questions put by the clinical officer to the complainant.

20. The complainant stated in court that she was aged 8 years. Her mother PW3 stated that at the time that the complainant was defiled, she was aged seven and a half years. The age assessment report dated 22nd July, 2013 was made by one Dr Odhiambo Wandei of Vihiga District Hospital. The said Doctor did not testify. His report was produced in court as exhibit by the investigating officer Cpl Maina PW6.

21. ***Section 77*** of the Evidence Act cap 80 Laws of Kenya allows the court to admit documents prepared by experts where an expert is not available to produce the document in court. However if the document is to be produced by any other person, the person producing it must show that he was conversant with the signature of the maker of the document. This was the holding of the Court of Appeal in ***Sibo Makovo vs Republic, Nakuru Criminal Appeal No39 of 1996*** **(1997) eKLR** where it held that:-

> ***"… No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the Evidence Act (cap 80 Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is not taken seriously and we wish to impress upon trial magistrate to be careful in admitting P3 forms when the maker is not called."***

This statement applies to P3 forms as it does to age assessment reports. In this case it was not explained to the court why Dr Odhiambo was not available to produce the document himself. Cpl Maina never stated that he was conversant with the signature of Dr Odhiambo. The age assessment report was therefore not properly produced in court as exhibit. The trial magistrate should not have relied on the documents to determine the age of the complainant.

22. However the age of a person can be proved in various ways. In ***Edwin Nyambaso Onsongo vs Republic*** (2016) eKLR – the court cited the case of ***Mwolongo Chichero Mwanyembe vs Republic, Mombasa Criminal Appeal No.24 of 2015*** (UR), where the Court of Appeal held that:-

> ***"… the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." "… we think that what ought to be stressed is that whatever the nature of the evidence preferred in proof of the victim's age, it has to be credible and reliable."***

The child herein was intelligent enough to know her age. Her mother confirmed her age that she was aged seven and a half years at the time of defilement. There was thereby credible evidence that the girl was aged seven and a half years.

23. The appellant complained that the trial court did not issue him with copies of witness statements, copy of charge sheet and proceedings to enable him to prepare for his case.

***Article 50(2)*** of the Constitution of Kenya 2010 provides that every accused person has the right to a fair trial which includes the right to have adequate time and facilities to prepare a defence. The right to be provided with facilities to prepare for a defence encompasses the right to be supplied with copies of the charge sheet, witness statements and copy of proceedings. However an accused person has the liberty to invoke this right in court. Where an accused person does not do so the court can assume that he has waived that right. In this case the appellant did not demand to be provided with copies of the documents. The court could not have known that he did not have the copies of the documents when he did not request for them from the court. The appellant cross-examined the witnesses at length. He was therefore not prejudiced by the lack of the documents or otherwise.

24. There was corroborative evidence from the complainant, B PW2, the complainant's mother PW3, the clinical officer PW4 and the investigating officer PW6 that the appellant defiled the complainant. B PW2 saw the appellant at the scene of the offence. The clinical officer found the complainant with a torn hymen. The dress and the pant that the complainant was wearing at the time were blood stained. The evidence against the appellant was water tight that he defiled the complainant. The appeal ought to be dismissed.

23. The complainant was aged seven and a half years at the time that she was defiled by the appellant. The minimum sentence provided by ***section 8(1)*** as read with ***section 8(2)*** of the Sexual Offences Act for the commission of the offence of defilement where the victim is aged 11 years and below is imprisonment for life. The appellant was given the minimum sentence of imprisonment for life. The sentence was thereby lawful.

In the final end the appeal against both conviction and sentence is unmerited. The appeal is accordingly dismissed.

**Delivered, dated and signed at Kakamega this 19th day of October, 2017.**

**J. NJAGI**

**JUDGE**

In the presence of:

Jamsumba - for respondent/State

George - court assistant

Appellant - present

14 days right of appeal

Appellant¨ I apply to be supplied with a copy of the judgment.

Court: A copy of the judgment to issue to the appellant.

**J. NJAGI**

**JUDGE**