



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIIAYA

CRIMINAL APPEAL NO. 16 OF 2016

(CORAM: J. A. MAKAU – J.)

ELIUD OUMA AGWARA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal against both the conviction and the sentence DATED

26.2.2016 in Criminal Case No. 210 of 2014 in BONDO Law Court

before Hon M. OBIERO – .P.M.)

JUDGMENT

1. The Appellant **ELIUD OUMA AGWARA** was charged with an offence of defilement contrary to **section 8 (1) (4) of The Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on 28th day of August at Usenge Market in Bondo District within Siaya County unlawfully and intentionally caused his penis to penetrate the vagina of L.A.B. a child aged 16 years. The appellant also faced an alternative charge of **committing an indecent Act with a child contrary to Section II(I) of the Sexual Offences Act No. 3 of 2006**, the particulars are that on the 28th day of August, 2013 at Usenge Market in Bondo District within Siaya Count unlawfully and intentionally caused his penis to penetrate the vagina of L.A.B. a child being a child aged 16 years.

2. After a full trial the appellant was found guilty on the main charge, convicted and sentenced to serve 15 years imprisonment.

3. Aggrieved by the conviction and sentence the appellant preferred this appeal setting fourteen (14) grounds of appeal in the amended petition of appeal dated 11th March 2016 thus:-

(a). The Learned trial Magistrate erred in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt when the evidence as presented did not support the charge as drawn.

(b). The Learned trial Magistrate erred in law and in fact in convicting the Appellant under section 8 (1) of the Sexual Offences Act as read with Sub Section 4 thereof, without sufficient evidence and without making a specific finding as to whether the appellant in fact defiled the complainant on the date, time and place indicted in the charge sheet.

(c). The Learned trial Magistrate erred in fact and in law in failing to consider glaring

inconsistencies in the prosecution's evidence and in failing to consider the evidence as a whole and especially for the defence.

(d). The Learned trial Magistrate completely misunderstood the case that was before him, misconceived the issues and as a result came to a wrong decision.

(e). The Learned Trial Magistrate erred in fact and in law in failing to take into consideration the defense put forward by the Appellant, in shifting the burden of proof to the Appellant and is failing to find for the Appellant on parallel evidence.

(f). The Learned Trial Magistrate erred in fact and in law in failing to take into account the result of the DNA test on the paternity of the Complainant's child when the same was a material issue before him as the child was alleged to be the result of the act of defilement for which the Appellant was charged.

(g). That the Trial Magistrate erred in law and in Fact in convicting the Appellant in the absence of compelling Evidence from the prosecution.

(h). The Trial Magistrate erred in law and Fact by deviating from the Evidence adduced by the Complainant as backed by her statement by the police and introducing extraneous facts and assumptions on which the Complainant was not led during the examination in Chief.

(i). The trial Magistrate erred in Law in moving Suo-Moto in amending the charge sheet with regard to the date of the offence in his Judgment at the time of the Judgment.

(j). The Learned trial Magistrate erred in law and fact in principle in assuming an Appellate Jurisdiction with regard to the admissibility of Documentary Evidence especially the Certificate of Birth of the Complainant and making adverse comments thereon when the issue was not available for review and/or appeal before him.

(k). The trial Magistrate erred in Law by not appreciating and disregarding the Evidence of the Defence throughout the case.

(l). The Learned trial Magistrate erred in law and procedure by shifting the burden of proof from the prosecution to the defence.

(m). The Learned trial Magistrate erred in law and fact in wholly premising his finding and conviction on his own personal views and opinions which were neither supported by the evidence before him nor the applicable law.

(n). In whole, the finding and holding of the Learned trial Magistrate as contained in his judgment delivered on 26th February 2016 is inconsiderate, erroneous, unlawful biased and untenable in law.

4. At the hearing the appellant was represented by Mr. Sala, Learned Advocate, whereas the State was represented by Mr. Eliphas Ombati Learned Prosecution State Counsel.

5. I have very carefully considered the appeal, the rival submissions by both Counsel as well as authorities referred to by each side.

6. I have carefully considered the Appellants appeal, the counsel oral submissions, and the proceedings and trial courts Judgment. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the Court of Appeal case of **Okeno V. R. (1972) E.A. 32** where the Court set out *the duties of a first appellate court thus:-*

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). 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 finding and conclusion; 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 V. Sunday Post, (1958) E.A. 434”

7. I am not going to reproduce the evidence in support of the prosecution case nor the defence as the proceedings of the lower court form part of the record of appeal and can easily be perused and/or referred to if need be, however I shall briefly summarize the prosecution case and the defence before dealing with the grounds of appeal raised by the appellant.

8. The facts of the prosecution case are that on 28th August 2013 PW1, L.A.B., had taken her shoes to a **“fundu”** when the appellant who is known to her, as he used to go to her parent's home, to buy stones from her father, called her and invited her to Dallas where alcohol is sold. PW1 accompanied the appellant to Dallas where the appellant bought alcohol and a soda for PW1 as PW1 refused to take alcohol. The appellant later forced PW1 to go and have a shower, as she was showering, the appellant forced the door open, entered inside the bathroom, grabbed PW1 pushing her against the wall, forced PW1 to the bed, removed PW1's pantie, covered her mouth and defiled PW1 several times. PW1 felt pain. That after finishing with her he told her to shower. PW1 testified that was her first time to have sex. The appellant then escorted PW1 home and on arrival PW1 did not inform her parents. In September PW1 discovered she was pregnant and informed the Deputy Principal who summoned PW1's mother to the school, and informed her. PW1 was taken to Bondo Hospital where it was confirmed she was pregnant as per treatment notes as MFI-P1. That after examination at the hospital PW1 and her mother reported the matter at Usenge Police Station and whereby she was issued with P3 form as MFI – P2.

9. The appellant denied the offence admitting that he knows the complainant and put forward a defence of alibi. That in January 2014 while at his Hardware he saw PW1's mother who informed him she had been sent by her husband to find out whether he was considering marrying their daughter who was expectant with his child and whom he had sex with. The Appellant denied the allegation and rejected the proposal and also rejected to give her financial assistance which she had used to come for everyday. That he applied for DNA test as he was being accused unfairly. The DNA report involved the appellant, complainant and G.O. the child. That the findings excludes Eliud Ouma Agwara the Appellant, as a biological father of “G.O.”

10. Mr. Sala Learned Advocate for the Appellant concentrated on grounds numbers 6, 9, 10 and 2 of the appeal in that order. I shall therefore in this appeal deal with the said four grounds of appeal as the other grounds of appeal were deemed abandoned.

11. On ground number 6 of the appeal, the appellant contends that the trial Court erred in failing to take into account the results of the DNA test on the paternity of the complainant's child when the same was a material issue before him as the child was alleged to be the result of the act of defilement of “L.A.B.” for which the Appellant was charged.

12. PW1 L.A.B. In her evidences testified that on 28.8.2013 the Appellant defiled her as a result of which she became pregnant and that was the first time she had sex in her life time. That the Appellant defiled her and made her pregnant. PW2 testified that PW1 “L.A.B” informed her that the Appellant made her pregnant and that the appellant was aware of the pregnancy. PW3 testified categorically that the complainant was pregnant arising out of an act of defilement by the appellant on either 28.8.2013 or 25.8.2013 and that by 22.1.2014 that she was six (6) months pregnant. The complainant in her evidence in chief, is important to note and mark that she was categorical that on 28.8.2013 was when she was as result of defilement by the Appellant that she became pregnant Similarly PW4 a registered Clinical Officer at Bondo District Hospital who examined “L.A.B.” on 22.1.2014 testified L.A.B. alleged she had

been defiled and as such she was impregnated by the Appellant, that she became pregnant and by then she was six months pregnant.

13. From the evidence of PW1, it is her evidence on 22.8.2013 it was her first time in her life to have sex. She ruled out of having had sex previously or before 28.8.2013, with any other person or at all thus she was in other terms virgin.

14. The Appellant at the earliest opportunity did not only deny the commission of the offence levelled against himself but applied for DNA test involving the appellant, the complainant and the child. The DNA test was obtained and supplied to the prosecution and the defence. PW1 LAB on being cross-examined by Mr. Ogonda Learned Advocate for the Appellant testified:-

“From the results of the DNA the child does not belong to the accused. It is the accused who defiled me and made me pregnant.”

PW3 No.72322 P.C. Vitalis Owino on the DNA test testified:-

“I received the DNA report. Its DM(f1 -1. I looked at the report. The accused is not the Biological father of complainant's child. The minor did not tell me the age of the pregnancy. The pregnancy was as a result of the alleged defilement.”

15. The defence called DW3 Richard Kimutai Langat, a Government Analyst based at Government Chemist in Kisumu who testified that by examining the DNA it is possible to determine the element of DNA gained from the mother and those gained from the father. He testified that after examining the DNA profiles of the three people, the findings were:-

“ ----- the findings were that Eliud Ouma Agwara was excluded from being the father of the child in dispute ----”

In being cross-examined he testified that DNA testing is very accurate and its accuracy is 100% and that he does those kind of test.

16. The DNA test excluded the Appellant from being the father of the complainant's child. The Government Chemist testified that DNA testing is very accurate and its accuracy is 100% correct. The prosecutions did not challenge the DNA test nor called for second opinion. The prosecution witness confirmed the DNA test excluded the appellant. The exclusion of the appellant as being the father of the child and the fact that PW1 insisted she had had no sex before with any other person and that was her first time to have sexual intercourse should have lead to no other reasonable conclusion other than that the complainant's pregnancy was not as a result of the alleged defilement of either 28.8.2013 or 25.8.2013 whichever date one may take on, by the appellant.

17. PW4 in his evidence testified that PW1, LAB was examined on 22.1.2014 and confirmed to be six(6) months pregnant. That by going with the date of the alleged commission of the offence in the charge sheet and evidence of PW1, “LAB” that she was defiled on 28.8.2013 and by evidence of PW3 who testified PW1, LAB reported she was defiled on 25.8.2013 and became pregnant as a result of that defilement, if that is the correct position and if PW1 LAB was virgin as of the aforesaid date, doing first simple mathematics and calculating the age of pregnancy as of 22.1.2014 when PW4 testified she was examined, she ought to have been four to five months pregnant and not 6 months pregnant. That if she was then six (6) months pregnant it means the complainant had sexual intercourse prior to having one with the appellant, according to PW1 on 28.8.2013 or 25.8.2013 according to PW3 with a third party and she was not virgin as she alleged when according to her the Appellant defiled.

18. The trial court in its judgment stated as follows as regards DNA test:-

“The DNA results report is an expert report and in the absence of any other contrary expert report the same cannot be challenged as such am of the findings that the accused is not the

biological father to the complainant's child.”

19. The DNA results having not connected the appellant with the complainant's child as a result of the alleged result of defilement and the complainant having not connected the appellant with any other previous act of defilement or having not stated that she has had an earlier encounter with another person who could in view of the DNA results be said to be the father of the child, meaning the age of pregnancy and the child should have related to the incident and results should have confirmed the Appellant was the father of the child. The appellant should have been accorded the benefit of doubt. The trial Court fell into an error when it held that DNA results could never be a defence in an offence of defilement as the court did not properly evaluate and analyse the evidence which prosecution was relying upon thus as a result the defilement of the complainant she became pregnant meaning the age of pregnancy and the child should have related to the incident and results should have confirmed the Appellant was the father of the child. It was therefore apart from proving defilement the duty of the prosecution to prove as they alleged the complainant has had no other sexual intercourse with any other person prior to the date of defilement to prove that as a result of the alleged defilement PW1 became pregnant, bore the child whose DNA test report connected the appellant with the act of defilement.

20. In the case of **Scofield Biko Ogweno V. Republic HCRA 45 of 2015** my brother Justice D. Majanja stated thus:-

“The only evidence in support of the prosecution case on the issue of penetration is that testimony of PW1. The DNA test excluded the appellant as the biological father of the child and the medical examination carried out on 16th July 2012 was too remote to connect the appellant to the defilement as it was carried out a year and 5 months after the incident.”

21. The Learned Magistrate failed to weigh the evidence of PW1, PW2, PW4 and DW4 as regards the DNA test and its results. Had the trial Court done so he would probably have arrived at a different conclusion. The failure to do so made him misapprehend the essence of DNA test and more so when PW1 categorically stated she got pregnant as a result of that very act of her being defiled on a particular occasion by the appellant. Similarly had the trial court seriously considered the evidence of PW4 it would have come to a different conclusion concerning the age of the pregnancy as from the month of August to January 2014 as that period cannot by all means of calculation be six (6) months. The Learned State Counsel conceded this ground of appeal and I find that he correctly did so as the ground is meritorious. I therefore allow ground No. 6 of the appeal.

22. The appellant under ground No. 9 contends that the trial court erred in law in amending the charge sheet *suo moto* with regard to the date of the offence in the judgment at the time of judgment. The trial magistrate in his judgment stated as follows:-

“In the charge sheet, in the main charge, the particulars show that the alleged incident occurred on the 28th day of August, 2013. In the alternative charge the particulars read that the incident took place on the 28th day of August, 2014. The complainant's testimony in chief was that the alleged incident occurred on the 28th day of August, 2013. On cross-examination, she said that she went to the accused person's hardware on the 25th day of August, 2013 at 7.00 a.m. According to the P3 form that is exhibit 2, the alleged incident occurred on the 25th day of August, 2013. The whole of the defence is based on the 25th day of August, 2013.

The issue that arises at this stage is to whether the discrepancies in the dates have in any way prejudiced the accused person herein. My considered opinion is that the accused person was not prejudiced in any way. This for reasons that the accused person was able represented and both the accused and his advocate knew the date as 25th day of August, 2013 and to avoid the issue of date being contested, I will take the 25th day of August, 2013 as the date of the alleged incident.”

23. The charge that the appellant faced read 28th August 2013 and the same to date has not been amended by the prosecution. PW1 “LAB” in her evidence in chief maintained that the defilement occurred on 28.8.2013 but in cross-examination she stated she went to the appellant's hardware on 25.8.2013. The

trial court was not addressed by both the prosecution and the defence on the discrepancies of the dates before retiring to write the judgment. However the court at the center of its judgment moved so *suo moto* and choose the date of commission of the offence on its own.

24. The State Counsel on his part urged that the court acted properly and within the law as PW1 LAB had given two different dates as the dates of commission of the offence and the court went ahead to pick one of the dates which it thought was the most appropriate as that was the only chance the trial court had. The state submitted such change did not prejudice the appellant as he had an opportunity to clarify those days during the proceedings of the case. The state further submitted the change of dates did not amount to amendment of the charge sheet referring to such situation as contradiction of the evidence and not amendment of the charge sheet.

25. In the case of **Vincent Shatuma Naste V R (2014) eKLR**, Lady Justice G.W. Ngenye – Macharia faced with a similar matter as this appeal stated:

“Back to the charge sheet, the Appellant submitted that its substitution was unprocedural because he was not given an opportunity to plead afresh, Section 214(1) (I) of the Criminal Procedure Code under which prosecution has powers to amend a charge sheet reads:

“214 (1) Where, at any stage of a trial before the close of the case for the prosecution it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case.

Provided that -

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge.”

Under Sub-Section (i) above, it is important that the trial court calls upon the accused to plead afresh to the amended charge(s).”

(Also see the case of Jason Akumu Yongo V R Court of Appeal Cr. A No. 1 of 1983, R V Francis Waweru Njuki (2006) eKLR, Peter Gitau Njuguna & Another V R HCRA No. 247 consolidated with No. 249 of 2011 and John Ngari Njiru & Another V R HCRA 145 of 2012 consolidated with CRA 146 of 2012)

26. The principle laid down in the above mentioned authorities under **Section 214 of Criminal Procedure Code Cap 75 of Laws of Kenya** is that the prosecution can be allowed to amend or alter the charge by way of amendment or by substitution or additional of a new charge at any stage of trial before the close of the case for the prosecution. This is to ensure the constitutional rights of the accused persons are at all times safe-guarded, the accused person must at all times have a fair trial as enshrined in **Article 50 of the Constitution**. The accused person before trial should be informed of the charge with sufficient detail to answer it, have adequate time and facilities to prepare a defence, short of that the accused person's constitutional rights to a fair trial stands violated, breached and infringed which renders the whole trial null and void.

27. That once charge is amended or altered the accused must be allowed to plead to the altered charge and be given the opportunity to recall any witness who has testified for cross-examination. **Sub-Section (3), of “Section 214 of CPC** allows the court to adjourn the trial in cases where alteration of a charge is such that there is a variance between the charge and the evidence.

28. In the instant case the trial court altered the particulars of the charge after the prosecution had closed their case and at the middle of its judgment. **Section 214 of CPC** is clear that after close of the prosecution case the charge sheet cannot be amended or altered even by the court, as was the case in this

case. The prosecution and the defence must have been caught by surprise by the trial court's judgment as the alteration of the particulars in support of the charge sheet was made *suo-moto* by court. The trial court's alteration of the dates of commission of the offence altered the whole charge to which the appellant had pleaded to. The alteration of the charge sheet by trial court at judgment stage did not only cause prejudice to the appellant but meant that the whole exercise was flawed and was an abuse of the court process. The judgment following thereafter violates the provisions of the law. It violated **section 214 of CPC and Article 50 of the constitution** dealing with fair hearing.

29. I will now turn to the appellant's ground No. 10 of the appeal. The Appellant contends that the trial magistrate erred in law and fact in principle in assuming Appellate jurisdiction with regard to the admissibility of documentary evidence especially the certificate of birth of the complainant and making adverse comments therein when the issue was not available for review and/or appeal before him. The Appellant's Counsel urged the age of the complainant "LAB" needed to be proved before the appellant could be convicted. He urged under **Section 8 of the Sexual Offences Act**, the age of complainant must be proved because sentences under **The Sexual Offences Act** are hinged on the victim's ages. That PW1 did not produce her Birth Certificate and an attempt by PW3, the investigating Officer, to produce the same was rejected by trial court and court ruled that PW1 LAB could be recalled to prove the Birth Certificate. The trial court did in absence of production of Birth certificate order for Age assessment of the complainant "LAB" That the prosecution did not produce any other document such as Baptism card, Child Health Card or Clinic Card. The P3 form indicated the complainant was aged 16 years, however the producer of the P3 form, never stated that the complainant was medically examined to prove her age was 16 years as indicated in the P3 form.

30. The State Counsel countered the ground urging that Birth certificate is not the only way of proving the age of the complainant under **The Sexual Offences Act**, conceding that no document was produced regarding the age of the complainant LAB but insisted the age was proved through Sworn evidence of PW1 when she testified she was 17 years old. That P3 form showed that the complainant was 16 years old urging the information in P3 form was information given by the guardian and the victim, to the medical officer adding further the court can pick the age of the complainant from the said document.

31. The learned trial Magistrate in his judgment had the following to say:-

“from the date of the incident. She stated that she was born on the 25th day of August, 1997. I have noted that there was a certificate of birth in respect of the complainant however, the same was not produced as an exhibit.”

32. The age of a complainant in a sexual offences under **The Sexual Offences Act** can be proved by documentary evidence. The relevant documents are many and apart from Birth certificate, age can be proved by production of other relevant documents such as Baptism card, school leaving Certificate, School admission letters, child Health Clinic card, Notification of Birth Card, Age assessment Report. That though sworn evidence can be admissible I am of the view that sworn evidence alone cannot suffice nor can P3 form unless the producer of the same testifies that he/she medically examined the complainant at the time of completing P3 form and assessed the victim's age as indicated in the P3 form and such information should be part of the information in the P3 form or be contained in the P3 form or be made in a separate note or age assessment Report.

33. In the instant case thus though the Birth certificate of the complainant was said to have been available the court could not rely on unproduced Birth Certificate. The appellant was not afforded an opportunity to cross-examine on the said Birth certificate and by relying on the unproduced Birth Certificate which was not testified on its authenticity and challenged through cross-examination, that failure prejudiced the appellant and was against the rules of natural justice. In case of defilement the prosecution is required to prove the following ingredients to succeed in a defilement case, thus: penetration, recognition and/or identification, age of the victim and/or lack of capacity to consent to the Sexual intercourse. In the instant case the prosecution proved recognition as PW1 and the appellant knew each other before the incident and which both sides agree, however the prosecution failed to prove penetration, and age. I therefore find and hold that prosecution failed to prove the age of the victim by failing to produce documentary

evidence proving the age of the victim. There are several procedures and modes of proving age of victim of defilement and it does not mean the only document that can be used to prove victim's age Birth Certificate. It is my view that the prosecution at the time of seeking the medical officer to fill P3 form the Police can request the officer to medically assess the age of the sexual offence victim and this I believe will go a long way to ensure victims of defilement who may have no Birth Certificate or any other document to prove their age will get justice as the issue of the age will be resolved at the same time with the issue regarding sexual injury sustained and/or on issue of penetration.

34. In the case of **Nyongesa V. R. Criminal Appeal No. 123 of 2009** in which the issue of age was raised, addressed itself thus:

“All there is as concerns age is the victims word for it. The victim also told the doctor examining her that she was 15 years old. In my considered view those two statements by the victim in the absence of a birth certificate or medical age assessment reports do not suffice Age is such a critical aspect in Sexual Offences that it has to be conclusively proved. Anything else is not good at all. It will not suffice. And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim. In this case the age of the victim was not proved and hence any sentence passed and meted out to the accused would be a matter of conjecture which would not stand in criminal cases where the offence must be proved beyond any reasonable doubt.”

35. I therefore find and hold age of a victim is one of the essential ingredients of an offence under **The Sexual Offences Act** as the charging Section under the said Act and the sentence is pegged on the age of the victim especially in offences related to defilement. That without proof of age as required the sentence to be meted would be difficult to determine and would be a matter of conjuncture which would not stand as it would be against the law which provides minimum sentence in defilement matters, which is based on the age of a given victim age is therefore necessary for an offence of defilement to be proved beyond reasonable doubt as required in criminal cases and for meting the appropriate sentence.

36. The Appellant under ground No. 2 of the appeal contends that the trial magistrate erred in law and fact in convicting the appellant **under Section 8 (1) of the Sexual Offences Act** as read with Section 4 thereof, without sufficient evidence and without making a specific finding as to whether the appellant in fact defiled the complainant on the date, time and place indicated in the charge sheet. PW1 LAB in her evidence testified that the Appellant took her to Dallas, a Public place where alcohol amongst other drinks are sold as it was a bar. She testified the appellant forced her to take a shower before he forcefully took her to bed and defiled her. It is appellant's contention that this being a public place patronized by members of public and the same manned by staff employed at Dallas Hotel, the prosecution should have called witness to fortify the prosecution's case by proving that at that time PW1 and the appellant were customers at the said Dallas Hotel. That at least receipts of the purchases or hiring of the room should have been produced to give strength to PW1's evidence.

37. In the instant case the prosecution did not produce any material documents nor called any employee or proprietor of the Dallas Hotel to corroborate the evidence of PW1. The evidence relied upon by the prosecution was of a single witness thus PW1. LAB, a minor. The law is clear that in Sexual Offences involving a minor court can convict on the uncorrobarated evidence of alleged victim of the offence for reasons to be recorded in the proceedings, if the court is satisfied, that the alleged victim is telling the truth. **Section 124 of the Evidence Act** provides that in Sexual Offences where the victim is a minor the court upon complying with the afore said provision it can convict the accused notwithstanding that there is no corroboration of the evidence of the alleged victim and that is good law as in most cases the offences of that nature are committed in secrecy or in absence of witnesses. **Section 124 of the Evidence Act** Provides as follows:-

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with the 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.”

38. In the case of **Andrew Mulika Kithusi V Republic (2014) eKLR** Lady Justice L.N. Mutende quoted with approval from the case of **Bukenya V. Uganda (1972) E.A. 549** thus:

“Thirdly, while the Director is not required to call a superfluity of witnesses, if 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 evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case -----.”

39. In the case of **Denis Osoro Obiro V R (2014) eKLR the Court of Appeal** sitting at Nairobi reiterated the provisions of **Section 124 of the Evidence Act** and stated thus:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

40. In view of the provisions of **Section 124 of the Evidence Act** and the above quoted authorities, I find that failure to call the staff or proprietor of Dallas Hotel where PW1 testified the appellant took her and defiled her and failure to produce receipts or any other evidence to place the appellant at the scene of the crime cannot be a basis for drawing an inference that evidence of those witnesses, if called would have been or would have tended to be adverse to the prosecution case. That after all PW1 LAB did not mention that she screamed and that some of the people at bar witnessed the incident. Further more human beings do not go about having sex openly as it is always a guarded secret unless the two are accidentally caught in the very act. The calling therefore of the Dallas Staff would have added no value to the prosecution case as the appellant did not state nor give particulars of witnesses who were supposed to be called and were not called by the prosecution. I therefore find and agree with the authorities stated hereinabove that court can convict on evidence of the victim alone, thus the alleged victim, if the court believes the victim is telling the truth and secondly if the reasons for such belief are recorded. In the proceedings, before Hon. C.A. Kutwa P.M., who was transferred and Mr. B. Obiero P.M. took over the matter on 26.6.2015 and complied with **section 200 of CPC**, he rightly in his judgment stated that he never saw nor heard PW1 LAB give evidence and could not comment on her demeanour. The trial court did not and could not state it believed the evidence of the victim as the victim had not given evidence before it. In view of the court having taken over the matter which had commenced before his predecessor who had not recorded any reasons, as regards whether he believed the victim was telling the truth or not, the trial court was therefore required to rely on the entire evidence to come to just conclusion. I therefore find that had the trial court considered the entire evidence it would have come to a different conclusion in its judgment.

41. **Having come to the conclusion that I have, I am satisfied that the appeal is meritorious, the same is allowed, the conviction is quashed and sentence set aside. The appellant is set at liberty forth with unless otherwise lawfully held.**

DATED AT SIAYA THIS 23RD DAY OF JUNE, 2016

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence of:

Mr. Sala for the Appellant.

Mr. Elphas Ombati for the State.

C.C. 1. Kevin Odhiambo.

2. Mohammed Akideh.

J. A. MAKAU

JUDGE