**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 134 OF 2013**

**M O……..…….APPELLANT**

**VERSUS**

**REPUBLIC…….……..……RESPONDENT**

**JUDGMENT**

## INTRODUCTION

This is an appeal arising from the decision of C.L.Yalwala (AG. Principal Magistrate as he then was) in Bungoma C.M.C.C. NO. 133 of 2012, where the appellant was sentenced to serve 20 years imprisonment for the offence of defilement.

The particulars of the offence were that the appellant on the diverse dates between 19th and 21st day of January 2012 in Bungoma County intentionally and unlawfully caused his penis to penetrate into the vagina of C M a child aged 14 years. Contrary to Sections 8(1) & 8(3) of the Sexual Offences Act, 2006.

Being aggrieved by the conviction and sentence the appellant has filed an appeal to this court on the following grounds;

1. THAT the learned trial magistrate erred in law and facts in facilitating to take a proper accounts under article 50(i) (e) of the Constitution which state that to have affair trial begin without a reasonable delay.
2. THAT the learned trial magistrate erred in law and facts in facilitating to take a proper accounts under article 49(9) (7) of the constitution.
3. THAT the learned magistrate erred in law fact did not observe at the of conviction that I was a student in form 3.
4. THAT the magistrate erred in law and facts in failing to realize that the prosecution causes was speculative, discernible, fabricated in materials particular.
5. That the learned trial magistrate erred in law and facts in failing to take into accounts of the credibility of the prosecution witness before against the appellant and thereby conviction me on the basis the of the same in which I certified prejudice.
6. That I pray to be present of the hearing of the appeal.
7. That I pray to be present at the hearing of his appeal and wish furnished with certified copy of court proceedings.

During the hearing of the appeal the appellant opted to rely on submission which may be summarized as follows:-The evidence submitted by the prosecution was weak, distorted, flimsy, insufficient, inadequate and contradictory to warrant a conviction. There was no evidence pointing directly to the appellant, the trial magistrate erred in fact and in law in sentencing the appellant on a defective charge sheet which

indicated defilement whereas the medical reported indicated the nature of the offence to be rape, there could have been a possibility of mistaken identity as the appellant was only identified during the court process, there was failure to call the key witness who was the grandmother of the complainant, the magistrate did not consider that the evidence against the appellant was tendered by members of one family and that there was a likelihood of bias, the letter that was produced in court that showed he wrote it to the complainant was not certified by a handwriting expert to be his, that the trial magistrate shifted the burden of proof to the appellant, whereas it was the duty of the prosecution to prove their case beyond reasonable doubt. The appellant urged court to be lenient to him since he had already reformed and had served part of the sentence. He further urged the court to set aside the conviction and sentence.

The state on the other hand opposed the appeal as follows, the victim was 14 years, the parents traced the complainant at the appellant's house where the appellant was arrested by police officers. That the medical examination confirmed defilement since there was a whitish discharge in the vagina. That on his defence the appellant claimed that PW1 was his friend. At the time of arrest the appellant was 20 years. That the case was proved and the sentence was in accordance with the law.

**ISSUE FOR DETERMINATION**

The issue this court is to determine is whether the offence of defilement against the appellant was proved beyond reasonable doubt. This being a first appellate court the court has a duty to examine the evidence afresh, analyze and re-evaluate the same in order to come up with its own independent finding this bearing the fact that the court has no advantage of re-examining the witnesses. See the case of ***Okeno v Republic 1972 EA***.

The prosecution called a total of 5(five) witnesses.**PW1 C M** testified that she was aged 14 at the time of the incident having been born on 14.71998 and was in form 1 at [Particulars Withheld] Secondary School. On the material day she was at her grandmother's place in [particulars withheld] after her KCPE exams. Her grandmother sent her to go buy sugar at [particulars withheld] market at about 3.00pm and while on her way she met the appellant who had called her and told her where to meet. She was known to him. He had asked her to get her photographs and clothes which he had taken some time back when she was at her parents place in [particulars withheld]. She asked him to deliver the same at her mother's but he declined she therefore accompanied him so that he could give them to her.

That at 11.00 pm he took her to his friend's place. The friend was known as Evans. He did not give her the things, he refused and instead locked the door from outside and left with Evans. That he returned at 2.00 am entered the house and Evans locked it from outside. That the accused forced her to bed and engaged her in sexual intercourse. That he retained her in that house for 3 days. That he had sexual intercourse again with her on the 3rd day. On 21.1.2010 a police officer came at about 11.00 pm and found her alone in the house as the accused and his friend Evans had locked it from outside. They had opened the door and found her seated. They went to look for the accused and arrested him and took both to the police post at [particulars withheld], whereby they were locked in the cells. On 22.1.201 they were taken to Bungoma Police Station and she was issued a p3 form and treated. She further testified that this instance was not the first time she had had intercourse with the appellant that on a previous occasion the appellant took her to [particulars withheld] for two days and had sexual intercourse with her. Thereafter a case was lodged and the appellant took her and hid her at his friend's Davis' house. The appellant told her not to attend court so that the case could be dismissed. That she stayed at Davis house for two days before she went back to her parents. She stated further that the appellant continued pursuing her for friendship; she produced a letter written by the appellant who sent one J to deliver to her. Where he says she was stupid for not accepting his marriage proposal.

**PW2 E N** testified that she was the mother of PW1 and produced a birth certificate indicating the age of PW1 to be 14 years. That on the material day PW1 was at her grandmother's place. That she had taken pw1 there so that PW1 could stay away from the appellant since he had previously been charged in a different case with respect to the same offence. That on 21.1.2012 the complainant's grandmother called her and told her that PW1 had disappeared on 19.1.2012 at about 3.00 pm. That PW2 immediately thought about the appellant given his previous record and sent children to look where the appellant

stayed.

The appellant stayed near one C who was PW2's brother in law. That C told her that there was one house that had remained locked for three days and he suspected that PW1 was staying there. Armed with this information she reported the matter to Nzoia police station that night. Police officers went where the appellant stayed led by C at around 11.00pm, and they found the appellant. They also found PW1 and both were taken to the police station where they recorded statements and the next day PW1 was taken to the hospital for treatment.

**PW3 C W S** testified that PW2 was his sister in law and that PW1 was his niece. That he stayed In the same plot with the appellant. That on 21.1.2012 he was on duty at Nzioa Sugar Company where he worked as a loader. That PW2 telephoned and informed him of PW1's disappearance. She requested him to check if the appellant was staying with the accused at the plot. He checked and found the appellant in his house on enquiring about PW1, the appellant told him that PW1 was not there. The house adjacent to it that belonged to the appellant's friend was locked after a while he saw the appellant entering that house and he became suspicious and informed the police who went there and on search found PW1 locked in the house. Both the appellant and PW1 were taken to Nzoia police station and locked in cells.

**PW4 ELIAS ADOKA** a clinician he examined PW1 on 23.1.2012. She had a history of having engaged in sexual intercourse with a known person. He established her age to be approximately 14 years using the dental formula. He found her external genitalia normal, the hymen membrane was absent but there were no fresh tears. That the vaginal discharge was white, looked like semen and she had a foul smell. On urinalysis there were numerous epithelial cells and small pus cells. Viral test for syphilis was negative so was the pregnancy test. He concluded that PW1 was possibly raped because of the whitish discharge that came from her vagina which looked like semen.

**PW5 P.C DOUGLAS NJOROGE** No. 38464 attached to Nzoia Police Station**,** was the investigating officer in the case. He recalled that on 21.1.2012 at about 10.00 pm he was at the station when PW2 reported that PW1 had gone missing and was found at [particulars withheld] market with his colleague PC Edward Kariuki. That, they were led to the house where PW1 was. They he found her with a boy the appellant. Both were arrested them and the next day PW1 was taken for age assessment and medical examination. PW1's age was assessed to be 14 years. She was also examined and it was established that she had been defiled. He interrogated PW1 who told him that she had been taken by the appellant to the rental house and defiled. He then charged the appellant.

The court found the Appellant had a case to answer, he gave unsworn statement. He gave his names as **M O B**, was a form 3 student at [particulars withheld] Secondary School. On the material day at night he was in his room with two small children doing studies when three police officers came and knocked on his door. He opened the door and one police officer whom he knew entered and greeted the appellant by his name. The officer asked the appellant who he was staying with in that house and the appellant replied no one. That the officer picked a lamp and started searching the house, the officer left, returned shortly and handcuffed him. When he went outside he found PW1 standing with two other officers. He was taken to Nzoia police station where he found PW2 who accused of disturbing PW1 and said she wanted the appellant to be punished. He stayed at the police station one week stay at the police station, and charges were levied against him after complaints by his people. He alleged to have been framed by PW2.

Section 8(1) provides that;

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

Section 8(3) provides that;

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

In STEPHEN NGULI MULILI VERSUS REPUBLIC CRIMINAL APPEAL NO.90 OF 2013, the Court of Appeal in making reference to the "**Golden thread**" in the "**web of English common Law"** as the duty for the prosecution to prove its case as stated in the notable case of DPP VS WOOLMINGTON (1935) UKHL also referred to MILLER VERSUS MINISTRY OF PENSIONS (1947) 2 ALL ER 372 where it was stated;

"That degree is settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course if it is possible, but not in the least probable, the case is proved beyond doubt, but nothing short of that will suffice."

The prosecution therefore had a duty as always to prove the evidence against the appellant herein beyond reasonable doubt.

This court is also cognizant of Section 124 of the Evidence Act and the proviso to it that gives an exemption to sexual offences as relates to corroboration.

The age of PW1 was established to be 14 years of age. PW2 produced a birth certificate indicating that PW1 was born on 14.7.1998. PW 4 also gave an assessment of age at 14years having used the dental formula. With this evidence I am satisfied that by the time the incident subject herein happened PW1 was still a child.

PW1 gave a history of her sexual escapades with the appellant on two different occasions and on both various times. Initially in [particulars withheld] where a complaint was lodged and later in an incident culminating in the arrest and eventual conviction of the appellant with is subject of this appeal. From her testimony it is clear that PW1 and the appellant were intimate friends. Three days or so, before the appellant was arrested they met while PW1 who at the time was staying at the grandmother's in [particulars withheld]. The appellant took her to a friend's house within the three days they had sexual intercourse twice. PW4 the clinical officer confirmed on examination that PW1 indeed had sex. I therefore find that as a matter of fact PW1 had sex during the three days when she disappeared from home. Next is to establish who she had sex with. It was the evidence of PW1 that the appellant in the company of one N took her from her grandmother's place in [particulars withheld] to N. She was taken to the house of the appellant's friend Evans where he locked her up for three days, during which time the appellant had sex with her twice.

PW3 told court that when he went to look for PW1 at the appellant's house he did not find her he only found the appellant alone in his house but that the adjacent house that belonged to the appellant's friend was locked. That later on he saw the appellant enter the friend's house and he became suspicious and called the police. That when they came with the police they found PW1 locked up in that house. Any doubt about the encounter by the two is cleared by the letter produced that clearly confirms the friendship between the two.

I find the evidence of PW1 clear and vivid. I find that both PW1 & PW3 were truthful.

The trial court found that PW1's evidence was corroborated by the evidence of PW2, PW3 & PW4. The court further found that at the time PW1 and the Appellant were together they had sexual intercourse twice during this period leading to the appellant's arrest. The trial court found PW1 to have been a truthful witness. On the other hand the court found the appellant not to have been truthful or forthright. The court thus accepted PW1's evidence. The court further found that since PW1 was a minor she could not give consent to a sexual encounter and was therefore of the view that an offence of defilement had been committed. I totally agree with the findings of the trial court. PW1 was a minor, the appellant had sex with her and therefore he was guilty of the offence of defilement.

The evidence against the appellant was proved beyond reasonable doubt by the prosecution witnesses.

Contradictions if any were minor and did not otherwise interfere with the evidence placed before court.

The trial magistrate having convicted the appellant, sentenced him to a jail term of 20 years. This sentence is within the law and the trial court cannot be faulted on this. I have no reason therefore to interfere with both the conviction and sentence.

For the reasons above this appeal must fail and it is therefore dismissed.

Dated and Delivered in Bungoma this 29th day of September, 2015

**ALI-ARONI**

**JUDGE**

In the Presence of

State Counsel……..…….

Appellant/Counsel……