REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 110 'B' OF 2014.

DENIS OKELO MATEBA :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(An appeal from the conviction and sentence of Hon. C. Kendagor – AG. SRM in Kakamega Chief Magistrate's Criminal Case No. 74 of 2012 delivered on 13th August, 2014.)

J U D G M E N T.

1. The appellant was charged with the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 20 years imprisonment.

2. The appellant being dissatisfied with the conviction and sentence meted out to him filed an appeal raising the following grounds of appeal:-

i. *That the court lowered the standard of proof in criminal cases as the case was not proved beyond reasonable doubt;*
ii. *The court used uncorroborated evidence to convict the appellant;*
iii. *The court did not take into account of the (sic) contradictions between (sic) the testimonies of PW1 and PW2 as to what happened which raised reasonable doubt;*
iv. *The court relied on medical evidence which did not connect the accused person to the offence;*
v. *The medical report from the laboratory did not connect the appellant to the offence in any way;*
vi. *The court reached a finding which was contrary to the medical evidence produced in court;*
vii. *The court did not analyze the evidence of the witnesses and failed to appreciate the importance of the appellant's testimony; and*
viii. *The court just agreed to the testimony of the prosecution without critically analyzing the same.*

3. The appellant was represented in court by Mr. Momanyi Advocate who filed written submissions in the matter. At the hearing of the appeal, the learned counsel for the appellant highlighted his submissions as summarized here below:-

i. The case was not proved beyond reasonable doubt as PW1 did not adduce evidence to show if there was partial or complete insertion of the appellant's genital organs into PW1's genital organs. The element of penetration was therefore not proved. The medical evidence did not show any evidence of penetration;
ii. The evidence of PW1 and PW2 who were minors was not corroborated;
iii. PW2 should have given unsworn testimony after the learned trial magistrate found that she did not have a sound religious background. She was however affirmed;
iv. There were contradictions in the prosecution evidence in that PW1 stated that she was given a

herbal concoction and became unconscious whereas PW2 said that she heard PW1 crying until the time the appellant left. Another contradiction, Mr. Momanyi submitted, was the fact that PW1 said that when she woke up she was naked, but PW2 said that PW1 was wearing a skirt;

v. The trial court failed to analyze the medical evidence tendered by PW5. The P3 form had a contradiction in that on the one hand it indicated that PW1 was not injured in her genitalia and at the same time indicated that the injuries were two days old. Further, that the P3 form showed that there was no hymen. PW1 indicated to the court that she had engaged in sex when she was younger;

vi. The learned trial magistrate found that epithelial cells could not have been found in the high vaginal swab taken from PW1 if there was no injury. Mr. Momanyi submitted that the existence of epithelial cells did not connect the appellant to the commission of the offence;

vii. It was erroneous for the magistrate to hold that PW1 was menstruating on 20/12/2011;

viii. The learned trial magistrate found that the appellant bought family planning tablets (femiplan) which he gave to PW1. This element was not proved as the person who sold the femiplan tablets was not called to testify. There was no proof that the tablets were for family planning.

4. To support his submissions, Mr. Momanyi relied on High Court decisions in Criminal Appeal No. 49 of 2006, **Reagan Mokaya vs. Republic**, which held that the evidence of a minor cannot corroborate the evidence of another minor. Criminal Appeal No. 38 of 2005, **Mateso Juma vs. Republic**, in which the Doctor's evidence was not conclusive on whether the offence of rape had been committed against the victim. Mr Momanyi also cited the decision in the case of **Felix Luwambe Gonzi vs. Republic in Criminal Appeal No. 83 of 2006**, where the court held that it was difficult to know the true position of a matter when witnesses give contradictory evidence.

Learned counsel for the appellant urged this court to allow the appeal and set the appellant free.

Respondent's submissions

5. Mr. Oroni, learned prosecuting counsel opposed the appeal and submitted that the appellant approached PW1 and told her he was a pastor who exorcises demons and that he wanted to exorcise demons placed in her private parts by her boyfriend. PW2 testified that PW1 was called into a house and that the appellant locked the door. When PW2 went to find out what was happening, she found PW1 lying on a sack with the appellant lying on top of her. She saw this through a glass window. When the appellant saw PW2, he stood up and got out of the house.

6. Mr Oroni further submitted that no evidence was tendered by PW1 to the effect that there was bleeding before the encounter with the appellant. The bleeding happened after the appellant walked out of the house.

This offence was occasioned on a 13 year old girl by a person whom she trusted as a pastor. It was submitted that there was no independent adult witness. PW1 was taken to hospital 2 days after the incident, which could have led to loss of evidence. The minors (PW1 & PW2) only named the appellant as the perpetrator of the offence.

7. It was submitted by Mr. Oroni that section 8 (1) (3) of the Sexual Offences Act gives the elements of defilement as:-

i. Penetration; and

ii. The age of a child for the purposes of sentencing.

It was his submission that the above elements were proved and the court therefore properly convicted the appellant to serve twenty (20) years imprisonment.

Analysis of the evidence

8. As the first appellate court, I am duty bound to analyze, re-consider and re-evaluate the evidence

adduced at the trial court afresh with a view of reaching an independent decision on the matter. I am also obligated to carefully consider the judgment by the learned trial magistrate with a view of determining whether the conclusions reached by the said court were sound. In the case of **David Njuguna Wairimu vs. Republic [2010] eKLR** the Court of Appeal reiterated this duty as follows:-

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision".***

9. PW1, **L.W.W**, the complainant was a child of fourteen years at the time she testified in court on 10/7/2012. She had in court her birth certificate showing that she was born on 5/3/1998. The learned trial magistrate conducted voir dire examination and noted that PW1 understood the meaning of an oath. She gave sworn evidence. She testified that she was thirteen (13) years old on 20/12/2011 when the offence occurred. She gave evidence that on the said date at 3.00 p.m she was at home with her cousin **L** (PW2) and that while preparing supper, the appellant went to their home and said that he was a pastor. PW1 had seen the appellant at their home on two previous Tuesdays when he had gone to see their mother.

10. PW1 further testified that on that occasion, the appellant told her that he exorcises demons. He called her by her name "**W"** and told her to enter a house so that he could remove demons from her vagina and he told her that it was her boyfriend who had done that to her, yet PW1 did not have a boyfriend. When PW1 resisted, the appellant gave her some herbal concoction which he made her drink. She drank it in her parents' house as her mother was away attending a funeral. It was her evidence that after taking the herbal medication, she became confused and although she had refused to undress, when she came to her senses, she found that she was lying on a sack on the floor of the bedroom near the door, she was naked.

11. It was PW1's testimony that she had no recollection of what transpired as she found the appellant outside the house. She was in a lot of pain and was bleeding from her vagina. PW1 took a bath and waited for her mother. The appellant called PW2 and the two went to the shops. The appellant returned with femiplan tablets and told PW1 to take a tablet daily every morning and evening. PW1 took the tablets from the appellant and kept them as evidence to show her mother. She produced the femiplan tablets in court. She reported the incident to her mother who took her to the appellant's place. He denied any wrong doing. They all went to Khaunga health centre where they waited for about ten minutes before the appellant disappeared leaving PW1 and her mother behind. They later went to Kakamega General hospital where PW1 was examined, treated and issued with a post rape care report form and a P3 form.

    It was the evidence of PW1 that PW2 washed her clothes i.e. a biker, skirt, top and a blouse on the instructions of the appellant.

12. On being cross examined, PW1 stated that she did not record in her statement that she was given herbal medication that made her feel dizzy. She indicated that she had a sexual encounter in the year 2002 when she was young. She told the court that after the incident she inquired about the femiplan tablets and she was told they were to prevent pregnancy. She denied that her mother bought her the said tablets.

13. PW1 was re-examined and stated that she got her periods on 21/12/2011 after the incident happened. She further said that her mother had not told her that there was a pastor who would go

to pray for her on the day in issue. She had no problem that required prayers. She further said that she was given a substance by the appellant which she chewed and swallowed with the help of water. That she told the police officer who recorded her statement but he did not record that. She reiterated that what she was saying was true about the appellant giving her raw herbs.

14. PW2, **L.W,** was a child of 12 years of age. She was affirmed after the court formed the opinion that she did not have a sound religious background. She testified that on the material day at around 3.00 p.m., she was cooking vegetables in the kitchen with PW1. The appellant went to their home and called PW1 into the "big house". PW2 remained in the kitchen for a little while. She then heard PW1 crying in the "big house". When she went there, she found that it was locked from the inside. She found the bedroom window open and on looking through the glass window, she saw the appellant sleeping (sic) on PW1 who was facing upwards. PW1's and the appellant's legs were astride. The two were lying on a sack, which she saw was bloodstained. The appellant stood up when he saw PW2. He was wearing a long trouser and PW1 was wearing a skirt only. PW1 was still crying.

15. The appellant requested PW2 to accompany him to a shop where he bought medicine and they went back home. The appellant gave the medicine to PW1 and told her to swallow the tablets which PW2 identified in court as the femiplan tablets that were produced in court. The appellant left. It was the evidence of PW2 that PW1's skirt was bloodstained but PW2 washed it on the instructions of the appellant before her mother returned home.

16. On being cross-examined, PW2 said that she heard PW1 crying in Kinyala language that the appellant had slept on her. That when the appellant went out of the house he had worn a trouser. PW2 informed the court that she saw PW1's underpants in the bedroom. PW2 said that their mother had not told them that the appellant would go to their house to pray on that day.

17. PW3, **E.N,** the mother to PW1 went home at 5.00 p.m., on the material day and found PW1 crying, PW1 informed her that the appellant had gone to their home and prayed for her and did something wrong. PW2 told PW3 that the appellant had raped PW1 in the "big house". PW3 was shown the room where the incident happened, she observed that there was blood on the floor. She was told that a towel and sack that had been placed on the ground had been washed. PW3 informed the court that she had not invited the appellant to pray for them that day.

18. PW3 testified that she left for the appellant's house with PW1 and met him on the way to the market. On being questioned by PW3, he denied any wrongdoing. PW3 reminded the appellant that he had called her and she had told him that she was at a funeral. The appellant had called PW1's father and established that he was not at home. PW3 showed the appellant the femiplan tablets and asked him why he had bought them for PW1, yet she was not sick. The appellant insisted that they all go to Khaunga General hospital but they found it closed. PW3 called her brother-in-law who went to where they were. The appellant escaped on seeing him.

19. PW3 informed the court that when PW1 told her that she had been defiled, she examined her and saw a discharge of blood which was not her monthly period. PW1 was examined at Kakamega Provincial hospital on 22/12/2011 where she was treated and given medicine. PW3 produced PW1's birth certificate.

20. On cross-examination, PW3 informed the court that she does not go to the same church as the appellant and that she does not know the church that he attends. She knew the appellant as a pastor who had prayed for her on two occasions when she was sick and she was healed. She therefore believed that he had the power of healing. She further said on cross-examination that PW1 did not have a problem with her menses and he did not ask the appellant to pray for her. On the material day, the appellant called her and told her to call him in case she needed prayers.

21. PW4, a police officer received a defilement report from PW1's father on 27.12.2011. He informed the court that PW1 had made a report at Kakamega police station on 21.12.2011. She had been

treated at Kakamega provincial General hospital where her P3 form was filled in. PW4 recorded statements from witnesses.

22. PW5, a medical Doctor examined PW1 on 22.12.2011 who explained that she was sexually assaulted by someone who is a healer who told her that she had a problem in her vagina. The said healer forced her to have sex. Her private parts were normal and she had her menses. PW1 underwent laboratory tests and foreign cells (epithelial) were found in her fluids. This was a sign of assault.

23. On cross-examination, PW5 informed the court that epithelial cells are cells that are present after injury on a surface. They flow in the fluid after they are removed as a result of injury. The said cells are of the person examined.

24. In his defence, the appellant admitted that he went to PW3's house on the material day where he found PW1 and PW2. He stated that PW3 had called a meeting for their catholic women's group. When the appellant went to PW3's home, he called PW3 and found out that the meeting had been cancelled. PW1 and PW2 told him that PW3 had gone for a funeral. The appellant left. In the evening, PW3 called him to ask what he had done to her daughter. She hang up (sic) on him and told him that he would see (sic) for what he had done to her daughter. He was arrested after a month. The appellant denied having committed the offence and stated that he did not know what PW1 and PW3 have against him. He told the court that PW1's father demanded for Kshs.10,000/- to have the case withdrawn.

Determination of the appeal

25. This court finds that although the evidence of PW1 and PW2 was that of minors, the learned trial magistrate was alive to the provisions of section 124 of the Evidence Act which state that -

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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".

26. It therefore follows that for a conviction to hold under the proviso to section 124 of the Evidence Act, the trial magistrate must be satisfied that the child is telling the truth, and record the reasons for that belief. The law on the evidence of children in sexual offences was enunciated in the case of **Chila V Republic (1976) E.A** that-

"the law of East Africa on corroboration in sexual cases is as follows: The Judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so, he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice".

With regard to this, the learned trial magistrate in this case had this to say ***"I do warn myself on the evidence of PW1 as well as PW2 both minor (sic) and witnesses to this case as well as the need for corroboration".***

27. PW1 testified that the appellant gave her a herbal concoction that made her confused and

although she had refused to undress, when she came to her senses, she found herself on the floor of the bedroom on a sack near the bedroom door naked. She said that she had no recollection of what transpired. She found the appellant outside the house. In such an instance, it was therefore necessary for the court to look for other evidence that could corroborate the act of defilement.

28. The learned trial magistrate found corroboration in the laboratory tests that showed that defilement had occurred. PW5 in her evidence testified that laboratory tests conducted on a high vaginal swab taken from PW1 showed that she had numerous epithelial cells. This court notes that this information is contained in PW1's post care form which was produced in evidence. The Doctor, PW5, explained in court that ***"epithelial cells are cells that are present after injury on a surface. The foreign cells in her fluids were a sign of assault and that they flow in the fluid after they are removed as a result of injury. They are of the person examined. They fall off from the injured person:"*** From the foregoing evidence, this court is in agreement with the learned trial magistrate that PW1 was sexually assaulted which led to the existence of epithelial cells in the high vaginal swab taken from her.

29. The evidence of PW2 was to the effect that she peeped through a glass window of the bedroom of the "big house" and saw the appellant lying on top of PW1 with his legs astride. PW1's legs were also astride. The evidence of PW2 shows that the perpetrator of the defilement was none other than the appellant. This explains the reason why PW1 was bleeding from her private parts and was in pain when she came to, after the incident.

30. It was submitted for the appellant that no injuries were observed on PW1's genitalia, cervix or labia. This was not surprising as PW1 testified that she had had a sexual encounter in the year 2002 when she was younger. This Court does not hold it against PW1 that the folly of youth had driven her to have sexual intercourse when she was young. This however did not make PW1 a free for all young girl to be predated upon by the appellant herein or others of similar intent.

31. Further corroboration of the appellant's commission of the offence is to be found in his conduct. The appellant requested PW2 to accompany him to a shop where he bought femiplan tablets which he gave to PW1 and told her to take one tablet daily in the mornings and evenings. This court looked at the femiplan tablets produced in court, the inscription on the packet is ***"femiplan everyday pill. Quality family planning for the modern woman".*** The very act of the appellant buying the tablets and giving them to PW1 is inconsistent with his innocence and a clear indicator that he had defiled PW1 as a result of which he expected her to take the femiplan tablets to counter her becoming pregnant.

32. As the learned trial magistrate correctly found, the conduct of the appellant of making telephone calls to PW1's parents before he went to their home is inconsistent with his innocence. His actions clearly indicate that he had the intentions to defile PW1 thus his visit to their home when her parents were away. He took advantage of the naivety of PW1 by telling her that he had gone to their home to exorcise demons from her vagina that had been put there by her boyfriend. It was PW1's evidence that she had no boyfriend but it is apparent that she fell line, hook and sinker for the appellant's lie. PW1 believed that he would pray for her as her mother had previously told her that he was a pastor. It is however worth noting that PW3 testified that the appellant was not expected to visit their home on that day and she had not asked him to pray for her daughter as she had no problem.

33. The conduct of the appellant of disappearing from Khaunga General Hospital on seeing PW3's brother-in-law is also indicative of his guilt. His guilt is further amplified by the fact that he told PW2 to wash PW1's blood stained skirt. The instructions of the appellant to PW2 to wash the said item, led to the destruction of crucial evidence. I also find corroboration of PW1's and PW2's evidence that the act of defilement was on the floor of the bedroom in that PW3 saw that the floor where the defilement had taken place was blood stained.

34. In his submissions, Mr. Momanyi for the appellant highlighted several inconsistencies in the

evidence of PW1 and PW2. This court notes that the said inconsistencies do not affect the substance of the case. In the case of **Joseph Maina Mwangi vs. Republic, Criminal Appeal No. 73 of 1993** the court held that:-

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the CPC viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."***

35. It was further submitted for the appellant that the medical evidence adduced in court did not connect the appellant to the commission of the offence. As earlier indicated in this judgment, the appellant disappeared on seeing PW3's brother-in-law. He was therefore not in the company of PW1 as at the time she was being examined by the Doctor on 22.12.2011 at Kakamega Provincial General hospital. That ground of appeal is without basis and must fail.

36. This court has considered the defence by the appellant who admitted that he went to PW3's house where he found PW1 and PW2. He stated that it was PW3 who had called a meeting for their Catholic Women's Group. When the appellant went to PW3's home, he called PW3 found out that the meeting had been cancelled. PW1 and PW2 told him that PW3 had gone for a funeral. The appellant left. It is not plausible that PW3 had invited the appellant for a meeting for their Catholic Women's Group as PW3 testified that she does not go to the same church as the appellant. She does not even know the church that the appellant attends.

37. The defence put forward by the appellant shows that his visit to PW3's house gave him the opportunity to commit the offence in the absence of PW1's parents. Although mere opportunity to commit an offence does not in itself amount to corroboration, the opportunity may be of such character that taken together with other circumstances, may in itself amount to corroboration see **Malonza Vs Republic 1986 KLR 426.** Corroboration has also been defined as some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence.

38. This court does not believe the defence of the appellant that he did not defile PW1. He had no business visiting PW3's house in her absence. He was seen by PW2 lying on top of PW1 with both their legs astride, medical evidence of epithelial cells from PW1 laboratory tests all conclusively pointed to PW1 having been defiled. This Court has no doubt whatsoever that the appellant took advantage of a defenceless young girl in the pretext of exorcising demons from her vagina and notes that he was neither exorcising demons nor performing pastoral duties in her vagina. This court is convinced beyond reasonable doubt that the appellant stupefied PW1 by giving her a herbal concoction to take. As PW1 lay on the sack and towel placed on the floor, he inserted his genital organs into the genital organs of PW1. The act of defilement was thus executed.

39. It is the finding of this court that failure to call Lilian who sold the femiplan tablets to the appellant was not prejudicial to the appellant. In the case of **Cliff Bikeri Mokua and Another Vs. Republic [2014] eKLR**, the Court of Appeal stated that the duty of the prosecution is to present before the trial court such witnesses as it thinks will establish its case beyond reasonable doubt.

In the instant case, the evidence of PW1 and PW2 that the appellant gave PW1 the femiplan tablets was sufficient to prove that fact. As said earlier, the magistrate had cautioned herself adequately about the evidence of PW1 and PW2, who were minors.

40. This court notes that the charge as framed was defective in that the appellant should have been charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No.3 of 2006. This court invokes the provisions of section 382 of the Criminal Procedure Code to cure this defect. The appellant knew all along that he was facing the offence of defilement. He cross examined the witnesses at length and defended himself of the said

charge.

41. I find that the prosecution proved its case beyond reasonable doubt. The authorities cited for the appellant do not come to his aid as each case must be determined on its own circumstances and merit.

42. The minimum sentence provided by law for the offence of defilement of a child between the age of twelve and fifteen years is twenty (20) years imprisonment. The sentence imposed on the appellant was the minimum sentence for the said offence.

43. This court finds that the appeal herein is without merit. I hereby dismiss it in its entirety. The appellant has the right of appeal.

DELIVERED, DATED and **SIGNED** at **KAKAMEGA** on this18TH day of DECEMBER, 2015.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... for the Appellant.

..... for the Respondent.

..... Court Assistant.