REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 11 OF 2015

(CORAM: J. A. MAKAU – J.)

KOA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal against both the conviction and the sentence in Criminal Case No. 108 of 2013 in Siaya Law Court before Hon. M.S. KIMANI – R.M.)

JUDGMENT

1. The Appellant **KOA** was charged with an offence of defilement Contrary to **Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 23rd April 2008 in Gem District within Siaya County intentionally caused his penis to penetrate the vagina of MA a child aged 8 years. The appellant 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 were at the same date and place the appellant unlawfully and indecently assaulted MA. a girl aged 8 by touching her private parts.

2. **PW1 MAO.** the complainant testified that she knows the appellant who used to be her mother's husband and gave his name of KOA. She stated in 2008 she was in class II and aged 8 years. She identified her Births Certificate showing she was born on 6th April 1999. The Certificate of Birth was marked as MFF – P1. She also identified Baptism card as MFI – P2 and immunization card issued by Sagam Community Hospital on 3.8.1999 as MFI – P3. PW1 testified that on 23rd April 2008 at about 2.00 p.m. she was at home in campany of her young siblings when the appellant came back from the shamba and asked PW1 to take her young siblings to her grandmother's homestead. PW1 complied and returned back home. The appellant asked PW1 to go inside the house and sit on her mother's bed. The appellant then undressed PW1 and removed her inner pant/wear. He held PW1 by her abdomen and laid her on the bed. PW1 started screaming and the appellant threatened to strangle her if she continued screaming. The appellant then removed his penis and inserted it in PW1's vagina. PW1 felt pain and screamed. The appellant slapped her and threatened to strangle her if she continued screaming and if she tells her mother, however her mother arrived. PW1 testified the appellant had sex with her for about an hour. The appellant had meanwhile locked the doors to the house. That when PW1's mother came she rescued PW1 as the appellant got so shocked that he stayed on the bed. PW1's mother took her to the hospital. She was first taken to Sagam Community Hospital. She identified Sagam Community Hospital O/P Card MFI. P4, lab test as MFI P5, PW1 was later taken to Nairobi Women Hospital. She identified the treatment notes from Nairobi Women Hospital as MFI – P6. PW1 testified after treatment at Sagam

Community Hospital they reported the incident at Yala Police Station and recorded statements. That the P.3 form was filled at Sagam on 28th April, 2008. She identified P.3. form as MFI – P7. She testified that she is now healed. She testified the appellant was arrested by Police from Yala. She added after she was defiled the appellant stopped staying with PW1's mother but went away. PW1 stated her inner wear and dress which she wore on the material day of defilement were initially produced as exhibit in the other case. During cross-examination PW1 testified that the appellant used to be her step father but she could not remember the number of years he stayed with her mother. She added that she felt pain when the appellant inserted his penis in her vagina and she started screaming leading to the appellant slapping her and telling her to keep quiet. That he also muffled up PW1 by using his hand. PW1 testified the appellant entirely inserted his penis in her vagina. She testified that she has shown the Court documents confirming she was defiled by the appellant. Pw1 testified that she was not couched by anyone adding she told the Court what the appellant had done to her. She added at Sagam Community Hospital she was with her mother and the appellant. She stated she was inside with the doctor and she is not aware whether the appellant was examined or not but she was aware the appellant was ushered in later on and the person who can know whether he was examined is the doctor.

3. **PW2 POA** testified that PW1 is her second born daughter. PW2 testified she knows the appellant who is the man who had inherited her as a wife after the death of her husband but have since 2008 separated. That on 23rd April 2008 at 12 noon PW2 stated she was at Sagam and as she returned home on approaching her gate she heard M (PW1) crying from inside the house. She struggled to push the door. It opened and walked in on her husband, the appellant having sex with her daughter (PW1) on PW2's bed. Both PW2 and the appellant got surprised. The appellant then left PW1 alone. PW2 got on PW1 and put her down. PW2 noted PW1 was bleeding from the vagina. She was in much pain and crying. The appellant walked out. PW2 took PW1 and headed to her mother-in-law's homestead. PW2 found appellant's parent's and shortly the appellant arrived with PW2's father-in-law. The appellant was complaining that PW2 was spoiling his name by stating the appellant had sex with PW1. PW2 then invited everyone there to examine PW1's private parts to see for themselves, the damage that had been done. PW2 thereafter took PW1 to Sagam Community Hospital. She identified treatment notes MFI-P4, MFIP5 and PW1's immunization card MFI P3 and a P.3. form MFI P7 which were issued when PW2 and PW1 reported at Yala Police Station. PW2 also identified PW1's Birth Certificate MFI – P1 showing she was born on 6.4.1999. She also identified Baptism Card for PW1 as MFI – P2 and testified that the appellant was arrested on the same day by AP Officers from Sinaga Police Station and escorted him to Yala Police Station. On cross-examination PW2 testified that the appellant was her husband for 1 year after meeting at a place where both were serving as casual labourer. That at the same time appellant had a wife and the appellant left his home to live with PW2 at her home. PW2 denied that she wanted the appellant out by all means and as such she framed him with this case. PW2 testified when she walked in the appellant had removed his trouser and PW1 had no inner wear and that PW2 found the appellant on top of PW1 forcing himself on her. That PW1 was treated at Sagam Community Hospital and the appellant was there. The nurse talked to him and he told her he had done something bad claiming Satan had cheated him. On re-examination PW2 stated she did not frame the appellant.

4. **PW3 SAO** testified that on 23rd April 2008 at about 2.00 p.m. she was at PW2's house with PW2 after they had just come form Sagam. That when they arrived PW3 remained outside PW2's house while PW2 entered and at that point she found Kennedy and PW1 inside the house. PW1 shrieked and was crying out aloud. PW3 got inside the house and found PW1 naked without her pantie on the bed and the appellant who PW3 referred to as Ken with his trouser halfway down. They then proceeded to Sagam Community Hospital. The doctor allowed PW3 inside the examination room. She testified PW1 had blood oozing from her private parts. She later recorded her statement. On cross- examination by the appellant, PW3 testified she knows the appellant and gave his name as Kennedy Okinda Ayua. PW3 stated PW2 and appellant had stayed together for about 1 year she testified that they left PW2's house and went straight to PW1's grandmother's house. Where the appellant followed them, they proceeded to Sagam Community Hospital. Where both PW1 and the appellant where subjected to clinical examination. PW3 denied having conspired with Pw3 to spoil the appellant's name.

5. **PW4 Michael Odera Atieno** Assistant Chief of Marenyo Sub-Location testified that on 23rd April 2008 at about 4.00 p.m. he was at Sagam Primary School when he received a telephone call from SOK

(PW3) informing him of a girl who had been defiled by her step-father. She gave the name of the child as MA.(PW1). PW4 asked PW3 to have the child taken to the Hospital and inform elders to apprehend the culprit. PW4 proceeded to Sagam Community Hospital where he met the child MA. (PW1), S (PW3) and P (PW2) and the child's grandmother. PW1 was attended to and referred to Yala Level IV Hospital. The appellant was also present at Sagam Community Hospital from where he was arrested. PW4 later recorded his statement. PW5 testified that the appellant was well known to him as he was a resident of PW4's area and he had inherited "P" according to custom and gave his name as KOA. He identified him as the man in the dock. During cross-examination by the appellant. PW4 testified that the appellant came from his ancestral home in ***[particulars withheld]*** area under jurisdiction of PW4 and inherited a widow by the name PO who is a resident of PW4's area of jurisdiction. PW4 denied that he is interested romantically with P as in his mother. PW4 testified that the appellant was also at Health Centre and he was also examined. PW4 denied that the case is a frame up. He said the child said that appellant defiled her and that PW2 found him red handed in the very act.

6. **PW5 Vincent Ratemo**, a Clinical Officer testified that before he was working as clinical officer at Yala Sub-District Hospital and that he was conversant with the case before the Court. That he has a P.3. form of MAO. That when he saw her she was 8 years old. He testified that he can recall that on 28th April 2008 while on duty a child by the name MAO. was brought to the clinic with history of having been defiled some days prior thus or 23.4.2008 at 2.00 p.m. by a well known person. She had earlier on been attended at Sagam Community Hospital. He examined her and perused her treatment notes from Sagam and noted lacerations on the lower vaginal walls. He noted though she was under treatment there were presence of whitish discharge. Lab tests showed presence of motile spermatozoa cells. HIV test was negative as at the time. PW5 signed the P.3. form which he had prepared on 28.4.2008. He confirmed the girl had been defiled. He produced P.3. form as exhibit MFI – P7 as exhibit P.7. During Cross-examination PW5 testified that he has got over 10 years experience and he did not examine the appellant.

7. **PW6 Nicholas Mukuna Wanda** a Clinical Officer based at Umala Dispensary testified that in the year 2009 he was based at Sagam Community Hospital. He testified that while in the Hospital he recalled treating M A on 23.4.2008. That she was 8 years old. She had come to the Hospital with history of having been defiled by her step-father at around 2.00 p.m. On examination PW6 found that PW1 had blood around the vulva extending to thighs with lacerations on the vaginal walls which were actively bleeding. There was presence of motile spermatozoa with yeast cells on the vagina. PW6 stated there was clear indication that the patient had been defiled. After treatment of the patient he referred her to Police to collect P.3. form. He later filed the P.3. form which he stated ed was in Court. He produced Discharge summary notes (MFI – P4) as exhibit P.4. laboratory test (MFI P5) exhibitP5. PW6 testified that he did not attend to the appellant. During cross-examination PW6 testified he is the one who treated PW1 during the material date of defilement, and his role was to confirm that M had been defiled.

8. **PW7 No. 41015 P.C. Joseph Kagiri** testified that in the year 2008 he was based at Yala Police Station. That he is the investigating Officer in this case. He recalled that on 23.4.2008 at 4.00 p.m. he received the complainant MA, a child aged 8 years, who was accompanied by her mother complaining that on 23.4.2008, she was defiled by her step-father by the name KOA. That before the matter was reported M A. had been seen and treated at Sagam Community Hospital. PW7 took over the matter and had the appellant arrested by A.P. Officers at Sagam area and taken to Yala Police Station. PW7 obtained copy of Birth Certificate of the victim, a copy of the Child Health Card both of which reflected the date of birth to be 6.4.1999 confirming the minor's age as 8 years. He testified the original copy were retained in the appeal file. PW7 produced Birth Certificate (MFI – P1) and Health Care Card (MFI – P3) as exhibits 1 and 3 respectively. He also produced P.3. form to the victim as exhibit 7. PW7 identified the person who was arrested with the offence of defilement as the person seated at the dock. During cross-examination PW7 confirmed he was not the arresting officer but investigating officer. PW7 testified he produced P.3. form, child Health card and Birth Certificate. He denied that he remained with appellant's Ksh. 300/= and further stated he was not present when appellant was escorted into Yala Police Station.

9. Upon the appellant being put on his defence he opted to give unsworn statement and opted to call no witness. The appellant testified that on 23rd April 2008, that he went to the farm and left his wife (PW2) P.O behind with the children. That he did some weeding upto 2.00 p.m. as his wife had said she would go

to Sagam Centre to fetch fertilizer. That at 2.00 p.m. he went back home and found his wife had returned home with her sister. That on returning PW3 started accusing him of having had sex with her child MA. (PW1). PW3 sister to PW2 S said they should go to appellant's mother so that the incident is known. That at that moment people had gathered after hearing quarrels. That members of public who had arrived started beating the appellant, hence it was decided all go to Sagam Community Hospital so that it can be established whether indeed the appellant had defiled PW1. That at Sagam Community Hospital PW1 was ushered in and then it started raining. That it was then when Assistant Chief (PW4) came, saw the accused at the hospital and on asking he was told by PW2 what she was alleging. He called the Police at Sinaga who arrived, found them at the hospital, arrested the appellant and took him to Yala Police Station. He was latter arraigned before Court with the charge of defilement which he denied terming as a stranger to the charge.

10. Upon analysis and evaluation of the prosecution case and considering the appellant's defence the Learned trial Magistrate convicted the appellant and sentenced him to serve life imprisonment.

11. Aggrieved by the conviction and sentence the appellant preferred the appeal setting out 5 grounds of appeal in a petition of appeal dated 10th December 2014, however when the appeal came up for hearing the appellant put on supplementary grounds of appeal which he now relies upon. The supplementary grounds of appeal has four(4) grounds of appeal being as follows:-

> ***a) That the learned trial Magistrate erred in law and fact by failing to appreciate that the prosecution case was not only insufficient but was unreliable discredited, fabricated, speculative, conjecture and lacked probative values to warrant a conviction.***
>
> ***b) That the learned trial Magistrate misdirected himself in law and fact by overlooking the material factors in the instant case and thus putting much consideration into immaterial factors to base a conviction which was unsuitable and unsustainable in the interest of justice.***
>
> ***c) That the learned Magistrate and trial Court misdirected itself in law and fact by failing to invite the doctrine of the provision of Section 36 of the Sexual Offences Act No. 3 of 2006 in determining the present case which was unsafe and unsatisfactory.***
>
> ***d) That the trial Court erred in law and fact by rejecting the appellant's alibi defence which was cogent and/or sufficiently created a reasonable considerable amount of doubt as to strength of the prospection case.***

12. This is the first appeal and being first appellate Court I have the duty and obligation to re-evaluate and re-analyze the evidence that was adduced at the Lower Court to enable me reach my own conclusions. When doing so I have to bear in mind that I never had the opportunity to observe or hear the witnesses give evidence and observe the manner and demeanor of the witnesses. Those basic principles were set down in the case of **Okero V. Republic (1973) E.A. 32** where Court of Appeal set out the duty of the first appellate Court in the following terms:-

> ***"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination [Pandya V. Republic (1957) E.A. 336] and to the appellate Court's own decision or the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwola V. Republic [1957] E.A. 570) It is not the function of the first appellate Court merely to scrutinize the evidence, to see if there was evidence to support the lower Court's finding and conclusions it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had an and advantage of hearing and seeing the witnesses, (see Peters V. Sunday Post [1958] E.A. 424.)"***

13. The appellant appeared in person and during the hearing of this appeal he tendered his written submissions and added that he was relying on the supplementary grounds of appeal which he tendered together with his written submission:- In his written submission he submitted that he was not subjected to

medical check up promptly and when first report was made at the same time with the complaint and DNA test should have been conducted as it is one of the best test in cases under the **Sexual Offence Act**. He also urged all exhibits such as assorted clothes and pants which complainant was wearing at the time of the alleged incident were not produced. The appellant also raised a defence of *alibi* which he submitted was not considered by the trial Court.

14. Mr. Ombati learned State Counsel appeared for the State. He opposed this appeal and submitted that the DNA test was not necessary as the victim was 8 years old and there was no evidence of her having become pregnant and as such he submitted the issue of DNA did not arise. He submitted the prosecution evidence from PW1 and PW2 was consistent and there were no contradictions on who did what. That appellant's defence he submitted PW1 and PW2 placed the appellant at the scene of crime. He further submitted there was no allegation of existence of grudge between PW1 and PW2 in his evidence. That PW1 and PW2 depended on the appellant as the bread winner and had no grudge or reason to frame him. He referred to the case of **Erick Onyango Ondeng' V. R. (C.A.) CRA No. 5 of 2012** dealing with fair trial. The learned Counsel went on to submit that as there are no material contradictions the appeal should be dismissed. On sentence Mr. Ombati learned State Counsel urged the victim was aged 8 years. That the appellant had initially been tried, filed appeal to the High Court and then to Court of Appeal which ordered retrial in **Court of Appeal Criminal Appeal No. 278 of 2010** vide its order of 21.2.2013. That the retrial was conducted in the lower Court in **SPMCRC Case No. 108 of 2013** where judgment is subject of this appeal. He urged the sentence imposed by the trial Court of imprisonment for life is lawful and proper and Court's hands are tied by law. He urged that the Court cannot interfere with the same urging the Court to uphold the conviction and the sentence.

15. The appellant's ground of appeal Nos 1 and 2 deal with the evidence of the prosecution evidence in support of the charge of defilement and I shall combine the two grounds and deal with the same altogether as one ground.

16. An offence of defilement can be proved by proving the three ingredients namely identification, penetration and lack of consent from the victim. In the instant case the offence took place at 2.00 p.m. when it was broad daylight at the home of the parents of PW1. The appellant conviction was based on evidence of recognition by PW1, PW2 and PW3. It was also based on evidence of penetration through evidence of PW1, PW2, PW3, PW4, PW5, PW6 and PW7 and lack of capacity by PW1 to give consent as per evidence of PW1, PW2, PW3, PW4, PW5, PW6 and PW7.

17. It is important in my view when assessing the evidence of recognition of the attacker as for the Court to examine the conditions of lighting at the time recognition is made, the duration of the offence, and the distance of the attacker from the complainant amongst other factors to satisfy oneself that the conditions that prevailed at the time were conducive for positive recognition of the attacker(s).

18. In the case of **R V. Turnball and 2 others. (1973) 3 ALL ER 549**, the Court considered what factors the Court should take into account when the only evidence turns on identification by a single witness. The Court stated:

> ***" …. the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made, how long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in anyway ….? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the Police? Was there any material discrepancy between the description of the accused given to the Police by the witness when first seen by them and his actual experience? Recognition may be more reliable than identification of a stranger, but even when witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made?"***

19. My observation is that PW1's evidence is that she knows the appellant very well as her mother's husband. That he talked to her and asked her to go to the house where he followed her. He undressed

PW1. The appellant removed his penis and inserted it into PW1's vagina. It was day time and PW1 was able saw the appellant and gave his name as KOA. PW1 testified she was defiled for one hour. PW1 had the appellant under her observation for about 1 hour from close range as he defiled her. It was day time. There was nothing impending her sight. She knew her assailant as he was her mother's husband for some years which she could not remember. PW2 on arrival at her home on 23.4.2008, she heard PW1 crying from inside of her house and on entering the house she found the appellant, her husband, having sex with PW1 on PW2's bed. PW1 was bleeding from her vagina and without her underwear, the appellant walked out. PW3 who was PW2 found PW1 naked with her pantie on bed and appellant's trouser halfway down. PW3 and PW2 were able to see KOA, the appellant with PW1 in the bed as it was day time. They knew him very well. PW3 called PW4 an Assistant Chief and told him PW1 had been defiled by the appellant. PW7 testified that the complainant PW1, PW2, PW3 gave him the name of the defiler of PW1 as KOA.

20. The learned trial Magistrate in his judgment partly stated:-

> ***"First and foremost the incident under interrogation occurred in broad daylight --- PW2 and PW3 had the God given resource of natural light to identify the accused is not in question. Second. The accused was well known to the complainant. He was her step father. She had lived with him for quite some time."***

21. In the case of **Wamunga V. R. (1979) KLR 424** it was stated where the only evidence against the defendant is evidence of recognition, a trial Court is enjoined to examine such evidence carefully to be satisfied that the circumstances of recognition were favourable and free from possibility of error because it safely make it the basis of conviction. In case of **Simiyu & Another V. R. [2005] 1 KLR 192** it was stated that there is no better mode of identification than by name and when a name is not given then there is a challenge on the quality of the identification and a great danger on mistaken identity arises.

22. In the instant case the commission of the offence was during broad day light, the incident took more or about an hour, the appellant was well known to witnesses PW1, PW2 and PW3, PW2 and PW3 found him in the very act of defiling PW1 at PW2's bed. I am satisfied from the circumstances of this case that the circumstances of recognition were favourable. The appellant was recognized and his name given to PW4 and PW7 by PW1, PW2 and PW3. I find that there is no challenge to the quality of identification nor of evidence of mistaken identity. The assailants was recognized by PW1, PW2 and PW3 as the appellant and no other.

23. The **Sexual Offences Act under Section 2 (1)** defines penetration as follows:-

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

24. PW1 testified that the appellant removed his penis and inserted it in her vagina PW2 testified she walked in on her husband, the appellant, having sex with PW1 on PW2's bed. PW1 was bleeding from the vagina. PW2 testified she found the appellant on top of PW1. PW3 found PW1 without pantie and the appellant's trouser halfway down. PW1 had blood oozing from her private parts. PW5 noted lacerations on lower vaginal walls of PW1, presence of whitish discharge and presence of spermatozoa cells. He concluded PW1 had been defiled. PW6 testified he examined PW1 and found blood at the vulva extending to the thighs with laceration on vaginal walls and also found presence of spermatozoa with yeast cells. He stated PW1 has been defiled.

25. The trial Magistrate noted in his judgment as follows:

> ***"The treatment note, laboratory tests report and P.3. form issued produced as prosecutions exhibits --- from them there is totally no doubt that penetration was achieved----"***

26. I have carefully considered the evidence of PW1, PW2, PW3, PW5 and PW6 as well as the exhibits specially P.3 form and I have no doubt from that evidence that penetration was proved beyond any reasonable doubt.

27. On the ingredient of consent **Section 42 of the Sexual Offences Act No. 3 of 2006** provides:

"42 (3) False pretences or fraudulent means, referred to in subsection

(1) (b) include circumstances where a person;

(a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;

(b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or

(c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected

by HIV or any other life-threatening sexually transmissible disease"

Further **Section 43 (4) (f) of the Sexual offences Act provides**:

*"**43(4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (I) include circumstances where such a person is, at the time of the commission of such act -***

(f) a child."

28. The complainant in this case PW1 at the time of commission of the offence was in class II and aged 8 years. She was born on 6.4.1999 as per birth certificate exhibit P.1. PW7 produced PW1's birth certificate as exhibit P1. That in 2008 PW1 was aged 8 years and below 18 years and a child as defiled under **Section 2 of the Children Act (Cap 141)** which states:-

"Child" means any human being under the age of eighteen years."

In the instant case there is no claim PW1 consented to Sex and even if that was so,PW1 being a child had no capacity to consent to sex. I therefore find the ingredient of lack of consent was proved to the required standard by the prosecution.

29. The learned trial Magistrate in his judgment had this to say:-

"The complainant was a nine year old child as at the time of the offence in question. There is really no contention about the complainant's age as at the time it is alleged that she was defiled."

30. The appellant's contention that the trial Court did not appreciate that the prosecution case was not only insufficient but was unreliable, discredited fabricated, speculative, conjecture and lacked probative value to necessitate a commotion is incapable of being supported by the prosecution evidence. I find the learned trial Magistrate did not mis-interpreted the evidence nor misdirected himself in law and fact as alluded to by the appellant. He did not overlook the material factors in considering this matter and in arriving at his judgment as submitted by the appellant. The appellant in his submissions did not point out what were the areas of law in which the learned trial Magistrate misdirected himself or what material factors he overlooked. To the contrary I find that the three ingredients of an offence of defilement were proved beyond reasonable doubt. I find the appellant was recognized as the defiler of PW1, by PW1, PW2 and PW3 who placed him at the scene of the incident; the prosecution proved the ingredients penetration and lack of consent by PW1 to have consent. Indeed PW1 testified how the appellant forced himself on her. There was sufficient evidence from PW1, which was corroborated by PW2, PW3, PW4, PW5, PW6 and PW7 to warrant conviction. I therefore find and hold the appellant's ground of appeal No. 1 and 2 are without merits and I dismiss them accordingly.

31. The appellant in ground No. 3 faults the trial Magistrate for failing to invoke **Section 36 of the Sexual Offences Act No. 3 of 2006**. **Section 36 of the Sexual Offences** Act Provides:-

> ***"(36) (1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the Court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the Court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."***

32. The above Section in my mind cannot be dealt with in isolation of **Section 26 of the Sexual Offences Act**. Section 36 of The **Sexual Offences Act deals** with evidence of Medical or forensic nature. It deals with obtaining appropriate sample or samples from the accused person for the purpose of forensic and other scientific testing including DNA test in order to gather evidence and to ascertain whether or not the accused person committed an offence. That procedure may be relevant and of great importance where an accused is facing an offence under **Section 26 of the Sexual Offences Act**. Thus where the accused is alleged to have infected the complainant with HIV or any other life threatening Sexually transmitted disease intentionally, knowingly and unlawfully or does anything or permits the doing of anything or permits the doing of anything which he or she know or ought to reasonably know will infect another person with HIV or of other threatening Sexually transmitted disease amongst other conditions as set out under the said Section. **Section 36 of the Sexual Offences Act** is not of mandatory application in other sexual offences. Further it is not a mandatory Section as the word used under the Section is "may direct." My view is that in Sexual Offences Act where an offence can be proved by direct evidence or other means it is not mandatory to subject an accused person to provisions of **Section 36 of the Sexual Offences Act.** The Learned trial Magistrate did not err or misdirected himself in law and fact by failing to apply the provisions of **Section 36 of the Sexual Offences Act** in determining the case before him as there was other sufficient evidence linking the appellant with the offence and which evidence was properly considered. I find no merits in appellant's ground No. 3 of appeal.

33. The appellant's fourth ground of Appeal his that is defence of alibi which was cogent was not considered. The Learned trial Magistrate in his judgment stated

> ***"it in the circumstances, I reject the accused person's defence with totality. If anything he does not dispute having been present at the scene of the crime on the material day."***

34. I have carefully considered the appellant's unsworn defence the defence in my view is not a defence of alibi as the appellant was at the scene of crime at material time of commission of this offence only that he is denying having committed the offence. The appellant did not raise his purported defence of alibi early enough but only in his unsworn defence. He did not challenge the evidence of any of the prosecution witness on his alleged defence of alibi through cross-examination. He did not put it to the prosecution witnesses, even after PW1 confirmed she was defiled by him and further when PW2 and PW3 testified they found him in the very act. He did not challenge PW1 that she was defiled by someone else other than himself. PW1, PW2 and PW3 placed the appellant at the scene of the incident. In his defence he stated that he had no grudge with the prosecution witnesses. I find his defence is nothing more than a mere denial and an afterthought. The trial Court considered his defence and rejected it as the appellant did not deny being at the scene of crime. I find the defence was considered and rightly rejected. I find no merits in ground No. 4 of the appeal and I proceed to dismiss the same.

35. **The upshot is that the evidence of PW1 was materially corroborated by PW2, PW3, PW4, PW5, PW6 and PW7 and I find that there was overwhelming evidence in support of the prosecution's evidence. Having considered the totality of the evidence tendered by both sides in this case, I find the prosecution evidence was overwhelming, to found a conviction, that it was indeed the appellant who viciously defiled PW1. I uphold the conviction and confirm the sentence. This appeal lacks merits and is dismissed.**

DATED AND SIGNED AT SIAYA THIS 10TH DAY OF DECEMBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 10TH DAY OF DECEMBER, 2015.

In the presence of**:**

M/s. M. Odumba holding brief for Mr. Ombati State Counsel.

Appellant – Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

J. A. MAKAU

JUDGE