E.M..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

J U D G M E N T

The appellant was charged with the offence of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No.3** of **2006.** The particulars of the offence were that on the 29th day of July 2010 at S[...] in Kakamega East District within Western Province, the appellant unlawfully inserted his genital organ namely penis into genital organ namely vagina of L A, a girl aged 11 years.

Being dissatisfied with the conviction the appellant preferred this appeal. The grounds of appeal are that:

- The prosecution evidence did not disclose any or an offence.
- The trial magistrate erred in sentencing the appellant for defilement of a child aged over 11 years but less than 12 years where there is no sentence prescribed therefor under the Sexual Offences Act No. 3 of 2006 or at all.
- The charge of defilement could not be sustained in view of the clear definition of penetration as given under Section 2 of the Sexual Offences Act No. 3 of 2006.
- The trial court failed to discredit the medical evidence adduced when the same was contradictory, insufficient and so weak as to be believed.
- The trial court failed to make the usual presumption when there were alleged witnesses who could be called but were not called for no reason at all.
- The trial court's judgment is casual, perfunctory and does not contain the point or points for determination contrary to the requirements of the law.

Mr. Nyikuli, counsel for the appellant in his submissions elaborated on each ground of appeal. Counsel submitted that since the complainant was born on 10th August 1998, she was therefore 11 years 11 months and 19 days at the date of the alleged defilement and this meant that she was neither 11 years nor 12 years. Section 8 of the Sexual Offences Act No. 3 of 2006 only prescribes penalties for victims of defilement aged between 0-11 years, 12-15 years and 16-18 years. The trial court sentenced the appellant to serve 20 years as though the complainant was 0-11 years and that was wrong.

Learned counsel for the appellant contends that the charge sheet did not disclose any offence of defilement. The offence can only be committed when there is penetration and penetration is clearly defined under **Section 2** of the Act to mean partial or complete insertion of the genital organs of a person into the genital organs of another person. Counsel's main dispute is that the charge sheet referred to genital organ and not organs as what is provided in the charge sheet is appellant's genital organ into the

genital organ of PW1 – the complainant. This fell below the legal penetration as defined by the Act.

Counsel further maintains that the prosecution evidence was not upto the required standard. The alleged offence occurred at a market place. The complainant allegedly fled but slept over it without informing her mother (PW2) and the witness who allegedly saw the appellant pulling the complainant was not called. On this point counsel relied on the case of **SHAZAD & 2 OTHERS VS REPUBLIC]1998] KLR 282**.

The appellant contends that the medical evidence was unworthy of credit. It contradicted the evidence of PW1 and PW2 as PW3, the medical officer testified that PW1's pant was dry, torn and had bloodstains yet according to PW2 the pant had been washed. PW3 allegedly did some lab tests that were not produced. PW3 alleged that PW1's hymen was broken but that is not recorded in the P3 form and the epithelial cells and sperms found in PW1 were not from the appellant.

Counsel for the appellant further submitted that the evidence of PW1 required corroboration which was lacking yet the trial court did not warn itself against the danger of convicting upon uncorroborated evidence of a child especially so far as sexual offences are concerned. The appellant raised a defence of alibi and this was not considered. The appellant relied on the cases of **ODHIAMBO VS REPUBLIC]2005] 1 KLR 564, BWANEKA VS UGANDA [1967] E.A. 768, JUMA NGODIA VS REPUBLIC [1982 -1988] 1 KAR 454** and **GANZI & 2 OTHERS VS REPUBLIC [2005] 1 KLR 52.**

Mr. Orinda, learned State Counsel opposed the appeal. Counsel submitted that the prosecution evidence was sufficient and proved the case as required. The appellant was well known to the victim having been neighbours and the defence confirmed that fact. The complainant's age is not an issue as a baptismal card was produced which gives the complainant's age to be between 11 – 12 years. Although the police officer did not testify, the conviction was safe and that the medical evidence corroborated the evidence of PW1.

The proceedings show that only three witnesses testified. PW1 L A was the complainant. Her evidence was that on the 29th July 2010 at about 7.30 p.m. she was at the S[...] market. She had to attend to a call of nature. She lived in the same compound with the accused near the market. After completing her call she decided to go back to the S[....] market. The appellant asked her to pass through a route that goes behind the Library and she went with him

The complainant's further evidence is that when they reached near the library, the appellant held her by the neck and took her behind the library. The appellant produced a knife and threw her down threatening to kill her. He removed her pant and opened his zip and inserted his penis into her vagina. When the appellant found she was bleeding he stood up and told her to go away with a threat to kill her in case she informed her mother.

The complainant went to S[...] market where her mother was, she did not inform her mother and slept. In the morning her beddings had blood and decided to clean them. PW2 confronted her, and she had to tell her the alleged defilement. She was taken to Kakamega Provincial Hospital where she was treated. A P3 form and a post rape care form were filled later. According to PW1, she was born on 10th August 1998 and on the material day she passed the appellant and his wife at the gate of the compound.

PW2, J A is the mother of PW1. On 29th July 2010 she was at the S[...] market at about 6.20 p.m. with PW1. PW1 went home to attend to a call of nature. PW2 waited for her upto about 7.45 p.m. but by then she had not returned. PW2 decided to check her at home but did not find her and on returning to the market, PW2 found PW1 who told her that she had a stomachache. In the morning, PW2 found blood on some clothes PW1 had socked as well as PW1's pant. A lady by the name V informed PW2 she had seen the appellant pulling PW1 the previous evening. PW2 confronted PW1 who informed her that the appellant had defiled her the previous evening. P2 further testified that she took PW1 to hospital and reported the matter to the police.

PW3, FRANCIS WASIKE, a clinical officer based at the Kakamega Provincial General Hospital

examined the complainant and concluded that she had been defiled.

The appellant was put on his defence. He denied committing the offence in his sworn testimony. The appellant testified that on the 29th July 2010 at about 6.30 p.m. he was at home with his wife (DW1). The appellant's evidence is that PW2 wanted him to be her lover but he refused. PW2 would go to his house whenever the appellant's wife was away. PW2 was his neighbour for about two years and that PW2's reputation was so bad that she had to move from S[...]. The appellant heard about the alleged defilement on 4th August 2010 when police officers went to his house.

DW2, A A+ is the appellant's wife. Her evidence is that on the 29th July 2010 at about 6.30 p.m. she was at home cooking while the appellant was watching television. The appellant did not go out that evening. DW1's further evidence is that PW2 wanted her husband (the appellant) and that PW2 used to look for people's husbands to befriend. PW2 was their neighbour for two years and there is a library about 50 meters from the house.

In dealing with the issues raised in the petition of appeal, I will start with ground two (2) of the petition of appeal. The appellant contends that the age of the complainant falls within 11 – 12 years. At the time of the alleged offence, the appellant was 11 years, 11 months and 19 days. The Sexual Offences Act No. 3 of 2006 according to the appellant does not prescribe punishment for that age bracket. The trial court in its judgment captured that part of the appellant's contention and held that *"in law a person is some years old after he completes that year and not before."* Section 8 of the Sexual Offences Act No. 3 of 2006 provides for punishment for an offence committed against someone who is less than 11 years, between 12 years and fifteen years and between sixteen and eighteen years. I do find that the trial court correctly interpreted the provisions of Section 8 of the Act. It was not the intention of the law that any child aged between 11 to 12 years or between 15 to 16 years would not invite punishment should he or she be a victim of defilement. The preamble to the Sexual Offences Act No. 3 of 2006 provide as follows:

"An Act of Parliament to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful acts, and for connected purposes."

It was not the intention of the law to leave scot free those who

defile minors aged between 11 – 12 years. The contentions by the appellant relating to non-prescription of punishment for victims falling within the age bracket of 11 – 12 years is misplaced. All unlawful acts must be punished as per the pre-amble of the statute and the complainant was eleven years as she had not turned twelve years.

The next issue raised by the appellant is ground three (3 which states that the charge of defilement against the appellant would not have been sustained in view of the definition of penetration as given under Section 2 of the Sexual Offences Act No.3 of 2006.

Section 2 of the Sexual Offences Act define **penetration as the partial or incomplete insertion of the genital organs of a person into the genital organs of another person.** The same Section defines "genital organs" to include the **whole or part of male or female genital organs and for purposes of the Sexual Offences Act includes the anus. Section 8(1)** of the Act states that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

The appellant contends that the charge sheet states that the appellant inserted his genital organ into the genital organ of the complainant and therefore the particulars do not disclose legal penetration as defined under the Act, thus rendering the charge defective. The appellant raises two issues in this ground. Firstly, the issue of genital organs and secondly, penetration as defined by the Act. On the first issue the appellant's submissions put emphasis on the word organ in the charge sheet and the fact that the appellant is alleged to have inserted his organ. In other words whereas the Sexual Offences Act provide for insertion of "**organs"**, the charge sheet simply used the word *"organ"*. The charge sheet ought to have used the word "*organs"* as per the appellant.

Given the definition of "*genital organs*" by **Section 2** of the Sexual Offences Act, the contentions by the appellant are misplaced. Genital organs as defined by the Act does not mean several organs of the victim or the accused. The Act provide that genital organs include the whole or part of male or female genital organs. It is a matter of notoriety that with a few exceptions, each human being has one genital organ and for purposes of the Sexual Offences Act, the second genital organ is the anus.

The Sexual Offences Act includes part of a male or female genital organ as genital organs. For the males, that would include the penis and the testicles and for the female that would include the vagina, its vulva and the clitoris. I do not wish to labour much on the definition of the term genital organs and do find that the appellant's contention that the charge sheet only provided for the word "*organ*" and not "*organs*" as out of this world.

Secondly, turning back to the issue of penetration, the Sexual Offences Act defines penetration to mean partial or complete insertion of the genital organs of a person into the genital organs of another person. The charge sheet states that the appellant unlawfully and intentionally inserted his genital organ namely penis into genital organ namely vagina of the complainant.

The concise Oxford English Dictionary (Eleventh Edition) defines the word insert as **place, fit or incorporate (something) in something else.** The Sexual Offences Act provides that penetration can be partial or complete insertion. The prosecution would have to prove that indeed the accused penetrated the complainant either partially or completely. From the wording of the charge sheet, I do find that the charge sheet was not defective. It did provide for the word "*insertion*" which is part of the definition of penetration. Whether the insertion was partial or complete would be a matter of evidence and does not need to be stated in the charge sheet.

On ground four of the grounds of appeal, the appellant states that the trial court failed to discredit the medical evidence which was contradictory, insufficient and so weak as to be believed. **PW3, FRANCIS WASIKE** produced the medical evidence. He is a clinical officer who was based at the Kakamega Provincial General Hospital. According to his evidence, the complainant had a bruise on the anterior aspect of the neck. She had swelling and bruises on the labia majora. She was bleeding from the vagina. A vaginal swap and analysis revealed the presence of epithelial cells and spermatozoa. He did a HIV test and it was negative. He filled in the P3 form and the post rape care form. According to PW3, there was penetration and there was swelling at the lips of the vagina and did establish that the complainant was a virgin prior to the incident as her hymen was broken as indicated in the post rape care form report.

Counsel for the appellant contends that the epithelial cells and sperms found in the complainant were not linked to the appellant. the alleged lab tests were not produced. Counsel submits that the evidence of PW3 does not point to the appellant nor does it establish that an offence was committed. According to PW3, the complainant's pant was handed to him and it was dry with blood stains yet the complainant and her mother PW2 testified that the pant had been washed.

From the proceedings, PW3's evidence was based on the examination by the witness on the complainant. What the witness stated is what he found after examining the complainant. I do agree with the submissions by the appellant's counsel that the complainant's pant had been socked in water and could not have been handed to PW3 when dry, but it could still have had blood stains as there is no evidence that the socking had cleaned the blood stains. PW2 testified that she saw blood on the pant of PW1. That finding however cannot replace the results of the medical examination by PW3. When PW3 was examining the complainant, he did not know who had defiled her and cannot be held to have tailor made his report in favour of the complainant. PW3 would not have given a report different from what he saw and established after medically examining the complainant. The evidence of PW3 does not point out that it is the appellant who committed the offence but does establish that indeed the complainant was defiled. The trial court was therefore correct in taking into account that evidence. The examination by PW3 was on the body of PW1 and not on the pants.

The appellant contend that crucial witnesses were not called to testify for no reason and this could

be taken to mean that their evidence would have been adverse to the prosecution case. The proceedings establish that the investigating officer did not testify as well as a lady by the name V who allegedly saw the appellant pulling the complainant. Counsel relied on the case of **Juma Ngodia vs Republic** and that of **Shazad & 2 Others v Republic**.

The charge sheet shows that one police constable (woman) W was to be one of the witnesses. She did not testify as the prosecution was granted a last adjournment and the witness was not in court during the date she was expected to testify. This made the prosecution to close its case. PW2 testified that she was informed by a lady by the name V that she (V) had seen the appellant dragging the complainant behind S[...]Library. In its judgment, the trial court noted that V did not testify. The judgment of the trial court does not show that it was based on the allegations of V that she saw the appellant pulling the complainant behind the library. The judgment is based on the evidence of the three witnesses who testified.

From the proceedings and the judgment, I do find that the fact that V was not called to testify or that the investigating officer didn't adduce evidence did not prejudice the appellant's case. The non-appearance of the two witnesses cannot be taken with finality that their evidence was prejudicial to the prosecution. Each case has to be analysed on its own facts. Indeed the appellant had the opportunity to call for the witness statements and could have sought the production of the statement of the investigating officer if he felt that it was going to assist his case. That could not have been taken to mean that the burden of proof was being shifted as the appellant once put on his defence had a duty to discredit the prosecution case or exercise his right to keep quiet. I do find that the fact that V and P.C. W did not testify did not prejudice the defence case and it could not be presumed that their evidence would have disproved the prosecution case. Even if V were to testify that she did not inform PW2 that she had seen the appellant pulling the complainant, still there was the allegations of the complainant that she was pulled by the appellant and the court's judgment, as indicated herein, is based on the entirety of the evidence adduced.

On ground six, the appellant submit that the judgment did not give the reasons for the conviction or the points of law to be determined contrary to the provisions of Section 169 of the Criminal Procedure Code. Under Section 169 of the Criminal Procedure Code a judgment should contain points for determination, decision and reasons for the decision. The trial magistrate in his judgment picked out three points for determination and these are, as per the judgment.

1. Whether L A is a child aged 11 years.

2. Whether L A was defiled on 29th July 2010 at 7.30 p.m. or

3. Whether it was the accused who defiled and/or did indecent Act with her.

For purposes of Section 169 of the Criminal Procedure Code, I do find that the trial court in its judgment established the points or issues for determination. The trial magistrate further analysed the evidence and made findings relating to the age of the complainant, the medical evidence, the appellant's defence and the final decision. I do hold that the judgment satisfies the requirements of Section 169 of the Criminal Procedure Code.

Other than the above issues, the main remaining point for determination is whether the prosecution proved its case as required by the law. The appellant in his ground one of the appeal states that the prosecution evidence did not disclose any or an offence.

Three witnesses testified for the prosecution. **PW1 L A** was the complainant. Her testimony as indicated herein was that on the 29th July 2010 at 7.30 p.m. she was at S[...] market when she decided to go home for a short call. After using the toilet she decided to go back home and the appellant who is a neighbour advised her to use another route that goes behind the library. On reaching near the library the appellant grabbed her by the neck and took her behind the library, removed a knife and threatened to kill her if she screamed. The appellant removed her pant, opened the zip of his short and defiled her. She bled and was threatened with death. She slept and didn't inform her mother. The following day she found blood on her

beddings and as she was cleaning the blood her mother saw it and on inquiry she didn't tell her the truth. Her mother was heading to the market and later came back and confronted her about the incident. PW1 had to tell her mother her story and was taken to Kakamega Provincial Hospital.

PW2 J A is the mother of the complainant. She was with PW1 on 29th July 2010 at about 6.30 p.m. at S[...] Market when PW1 told her that she was going home for a call. She waited and by 7.45 p.m. she had not returned. She went home to check PW1 but did not see her and when she returned to the market she saw PW1 seated and on inquiry PW1 told her that she had stomachache. The following morning PW2 saw PW1 had socked her clothes and noted blood in the water. She picked up the pant and saw it had blood. PW2 was later informed by one V that she had seen the appellant pulling the complainant near the library the previous day. PW2 confronted PW1 who informed her that the appellant had defiled her the previous evening. PW2 took PW1 to Kakamega Provincial General Hospital.

PW3 examined PW1 and found that she had been defiled. PW3 filled the P3 form and the post rape care form. According to PW3, there was penetration and PW1's hymen was broken.

That evidence has to be weighed against the defence evidence. The appellant testified that on the 29th July 2010 he was at his house watching television at about 7.00 p.m. He was with his wife, DW2. The appellant denied having defiled the appellant and stated that the library that is near his home is surrounded by a perimeter wall. The appellant alluded to the allegations of the complainant and her mother to attempts by PW2 to be the appellant's lover which attempts were declined by the appellant. The appellant did confirm that he was a neighbour to the complainant. The Administration Police officers went to his house in August and he was not arrested until two months later when he was summoned to the District Officer's office.

DW1, A A. is the wife of the appellant. Her evidence is that she is a neighbour to PW1 and PW2 as their rented rooms face each other. According to DW1 she did not see the complainant on the 29th July 2010 in the evening. DW1 was cooking while the appellant was watching television. According to DW1, PW2, the complainant's mother had the habit of looking for people's husbands and would jump from one man to another. PW2 was chased away from S[.....] because of that habit. PW2 has been her neighbour for about two years.

The prosecution evidence does establish that PW1 was defiled. The medical evidence contained in the medical treatment notes, the P3 form and the post rape form does show that the complainant was defiled. The main issue is whether it was the appellant who defiled her. According to both the prosecution evidence and that of the defence, the complainant is a neighbour to the appellant. The two parties lived in the same compound. The complainant's testimony is that as she had finished her call of nature and was going back to S[....] market, the appellant convinced her to use another route that passed behind the library. The complainant further states that the appellant removed a knife and threatened to kill her if she were to scream or inform her mother. She was scared and that is why she did not inform her mother until when her mother found out. Can the evidence of PW1 be taken to have been made with the intention of revenging for her mother whose attempts to befriend the appellant were thwarted by the appellant? what about the medical evidence? Was it part of the same scheme to punish the appellant?

From the prosecution evidence, I am satisfied that it was the appellant who defiled the complainant. There is no good reason as to why the complainant could falsely allege to have been defiled. The medical evidence proves that PW1 was defiled. PW1 knew the appellant. The defence evidence confirms that the appellant was at home that evening and that was not a mere coincidence. There is no evidence of alibi by the appellant to show that at the time of the alleged offence he was far away from the scene. The appellant contends that the offence was allegedly committed at or near a market place or next to rented houses on a foothpath yet no one witnessed. The fact that no one witnessed the incident does not disprove the complainant's allegations. The allegations that the complainant's mother intended to have a love relationship with the appellant does not discredit the prosecution evidence on the defilement of PW1. The defence evidence could only discredit the prosecution evidence if it were shown that the complainant was not defiled. However the medical evidence proved that indeed the complainant was defiled.

It is the submission by counsel for the appellant that the evidence of PW1 required corroboration. **Section 124** of the Evidence Act, Cap 80 Laws of Kenya provide as follows:

124.*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."

From the above Section, it is clear that the evidence of a defiled minor does not need corroboration. If the court is satisfied by the evidence of the victim, whether such a victim is a minor or not, the court can convict the accused. In the current case, the evidence of PW1 is corroborated by that of PW2 and PW3. PW2 saw blood coming from PW1's genital organs as well as the clothes that were socked in blood. PW3 examined PW1 and found that she had been defiled. The two witnesses, PW2 and PW3 did corroborate the evidence of PW1 and there was no need for the trial court to warn itself on relying on the evidence of PW1 before convicting the appellant. The conviction is based on the evidence of the three witnesses. Which evidence corroborates each other.

I do note that the investigating officer did not testify. It is not clear why it took long before the appellant was arrested. The investigating officer could have shed light on the investigations. The appellant contends that he was at home and yet he was not arrested while PW2 testified that the appellant went into hiding and she was chased away from S[....] not because of her alleged habit of pursuing people's husbands but because she had brought the appellant to court.

As I have already held hereinabove, the none attendance of the investigating officer does not establish that his/her evidence would have been detrimental to the prosecution case and also it did not prejudice the defence case.

The trial court held that the complainant was 11 years. However, the sentence meted out on the appellant is for the offence falling within **Section 8(3)** as opposed to **Section 8(2).** Had the court sentenced the appellant under **Section 8(2)** of the Act, the appellant would be serving life sentence. Although the court is empowered to alter the sentence, I do not wish to disturb the findings of the trial court on sentence.

In the end, I do hold that the appeal lacks merit and the same is disallowed. The appellant shall continue to serve his sentence of 20 years.

Delivered, dated and signed at Kakamega this 3rd day of May 2012

SAID J. CHITEMBWE
J U D G E