**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 29 OF 2017**

**JOSEPHAT KAMAU NJUGUNA……..…..... APPELLANT**

**VERSUS**

**REPUBLIC …….....….....……..….. RESPONDENT**

(Appeal against both conviction and sentence from the judgment of Hon. P. Mutua Senior Principal Magistrate, Nyeri delivered on 15th May, 2017 in Criminal Case No. 63 of 2015)

**JUDGMENT**

**FACTS**

1. The Appellant **Josphat Kamau Njuguna** was charged with the offence of defilement of a girl contrary to **Section 8 (1)(2)** of the **Sexual Offences Act;** the particulars of the charge are that on the 22nd October, 2015 at [particulars withheld] within Nyeri County, the appellant intentionally caused his member to penetrate the genital organ of **JWW** a child aged seven (7) years.

2. The alternative charge was that of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act; that on the same date and at the same place hereinabove mentioned the Appellant intentionally touched the private parts of **JWW** with his member.

3. The prosecution called a total of six (6) witnesses in furtherance of its case; the Appellant was convicted on the main count and was sentenced to life imprisonment;

4. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal together with his Grounds of Appeal which are as summarized hereunder:-

(i) The prosecution failed to call a crucial witness who was the brother of the complainant who is said to have witnessed the act;

(ii) The trial court erred in believing the doubtful evidence of the village elder who claimed he heard the complainant scream;

(iii) The medical evidence was not procedurally admitted; and was not in conformity with the provisions of Sections 33 and 77 of the Evidence Act;

(iv) The trial court rejected the Appellant's defence;

5. At the hearing hereof the Appellant was unrepresented and relied on his written submissions; whereas the State was represented by Prosecuting Counsel Mrs Gicheha who made oral submissions; hereunder are the parties rival submissions;

**APPELLANTS SUBMISSIONS**

6. The Appellant contends that with the omission of the words ***"as read with"*** rendered the Charge Sheet as being defective; that Section 8(1)(2) does not exist in the Sexual Offences Act;

7. When the case started ***'de novo'*** the complainant told the court that she was asleep in the same room with her brother and sister who were on a different bed and that the brother and sister never woke up; but the evidence previously adduced before the case started afresh was that the brother had heard her screaming and had come into the room and put on the light; the Appellant then threatened him with a beating and the brother had put off the light and left; the Appellant faulted the trial court for finding that the failure to call this prosecution witnesses together with the persons who were with **PW3** was not fatal to its case as they had not witnessed the incident;

8. **PW3** had clearly indicated that he was with others who were not disclosed; the prosecution never called these crucial witness; he relied on the case-law of **Bukenya & others vs Uganda (1972) EA 549**;

9. The trial court also improperly invoked the provisions of Section 124 of the Evidence Act;

10. The complainant in her evidence stated that the Appellant **"did bad manners"**; that the use of such words didn't prove that penetration took place in accordance to Section 2 of the Act; **PW6** Dr Sharon Kiruru Ngonyo who examined the minor did not give the alleged age of the injuries to the genital organs of the victim; and Section 33 and Section 77 of the Evidence Act was not complied with before the doctor testified;

11. That the evidence of **PW1, PW2** and **PW3** was filled with inconsistencies and contradictions that left doubts;

12. The Appellant gave a sworn statement of alibi defence and called no witnesses; he stated that the mother of the minor (**PW2**) confirmed in evidence that she was his friend; his contention was that this friendship resulted into a grudge because of his unwillingness to pay school fees; this led to him being framed; the trial court rejected his defence evidence on the existence of a grudge that led to him being framed by **PW2**; that this evidence displaced the prosecution's case;

13. He urged this court to re-assess and re-evaluate the evidence and to allow the appeal in its entirety; and that the conviction be quashed and sentence be set aside.

**RESPONDENT'S SUBMISSIONS**

14. In response the respondent made the following submissions; counsel gave a summary of the evidence of the prosecution witnesses; the evidence of **PW1** was that on the material date she was at home with her brother and sister when the Appellant called in for supper; that he had a daily habit of eating there but never slept there; on this particular night the Appellant ate but did not leave instead he turned up the volume of the radio;

15. Whilst she was asleep the Appellant came and forcefully removed her clothes and also removed his clothes and '***did bad manners***' to her; that she was screaming and crying and this made her brother to wake up and turn on the lights; the Appellant threatened him with a beating so he put the lights off; the Appellant then continued defiling her and she continued to scream; the Appellant then left the house after threatening that he would kill her if she told her mother;

16. She didn't tell her mother about the incident but her mother saw that her panties and private parts had blood; she then told her that it was the Appellant who had defiled her; she was taken to hospital by her mother for examination;

17. In her evidence **PW2** stated that the Appellant was her boy-friend and confirmed that he used to come over for supper on a daily basis; and on this particular date it was not unusual for him to have been there; at 6.00pm that day she went to open her kiosk and upon her return she found **PW1** crying and she discovered blood on the minor's private parts; in the presence of a neighbor the minor told her that it was the Appellant who had defiled her;

18. Upon taking the minor to hospital they encountered the appellant at the hospital gates and he tried to stop them; her testimony was that from the date of making the report the Appellant kept begging to be forgiven which she declined;

19. **PW3** stated that he was a neighbor and a caretaker of the premises where **PW2** lived; he corroborated the evidence of the minor in that he heard the radio tuned to a high volume and he heard a child crying in **PW2's** house; that he knocked on the door but no one opened; he sat outside and later the Appellant came out of the house and left; he never talked to the Appellant; the following morning **PW2** called him and this confirmed to him that the Appellant defiled the child;

20. **PW6** was the examining doctor and found that **PW1** had minor injuries and bruises on her external genitalia and there were pus cells and urine; her hymen was perforated; she treated the minor and made a conclusion that there was evidence of defilement; the P3Form was duly filled on the 26/11/2015 but this was not the date of examination;

21. **PW4** was the arresting officer and he arrested the appellant on the 4/11/2015 at Whispers Park in Nyeri and it was **PW2** who pointed him out; **PW5** was the Investigating Officer who carried out the investigations and recorded the statements; and he also produced the Birth Certificate confirming the age of the minor to be 7 years

22. There were no inconsistencies in the evidence of **PW1** who was not shaken even under cross-examination; **PW2's** evidence was also consistent and there was no doubt raised in her evidence and she had no reason to frame the Appellant; on the age of the injuries **PW2** stated that the incident took place on 21/10/2015 at night and she took the child to hospital on the 22/10/2015;

23. The age of the minor was proved to be 7years; penetration was proved by **PW6** as narrated by **PW1**; and the Appellant was identified as the one who defiled the minor and was seen by **PW3** exiting from the house that night and the Appellant didn't deny his presence that night; there was no mistaken identity and the defiler was a person well known to **PW1**;

24. The Appellant's contention that the charge was defective as framed with the omission of the words as read with in between Section 8(1) (2); but this error can be cured by Section 382 of the Criminal Procedure Code by the addition of the words **"as read with";** and this correction will occasion no prejudice to the appellant;

25. The Appellant also contends that his defence was disregarded; that on the material date he didn't go to PW2's house as he was sick; and

that **PW2** was framing him because he had refused to marry her; but during cross-examination he had stated that it was because he had refused to pay school fees; but there was the evidence of **PW3** who saw him leave; the trial court rejected his defence, found him culpable and gave him the legal sentence;

26. Counsel prayed that the appeal be dismissed; and the conviction and sentence be upheld;

**ISSUES FOR DETERMINATION**

27. After taking into consideration the forgoing submissions made by the Appellant and those of the Counsel for the State, this court has framed the issues as set out hereunder for determination;

(i) Whether the Charge Sheet was defective;

(ii) Whether the prosecution failed to call crucial witnesses to testify; in particular the brother to the complainant;

(iii) Whether there were inconsistencies in the evidence of the prosecution witnesses;

(iv) Whether the medical evidence was admitted un-procedurally;

(v) Whether the prosecution proved its case to the desired threshold;

(vI) Whether the trial court disregarded the Appellants defence without giving sound reasons.

**ANALYSIS**

28. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses; reference is made to the case of **Okeno vs Republic (1972) EA 32.**

**Whether the Charge Sheet was defective;**

29. The Appellant contends that with the omission of the words ***"as read with"*** the Charge Sheet was rendered defective; that Section 8(1)(2) does not exist in the Sexual Offences Act;

30. The record indeed shows that the Charge Sheet reads that the Appellant was charged under Section 8(1) (2) of the Sexual Offences Act; but the omission of the words **"as read with"** in between the two sections does not mean that the offence that the Appellant was charged with was not disclosed; the Charge and the contents of Statement of Facts were set out in clear and unambiguous terms and sufficiently disclosed and established the nature of the offence that the Appellant was faced with as required by Section 134 of the Criminal Procedure Code; the Appellant knew the exact offence that he was alleged to have committed and faced with; the record also shows that the Appellant followed the entire proceedings and appreciated the evidence tendered against him; and that he was able to cross-examine all the prosecution witnesses; and was able to ably defend himself;

31. This court is satisfied that the particulars on the Charge Sheet clearly stated that the child was aged seven (7) years which places it within the provisions of Section 8(2) of the Sexual Offences Act; and finds that the omission of the words **"as read with"** did not occasion any miscarriage of justice as the Appellant was always aware of the charge against him and the particulars and the essential elements of the offence had been disclosed to him.

32. The ground of appeal on the charge sheet being defective is found lacking in merit and is disallowed;

**Whether the prosecution failed to call crucial witnesses to testify; in particular the brother to the complainant;**

33. The Appellant faulted the trial court for finding that the failure by the prosecution to call crucial prosecution witnesses was not fatal to its case as these witnesses had not witnessed the incident;

34. The record reflects that **PW1** told the trial court that she was asleep in the same room with her brother and sister who were on a different bed; her brother had heard her screaming and that the brother woke up and turned the lights on; the Appellant then threatened him with a beating and the brother had put off the light;

35. In its judgment the trial court addressed this issue in its judgment and stated as follows;

> ***"….where the prosecution fails to call material witnesses. The court may draw an adverse inference against the prosecution. This however applies only where the prosecution evidence tendered is weave (sic) and inadequate to support a conviction – Njoka v Republic (2001) KLR 175.***
>
> ***In this case the evidence of PW1's siblings was no (sic) material.***
>
> ***They did not witness the incidence as they were in the other room. At best they could only say that the accused was in the room, the***

***radio was in high volume and that they heard PW1 screams."***

36. The Appellant had further contended that **PW3** had clearly indicated that he was with others who were not disclosed; that the prosecution never called these crucial witness;

37. Section 143 of the Evidence does not provide for the number of witnesses the prosecution must call to prove a fact; the choice and number is left to the discretion of the prosecution to determine; from the evidence on record it is evident that the evidence of these so called crucial witnesses would not have been a crucial source of evidence as they were not eye witnesses to the offence; their evidence would have been at best hearsay evidence; therefore the trial court was correct in its finding that the evidence of the sibling brother was not material to the prosecution's case as he did not witness the incident;

38. This also applies to the other persons who may have been with **PW3** their evidence would have been at best repetitive;

39. This court shall therefore draw no negative inference from this omission by the prosecution; this ground of appeal is found lacking in merit and is hereby disallowed.

**Whether there were inconsistencies in the evidence of the prosecution witnesses;**

40. The Appellant contends that the evidence of the prosecution witnesses **PW1, PW2** and **PW3** was full of inconsistencies that raised doubts in the prosecution's case;

41. Upon perusal of the evidence on record this court notes that there were no inconsistencies in the evidence of **PW1** and finds that she was not shaken even under cross-examination; **PW2's** had stated that the incident took place on 21/10/2015 at night and she took the child to hospital on the 22/10/2015; the evidence of **PW3** confirms that the incident occurred on the night of 22/10/2015; and **PW6** stated that she filled the P3 Form on the 26/10/2015;

42. It is noted that the Charge Sheet indicates that the incident occurred on the 22/10/2015; **PW3** stated that the incident occurred on the night of 22/10/2015; the so called inconsistencies on the dates of the incident are resolved by the evidence on the P3 Form (**PExh.1**) which indicates the date the incident was reported to the police and the complainant sent to hospital as the 22/10/15;

43. This court is satisfied that the inconsistencies on the dates of the incident is resolved by the evidence on record; the dates are found not to create any doubt as to the credibility and reliability of the evidence that **PW1** adduced on the key ingredients of defilement; the inconsistencies are found to be immaterial as it found that it does not raise any doubts in the prosecutions' case;

44. This ground of appeal is found lacking in merit and is hereby disallowed

**Whether the medical evidence was admitted unprocedurally;**

45. The Appellant contends that the P3 Form was inadmissible as the person who produced it was not its author;

46. The record demonstrates that the P3 Form was produced by Dr. Sharon Kiruru Ngonyo **(PW6)**; she stated in evidence that she was the one who duly signed the P3 Form on the 26/10/2015;

47. It is trite law that under the provisions of **Section 35 of the Evidence Act** in instances where the maker is unavailable and so as to expedite the hearing of the matter a public document such as a P3 Form may be produced by a person other than the maker; provided the person producing the document is conversant with the handwriting of the maker; **PW6** confirmed that she was the maker of the document and therefore she was the one who was legally mandated to produce it as evidence, which she did;

48. This court finds no reason to fault the trial court for allowing the document to be produced as evidence; and is satisfied that the document was produced procedurally by **PW6**.

49. This ground of appeal is found lacking in merit and it is hereby disallowed

**Whether the prosecution proved its case to the desired threshold;**

50. The key ingredients for the offence of defilement are identification, penetration and age;

51. **On identification**; the Appellant never addressed the issue of identification at all in his appeal; but only emphasized the issue of age and penetration and raised the defence of alibi meaning that he was elsewhere on the material date; his defence was duly rejected by the trial court and noted in its judgment that it was not a case of mistaken identity; the trial court went on to make a finding that the Appellant was a person well known by the complainant and also to **PW3**; the record states as follows;

***"It is clear from the evidence of PW1, PW2 and PW3 that the accused went to the house. PW1 and PW3 said they saw the accused. They know him very well and there is no chance of them mistaking him……."***

52. After carefully re-evaluating the prosecution evidence on identification this court is satisfied that the trial court properly analyzed the evidence on identification and this court finds no justifiable reason to interfere with the trial court's finding that the Appellant was a person

known to the complainant and that he was the person who had defiled her;

53. This court is satisfied that the Appellant was positively identified by way of recognition; and that the prosecution proved the ingredient of identification to the desired threshold;

54. **As for the ingredient of penetration**; the evidence of **PW1** was that on the material date she was at home with her brother and sister when the Appellant came home for supper; that he had a daily habit of eating there but never slept there; on this particular night the Appellant ate but did not leave instead he turned up the volume of the radio;

55. Whilst she was asleep the Appellant came and forcefully removed her clothes and also removed his clothes and '***did bad manners***' to her; that she was screaming and crying which made her brother wake up and put on the lights; the Appellant threatened him with a beating so he put off the lights; the Appellant then continued defiling her and she continued to scream;

56. **PW3** stated that he was a neighbor and a caretaker of the premises where **PW2** lived; he corroborated the evidence of the minor in that he heard the radio tuned to a high volume and he heard a child crying in **PW2's** house;

**57. PW6** a doctor at Nyeri P.G.Hospital where **PW1** was examined stated in evidence that **PW1** had minor injuries and bruises on her external genitalia and there were pus cells and urine; her hymen was perforated and she made a conclusion that there was evidence of defilement; the P3 Form was tendered as evidence and was marked **"PExh.1"**; the witness confirmed that the incident was referred to the hospital on the 22/10/15 and that she signed the P3 Form on the 26/10/2015; the witness was categorical that this was not the date of the incident; the record reflects that the trial court found no reason to doubt the credibility of this expert witness;

58. Section 2 of the Sexual Offences Act defines penetration as follows;

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

59. Upon re-evaluating the evidence adduced this court finds that there is sufficient medical evidence that corroborates the evidence of the minor on the key ingredient of penetration; this court is satisfied that the prosecution proved the ingredient of penetration to the required threshold;

60. The ground of appeal that the prosecution failed to prove this ingredient to the required standard is found lacking in merit and it is hereby disallowed;

61. **On age**; the minor when giving her testimony had stated that she was seven (7) years old; the P3 Form (**PExh.1**) which was the medical document produced by **PW6** in evidence indicates that the complainant was aged seven (7) years; the record shows that the **PW5** the Investigating Officer obtained the Birth Certificate (**PExh**.**3**) for the complainant and produced it as evidence; it clearly stipulated the age of the complainant and demonstrated that when the offence was committed the minor was aged 7 years

62. This court is satisfied that the prosecution provided sufficient documentary evidence that proved the age of **PW1** as at the date when the offence was committed.

63. The prosecution is found to have satisfactorily proved the key ingredients of defilement to the desired threshold; this ground of appeal is found to have no merit and is disallowed;

**<u>Whether the trial court disregarded the appellant's defence without giving sound reasons;</u>**

64. The Appellant raised the issue of having been framed by **PW2** because he had refused to marry her; he also raised an alibi defence in that on the material date he did not go the home to eat as he was sick;

65. On the issue of being framed by **PW2** the trial court observed;

> ***'On the issue of being framed by PW2 I note that it was not only PW2 who testified against him. Actually the evidence of PW2 is immaterial. So is he saying that PW2 influenced all the other witnesses and even inflicted such serious injuries to her own daughter (PW1) merely to frame him up? That is not possible. All the witnesses testified as to the facts is what they saw.Further while in his defence the accused gave the reason for his being framed up by PW2 as his refusal to marry her, in cross-examination he put it to her that she had framed him up for refusing to pay school fees for her child.'***
>
> ***put such suggestions, by way of cross-examination, to the said witness (PW5) or the complainant for them to confirm or deny.'***

66. The trial court found the Appellants defence to be a fabrication and rejected the same as it found it to be untrue;

67. As for the alibi defence; it is trite law that when an accused person raises an alibi defence he does not assume any burden of proving it; however it must be borne in mind that such evidence ought to have been tested and therefore when invited to cross-examine **PW1** the Appellant ought to have tested his alibi defence by putting it to the witness as to she actually saw him in the house on the material date; it is noted that the Appellant only posed such a question to **PW3** who answered;

> ***"…I saw you leave the house as we were seated outside. We did not ask you why the child was crying as you did not talk to us."***

68. The trial court found that the evidence of **PW3** corroborated the evidence of **PW1**; that **PW1** was screaming and the radio was on high volume; that both '***saw him there and he was indeed there***'; the trial court also found the complainant to be truthful and found no need for corroboration of her evidence as he was satisfied with her evidence; it proceeded to invoke the provisions of Section 124 of the Evidence Act and also made reference to the case of **Kibet vs Republic (2009) KLR 47;**

69. This court is satisfied that the trial court correctly evaluated and analysed the Appellants alibi defence and that of being framed which found that the defence did not displace the prosecution's case; this court is satisfied that the defence did not introduce any doubt in this court's mind; the conviction is found to be safe;

70. This ground of appeal is found lacking in merit and is hereby disallowed;

**FINDINGS**

71. In the light of the forgoing this court makes the following findings;

(i) The Charge the contents of Statement of Facts were set out in clear and unambiguous terms and sufficiently disclosed and established the nature of the offence; the omission of the words **"as read with"** did not render the Charge Sheet as defective;

(ii) The inconsistencies and contradictions in the evidence of the prosecution witnesses were resolved by the evidence adduced and were found to be immaterial as it did not create any doubts in the prosecutions' case;

(iii) The evidence of the so called **'crucial witnesses'** would not have added any value to the prosecution's case.

(iv) The medical evidence is found to have been admitted procedurally;

(v) The prosecution is found to have proved the key elements of the offence of defilement to the desired threshold;

(vi) The trial court is found to have taken into consideration the appellant's alibi defence and gave sound reasons for rejecting it; the conviction is found to be safe;

**DETERMINATION**

72. The appeal is found to be lacking in merit and is hereby disallowed.

73. The conviction and sentence are both hereby upheld;

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 11th day February, 2019.**

**HON.A.MSHILA**

**JUDGE**