REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 42 OF 2018[SOA]

(CORAM: R. E. ABURILI - J.)

MO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence delivered on 30/8/2018 at Ukwala SRM's Court vide SO Case No. 26 of 2017, before Hon. C.I. Agutu, RM)

JUDGMENT

1. The appellant herein **MO** was 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. Particulars of the offence are that **MO** on the 11th and 12th day of July 2017 at Siranga sub-location in Ugenya intentionally caused his penis to penetrate the vagina of VAO [full name withheld] a child aged 14 years.

2. The appellant also faced a second count committing an indecent act with a child contrary to **Section 11(i)** of **Sexual Offences Act No 3 of 2006**.

3. He pleaded not guilty and was tried and found guilty of the first count and sentenced to serve 20 years' imprisonment. Being dissatisfied with the judgment, conviction and sentence meted out, the appellant filed this appeal setting out the following amended grounds of appeal.

> ***1. That the Prosecution failed to observe the provisions within the law.***
>
> ***2. That Section 144 of the CPC was breached during trial.***
>
> ***3. That medical analysis and findings were not conclusive and credible enough to be relied upon.***
>
> ***4. That the trial court failed to fulfill the rules under Section 169 of the CPC (content of judgment).***
>
> 5. ***That my alibi defence was overlooked unreasonably***.

4. In support of his grounds of appeal, the appellant filed written submissions which he adopted as canvassing the amended grounds of appeal.

5. In determining this Appeal, the court must fully understand its duty as the first Appellate court as stated

in the case of ***Pandya vs. R (1957) EA 336*** and ***Ruwala vs. R*** **(1957) EA 570** which is to subject "*the evidence as a whole to a fresh and exhaustive examination* and for this court to arrive at its own decision on the evidence, it must weigh evidence and draw its own conclusions and its own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

6. Revisiting the trial court record, PW1 **VAO** testified after *voire dire* examination and stated that she was a class six pupil at [Particulars Withheld] Primary School. She recalled that on 11th July 2017 while she was going to the river, at about 3 pm, the appellant called her. That she went to his house. She stated that the appellant ordered her to remove her clothes and told her that they do bad manners. She kept quiet but that after doing bad manners he gave her Kshs 100/ and asked her not to tell anyone. That the appellant was in the home where he used to guard.

7. PW1 described how the appellant removed his lower clothing, kissed her on her cheek and mouth, sucking her breasts and used his urinating organ to insert it in her four times very fast. That she proceeded to the river and he forbade her from telling anyone and instructed her to return to him during the third month of the year. She stated that that was the second time that the appellant was defiling her.

8. PW1 further narrated that on another occasion she went to him and he gave her Kshs 200/ which she used to buy a geometry set and he defiled her. She recalled that she had been going to his place and that on a Sunday he slapped her telling her to hurry up as he wanted to go about his duties and that some children saw her come out of the appellant's house and alerted her teachers. She stated that she did not tell her parents because she feared being beaten and that although sometimes he ordered her to go to his place on other occasions she went there willingly and that he gave her money to buy what she wanted.

9. When her teachers were alerted and they asked her about her relationship with the appellant, she disclosed that the appellant had been defiling her. Her mother was then informed and she was taken to hospital. She stated that whenever she urinated, she felt stings. She stated that the appellant had been defiling her since 2014 when she was in class three. She stated that she was born on 31/1/2003 and that she was 14 years old.

10. On being cross examined by the appellant's counsel, the complainant responded that on 11/7/2017 she was alone when the appellant called her. She stated that she knew NA and that she was with her. She stated that after being defiled she had a discharge and that she was reported by other children VA and AA. She reiterated that in2014 the appellant called her and she went. She denied that knowledge of her mother being sexually involved with the appellant. She denied being coached by her mother to give evidence against the appellant. She stated that MA a student was sent to go and call her mother. She maintained that she was defiled on a Sunday and stated that it was on 12th July 2017. She stated that the other students who heard her being slapped reported her to Mr. Odero on a Tuesday. She insisted that she was telling the truth. She stated that the appellant had defiled her on several occasions and that in July 2017 is when she was reported to her teacher and that on Tuesday he had called her while she was sweeping outside the school.

11. PW2, **CAO** mother of PW1 testified and recalled that on 11th July 2017 MA, a student at [Particulars Withheld] Primary School called her and she went to see the teacher but she missed him so she returned to the school and found Mr. Odera who questioned her as to whether she was aware of any relationship between the complainant and MO the appellant herein. PW2 stated that the appellant was a caretaker in the home of one Masawa and that sometimes he used to sub contract her duties. She stated that both she and the appellant knew that they were H.I.V positive. She however denied that she was sexually involved with the appellant. She stated that when she met Mr. Odera, he asked her if she was aware that PW1 was being defiled by the appellant. She stated that she had noticed that PW1 had been treating other children to goodies. She stated that on one particular occasion in 2014, she had attended a funeral in a far place leaving PW1 behind and that when she returned, PW1 was missing but only came later with biscuits. On enquiry, she discovered that the minor had been defiled by the appellant and that he questioned him why he knew that he was sick yet he was transmitting the diseased to PW1. That PW1 had then contracted syphilis.

12. She stated that PW1 was born on 31st January 2003 and identified the complainant's certificate of birth serial number [xxxx] which was produced as an exhibit by the investigating officer.

13. On being cross examined by the defence counsel, PW2 stated that she went to her daughter's school alone after she had been summoned and that her husband accompanied her to the police station to make her statement but that he did not record any statement. She denied having a dispute with the appellant and stated that she worked for him at Siranga. She denied coaching her daughter to give false testimony against the appellant and maintained that she never had any sexual relation with the appellant although they both knew that they were HIV positive.

14. **George Otieno Ombwak**, a Clinical Officer based at Ukwala Hospital testified that he received and examined both the appellant and the complainant who was aged 14 years on allegation that she had been defiled by a known person since 2014, in February 2017 and April 2017 and the fourth time on 11th July 2017. On examination, he found that the complainant's hymen had been broken and the breakage was not fresh. There was fresh tenderness and a thick offensive smell, oozing, significant of a sexual infection- **Trichominal Sexually transmitted disease** but H.I V test turned negative. She had pus cells and leucocytes. There was also epithelial cells present. The recent injury was 9 days from date of alleged defilement. He filled her P3 form and advised on counseling.

15. PW3 also received the appellant and examined him and filled his P3 form. He had normal genitalia but with mild tenderness on the foreskin which was painful. He was found to be on HIV care and treatment at Khunyangu at Busia His Ampath No. was [xxxx]. He added that the complainant was still in window period because she had gone to hospital 9 days late from date of last sexual contact with the appellant who was HIV positive.

16. On being cross examined by the appellant, PW3 stated that he found only one disease on the complainant and that if the appellant was taking his drugs well, chances of infecting the complainant with HIV were reduced. Further, that he did not find the appellant infected with ***Trichominas*** disease which the complainant had because the appellant could have treated himself as it takes 3-5 days to treat.

17. The medic in the accused's p3 form on the part marked additional remarks states that the appellant is H.I.V positive and despite the complainant testing negative she was still within the window period during which she may convert and turn positive especially now that she came to hospital late 9 days later.

18. PW4 **JOY** a teacher at [Particulars Withheld] primary School testified that a class six pupil one VA and AA notified him that PW1 was sexually involved with a grown up, whom they referred to as **"Jasingenge**" who was a caretaker of a home and also engaged in constructing fences. That he then summoned the complainant who admitted that she was involved in a sexual relation with the appellant. PW4 told the deputy head teacher.

19. On being cross examined by the appellant, PW4 stated that he was a class teacher to the girls and that he followed the set down protocol and hierarchy rules by reporting the matter to the head teacher.

20. PW5 **PAO** a second Deputy Head teacher at [Particulars Withheld] primary school confirmed receipt of report of defilement of the complainant from Mr. Y a class teacher of standard six. Pw5 said Mr. Y told her that some students in his class meeting dubbed as "dream girls" saw PW1 enter ***Jasingenges*** house and heard their conversation. "How much do you charge" to which PW1 is said to have responded "Ksh 200" That PW shared this information with the other deputy teacher, Mr O. Together, they called PW2, the mother to PW1 by sending one, M. After questioning PW5 she said that she too got curious over a geometrical set that PW1 and that PW2 stated that upon questioning her daughter, PW1 responded that the set was given to her by a relative. PW5 stated that she knew the appellant by his name MO and was also aware that he was also referred to as ***Jasingenge*** and that is how the minors referred to him.

21. On being cross examined by the appellant, the witness stated that she did not know the name of the relative who allegedly bought the set for the complainant. She stated that PW1 was allegedly seen entering the house of the appellant on a Sunday.

22. PW6 VRA a minor gave sworn testimony and stated that she was the complainant's classmate and that she was told by another student, AA told her that she saw the complainant enter the ***Jasigenge's*** house she stated that she did not know ***Jasigenege*** and neither was she with AA when the latter saw PW1 enter the house of Jasigenge.

23. PW7 **NO. 46920 PC John Towett** based at Ukwala Police Station performing crime duties testified that on 21//7/2017 he was at the police station when the complainant accompanied by her mother reported that the complainant had been defiled on 11th and 12th July 2017 by a person well known to them. He recorded their statements and issued the complainant with a P3 form which she took to Ukwala sub county Hospital. After compiling statements of witnesses, he charged the appellant with the present offence.

24. On cross examination by the appellant, PW7 stated that there was no eye witness to the incident but that a witness heard the appellant speak with the minor.

25. At the close of the prosecution's case, the appellant was placed on his defence. He opted to testify on oath and called three witnesses. The appellant testified as DW1 and stated that he lived at Siranga and used to fence compounds and farms. He recalled that on 24th July 2017 he was working when he saw three police officers from Siranga who went and arrested him and took him to Siranga Police Post and later to Ukwala Police Station. That he was informed that he had defiled a minor on 11th and 12th July 29017 which he said was a lie because on those two dates he was at Ugenya Technical Training Institute, Ligose, Sega and that he had been there from 6th July to 14th July 2017, having been subcontracted by Sylvester Otieno Omuny and that he worked with Francis Okoth and Chrispine Odhiambo More from 7am to 7pm. He therefore denied the charges facing him.

26. DW2, Francis **Okoth Odhiambo** testified that he knew the appellant and that he lived at Siranga and worked as a mason. He stated that from 5th July 2018 he was with the appellant at Ligose village and that the started work from 6th to 14th July 2017.

27. On being cross examined by prosecution counsel, DW2 stated that on 11th he was with the appellant and closed work at 7pm and that they separated at Yenga and could not tell what transpired at night.

28. DW3 **Chrispine Odiambo** from Siraga testified that he does fencing and that he knew the appellant as a fencer. He stated that he had worked with the appellant for five years and that from 6th July2018 to 14th July 2018 they started work at 6pm and that they left for home at 5pm. That they left at 7pm and that they used to arrive at 9pm. In cross examination, DW3 stated that they left the appellant with his wife at 9pm and that he could not tell what happened after that hour.

29. **DW4 Sylvester Otieno** testified that he lived in Ugenya Yenga and stated that that from 6th July to 14th July 2017 between 7am and 7pm and on the evening of 11th and 13th July 2017 he was with the appellant at Ugenya Teachers Training Institute.

SUBMISSIONS

30. The appellant's appeal was canvassed by way of written submissions which he filed together with amended grounds of appeal on 23rd January 2019 and which he adopted wholly adding in his oral submission that he was framed but he did not know why.

31. **On the ground that the Prosecution failed to observe the rules of provisions of the law, the appellant submitted that voire dire examination** of the complainant and PW6 was not carried out by the trial court yet they were minors, to determine whether or not they were intelligent enough to tell the truth.

32. In the appellant's view, this omission by the trial court violated section 19 of the Oaths and Statutory

Declarations Act hence the appellant's rights under Article **50 of the Constitution** were violated.

33. **On the ground that Section 144 of the Criminal Procedure Code was breached during trial as crucial witnesses were not availed by the prosecution,** the appellant submitted that there were two crucial witnesses named **VA (PW6) and AA**, who saw and heard PW1 while communicating with the appellant. He submitted that failure to call AA to give evidence was prejudicial to the prosecution's case and raised massive doubt in the guilt of the appellant.

34. **On the ground that Medical analysis and findings were not conclusive and credible to be relied on, the appellant submitted that** PW3, the expert who conducted the process and examined both the complainant and the appellant on their physical and medical status, did not open up the litmus test set for the proof beyond reasonable doubt and did not establish the appellant's guilt. In addition, the appellant submitted that PW3 was also not tested as required under Section 164 of the Evidence Act by the prosecution to confirm the truthfulness of his observation and the analysis carried out.

35. **The appellant further submitted that** PW3 failed to indicate the clinical results for the injury and degree sustained by the victim. Further, that although the hymen was found broken but that it was not proved that the same was as a result of the incident giving rise to the charge herein as there was no sign or symptom to prove or detect the essential ingredients of penetration. In addition, the appellant submitted that laboratory findings did not prove Sec 26 of the Sexual Offences Act, and that the Clinical Officer did not note in section C, the kind of infection transmitted which was supported by lab results.

36. **The appellant also claimed that** Medical findings that the appellant was HIV positive and that he was on treatment and care at Khunyangu at Busia was a finding made without any documentary proof of the same.

37. **On the ground that the trial court failed to observe rules of Sec 169 of Criminal Procedure Code, the appellant submitted that the judgment** was misplaced, unsound and in contravention of section 169 of Criminal Procedure Code. That the trial magistrate failed to record the following issues for determination after summary of the prosecution and defence witnesses: -

- *Determination and analysis of the case after full trial and defence.*
- *The ingredients of the alleged offence and their respective supports required.*
- *The decision and reasons of the decision of the case.*
- *The record of the offender in nature.*
- *Mitigation purposes are important before passing a sentence.*
- *Content of charges and particulars in the judgment format does not exist in the SOA.*
- *One cannot be convicted and found guilty under Section 215 of the CPC as charges but is only convicted under Sec 215 (benefits of doubts) and finally ordered to appeal within 14 days if you are unsatisfied with the decision.*

38. **On the defence of alibi, the appellant submitted that his** alibi defence was never considered on how he spent the dates of the 11th and 12th July 2017 as from 6th to 14th 2017 together with his defence witnesses who also gave an account of how they were working at Ugenya T.T. Institute, at Ligose Sega upto 7pm in the night. Further, that the court misapprehended to call those who witnessed the scene of crime on the said dates to displace the appellant's alibi defence.

39. The appellant urged the court to allow the appeal, quash the conviction and set aside the sentence imposed on him.

40. In his oral submissions the appellant simply stated that he was framed and that he did not know why.

41. The Respondent represented by Mr. Okachi Senior Principal prosecution Counsel opposed the appeal and submitted orally to the effect that the prosecution had proved its case against the appellant beyond reasonable doubt. That the victim was clear that she was defiled by the appellant severally and that the appellant used to pay her for sexual favours. That the appellant was not a stranger to the victim and that therefore there was no mistaken identity. Counsel submitted that the appellant did not state why he was framed and that he never raised that issue during the trial.

42. On ***voire dire*** examination, it was submitted that the trial court carried out voire dire examination of the two minor witnesses.

43. On crucial witnesses it was submitted that the doctor who examined the minor testified and produced the complainant's P3 Form. Counsel urged the court to dismiss the appeal herein, uphold the appellant's conviction and sentence.

44. In a rejoinder submission, the appellant stated that he was HIV Positive, that he was on medication and that he had carried his drugs into court and that he did not commit the offence.

DETERMINATION

45. I have considered the appeal herein, the evidence adduced before the trial court for the prosecution and defence and the submissions made by the appellant and the Respondent's counsel on the merits and demerits of the appeal. In my humble view, the issues for determination emanate from the grounds of appeal as submitted by the appellant.

46. ***On the alleged failure to conduct voire dire examination on the minor witnesses PW1 and PW6,*** this court observes that indeed no voire dire examination was carried out on PW6. However, her evidence was hearsay and of no probative value as AA, the other child who told PW6 that the complainant had entered the house of *Jasigenge* was not called as a witness. In addition, this witness stated that she was not with AA when AA accompanied the complainant to the house of *Jasigenge.*

47. However, the trial court Record shows that a voire dire examination was conducted on PW1 the complainant only that the trial court did not state at the commencement whether the witness was competent to testify and whether she understood the nature of the oath and telling the truth. The record nonetheless shows that the trial magistrate indicated in her judgment that she conducted a *voire dire* examination on PW21 and found her to be intelligent enough and that she understood the meaning of an oath and telling the truth.

48. Section **19 of the Oaths and Statutory Declarations Act** Cao 15 Laws of Kenya provides:

> ***"19. Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person understand the nature of an oath, his evidence may be received, though not on oath, if in the opinion of the court or such a person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced in writing in accordance with Section 233 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that Section."***

49. The above section must however be read together with **section124 of the Evidence Act** which provides"

> ***"Notwithstanding the provisions 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."

50. From the evidence adduced by PW1 and the answers that she gave in cross examination and re-examination, this court is satisfied that the complainant who was aged 14 years was intelligent enough and understood the meaning of giving an oath and telling the truth as she withstood all the rigours of cross examination posed by defence counsel. I am unable to find any prejudice occasioned to the appellant by the failure to conduct a thorough voire dire examination on the complainant.

51. The trial court in her assessment of the evidence of PW1 stated: ***"the complainant struck the court as a truthful witness …the court finds that the evidence and demeanor of the minor to be truthful and actually connects with what other prosecution witnesses say."***

52. Iam fortified by several decisions of the Court of Appeal as applied by this court in many of its decisions. In **Maripett Loonkomok v Republic [2016] eKLR** the Court of Appeal dealt with the question of non-compliance with the said section 19 of the Oaths and Statutory Declarations Act and held as follows:

"It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;

"In appropriate cases where voire dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction." See Athumani Ali Mwinyi v R Cr. Appeal No.11 of 2015.

On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voire dire examination. The complainant's evidence was congent; she was cross-examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence, especially the medical evidence which corroborated the fact of defilement."

53. From the above Court of Appeal decisions, it is apparent that while the evidence of a witness of tender years who is not subjected to a *voire dire* examination is not dependable evidence, the other evidence adduced in a criminal trial if sufficient to the required standard of beyond reasonable doubt can still be relied upon to determine the guilt or otherwise of an accused person.

54. Accordingly, I find and hold that failure to conduct ***voire dire*** examination in the manner stipulated in ***Johnson Milimu v Republic [1983] KLR 447*** and ***Kiveveto Mboloi Vs. Republic [2013]eKLR*** was not fatal to the Prosecution's case as the trial court believed that the victim child aged 14 years was telling the truth and there was nothing to show that she could have been couched to frame the appellant with such an offence.

55. I further find that there was independent medical evidence of PW3 which was sufficient to prove penetration of the vagina of PW1 as stipulated in ***Section 2 of the Sexual Offences Act***, and that

excluding the evidence of PW1 a child who had given a narration of what had happened to her by the appellant to PW2 her mother and her teachers would not vitiate the conviction of the appellant. I find the ground of appeal devoid of merit and dismiss it.

56. **On the second issue of whether the prosecution failed to avail crucial witnesses,** the appellant claimed that AA was a crucial witness mentioned by PW6 but that she was not called as a witness. I have perused the evidence of PW6 and found it to be hearsay. AA whom PW6 mentioned is said to have gone to another school in Nairobi and it is not clear whether this AA was present on the specific dates mentioned in the charge sheet being the 11th and 12th July 2017 when PW1 was being defiled.

57. PW1 and PW6 did not testify that when PW1 was being defiled, AA was present or that she saw exactly what happened to PW1. Furthermore, it is not the evidence of AA that would have determined the guilt of innocence of the appellant. The trial court that heard and saw PW1 testify was satisfied that she was telling the truth. I have no reason to differ from that finding of fact.

58. In my humble view, failure to call AA as a prosecution witness cannot be inferred to mean that had she been called, then she would have given evidence adverse to the prosecution. The ground of appeal fails.it is dismissed.

59. **On the issue whether medical analysis and findings were not conclusive,** the appellant claimed that the P3 form for the complainant did not indicate the degree of injury suffered by the complainant.

60. In my humble view this omission is not fatal to the prosecution case as defilement is a special category of criminal cases and the injury that the court would be concerned with is that of penetration as defined in section 2 of the Sexual Offences Act and not the degree of injury sustained such as harm maim or previous harm as would be in a case of assault. In this case, the Clinician concluded that the child was penetrated and that is what is required in defilement cases not the assessment of degree of injury whether harm or maim or grievous harm as would be in the case of other assaults. The P3 Form itself is clear that in the case of sexual offences, there is a specific Part to be filled which in this case is PART "C" and which was duly filled by the Clinical Officer. Part B too was filled but the assessment was done in Part C

61. The appellant also claimed that although the hymen was proven to be broken, there was no evidence that the event of 11th and 12th July 2017 caused the breakage. However, the P3 form is clear that the hymen was broken but was not recent since the complainant had had several sexual encounters with the appellant since 2014. However, the Clinical Officer found that the complainant had mild tenderness on *labia minoras,* pus cells, epithelial cells, offensive foul yellowish smell and discharge in her vagina indicative of an infection *Trichominas sexually transmitted disesase,* from laboratory findings.

62. Although no DNA test was carried out to link the appellant with the defilement, DNA testing is not mandatory in sexual offences provided the court on the evidence of the complainant and medical evidence was satisfied that the complainant was telling the truth and that she was defiled by a person who was positively identified being the offender before the court. The trial magistrate stated: ***"The complainant struck court as a truthful witness….. The court finds the evidence and demeanor of the minor to be truthful and actually connects with what other prosecution witnesses say."***

63. ***In AML v Republic*** **[2012] eKLR** where the court held the same position stating:-

> *"**The fact of rape or defilement is not proved by way of a DNA test but by way of evidence**."*

64. The above position was taken in the case of ***Kassim Ali v Republic,*** **[2006] eKLR** that-

> ***"The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim or by circumstantial evidence."***

65. A similar view was taken in the case of ***Benjamin Mbugua Gitau v Republic*** where the court stated that ***there was no necessity of DNA test as penetration which is the*** **main element of the offence was**

proved.

66. Accordingly, I find and hold that there was sufficient evidence beyond reasonable doubt that the complainant minor age 14 years and 5 months was defiled and by a person who was well known to her, and it matters not that she had had earlier sexual encounters which did not form part of the charge. The evidence revealed that the complainant was a child who could not have consented to sexual favours whether before or on the dates mentioned in the charge sheet being 11th and 12th July 2017.

67. The appellant also claimed that the kind of infection the complainant had was not disclosed. However the P3 form says the infection was ***Trichominal Sexually transmitted disease.***

68. ***On alleged lack of evidence that the appellant was on HIV treatment at Khunyangu Hospital at Busia,*** the appellant himself told this court that he was HIV positive and that he had carried his drugs during the hearing of this appeal. The Clinical Officer also gave the appellant's Ampath Clinic registration number 267788084-7 and Hospital Number 1021KH-6. The allegation by the appellant is therefore unfounded. It is dismissed.

69. *O**n whether the trial court failed to adhere to section 169 of the CPC on how a judgment should be framed,*** I find that this is a procedural technicality which does not go to the root of the evidence adduced before the trial court. The trial court gave a narration of the charge, particulars and facts of the case and summarized the evidence for the prosecution witnesses and defence and his witnesses and considered the evidence on record as a whole before arriving at her decision and giving reasons for her decision. The allegation by the appellant is therefore devoid of merit and is hereby dismissed.

70. ***On the alibi defence, the appellant and his witnesses stated that they were in Ugenya on the material days when the appellant is said to have committed the offence,*** the appellant claimed to have been in Ugenya Technical Training Institute, Ligose, Sega working on a subcontract on the days when he is alleged to have committed the offences. He also called 3 witnesses who supported his assertion. The law is clear that the burden of proof lies with the prosecution throughout the trial and does not shift to the accused person. In other words, it is not for the accused person to prove his innocence.

71. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. Way back in 1939 in ***R. V. SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6 EACA 145***, the former Court of Appeal for Eastern Africa upheld the a decision of the High Court in which it was stated:

> ***"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."***

72. ***(See also R. V. AHMED BIN ABDUL HAFID (1934) 1 EACA 76*** and ***WANG'OMBE V. REPUBLIC [1976-80] 1 KLR 1683).*** The Supreme Court of Uganda, in ***FESTO ANDROA ASENUA V. UGANDA, CR. APP NO 1 OF 1998*** made a similar observation when it stated:

> ***"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."***

73. However, in ***GANZI & 2 OTHERS V. REPUBLIC [2005] 1 KLR 52,*** the Court of Appeal stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence.

74. In this case, the trial court considered the appellant's alibi and observed that ***the defence witnesses however could not account for other times apart from what they said that is between seven in the morning and seven in the night.*** I also find that the appellant's witnesses were simply called in to assist the appellant as he never raised his alibi defence well in advance to put the prosecution on notice to investigate the allegation that he was at Ugenya and in the company of the witnesses that he called. DW2 stated that he was with the appellant at Ligose College, DW3 did not even mention where he was working with the appellant on those material dates while DW4 statde that he was working with the appellant at Ugenya Teachers College. The appellant stated that he was working with his witnesses at Ugenya Technical Training Institute. There was material contradictions in the defence witnesses' evidence and none of the witnesses stated that they knew one another or that they were all working together on the material dates.

75. In the circumstances of this appeal, and having considered the evidence as a whole on record, I am satisfied that when weighed against the evidence of his identification and recognition by the complainant as the person who defiled her, the appellant's alibi defence was completely made up to escape justice.

76. On the whole, I find and hold that the prosecution proved the ingredients of the offence of defilement as stipulated in section 8(1) as read with section 8(3) of the Sexual Offences Act beyond reasonable doubt namely that the complainant was aged 14 years, that she was defiled and penetrated on the 11th and 12th July 2017 and that her offender was positively identified and recognized as the appellant who was well known to her.

77. Accordingly, I find and hold that the conviction of the appellant which ought to have been pronounced as under section 8 (3) of the Sexual Offences Act and not 215 of the Criminal Procedure Code was sound and safe. The appellant's appeal against conviction is devoid of merit. It is hereby dismissed.

78. On sentence, I order for a social inquiry report to be filed by Siaya County Probation Officer to guide the court and to give the appellant an opportunity to mitigate as the court record does not show that he was ever given a chance to mitigate prior to being sentenced.

Dated, signed and delivered at Siaya this 9th Day of October, 2019

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

Mr. Okachi Senior Principal Prosecution Counsel

CA: Brenda and Modestar