



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

(DEFILEMENT)

CR. A. CASE NO. 156 OF 2016

(CORAM: R. E. ABURILI – J.)

JULIUS ODIPO YAN APPLICANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence dated 11.11.2016 in Criminal Case No. 1003 of 2015 in Bondo Law Court before Hon. E.N. WASIKE – SRM)

JUDGMENT

1. This is an appeal arising from the Judgment of the Senior Principal Magistrate's Court at Bondo (E.N. Wasike) dated 11th November, 2016, wherein the Appellant Julius Odipo Yan was convicted and sentenced for life for the offence of **Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act Cap 3 of 2006**.
2. In the said criminal trial, the Appellant herein, was found guilty of intentionally causing his penis to penetrate the vagina of **P.A.O**, a child aged 8 years.[name withheld for legal reasons].
3. The Appellant was also charged with an alternative charge of **Committing an Indecent act with a Child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. Particulars were that the Appellant Julius Odipo Yan on the 15th day of October 2015, at about 9.00 hours within Siaya County, Intentionally touched the vagina of **P.A.O**, a child aged 8 years with his penis.
4. The Prosecution called 4 witnesses in support of its case against the Appellant.
5. It was the Prosecution's case that on the 18th day of October, the Complainant minor victim P.A.O was sent by her grandfather for some errands. She met the Appellant who send her for Sugar. The Appellant then called the minor and told her to sit on his bed in his house after which he removed her inner pants and he also removed his inner clothing and took out his penis and inserted it into the minor's vagina and had sex with her. The Appellant then wiped her private parts and told the minor not to tell anyone. The minor later informed her parents as to what had transpired after her father PW2 observed that the minor complained of stomach pains and walked while stooping and on inquiry the minor revealed that she had been defiled by the Appellant. The minor became sickly and slept most of the time and when she was taken for medical examination at Rambugi Dispensary she was found to have been defiled. The matter was reported to Ndori was reported to Ndori Police Patrol Base. The minor was medically examined by PW3 the Clinical other who filled a P3 form which he produced as P.Ex.3 and the treatment notes produced. He then issued an arrest Order for the Appellant who was traced, arrested and escorted to the Police Station and later charged with the offence. PW4 produced a baptismal card as P.Ex.1 in respect of the complainant/victim showing her age.
6. In his defence the Appellant stated that on 4.7.2015, he was called by his nephew Justus Onyango to go and assist with some work for 2 weeks after which he returned to his home. That on 4.11.2015 he said nephew recalled him and on 5.11.2015 as he was going to collect some cement from Ajigo two people aboard a motor cycle approached him and told him that he was required at the Police Station. He proceeded to Ndori Police Patrol Base and on arrival, he was placed in the cells and on 6.11.2015 he was arraigned before Court to answer to the charges of defilement and indecent assault.
7. The trial Court, after analyzing the Prosecution and defence case was persuaded that the ingredients of the offence had been established, that the Appellant had been properly linked to the offence; that the Appellant's defence was a sham and that the Prosecution had proved its case beyond reasonable doubt. He convicted him and sentenced him to serve life imprisonment.

8. Aggrieved by the decision of the trial Court, the Appellant lodged an appeal on 16.11.2016 by way of a Petition contending that:

- 1. The Learned trial Magistrate erred in law and fact by convicting in a charge sheet that was defaulted.**
- 2. That the Learned trial Magistrate erred in law and fact by convicting in a case that age was not conclusively proved.**
- 3. The Learned trial Magistrate erred in Law and fact by finding that the Prosecution had proved its case beyond reasonable doubt yet age was not conclusively proven.**
- 4. The trial Court did not find that the Appellant was not subjected to a fair hearing hence denied the Appellant all the document the Prosecution intended to rely on during the trial.**
- 5. That the Appellant cannot recall all that transpired during the trial hence he prayed for trial proceedings so as to adduce sufficient grounds and sought for habeas corpus.**

6. The Appellant prayed that the appeal herein be allowed, the conviction be quashed, and sentence set aside and the Appellant be set free.

7. At the hearing of the appeal, just as it was during the trial, the Appellant was self-represented. The Appellant also relied on an amended grounds of appeal wherein he contended that:

- 1) The learned trial Magistrate erred-in-law and fact in failure to consider the duration elapsed before the report was made.**
- 2) The Lower Court erred in law and fact in failure to consider that the Prosecution failed to prove their case beyond reasonable doubt in the absence of some essential witnesses.**
- 3) The Learned trial Magistrate erred both in law and fact in failure to consider that the minor's age was not conclusive.**
- 4) The Lower Court erred in law and fact in failure to consider that the medical (sic) exculpated me from the said act.**
- 5) The Learned trial Magistrate erred both in law and fact in failure to observe that there was a shadow investigation being carried out in this case which cause (sic) miscarriage of justice.**

8. In his *pro se* submissions written by hand and which were adopted by this Court at the hearing of the Appeal on 16.5.2018 as canvassing the appeal, the appellant submitted that the evidence of the first report was very important as it often provided a good taste by which the truth and accuracy of the subsequent statement. It was submitted that in this case the incident occurred on 18.10.2015 at 9.00 a.m. but that PW1 conceded in her testimony that she told her mother of what had happened after 2 days, yet, according to the Appellant the report to the Police was made on 5.11.2015, 10 days after the incident. Further, that the truth will always come from a statement taken from a witness at the time when the recollection is very fresh and there has been no time for consultation with others. It was submitted that failure to make a prompt report concerning the offence meant that the Court relied on hearsay and an afterthought. It was further submitted that essential witnesses were missing for Prosecution to prove their case beyond reasonable doubt. The Appellant maintained that the cousin who was a Community Health Worker who was informed about the incident by the minor's father and the minor were not called to give their evidence which, according to the Appellant, draws an inference that their evidence if called would have been or would tend to be adverse to the Prosecution's case. The Appellant further maintained that the complainant's age was not conclusive as there was no birth certificate which was produced in the trial Court to prove the exact age of the minor and that neither was the age assessment of the complainant done.

9. Further it was submitted that the Court's reliance on the baptismal card of the minor dated 20.12.2014, which was 7 years from the date when the minor was allegedly born.

10. According to the Appellant, the age of the minor was not proved beyond reasonable doubt as there was no other documentary evidence to corroborate the same, in the interest of justice.

11. According to the Appellant, the Medical Report exculpated him from the alleged offence as PW3 who was the Medical Officer alleged that the minor was defiled and infected with STI but that the Prosecution failed to prove to the Court that it is the Appellant who infected the minor with the STI because the Appellant was never examined to prove that he was infected with the STI. The Appellant further submitted that that there were shadow investigations in the matter. The Appellant urged the Court to allow his appeal, quash the conviction and set aside the sentence.

12. In opposing the appeal, Miss Odumba Prosecution Counsel submitted that the conviction and sentence by the trial Magistrate were sound. That the ingredients of defilement were proved by the Prosecution. It was submitted that PW3 the Clinical Officer examined the minor and confirmed that she was defiled further, that there was evidence of penetration as shown by treatment notes and the P3 form produced in evidence as exhibits.

13. It was further submitted in contention that the minor victim confirmed that she was defiled by the Appellant who also infected her with STI and the Appellant was recognized by PW1 and PW2 who come from the same village as him.

14. It was further submitted that the incident happened in broad daylight and that the trial Court found PW1 truthful in her testimony. On the question of the minors age running into 8 years as per her baptismal card produced as exhibit No. 1 which was identified by PW2 her father. In addition, it was submitted that the *voire dire* conducted on the complainant showed that she was a minor below the age of 10 years as

shown by the baptismal card and the P3 form.

15. On sentence, it was submitted that the minimum sentence provided in-law for defilement of a minor is life imprisonment hence the sentence meted out was lawful and hence this Court was urged to uphold both the conviction and sentence meted out on the Appellant. In a rejoinder, the Appellant left it to the Court to determine the appeal.

ANALYSIS OF THE EVIDENCE IN THE TRIAL COURT AND DETERMINATION.

16. From the evidence adduced, PW1 [P.A.O] was a minor. The trial court took her through voire dire examination and was satisfied that she had the necessary intellectual capability of appreciating the court proceedings. She therefore gave unsworn evidence owing to her tender age.

17. PW1 stated that she was in class two at [particulars withheld] Primary School and that she was 8 years old, she gave the name of her mother as M and her father as G.O. She stated that she knew the appellant herein and called him by name as Julius Odipo. She stated that he came from her home area.

18. The complainant recalled that on 18th October, 2015 at 9.00am her grandfather told her to go and call someone to come and pick his charcoal. She met Odipo the appellant herein who told her to go and collect sugar from her mother and when she returned, he told her to sleep on his bed. This was in the same home where the complainant had been send to call someone to go pick her grandfather's charcoal. The appellant then removed the complainant's inner pant. He also removed his inner pants, laid on top of her and defiled her and told her not to tell anyone or else he would kill her and promised to give her mandazi. She felt pain during the sexual encounter. He then washed her private parts and she went home but feared telling her mother because the appellant had threatened to kill her if she told anyone.

19. After two days, the complainant told her mother of what had happened to her. She was later taken to Hospital at Rambugu where she was treated. The complainant identified the appellant in court during the trial as a person she knew well because they lived in the same area and that he was at the home where her grandfather had send her to go and call someone to go and pick charcoal.

20. PW2 G.O.O the father to PW1 testified that PW1 was his daughter and that she was born in 2007. He identified her baptismal card which showed that the complainant was born on 30th December, 2007. He stated that he knew the appellant who was the caretaker at the neighbor's home.

21. He testified that on 31/10/2015 the complainant woke him up and complained of stomach pains as she walked while stooping. She told her father that she wanted him to take her out for a short call which he did but he noticed her standing while pressing her knees together. He asked her what the problem was and she said she wanted to urinate but he realized that she had already urinated. She went back to sleep early in the morning as he prepared to go to the shamba, her mother told him to see how the complainant was walking and he realized that she walked while bending. When he inquired from her, she told him that she had stomach ache from the umbilical cord. He went to the shamba and on returning he found her very sick and sleeping on the chair. He took her for treatment to a certain lady and on returning she told him that Odipo had on a certain day on an earlier date her grandfather send her and on coming back, Odipo called her and asked her to take sugar to him and when she went, he told her to enter his house and he told her to sit on his bed. He removed her pants and also removed his and lay on top of her after which he took water and washed her. PW2 took the complainant to one of his cousins who is a community health worker and told him what had happened and he accompanied the witness home and the complainant reiterated to him what she had told PW2. He took her to Rambugu Dispensary for treatment and she was given drugs. He identified the treatment book. He then went to Ndori Police Station and reported and recorded his statement and went to Akala Hospital where the child was examined and the Police later issued him with a P3 Form which he took to hospital. He identified the appellant in court.

22. The prosecution intended to call the complainant's mother but because her evidence was similar to that of PW2 her evidence was dispensed with leave of court and without any objection from the appellant accused person.

23. PW3 Jared Obiero Opondo a clinical officer based at Bera Sub County Hospital attended to the minor and filled her P3 Form dated 2/11/2015 produced as an exhibit. He stated that the minor gave a history of having been defiled by a person known to her on 18th October 2015.

24. According to the Clinical Officer, on examination, the minor was found to have septical bruises on the vaginal oryphis and the hymen was torn. The laboratory tests showed pus cells noted. The injuries were 17 days old. He concluded that the injuries amounted to grievous harm and that the minor was defiled and infected with STI. The minor had been treated prior at Rambugu Dispensary. He also produced the treatment book as an exhibit.

25. The prosecution also called PW4 the investigation Officer No.48932 PC Samson Katana who on 5/11/2015 was minuted a report of defilement by his Officer in charge. He interrogated the complainant who alleged that she was defiled on 18th October, 2015. He recorded the complainant's statement and visited the scene of crime at the appellant's house and later issued her with a P3Form. He then issued an arrest order and gave it to the Chief of East Asembo upon which the appellant was arrested and escorted to the police station and charged with the offence. He produced the complainant's baptismal card dated 20th December, 2014 as an exhibit showing that the minor was born on 16th November 2007.

26. In his sworn statement of defence the appellant testified that on 4th July 2015 he had been called by his nephew Justus Onyango to assist him so he proceeded to his nephew's place and stayed there for two weeks and returned to his home. Later on 4/11/2015 the nephew again called him. That as he was going to collect cement at Ajijo Centre, two people on a motorbike approached him and told him that he was required at Ndori Police Patrol Base although they could not explain the reason why he was required there. They went together to Ndori and on arrival he was placed in cells and on 6/11/2015 he was arraigned in court where he found himself charged with the offence of defilement. He denied committing the offence.

27. Persuaded that the prosecution had established the ingredients of the offence of defilement; that the appellant had been properly linked to the offence; that the appellant had not put forth a sustainable defence and that the prosecution had proved its case against the appellant beyond reasonable doubt on the charge of defilement of a minor, the trial court convicted him of the offence of defilement and sentenced him to life imprisonment. The appellant preferred this appeal against his conviction and sentence.

28. As earlier stated, the appellant appeared *pro se* [self-represented] and relied on his written submissions to canvass his appeal whereas the prosecution led by Miss Odumba represented the State, vehemently opposing the appeal herein and urging the court to dismiss the appeal and uphold the conviction and sentence meted out on the appellant by the trial court.

WHETHER THE APPEAL HAS MERIT

29. The appellant submitted that his right to a fair hearing under **Article 50(2)(c)** of the **Constitution** was violated during the trial because the prosecution had failed to avail to him all documents which the prosecution intended to rely on during the trial. As such, he was not able to prepare a suitable defence. He contended that the lapse in reporting the occurrence of the offence by 10 days ought to have been resolved in his favour. In his further view, the age of the minor which was a crucial component to the charges against him had not been proved simply because the prosecution failed to produce the minor's birth certificate. He also faulted the learned trial magistrate for failing to consider the fact that he was never examined medically to prove that he is the one who infected the complainant with STI.

30. The appellant further contended that some essential witnesses were not called, the investigations were shadowy and therefore he was occasioned a miscarriage of justice.

31. On her part, Miss Odumba submitted that there was overwhelming evidence against the appellant; firstly, the ingredients of the offence of defilement was proved, Pw3 the clinical officer who examined the minor confirmed that she was defiled, that there was penetration, treatment notes and P3 form were produced in evidence that the minor confirmed that the appellant defiled her and she knew him as they were from the same village the incident happened in broad daylight and the trial court found the minor complainant truthful. Further, that the baptismal card was produced which proved her age and the *voire dire* examination proved her age as below 8 years. She prayed for the appeal to be dismissed.

DETERMINATION

32. I have considered the record, reevaluated the evidence adduced, the grounds of appeal, the submissions tendered and the law.

33. **On the question of fair trial**, an integral component of a fair trial is that an accused person ought to be furnished with all the details and evidence against him at the earliest opportunity to enable him/her prepare a suitable defence. From the record, I note that at the first date of hearing on the 22/12/2015, the appellant stated that he was not ready for the hearing because he had not been supplied with statements. As a result the trial court adjourned the hearing and directed the prosecution to avail the statements and other relevant documents that the prosecution were to rely on at the hearing to the appellant. I have perused the record and it is clear the appellant raised the same issue of statements on 21/1/2016 and the trial Magistrate once again adjourned the hearing to 15th February, 2016 when the appellant said: **I AM READY**. This was after the Prosecution said it had 4 witnesses to call.

34. The record does not reveal that the appellant ever complained that the trial was proceeding without him being furnished with statements and other relevant documents that the prosecution was to rely on. He never raised the issue of statements and or documents again, which suggests that he was duly supplied with the statements and or documents as ordered by the court. Consequently, I find no basis for his complaint on appeal and therefore I have no basis to hold that the appellant's constitutional rights to fair hearing were violated as he claims. The ground of appeal therefore fails and the same is hereby dismissed.

35. **On the ground that the prosecution did not prove the appellant's guilt beyond reasonable doubt as the appellant was not medically examined to prove his involvement in the crime of defilement of the minor victim/complainant**, it cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy.

36. **Section 36(1) of the Sexual Offences Act** stipulates:-

“Notwithstanding the provision 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 condition, as the Court may direct for the purpose of forensic and other testing, including a DNA test, in order to gather evidence and to ascertain whether or not the Accused person committed an offence.”

37. The above provision was considered by the Court of Appeal in **Robert Mutingi Mumbi V R. Cr. Appl. No. 52/2014 (Malindi)** and in the former, the Court of Appeal stated:

“Section 36(1) of the Act empowers Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the Accused person and the offence. Clearly that provision is not concluded in mandatory terms.”

Decision of this Court abound which affirm the principle that Michael or DNA evidence is not the only evidence of which commission of a Sexual offence may be proved.”

38. In the **Williamson Sowa Mbwanga V R** case, the Court of Appeal stated:

“..... As the Court of Appeal of Uganda rightly stated, in the Sexual Offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be ruptured It is partly for this reason that Section 36(1) of the SOA is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purpose of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific or DNA testing.”

39. It is not in dispute that the minor was defiled as verified by PW3 Jared Obiero Opondo the Clinical Officer who examined the complainant. However, the appellant contends that there was no medical evidence connecting him to the offence. As pointed out by the Court of Appeal time after time, medical or DNA evidence is not the only way in which a charge of defilement can be proved against an accused. In ***Kassim Ali vs. Republic* [2006] eKLR** it was stated:

“... [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 of rape or by circumstantial evidence.”

40. The same position was further reaffirmed in ***George Kioji vs. R - Nyeri Criminal Appeal No. 270 of 2012 (unreported)*** that-

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

41. In this case the minor gave a detailed account of what transpired between her and the appellant. Her evidence was further corroborated by PW2 her father who observed her walking while bending and having difficulties while urinating. The complainant maintained in her testimony that she had been warned by the appellant that he would kill her if she revealed to anyone what had happened to her. As a young child, she obeyed the command not knowing that she had suffered grievous harm.

42. The trial court which had the opportunity to observe the demeanour of these witnesses found them to be truthful and I see no reason to interfere with that finding. At page 20 of the Judgment and page 29 of the record the trial magistrate stated:

“... PW1 clearly identified the accused as the person who defiled her and this evidence was not controverted. The witness also appeared truthful and therefore I have no doubt in my mind that the accused was the perpetrator.”

43. See also ***Samuel Muriithi Mwangi vs. R* [2016]**. I am satisfied that there was more than sufficient evidence and proof beyond reasonable doubt, from the complainant, her father and the clinical officer connecting the appellant to the offence of defilement of the complainant and therefore the ground of appeal on account that the appellant was not medically examined to prove his involvement in the crime fails. I dismiss that ground.

44. The appellant further claimed **that the age of the complainant was not conclusively determined and that therefore there was no proof that she was a minor of that age during the alleged defilement**. The significance of establishing the age of a victim of defilement was underscored in ***Hadson Ali Mwachongo vs. R* [2016] eKLR** in the following terms: -

“It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In *Alfayo Gombe Okello v. Republic* (2010) eKLR this Court stated as follows:

“In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)...”

45. The evidence adduced in respect of the minor's age was by her father PW2 and PW3 the clinical Officer who indicated in the P3 form that she was 8 years old at the material time. A baptismal card was also produced of Nomiya Church of Peace showing that she was born on 16/12/2007 and baptized the same month on 30th December 2007. There is nothing on record to suggest that the baptismal card was issued for purposes of the trial in this case. Was this sufficient proof of age?" Rule 4 of the Sexual Offences Rules stipulates that:

“When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”

46. The Sexual Offences Act adopts the definition of a child in the Children's Act. Section 2 of the Children Act defines "age" as,

"Where actual age is not known means the apparent age".

47. Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the Sexual Offences Act. Faced with a similar situation, as in this case, the Court of Appeal in ***Evans Wamalwa Simiyu vs. R* [2016] eKLR**, observed:

“As to whether the appellant’s age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant’s mother did not offer any useful evidence in this regard as she did not say anything about the complainant’s age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children’s Act “age” where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years.”

48. In **RUA NGAO MWATUMA -VS- REPUBLIC [2014] e KLR, H.C. AT MALINDI CRIMINAL APPEAL NO. 21 OF 2012**, Honourable Justice Angote while relying on the decision in the case of **KAINGU ELIAS KASOMO -V- R. MALINDI CR. APP. NO. 504 OF 2010** observed:

“The date of birth was not given and it would seem that the only medical evidence tendered was the P3 form which gives the estimated age as 15 years. In the case of KAINGU ELIAS KASOMO -V- R MALINDI CR. APP. NO. 504 OF 2010 the Court of Appeal stated that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence.

Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defilement victim is carried out by dentists.

The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth.”

49. In **GILBERT MIRITI KANAMPIUS -V- REPUBLIC [2013] eKLR, H.C. AT MERU, CRIMINAL APPEAL NO. 97 OF 2009**, Gikonyo J. while relying on the case of **FAPPYTON MUTUKU NGUI -VS- REPUBLIC, H.C. AT MACHAKOS CR. APPEAL NO. 296 OF 2010**, noted as follows;

“Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction. But see the decision by Prof. Ngugi J. in MACHAKOS HC. CR. APPEAL NO. 296 OF 2010 FAPPYTON MUTUKU NGUI -VS- REPUBLIC: “... that “conclusive” proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”

50. In **LAMECK OKEYO ONYANGO -V- REPUBLIC [2014]e KLR, H.C. AT KISII CRIMINAL APPEAL NO. 2 OF 2010**, Hon Nekoye Sitati, J. relying on **JOHN OTIENO OBWAR -VS- REPUBLIC HIGH COURT CRIMINAL APPEAL NO. 34 'B' OF 2010** reiterated as follows;

“In JOHN OTIENO OBWAR -VS- REPUBLIC HIGH COURT CRIMINAL APPEAL NO. 34 'B' OF 2010 Makhandia J (as he then was) held:-

“Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly, it is important that the age of the victim be proved by credible evidence. In the circumstances of the case, the charge sheet talks of the complainant being 14 years. Other than that allegation, there was no other proof. The clinical officer who examined her never assessed her age. It would have been easy for the prosecution to tender in evidence like the complainant's birth certificate to prove her age. This was not done with the consequence that the age of the complainant was not proved as required.”

51. In **WILLIAM ODHIAMBO SIARA -VS- REPUBLIC [2014] e KLR H.C AT KISUMU, CRIMINAL APPEAL NO. 77 OF 2012**, the learned Muchelule, J delivered himself as follows;

“In ground 4 of the petition of appeal it was contended that the age of PW3 was not proved beyond doubt. I agree that because of the fact that the various sentences under the Act are dictated by the age of the complainant, it is incumbent upon the prosecution to prove age beyond doubt. For PW3, her mother (PW1) gave her date of birth to be 2/3/99. That was not challenged. She also gave her baptismal card which showed date of birth. It is notable that documents like birth certificates, baptismal cards or school admission papers will indicate date of birth and, unless they are shown to have been made at the time when the prosecution was launched, are material corroborating evidence. An age assessment by a doctor would be useful, but it should be borne in mind that any such assessment is a medical approximation. I am satisfied that PW3 was 12 going to 13.”

52. In **JOSEPH KIETI SEET -VS- REPUBLIC [2014] e KLR, H.C. AT MACHAKOS, CRIMINAL APPEAL NO. 91 OF 2011**, Mutende Lilian, J. held as follows;

“ It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may

also be proved by birth certificate, the victim's parents or guardian and by observation and common sense”

53. Having taken the foregoing in mind, it is my considered view that in this case, the complainant/minor's apparent age was proved by the P3 form and the baptismal card as confirmed by her father, PW2 that she was born on 16/12/2007, accordingly, the appellant's ground of appeal fails and the same is dismissed.

54. **The appellant further claimed that some essential or crucial witnesses were not called to testify namely the grandfather who allegedly send the minor to go and call a person to collect his charcoal and the cousin Health Community Worker** to PW2 who was called to see the minor after it was discovered that she was hurting and who gave her some drugs. The appellant urges the court to draw an inference that had these witnesses been called to testify for the prosecution, they would have given adverse evidence.

55. This court is alive to the holding of the former East Africa Court of **Appeal in Bukonya & Others V. Uganda, [1972] E.A. 549**, that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case.

56. However, Section 153 of the Evidence Act, Cap.80 stipulates that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In addition, the proviso to Section 124 of the Evidence Act allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful.

57. Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available to testify.

58. In this case, after conducting a *voire dire* examination on the minor complainant, the trial court found that the complainant had intellectual capability of appreciating the proceedings and allowed her to give unsworn evidence owing to her age. She told the court that her grandfather had sent her to tell a neighbor to come and pick charcoal and that on return is when the appellant told her to go bring sugar from her mother. She obliged and upon her return he led her into his house and told her to sleep on his bed. He removed her pants, removed his as well and inserted his penis in her vagina and defiled her, she felt pain after which he washed her private parts and told her not to tell anyone or he would kill her. She did not tell her mother or anyone immediately until her condition worsened and her father noticed the problem is when she owned up and narrated to him her ordeal upon which her father informed his cousin who was a community health worker and treatment was initiated and a report made to the police station. She explained that the appellant took his penis out and put it in her vagina, and that after defiling her, he promised to give her mandazi.

59. The trial court, which had the opportunity to observe the complainant's demeanor found that she was truthful and believed her. This being a finding of fact, it is one which this court will not interfere with unless just cause is shown. Having carefully analyzed the complainant's testimony, I have found no reason to depart from the trial court's finding.

60. In my humble view, the complainant's sole evidence was sufficient to sustain a conviction in terms of the proviso to Section 124 of the Evidence Act. She knew the defiler very well as he comes from her locality and as it was in broad daylight. However, it was corroborated by the entire prosecution evidence as adduced by PW2 her father and the clinical officer who examined her.

61. P.W2 confirmed that the complainant informed her of the incident. When the report was made to the police, she recorded her statement which the police relied on to arrest the appellant and charge him with the offence. In addition, the medical examination established that the complainant's hymen had been broken, which according the P.W.3 was evidence that she had been defiled.

62. This court finds that there was no gap in the prosecution case that the additional witnesses' testimony would have filled. The complainant's credibility was not in doubt and she maintained her stand. In this case therefore, I find and hold that failure to call the additional witnesses was not crucial and had no bearing to the prosecution case. Accordingly, I dismiss the appellant's ground of appeal and complaint touching on failure to call additional witnesses as those alleged witnesses would have added no value to the already sufficient evidence adduced by the PW1, PW2 and PW3.

63. **The appellant further claimed that the report to the police was made after a long time of 10 days from the date of the alleged defilement.** However, the complainant stated that she feared telling anyone and especially her mother because the defiler had threatened to kill her if she told anyone and that the appellant defiler had promised to buy her a mandazi. She was however emphatic in her evidence that she was defiled on 18th October 2015 at 9.00am. It was not until 31st October 2015 that her father realized that the complainant had a problem. In her evidence the complainant told the trial court that she did not tell her mother because the appellant had said he would kill her if she told anyone. The complainant said she later told her mother after two days. However, there is nothing from the evidence of PW2 that suggests that his wife the complainant's mother was aware of the defilement of her child after two days. This is so because PW2 stated that it was after he had noticed the problem with the complainant, is when his wife told him that the child had problems walking. Albeit the child's mother did not testify as earlier stated, the failure to do so in my view is not material as the evidence on record is clear that the appellant had threatened to kill the complainant if she spilled the beans and that is the reason why she did not report the incident until the time when she was unable to walk properly with the STI having set in as confirmed by the medical examination report. In addition, there is evidence that when PW2 informed his cousin a Health community worker, the latter checked on the child and accompanied the father of the child and the child to Rambugu Dispensary where she was treated before a report was made to the Police Station. A treatment book from Rambugu Dispensary was produced in evidence as an exhibit.

64. In my view the prosecution established a strong case that the appellant defiled the complainant while in contrast, the appellant's defence that he knew nothing about the charge is very unlikely and unbelievable. I am satisfied that the prosecution proved its case beyond reasonable doubt. Accordingly, failure to report the incident to the police immediately after the defilement was not fatal to the prosecution case.

65. The appellant also claimed that the investigations were shadowy. In my view, that allegation was unsupported. There is evidence on record that after the report was made to the police, they recorded a statement from the complainant and her witnesses. She was medically examined and found to have been defiled and that is when the appellant was arrested and charged with the offence. There was no allegation or evidence of bad blood between the appellant and the complainant's family. PW4 PC Samson Katana stated that upon receipt of the report of defilement of the complainant, they carried out investigations, interrogated the complainant who stated that the incident took place on 18th October 2015 in the appellant's house. He issued her with a P3 Form and collected her baptismal card and then he issued an arrest order and the complainant pointed out to the police the appellant's home. The P3 Form was filled after the child was treated. The accused was charged with offence after the police were satisfied that there was material sufficient evidence to sustain a charge of defilement against the appellant. I find and hold that the investigations were not shadowy as alleged by the appellant. The ground of appeal accordingly fails.

66. The appellant never challenged the sentence imposed on him. The same was lawful. I find no reason to interfere with it. It is upheld. The appellant shall serve life imprisonment meted out by the trial court.

67. On the whole, I hold and find that all the appellant's grounds of appeal are without any merit. Accordingly, I see no basis of interfering with the findings of the trial court. The appeal as a whole be and is hereby dismissed.

68. Dated, Signed and Delivered in open court at Siaya this 12th day of June 2018.

R.E.ABURILI

JUDGE

In the presence of:

Miss Odumba Prosecution Counsel for the State

Mr Julius Odipo Yan the appellant in person

Court Assistants: Brenda and Laban