REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

(DEFILEMENT)

HIGH COURT CRIMINAL APPEAL NO. 158 OF 2016

(CORAM: R.E. ABURILI – J.)

MARTIN OKELLO ALOGO......APPELLANT

VERSUS

REPUBLIC.................................RESPONDENT

(Being an appeal against both the conviction and the sentence dated 11.11.2016 in Criminal Case No.395 of 2016 in Bondo Senior Principal Magistrate's Court before Hon. E.N. Wasike – R.M.)

JUDGMENT

1. The Appellant **MARTIN OKELO ALOGO** was charged with the offence of defilement contrary **to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act.** He was also charged with the alternative charge of **Committing an indecent act with a Child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.**

2. The particulars of the offence were that on the 13th day of March 2016 at 4.00 p.m. Bondo Sub-County with Siaya County, the Appellant herein intentionally caused his penis to penetrate the vagina of E.A.O [name of minor withheld for legal reasons], a child aged 10 years. In the alternative charge, the Appellant was alleged to have intentionally touched the vagina of E.A.O. a Child aged 10 years.

3. The Appellant pleaded not guilty to both charges. He was tried and convicted for the offence of defilement by Hon **E.N.Wasike**, Resident Magistrate and was sentenced to serve life imprisonment. He was acquitted of the alternative charge. This was on 11/11/2016.

4. Aggrieved by the conviction and sentence meted out to him by the trial Court, the Appellant lodged this appeal on 18.11.2016, setting out the following grounds:

> ***(1) That the Appellant was a minor by the time he was alleged to have committed the offence;***
>
> ***(2) That the learned trial Magistrate erred in law by convicting in a case that age was not conclusively proved;***
>
> ***(3) That vital witnesses were not called to ascertain the state at which the alleged offence occurred.***
>
> ***(4) That the alibi defence was conclusively considered hence harshly convicted;***
>
> ***(5) That I wish to supplement my grounds at the hearing of this appeal.***
>
> ***(6) That I cannot recall all that transverse during the trial hence pray for trial proceedings so as to adduce sufficient grounds hence habeas corpus (sic).***

5. The Appellant was unrepresented at the trial and on appeal, he availed to Court amended grounds of appeal which are undated. In the said grounds, the Appellant states:

> ***1) That the trial Magistrate erred in law and facts by convicting and sentencing the Appellant on PW1's evidence who was coached, coerced and lured to give incriminating evidence against the Appellant;***
>
> ***2) That the trial Magistrate erred in law and facts by convicting and sentencing without noting that very crucial witnesses were***

not summoned to testify hence their case not proved beyond reasonable doubts;

3) That the Prosecution failed to comply with the provisions of Article 50 (2) (2) (j) of the Constitution hence not accorded a fair trial;

4) That I was not subjected to any medical examination to link me to the said offence. The Appellant urged that this appeal succeeds, conviction quashed and sentence set aside. The Appellant also supplied the Court at the hearing, written submission.

6. In his written submissions, on the ground that the Complainant accordingly was coached, coerced and lured to give incriminating evidence against the Appellant, it was submitted that there was no way PW1 could be walking on a smooth road and suddenly fall on the ground and then from nowhere alleges that the Appellant came and defiled her. According to the Appellant, he was not an Angel to suddenly appear from nowhere and defile the complainant.

7. It was further submitted that the Complainant's inner parts were not produced in Court as proof, which, according to the Appellant, is indicative that the complainant was coached and lured to give incriminating evidence which the Prosecution failed to substantiate how PW1's evidence should be disregarded.

8. It was further submitted that the Prosecution did not discharge the legal burden of proving their case against the Appellant beyond reasonable doubt because crucial witnesses were not summoned to testify. For example, it was submitted that the lady who allegedly rescued the complainant and told her to go home was never called to testify.

9. Further, that the Complainants siblings whom the Complainant informed that she had been defiled were never called to testify. Further, that the Complainant's teacher who smelt foul smell and asked her what the problem was ad who called the Chief was never called to testify, and that neither was the Assistant Chief who called the Complainant's parents called as a witness.

10. It was submitted that if all the above named person had been called to testify, the trial Magistrate would have arrived at a different verdict form the one arrived at. It was submitted although there is no specific number of witnesses allowed by law to prove any case, the Prosecution deliberately avoided the said witnesses for fear of their impact hence the Prosecution case was not proved beyond reasonable doubt.

11. On non-compliance with **Article 50 (2) (j) of the Constitution**, it was submitted that the appellant was denied a fair trial because the said provisions were not observed. That although the Appellant was issued with witness statements and exhibits such as all the Prosecution's evidence, copy of the birth certificate and the first report made to the Police by the Complainant was not disclosed to the Appellant. The Appellant relied on the care of **Thomas Patrick Cholmondeley Vs. R. CR.A. No. 116/2007** where the Court of Appeal in allowing the appeal held that it was the duty of the Prosecution to disclose the Accused person al documents, exhibits and statements intended to be used at the trial, beforehand, whether asked for or not, as the criminal trial is in the nature of a contest, and a fair hearing requires in its nature equality between the contestants, assumption to presumption of innocence and that the guilt of the Accused person be proved beyond reasonable doubt.

12. It was further submitted that in a sexual related offence it is very essential to subject all the parties to medical examination to ascertain the truth and as a way of proving penetration. According to the Appellant, failure to subject him to any medical examination mans that he could not be medically linked to the Sexual Offence.

13. In opposing the Appellant's appeal, Miss Odumba, Prosecution Counsel, on behalf of the DPP orally submitted that the conviction and sentence meted out on the Appellant were sound. That all the ingredients of defilement were all proved. Further, that it was proved that the complainant was a minor aged 10 years, *voire dire* was conducted on her and she understood what was going on and that her birth certificate was produced in evidence.

14. It was submitted that the evidence adduced proved that there was penetration by the Appellant who grabbed the Complainant into the bush and defiled her.

15. Further, that her teacher observed her and the Medical Officer examined her and filled a P3 form showing that she was defiled, as shown by treatment notes that the victim's vagina was penetrated into.

16. Further, it was submitted that the Appellant was recognized by the victim as a person known to her and she mentioned him as Martin the Water Vendor.

17. It was further submitted that the incident took place in broad daylight at 4.00 p.m. hence there was no mistaken identity as the victim's mother too identified him.

18. On allegation that **Article 50 (2) (j) of the Constitution** was violated, it was submitted that all exhibits were produced in Court and the Appellant was given witness statements. Miss Odumba urged the Court to dismiss the Appellant's appeal and uphold the conviction and sentence.

ANALYSIS AND REASSESSMENT OF EVIDENCE ON RECORD AND DETERMINATIONS

19. The evidence adduced by the Prosecution witnesses PW2, PW3 and PW4 the mother, Clinical Officer and Police Officer show that the victim was aged 10 years, legally speaking, this is a child of tender age and therefore **Section 19 of Cap 15** applies. The trial record at page 7 shows that the trial Magistrate complied with **Section 19 of Cap 15** and conducted a detailed *voire dire* and after satisfying herself that the

minor had sufficient intelligence, allowed her to testify on oath and she was cross-examined by the Appellant herein. PW2 testified and stated that her daughter PW1 was aged 10 years as per her birth certificate was produced in evidence as an exhibit by PW4. PW3 the Clinician at Bondo District Hospital who examined the minor found that she was defiled and that there was penetration and that there were injuries on her private parts. PW1 testified that she fell while running home from the shops where she was coming from and that is when she was grabbed by the Appellant who dragged her into the bushes, removed her inner pants, removed his too and inserted his penis into her vagina. She shouted and a woman who was passing by asked as to what was happening and on hearing this the Appellant took her pant and ran away. She did not know the woman who then told her to go home it was about 4.00 p.m. when she went home and informed her siblings of what had transpired, they told her not to tell her parents as they would be punished. On the following day she went to school and as she was going to get her books, one of her teachers noticed that she was informed her teacher and the teacher called her parents who went to school and took her to hospital where she was treated, given waster to bathe and the following day she was taken to the Police Station to report. She stated that she knew the Appellant before the incident as he was a water vendor and she mentioned him by name as Martin. She also identified him in Court. On cross-examination by the Appellant, the Complainant stated that the woman who passed by did not take her home but went away and that the incident took place far from her home. She stated that she was from buying cooking oil and that the Appellant accosted her near the bush. She also shouted on being defiled and that is when the passerby woman went to her rescue. She maintained that she was speaking the truth and that she first informed her siblings about the incident but they told her not to tell anyone.

20. PW2 confirmed that she was the mother to PW1 who was 10 years old as per her Birth Certificate No. XXX produced in evidence as Ex.1 and stated that on 17.3.2016 at about noon she was called by the Assistant Chief to go to School at *[particulars withheld]* where she met the teacher who informed her that PW1 was having smelly discharge and that she had checked the child's vagina and seen bruises. PW2 checked the child and saw watery discharge from the vagina she took the child to Bondo Hospital where she was treated. She identified treatment notes in Court. She later went to Bondo Police Station and reported and was issued with a P3 form.

21. On being cross-examined by the Appellant, PW2 stated that it was the teacher who noticed something wrong with PW1, that PW1 identified the Appellant as the culprit and that at times she stayed away from her children so it was difficult to notice anything.

22. PW3 Japheth Oduor Mumi, a Clinician from Bondo District Hospital saw PW1 and examined her with a history of having been defiled by a well known person on 13.3.2016 at 4.00 p.m. She was dragging her left leg. He found laceration on the labia majora, tear on the labia minora which was tender on digital examination and hymen was broken. She had a foul discharge from her vagina indicate of some infection. He found no pubic hair and there was no spermatozoa infection of the urine pus cells was noted. He concluded that there was penetration and force used as shown by the reddishness in the labia majora and labia minora and the dragging of the leg. She produced P3 which he filled and treatment notes as PEX2 (a), 6 and (c) and P3 as PEX3.

23. On being cross-examined by the Appellant, PW3 stated that the patient stated that she was forced into performing sexual intercourse by someone known to her.

24. PW4 No. 38076 PC Jacob Festus Mbando attached to Bondo Police Station performing Crime Branch duties stated that on 18.3.2016 the Complainant reported that on 13.3.2016 she had gone to a shop to buy cooking oil when on returning she was grabbed by the Appellant and he had sex with her without her consent. He recorded her statement and issued her with a P3 form and issued an arrest order for the Appellant to be taken to the Assistant Chief of Nyawita Sub-Location one, Mr. Walter. Later the Appellant was traced, arrested and escorted to the Police Station where he was charged with the offence. PW4 later received PW1's birth certificate which was produced as an exhibit No. 1. He identified the Appellant in Court.

25. On cross-examination by the Appellant, PW4 stated he did not witness the incident.

26. On being placed on his defence, the Appellant gave unsworn evidence stated that he comes from Nyamira and usually made bricks and that on 13.3.2016 which was a Friday he was surprised to see the Assistant Chief and other two people go to his house and arrest him. That they found him burning charcoal and that the Assistant Chief told him that the Complainant's parents had reported that he had defiled her. He was escorted to the Police Station and was charged with the offence. He denied knowledge of the Offence. The Appellant closed his case without calling any witness.

27. In her judgment, the trial Magistrate after analyzing the Prosecution case and defence by the Appellant found and held that all the ingredients of the offence of defilement had been establishment. In that:

> ***(1) There was penetration,***
>
> ***(2) The perpetrator was positively identified by recognition as he was well known to the Appellant and the offence took place at 4.00 p.m. in broad daylight,***
>
> ***(3) That the age if the Complainant was proved by production of her birth certificate showing was born on 5.4.2006 hence she was 9 years and 11 months which falls within the age bracket envisaged by the Act.***

28. She found that the alternative she also found that the Prosecution witnesses were credible and that they Appellant was correctly connected with the offence. She also found that the Appellant's defence was sham and lacked substance and credibility.

29. Finally, the trial Magistrate found that the Prosecution had proved its case against the Appellant beyond reasonable doubt.

30. She accordingly convicted the Appellant for the offence of **Defilement Contrary Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006** and sentenced him to serve life imprisonment which is the minimum sentence provided under the law.

31. Having carefully considered the grounds of appeal and submission in favour of and against the appeal, and having analyzed and

reassessed the evidence adduced on record, having regard to the fact that I neither saw nor heard the witnesses as they testified, as was espoused in **Okeno V. Republic [1972] EA. 32, t**he issues for determination flow from the grounds of appeal namely:

> ***1. Whether the trial Magistrate erred in law and fact in convicting the Appellant when the complainant's inner pants were never produced in court;***
>
> ***2. Whether the conviction of the appellant was erroneous based on the evidence of PW1 and whether PW1 who was allegedly couched and lured to adduce evidence incriminating the Appellant.***
>
> ***3. Whether failure by the Prosecution to call all possible witnesses entitles the Court to make an adverse inference against the Prosecution in the circumstances of this case.***
>
> ***4. Whether the Appellant was accorded a fair trial under Article 50(2) (j) of the Constitution.***
>
> ***5. Whether failure to subject the Appellant to Medical Examination failed to link him to the offence of defilement and therefore whether such failure is fatal to the Prosecution's Case.***
>
> ***6. Whether the Prosecution proved its case beyond reasonable doubt. The above issues flow from the Appellant's amended grounds of Appeal presented to Court on 16.5.2018.***

32. On the first issue of whether the evidence of PW1 was safe to sustain the Appellant's conviction and whether PW1 was couched and lured to adduce incriminating evidence against the Appellant, the Appellant claims, that there is no way, and that it was therefore unbelievable that PW1 could have been walking on smooth road and suddenly fall on the ground and be defiled by the Appellant who emerged suddenly from nowhere.

33. This Court observes that from the record, the trial Court conducted *voire dire* examination on PW1. Section 19 of the Oaths and statutory 19 of the Oaths and – Statutory **Declaration Act Cap 15 Laws of Kenya** stipulates that:

> *"19(1) Thus, where, in any proceedings before Court, a child of tender age is called as a witness, the Court must be satisfied that is the child understands the nature of the Oath or*
>
> *(2) If the child, in the opinion of the court does not understand the nature of the Oath, whether the child is possessed of sufficient intelligent to justify the reception of the evidence, and understands the duty of speaking the truth. It is only after the Court conducts the inquiry that the testimony of a child of tender age is received in evidence either under Oath or as unsworn statement in both cases, however, the child is liable to be cross-examined. The question is whether the trial Magistrate complied with the above law and procedure since non-compliance thereof could lead to quashing of the conviction unless there is other independent evidence which is sufficient on its own to sustain a conviction. See* ***Nyasani s/o Bichana V. Republic [1958] E.A. 190****."*

34. From the above analysis of the trial record, it is clear to this Court that the Complainant was a minor aged 9 years and 11 months and that she was defiled at 4.00 p.m. by a person known to her and that that person is the Appellant herein. She identified him as Martin the water vendor. PW1 was rescued by an unknown woman who was passing by and who heard her screams and asked what was happening upon which the Appellant picked her inner pant and took to his heels. The Complainant was told by the lady to go home and when she met her siblings and told them what had happened to her, they warned her not to tell her parents apparently for fear of chastisement. PW1 did not tell her parents of her ordeal for fear of being punished. The following day, she went to school and that is where her teacher noticed that PW1 was smelly. The observant teacher questioned the minor after which PW1 disclosed what had happened. The teacher called the Assistant Chief who called the Child's mother who came and took the Child to hospital and a report made to the Policy.in my humble view, failure to produce the inner pant of the complainant is not fatal to the prosecution case as the minor clearly stated that the appellant ran away with her inner pants when she screamed and an unknown woman asked as to what was happening. It is not that the inner pant was recovered and that the prosecution failed to produce it in court as an exhibit. Furthermore, there is nothing on record, not even a question posed by the appellant to the prosecution witnesses as to whether they coached the complainant minor to give her evidence in the manner in which she did. The ground of appeal accordingly fails and the same is dismissed.

35. **On the issue of whether the age of the Complainant was proved,** the importance of proving the age of a victim of defilement under **Sexual Offences Act** by cogent evidence cannot be gainsaid. 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. See **Alfayo Gombe Okello Vs. R. Cr. Appl. No. 203 of 2009 (KSM)** where the **Court of Appeal** stated:

> ***"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 office under Section 8 (1) …"***

36. See also **Kaingu Elias Kasome V. R. Cr. Appl. No. 504/2010 Malindi C.A.** Evidence of PW1's age was given by PW2 her mother and by production of her birth certificate **No.XXX** which shows that she was born on 5.4.2006. The charge sheet states that she was aged 10 years. From the birth certificate, as at the date of defilement she was aged 9 years and 11 months only, about a month away to turn 10 years. In light of that evidence by PW2 and the Birth certificate, I am satisfied that the age of PW1 was appropriately proved and therefore there was no room for reasonable doubt to be entertained in that regard, as there was no evidence that the birth certificate was procured at the time of the trial to cover up the older age of the complainant. In **JOSEPH KIETI SEET -VS- REPUBLIC [2014] e KLR, H.C. AT MACHAKOS, CRIMINAL APPEAL NO. 91 OF 2011,** Mutende 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 ….”

37. The Court of Appeal in the case **of Hadson Ali Mwachongo v Republic [2016] eKLR** stated as follows regarding the issue of age of the victim of Sexual Offence:

“Before we conclude this judgment. It is necessary to say a word on computation of the age of the victim. The Sexual Offence provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim 15 aged 11 years or less, the prescribed punishment Child of 12 to 15 years attract 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment. Rarely will the age of the victim be exact, say exactly 8 years, 10 years, 13 years, etc, as at the date defilement to be treated as 11 years old or as more than 11 years old? If the victim is treated as more than 11 years old, to what term is the offender to be sentenced since the victim has not attained 12 years for which a sentence is prescribed. In the same vein, in the present appeal where the victim was aged 15 years and a couple of months old, but was not yet 16 years old, is the Appellant to be sentenced as if the victim was exactly 15 years or as if she was 16 years old? ….”

38. In this case it is no doubt that the complainant’s age is below 11 years hence the trial Court was correct in convicting the Appellant as she did based on evidence adduced that proved the offence of defilement against the Appellant beyond reasonable doubt.

39. Accordingly, that ground of appeal fails and is dismissed.

40. On the allegation that the Appellant was not medically examined to determine whether he was connected to the offence, **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 on 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***.”

41. The above provision was deliberated on by the Court of Appeal in the case of **Robert Mutingi Mumbi V R. Cr. Appl. No. 52/2014 (Malindi)** and 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.”

42. 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 six organ by the male sex organ is sufficient to Constitute* ***the offence and it is not necessary that the hymen be raptured ………… It is party 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.”***

43. Further **Section 124 of the Evidence Act** (the proviso thereto) clearly stipulate that the Court can connect the Accused person in a Prosecution involving a Sexual Offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief: (See **George Kioyi V R Cr. Appl 270/2012 (Nyeri**) and **Jacob Odhiambo Omumbo V R. Cr. Appl 80/2008 (KSM)**.

44. In this case the Trial Magistrate expressed himself this regarding PW1’s evidence:

“***The witness/minor appeared confident and believable when describing the events and I have no doubt in my mind that she was able to identify the Accused person as the perpetrator of the offence***.”

45. The trial Magistrate further stated that:

“Upon a general analysis of the proceedings on record, I have made the following inferences:,

- ***(i) The Prosecution witness appeared from and consistent;***

(ii) The evidence by the Prosecutor was not discredited by the defence.

(iii) The Accused failed to mount a sustainable defence;

(iv) The Prosecution were able to establish ingredients of the offence/changes facing the Accused person as per the law."

I therefore find that the Prosecution has been able to prove its case beyond reasonable doubt."

46. From the trial record, albeit this Court did not have the benefit of seeing and hearing witnesses and the Appellant as they gave evidence in the lower Court, I am satisfied that the trial Court properly directed itself and its mind on proof of the Sexual Offence with which the Appellant was charged and that even without the Appellant being medically examined there were other sufficient evidence upon which the Appellant could be properly convicted for defilement.

47. On whether the Appellants Constitutional right to a fair trial and fair hearing was violated and therefore whether **Article 50 (2) (j)** of the Constitution was violated, the Appellant claims that albeit he was furnished with witnesses statements and other documents, he was not furnished with medical evidence and copy of birth certificate and that the first report made to the Police by the Complainant was not disclosed to him and neither did he have access to them. He relied on Thomas **Patrick Cholmondeley Vs. R** where the Court of Appeal held that it was the duty of the Prosecution to avail to the defence beforehand, Whether asked or not, all statements and exhibits intended to be used at the trial by the Prosecution"

48. The trial record shows that on 3.5.2016 therefore **Hon. E.N. Wasike R.M**., the Appellant stated:

"***I am not ready. I do not have statement.***

Court: matter is hereby adjourned. Accused to be supplied with witness statements."

49. On 27.6.2016, the Prosecution stated that they had 4 witnesses and the Appellant stated: "***I am ready***." In the case of **Hadson Ali Mwachongo Vs. R. Cr. Appl. 65/2015 [2010] eKLR**, the Court of Appeal stated:

"We are equally satisfied that the Appellant's Constitutional right to a fair trial was not violated. The record does not indicate the Appellant raising any issue pertaining to access to witness statements. On the contrary, he is recorded informing the Court that he was ready for the hearing of the case when he was put on his defence on 18th April 2011, he informed the Court that he was ready for his defence but later stated that he needed to be provided with the "charge" The trial Court adjourned the proceedings and directed that the proceedings be typed and supplied to the appellant. ………………. As this Court stated in <u>Francis Macharia Gichengi, & 3 Others, Cr. Appl No. 11 of 2004,</u> it is to be reasonably expected that an Accused person who claims that his or her trial rights have been violated will at the very least raised the issue with the trial Court."

50. In the instant case, and as indicated above, the trial record shows that the Appellant was supplied with witness' statements and on the hearing date, after the trial Court adjourned the hearing, he stated that the was ready to proceed. In the same manner, on 19.8.2016 he stated that he was ready for his defence. He denied knowledge of the offence. He did not raise any claim that his rights had been violated or that he had not been supplied with all the documents that he required for the trial and to enable him, mount a defence. There is nothing on record to show that he asked for specific documents which the prosecution denied him or which the court ignored to record or direct the prosecution to supply him with. I therefore find and hold that the allegation that **Article 50(2) of the Constitution** was not adhered to, an afterthought and dismiss it.

51. The Appellant further claimed that crucial witnesses were not summoned to testify namely, the woman who found PW1 being defiled and told her to go home; the PW1's cousins to whom the minor notified of her ordeal and who warned her not to tell her parents for fear of being chastised; and the teacher who first discovered that the minor had a problem; and the Assistant Chief who was called by the teacher and who in turn called the minor's mother. The Appellant urged this Court to find that failure by the Prosecutor to call all those persons named as witnesses entitles the Court to make an adverse inference against the Prosecution in the circumstances of the case.

52. **Section 19 of the Oaths and Statutory Declaration Act** Chapter 15 Laws of Kenya initially provided for corroboration of the evidence of the Child of tender age in a proceeding. However, that Section was amended and the proviso which required corroboration of evidence of a child of tender age was omitted, and an amendment was effectively introduced in the **Evidence Act, Cap 80 Laws of Kenya by Act No. 5 of 2003**, adding the following proviso to **Section 124 of the Evidence Act**."

"Provided that where in a Criminal case involving a Sexual Offence, if the only evidence is that of a child of tender years who is the alleged victim of the offence, the Court shall receive the evidence of the child and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the child is telling the truth."

53. The Law on the point that the Court can convict on the evidence of a single minor's witness was settled in the case of **Chila VR [1967] EA 722 at 273** that:

"The law on the point that the Court can convict on the evidence of a single minor's was settled in the case of CHILA V R [1967] EA 722 at 273 that:

"The law of East Africa on corroboration in Sexual Offences is as follows:-

The Judge should warn the assessors and himself of the danger of acting on the uncorroborated Evidence testimony of the complainant, but having done so he may connect in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given then the conviction will normally be set aside unless the Appellate Court is satisfied that there has been no failure of justice. In this case, as earlier stated, the trial Magistrate after conducting that "I have assessed the minor and I find her fit to proceed with this trial. She can be sworn." In her assessment of the Prosecution's evidence, she stated.

The witness/minor appeared confident and believable when describing the events and I have no doubt in my mind that she was able to identify the Accused person as the perpetrator of the offence."

54. In the instant case, the trial Court also found that the PW1 positively identified the Appellant as the one who defiled her as it was at 4.00 p.m. and so there was sufficient light and that the witness also stated that she had known the Accused person before as he was a water vendor and that he is called Martin. Only the Complainant minor identified the Appellant whom she knew. Her evidence was that of recognition on which the Appellant was convicted. The woman who heard the minor scream upon which the Appellant is said to have escaped was, according to PW1, not known to her and that she simply walked away after telling the minor to go home! It may sound strange that one finds a minor being defiled but takes that kind of casual intervention but that is what the minor told the Court, that she did not know the woman. That being the case, the Prosecution cannot be expected to look for a witness who is unknown yet this witness could have assisted in giving an eye witness account of what he saw happen to the minor. There is nothing on record to suggest that had this witness been called for the Prosecution, she could have given evidence adverse to the Prosecution's case. In addition, the minor's teacher only observed the child being smelly and on interrogating her, learnt that she had been defiled. She called an Assistant Chief who in turn called the child's mother. Her evidence is that of being told as to what had happened and is no different from the mother's testimony. The cousins to the child who told her not to tell her parents as to what had happened to her were not eye witnesses either. Their evidence cannot be relied upon to support the case as they are the ones who encouraged the child not to reveal to her parents what she had told them otherwise she would be punished.

55. The Assistant Chief on being notified by the Teacher called the child's mother who came and attended to the child as was required. Her evidence could not have filled any gap in the prosecution case.

56. The law is that the Court, before convicting on the evidence of identification by ad single witness, should warn itself of the possibility of mistaken identity on the part of the witness. The trial Court should carefully evaluate such evidence with utmost thoroughness in order for it to be satisfied that it is safe to convict. It should therefore, consider any other independent evidence on the matter. (See **Abdallah Bin Wendo V R [1981] KLR 424 and R Vs. Turnbull [1976] 3 ALL E.R. 549**.

57. The above law recognizes that albeit identification of an Accused person by recognition is more reliable than identification of a strange, even when the witness is recognizing a person she knows well the trial Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

58. In this case, other than PW1 who is the witness who identified and recognized the Appellant, the rest of the evidence of PW2, is dependent on what PW1 told them of what had happened to her and as to who defiled her. On the other hand, PW4 examined the child and confirmed that indeed she was defiled and that there was forceful penetration which caused injuries to her genitalia. On identification of the Appellant as the defiler, the trial Magistrate at Page 25 of the record of appeal:

b) Identity of the perpetrator stated as follows:

"***PW1 stated that on the fateful day, she was able to clearly see the Accused person as the one who defiled her. It was 4.00 p.m. and so there was sufficient light. The witness also stated that she had known the Accused person before as he was a water vendor and that he is called Martin. The witness/minor appeared confident and believable when describing the events and I have no doubt in my mind that she was able to identify the Accused person as the perpetrator of the offence."***

59. With such analysis and finding by the trial Magistrate I am satisfied that he correctly applied her mind to the law and evidence placed before her and was satisfied that the identification of the Appellant by the victim/minor was by recognition which is more reliable than identification of a stranger. The **Proviso to Section 124 of the Evidence Act** is clear that in criminal cases involving a **Sexual Offence**, if the only evidence is that of a child of tender years who alleges to have been defiled, then the Court shall receive the evidence of the said child and proceed to convict the Accused person if, for reasons to be recorded, in the proceedings, the Court is satisfied that the child is telling the truth. In this case, the trial Magistrate satisfied herself that the minor victim of defilement charge against the Appellant was telling the truth and she proceeded and convicted the Appellant on the basis of that evident which she described as credible. Accordingly, I have no reason to differ with that finding and holding by the learned trial Magistrate which I find to be sound. I hereby uphold it. I find and hold that no other evidence that the Appellant describes as "crucial" witnesses could have displaced the credible evidence given by the victim of the offence and corroborated by medical evidence. There is absolutely nothing on to suggest that the minor was misguided in her identification and recognition of her Defiler Assailant.

60. This Court does not find anything on record that would invite doubt as to the recognition of the Appellant by the victim/minor as the person who grabbed her into the bush and defiled her and only left her when a certain woman who is unknown to the victim passed by, heard her screams and asked as to what was the problem. Accordingly, the prosecution need not have called 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. There is no gap apparent in this case for the prosecution which would have been filled by the witnesses whom the appellant has named. Accordingly, his ground of appeal fails and is dismissed.

61. I reiterate that there is nothing in the evidence of the minor that is suggestive of her having been coached, coerced and or lured to give

incriminating evidence against the Appellant as alleged by the Appellant. The Appellant in his cross-examination of the minor did not even suggest to her that she was lying or that she had been coached, coerced and lured to give incriminating testimony against him. There was also nothing on record to show that there could have been bad blood between the Appellant and the victim or any of her relatives or witnesses who testified against him, for the Court to draw some inference of the Appellant being framed with such a serious offence that carries serious punishment once found guilty.

62. In the end, I find and hold that the Appellant's appeal against his conviction by the trial Magistrate for the offence of defilement of a minor is devoid of merit. I find and hold that the conviction was and still remains sound.

63. As there is no challenge to the sentence meted out and as the same is lawful, I dismiss the appeal and uphold the Appellant's conviction. The appellant shall serve the lawful sentence meted out on him.

Dated, signed and delivered in open court at Siaya this 13th Day of June. 2018.

R. E. ABURILI

JUDGE

In the presence of:

Miss Odumba Prosecution Counsel for the State

Julius Odipo Yan the appellant in person present

Court Assistant: Brenda