**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 267 OF 2013**

**DANIEL KIPYEGON NG'ENO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal against Judgement, conviction and sentence passed in CMC Criminal Case Number 1972 of 2011, Molo, R vs Daniel Kiyegon Ngen, delivered by H. M. Nyaga, S.P.M. on 30.10.2013).

**JUDGMENT**

**Introduction.**

1. I find it convenient to start by restating the established the principles to be kept in mind by a first appellate court while dealing with appeals. These are:-[1]

> a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
>
> b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
>
> c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
>
> d. When the trial Court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.

2. Addressing the duty of a first appellate court, the Supreme Court of India,[2] rendered itself as follows:-

> "The appellate Court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,...The appellate Court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – **sans passion and sans prejudice**. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

**The Background.**

3. The appellant was charged, tried and convicted of the offence of defilement contrary to section 8 (1) , (2) of the Sexual Offences Act[3] in criminal case number **1972** of **2011**, at the Chief Magistrates Court, Molo.

4. The particulars of the offence were that on the 1st day of September 2011 in Molo District within the Rift Valley Province, he intentionally caused his penis to penetrate the vagina of PW, a child aged 8 years (herein after referred to as the minor). He faces an alternative count of committing an indecent act with a child contrary to section **11 (1)** of the Sexual Offences Act.[4] It was alleged that on

the 1st September 2011 in Molo District within Rift Valley Province, he intentionally touched the vagina of the minor, aged 8 years with his penis.

5. The prosecution called three witnesses. PW1, J N L, the minor's mother testified that the minor was born on 12th November 2002, and, that, her age as 9 years as at the time she testified in court. She stated that the minor was in standard 5 at [Particulars Withheld] Primary School. Further, she testified that on 28th September 2011, an assistant chief called her and informed her that she was needed at the minor's School over allegations of her defilement.

6. She stated that the head teacher and the minor's class teacher told her that they had noted behavioural change in her daughter, and that, the minor informed them that Dan, a neighbour and a customer had defiled her. She stated that she took her to Molo District Hospital where she was given a P3 Form.

7. The minor also gave evidence. She stated that she was 10 years. She stated that on 1st September 2011 she was alone at home, her mother had left early and had asked her to close the door, but she forgot and slept. She testified as follows:-

> "...then Dan, the accused came and entered the house. came to the bed and slept on top of me. He removed my underpants and then his trouser. He then did " tabia mbaya."He told me he loved me so much so I should not tell mother. He told me not to make noise. He said he would kill me if I told my mother so I kept quiet. I felt pain.

*Previously, he used to find me and he would fondle my breasts, saying he loved me. He was our neighbour. On another occasion, he caressed me on my private parts. He told me not to tell anyone. When I went back to school, my teacher questioned me. I told her what had happened. My mum was called and I also told her. I was taken to hospital."*

8. Doctor Alma Akoth, a Medical Officer at Molo District Hospital testified that he filled the P3 form on 30th September 2011. He stated that the minor had a history of having been defiled by someone known to her, and, that, upon examining her genitallia, his findings were that the external part was normal, she had rushes on her vagina that were dark in colour, and, that the hymen was not intact. He also stated that the vaginal wall was hyperaemic, and, that, the cervix was normal. He further stated that she had a yellowish foul smelling discharge. H stated that he did not find any spermatozoa, and, that, laboratory tests on HIV, syphilis and pregnancy were negative. Further, he testified that urinalysis showed pus cells that were higher than normal, and, that the discharge had gram positive rods, an indication of an infection of a sexually transmitted disease. He also stated that there was evidence of sexual penetration. On cross-examination he stated that a month had lapsed after the incident.

9. PC Christine Gakii of Molo, a police officer testified that on 30th September 2011, she was on duty at Mau Summit Police Station when the minor in the company of her mother came and reported that the minor had been defiled. She stated that she issued her with a P3 form, and, that the child gave her the name of the suspect whom she traced and charged in court.

10. At the close of the prosecution case, upon considering the evidence, the trial Magistrate placed the appellant on his defence. In his unsworn defence, the appellant stated that in 2011, the minor's mother moved to the plot where he was living, and, that they became friends and started living together, but they quarrelled and separated after he failed to give her some money. He stated that later he heard rumours that he had defiled the complainant. He stated that he called her but she abused him, and, that he never defied her and that he was arrested after one month.

11. Upon analysing the evidence presented by the prosecution and the defence, the learned Magistrate framed three issues for determination, namely, (a) whether there was penetration, (b) the identification of the perpetrator; and (c) the appellants defence.

12. On the first issue, the learned Magistrate considered the complainant's testimony and the Doctor's evidence, which concluded that the hymen was not intact, and that she had contracted sexually transmitted disease. She concluded there was penetration.

13. On whether the appellant was properly identified, the learned Magistrate upon evaluating the evidence stated that section 124 of the Evidence Act[5] permits a court to rely on the evidence of a victim without the need for material corroboration. The learned Magistrate found that the minor was consistent even on cross-examination. He also noted that the offence was committed in day light, and that the minor referred to an incident where the appellant fondled her breast. The learned Magistrate also considered that the appellant was a neighbour. He was satisfied identification was not in doubt and found no reason to doubt the minor.

14. Regarding the appellant's defence, that the minor's mother sought to implicate her over a broken friendship, the learned Magistrate observed that the minor's mother only came to know about the incident after she was called to school.

15. Upon determining the above issues as aforesaid, the Learned Magistrate concluded that the prosecution had proved its case to the required standard and convicted the appellant on the main count and sentenced him to life imprisonment.

**The appeal.**

16. Aggrieved by the verdict, the appellant appealed to this court citing **4** grounds in his amended Petition of appeal filed on 28th August 2018, namely:-

> a. The learned Magistrate erred in law and in fact when he found that as a matter of fact that the complainant had been sexually penetrated.

b. The learned Magistrate erred in law and fact in finding that the offence was committed in broad daylight and therefore the accused had been identified.

c. The learned Magistrate erred in law and in fact when he failed to consider the impact of the prosecution's failure to call key witnesses, the complainant's teacher and the chief.

d. The learned Magistrate erred in law and in fact in finding that the case against the accused person had been proven to the required standard.

e. The learned Magistrate erred in law and in fact in convicting the accused on the basis of insufficient evidence.

17. At the hearing of this appeal, M/s Muthoni, held brief for Mr. Mugambi for the appellant. She stated Mr. Mugambi wished to adopt his written submissions filed on 31th August 2018. Counsel for the DPP addressed the court orally.

**Determination.**

18. Upon analysing the rival submissions by the parties, I find that the following issues fall for determination, namely:-

a. Whether penetration was proved.

b. Whether the appellant was positively identified.

c. Whether the prosecution failed to call key witnesses.

d. Whether the minor's age was proved.

**a. Whether penetration was proved.**

19. The appellant's counsel argued that considering the minor's age, if at all there was penetration, there would have been severe pain, and, she could not avoid screaming and bleeding. He also argued that the minor's mother and teachers could not have failed to notice signs of defilement. He argued that the doctor's evidence that there was penetration was not supported by evidence since the Doctor stated that the external parts of the genitalia were normal. He also argued that the appellant was not tested for any disease.

20. It was his submission that the offence was not proved to the required standard because penetration was not proved beyond reasonable doubt and that the minor was examined one month after the alleged offence.

21. In his rejoinder, counsel for the DPP submitted that the minor had no reason to lie and that medical evidence was clear on the question of penetration.

22. I have carefully considered the submissions made by the appellant's counsel and counsel for the DPP on this issue. I have also reviewed the evidence on record and the relevant law. Section **8(1)** of the Sexual Offences Act[6] provides that "*A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."*

23. Section **8 (1)** provides the key elements of the offence of defilement. These are *"Penetration,"* and *"Child."* The act defines *"penetration"* as partial or complete insertion of the genital organs of a person into the genital organs of another person. The other element is that the person must be a *child.* The act defines a child as *"child"* has the meaning assigned thereto in the Children's Act.[7] The Children's Act defines a *"child"* as any human being under the age of eighteen years. The act also defines a child of tender years "means" a child under the age of ten years.

24. Section **8 (1)** defies the offence of defilement and therefore before section **8 (2)** comes into play, the prosecution must prove the offence of defilement was committed. Therefore, an important element of defilement is penetration.

25. The minor testified that the appellant slept on her, removed her underpants and his trouser, then did "*tabia mbaya."* This evidence was collaborated by the Doctor who testified the minor's hymen was not intact.

26. The appellant never rebutted this evidence. He did not address these allegations in his defence, but, said that he had a grudge with the minor's mother. On the contrary, the complaint was not initiated by the mother. The mother was summoned to the school and heard it for the first time from the child in the presence of the teachers. I find that the learned Magistrate analyzed this piece of evidence and arrived at the right conclusions.It is my finding that penetration was proved to the required standard.

**b. Whether the appellant was positively identified.**

27. The appellant's second ground of appeal is that the learned Magistrate erred in law and in fact in finding that the offence was committed in broad daylight and therefore the accused had been identified. Counsel's submission on this point is very thin. He only stated that there is nowhere on record to show that the offence was committed in broad day light.

28. In his rejoinder, counsel for the Respondent submitted that the appellant was properly identified, and that the child knew him and in any

event, the court noted that the child was consistent and proceeded on the basis of section 124 of the Evidence Act[8] and considered the available evidence including the medical evidence. He submitted that the evidence tendered was sufficient.

29. Identification evidence is defined as evidence that a defendant was or resembles a person who was present at or near a place where the offence was committed, or an act connected with the offence. It is an established principle that there is a special need for caution before accepting identification evidence. In *Charles O. Maitanyi vs Republic*,[9] it was held *inter alia* that it is necessary to test the evidence of a single witness respecting to identification, and that great care should be exercised and absence of collaboration should be treated with great care.

30. In *Kariuki Njiru & 7 others vs Republic*,[10] the court held *inter alia* that the *"law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."*

31. Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness.

32. Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the accused as the person who committed the crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.

33. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.

34. I am also alive to the fact that it is necessary to test the evidence of a single witness respecting to identification, and take great care and caution to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. These in my view include light, time spent with the assailant, clothes or any item that the witness may positively identify and whether the accused was known to the complainant. Such evidence may be reinforced by sufficient collaboration and where there is no collaboration the court needs to treat it with caution. Thus, in evaluating the accuracy of identification testimony, the court should also consider such factors as:-

a. What were the lighting conditions under which the witness made his/her observation?

b. What was the distance between the witness and the perpetrator?

c. Did the witness have an unobstructed view of the perpetrator?

d. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

e. For what period of time did the witness actually observe the perpetrator?

f. During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g. Did the witness have a particular reason to look at and remember the perpetrator?

h. Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

i. Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

j. What was the mental, physical, and emotional state of the witness before, during, and after the observation?

k. To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

35. The positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution. In the instant case, the appellant was known to the minor. That alone erases any doubts whether there was a mistake. Further, the appellant never raised the question of his identity in the lower court. It was raised for the first time in the amended grounds of appeal. The minor stated that the mother woke up and left and asked her to close the door, but she forgot and fell asleep. The learned Magistrate's observation that the offence was committed in day light was in my view informed by the said evidence, and in any event, the question of light was not raised in the lower court. There is evidence that the accused was also staying in the same plot. I find, that the evidence of identification was compelling.

**c. Whether the prosecution failed to call key witnesses.**

36. The third ground of appeal is that the learned Magistrate failed to consider the impact of the prosecution's failure to call key witnesses, namely, the chief and the complainant's teacher. In counsel's submission, failure to call the said witnesses was fatal to the prosecution case. To buttress his argument, counsel cited *Bukenya & Others vs Republic*.[11]

37. Counsel for the Respondent urged the court to uphold the conviction and sentence arguing that the evidence adduced was sufficient.

38. Section **143** of the Evidence Act[12]provides as follows:-

> "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact"

39. In *Julius Kalewa Mutunga vs Republic*[13] the Court of Appeal held as follows:-

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

40. The Court of Appeal reiterated the above position in the case *Alex Lichodo vs Republic*.[14] Perhaps the leading authority on this issue is the case of *Bukenya & Others vs Uganda*[15]cited by the appellants counsel where the East African Court of Appeal held that:-

> i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.
>
> ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.
>
> iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

41. Even though counsel for the appellant relied on the above case, he did not proceed to mention that in the same vein in the same case the court was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.

42. What should be made clear is that the famous rule in *Jones vs Dunkel*[16] which outlines the circumstances under which an adverse inference may be drawn where a witness is not called is grounded on common sense. The prosecution has discretion to assess the importance that the testimony of a witness would play, or would likely have played in relation to the issue concerned.

43. The unexplained failure by a party to give evidence or call a witness or tender certain documents may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The failure to call a witness or tender documents can allow evidence that might have been contradicted by such witness or document to be more readily accepted. Further, where an inference is open from the facts proved, the absence of the witness or documents may be taken into account as a circumstance in favour of the drawing of the inference. But the absence of a witness or document cannot be used to make up any deficiency in the evidence. Thus it cannot be used to support an inference that is not otherwise sustained by the evidence. The rule cannot fill gaps in the evidence or convert conjecture and suspicion to inference.[17]

44. Whether the failure to call a witness or tender a document gives rise to an inference depends upon a number of circumstances. In *Fabre vs Arenales*[18] Mahoney J. said that the significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. There are circumstances in which it has been recognized that such an inference is not available or, if available, is of little significance. The foregoing position was cited with approval by Miler JA in *Hewett vs Medical Board of Western Australia*[19] and also the same position has authoritatively been stated in *Cross on Evidence*.[20]

45. The rule only applies where a party is required to explain or contradict something. What a party is required to explain or contradict depends on the issues in the case as thrown in the pleadings or by the course of the evidence in the case. No inference can be drawn unless evidence is given of facts requiring an answer. This position was upheld in the following cases, namely; *Schellenberg vs Tunnel Holdings*, [21] *Ronchi vs Portland Smelter Services Ltd*[22] and *Hesse Blind Roller Company Pty Ltd vs Hamitovski*[23] and its also reiterated in *Cross on Evidence*.[24]

46. When no challenge is made to the evidence of witnesses who are called, the principle in *Jones vs Dunkel* cannot be applied to make an inference in respect of other witnesses who could have been called to give the same evidence.[25] A look at the record shows that minor's and the Doctors evidence are largely unchallenged. The witnesses who are said not have been called were to give the same evidence or corroborate testimony already presented. It has not been shown that the evidence on record has gaps which needed further clarification. As explained in *Cross on Evidence*,[26] the rule does not require a party to give merely cumulative evidence. In order for the principle to apply, the evidence of the missing witness must be such as would have elucidated a matter.[27]The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case.

47. In any event, it is established law that a conviction can be based on the testimony of a single witness, a position that was ably captured in *Anil Phukan vs State of Assam*[28] as follows:-

> "*A conviction* can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone"

48. A similar position was reiterated by the Court of Appeal of Tanzania in *Ahmad Omari vs The Republic.*[29]Also discussing the same issue, the Court of Appeal of Uganda in *Okwang Peter vs Uganda*[30] held as follows:-

> "Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error"

49. It is always competent to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect. The law is also clear that there is no particular number of witnesses required for proof of any fact.[31] I find no reason to make adverse inference in the circumstances of this case.

**c. Whether the minor's age was proved.**

50. Counsel for the appellant argued that the onus of proving the age of the victim lies on the prosecution[32]and that in defilement cases, age of the victim is crucial.[33]

51. In the case of *Hilary Nyongesa Vs Republic*[34] the court stated that:-

> "Age is such a critical aspect in Sexual Offences that it has to be conclusively proved…And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."

52. In *John Cardon Wagner –vs- Republic*,[35] the court held that:-

> "In defilement cases, the age of the complainant is proved by either medical evidence or through other evidence since the sexual offences act have different categories of ages and sentences of different ages…"

53. In Musyoki Mwakavi –vs- Republic[36] held that:-

> "…apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense…".

54. In the case of *Francis Omuroni vs Uganda*,[37] 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...".

55. The minor's mother gave her age as 9 years as at the time she testified in court on 13th June 2012. The charge sheet indicates that her age was 8 years as at the time the offence was committed on 1st November 2011. The learned Magistrate after conducting *voir dire* gave her apparent age as 9-10 years. The minor gave her age as 10 years as at the time of giving evidence. The Doctor gave her age as at the time of the offence as 8 years which is also the age stated in the P3 form. The drafters of the Children's' Act[38] seem to have been alive of situations whereby difficulties may arise in determining the actual age of a child. In its wisdom, Parliament adopted the following of age in the definition section at section 2 of the act, "age' where actual age is not known means apparent age.

56. One thing is clear from the foregoing, that the minor was a child within the definition given under the act at the material time. I find no evidence to suggest the contrary. I find no doubt that the minor was 8 years as at the time of the offence as stated in the medical evidence. This age falls within the definition of a child of tender years as defined in the Children's Act.[39] I am reinforced by the recognition that the trial Magistrate had the advantage of examining her at the time she testified and he gave her age as 9 to 10 years. The Doctor gave her age as 8 years also. It is my finding that the age of the child was sufficiently proved.

**Conclusion.**

57. I have reviewed and analysed the defence offered by the appellant in the lower court and the prosecution evidence. I am fully aware that the legal burden of proof in criminal cases never leaves the prosecution's backyard. A close examination of the defence offered clearly shows that it does not create doubts on the strength of the prosecution case.

58. I am satisfied that the prosecution proved the offence of defilement under section **8 (1)** as read with section **8 (2)** and that the necessary ingredients of the offence where proved beyond doubt. In the circumstances I find and hold that that the learned Magistrate correctly analysed the evidence and arrived at the correct conclusions. I find that the learned Magistrate properly convicted the appellant. Accordingly, I uphold the conviction.

59. Regarding the sentence, Section **8 (2)** of the Sexual Offences Act[40] provides that "a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life." The sentence imposed is the mandatory sentence provided under the law. The said provision leaves no room for this court to exercise its discretion and interfere with the sentence.

60. The upshot is that this appeal on both conviction and sentence fails and the same is hereby dismissed.

61. Right of appeal explained.

**Signed, Delivered and Dated at Nakuru this 3rd day of October 2018**

**John M. Mativo**

**Judge**

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[1] See *Ganpat vs. State of Haryana* {2010} 12 SCC 59.

[2] *K. Anbazhagan vs. State of Karnataka and Others*, Criminal Appeal No. 637 of 2015.

[3] Act No. **3** of 2006.

[4] Ibid.

[5]Cap 80, Laws of Kenya.

[6] Supra.

[7] Cap 141, Laws of Kenya.

[8] Cap 80, Laws of Kenya.

[9] {1988-92} 2 KAR 75.

[10] Criminal Appeal no. 6 of 2001 ( Unreported).

[11] {1972} EA 349.

[12]Cap 80, Laws of Kenya

[13] Criminal Appeal No. 31 of 2005

[14] Criminal Appeal No. 11 of 2015-Visram A, Karanja W, and Mwilu P. JJJA.

[15] {1972}E.A.549

[16] {1859} HCA 8; {1859}101 CLR 298, 308, 312

[17] See *Schellenberg vs Hesse Tunnel Holdings Pty Ltd* {P2000} HCA 18

[18] {1992} 27 NSWLR 437, 449-450,Priestly and Sheller JJA agreeing)

[19] {2004} WASCA 170

[20] 7th Edition, Page 1215, by Heydon J D.

[21] Cubillo (No. 2) 355

[22] {2005} VSCA 83

[23] {2006} VSCA 121 28

[24] Supra at page 1215

[25] See Cross on Evidence, Supra.

[26] Supra.

[27]See *Payne vs Parker*, 202 Cubillo )No. 2) 360.

[28]{1993} AIR 1462.

[29] Criminal Appeal No. 154 of 2005, Ramadhani C.J, Munuo JA and Mjasiri J.A.

[30] Criminal Appeal No. 104 of 1999.

[31] See Section ..... Evidence Act, Cap 80, Laws of Kenya.

[32] Citing *Dominic Kibet Mwareng vs Republic*, Kitale High Court Appeal No. 155 of 2011.

[33] Citing *Eric Nyaga Shanjera vs Republic*, Nakuru HCCR Appeal No. 263 of 2013.

[34] High Court Cr Appeal No. 123 of 2009, Eldoret.

[35] High Court Criminal Appeal No. 404 of 2009 ( Nairobi).

[36] High Court Criminal Appeal No. 172 of 2012.

[37] Criminal Appeal no 2 of 2000- Court of Appeal.

[38] Cap 141, Laws of Kenya.

[39] Ibid.

[40] Supra.