



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 33 OF 2017

CORAM: R.E.ABURILI J.

DOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment and sentence passed by Hon C.A.Okore, Senior Resident Magistrate at Siaya in Siaya PM Cr. Case No. 720 of 2016 on 23rd March, 2017)

JUDGMENT

1. This Appeal arises from the judgment, conviction and sentence by the Principal Magistrate's Court at Siaya in Criminal Case No. 720 of 2016 delivered on 23rd March, 2017. It is an Appeal against the conviction and a 15 year prison sentence imposed on the appellant **DOO who was the accused person** in the above lower court case between **Republic versus D OO**.

2. In the said court, the accused person, **DOO** (*hereinafter referred to as the Appellant*) was charged with the offence of Defilement contrary to Section 8 (1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 and 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.

3. The facts as per the charge sheet are that, **DOO**: on 24th day of July, 2016 in Siaya District within Siaya County, intentionally caused his penis to penetrate the vagina of JAA (full name withheld for legal reasons), a child of 16 years and in the alternative charge, the accused **DOO was charged that**: on 24th day of July, 2016 in Siaya District within Siaya County, intentionally touched the vagina of JAA (full name withheld for legal reasons) aged 16 years.

4. After full trial the Appellant - **DOO** was found guilty and was thereby convicted accordingly under Section 215 of the Criminal Procedure Code and after considering mitigation, the trial court sentenced the accused to serve 15years imprisonment as prescribed by law under Section 8 (4) of the Sexual Offences Act. No. 3 of 2006.

5. The Appellant (**DOO**) being aggrieved and dissatisfied with the conviction and sentence of 15 years imposed on him by the Principal Magistrate's Court at Siaya in Criminal case No. 720 of 2016 delivered on 23rd March, 2017, lodged this Criminal Appeal No.33 of 2017 setting out the following grounds as per the Petition of Appeal filed on 4/4/2017:-

1. That the learned magistrate erred in law and fact by failing to observe that the trial was meted with gross inconsistencies.

2. That the learned trial magistrate erred by failing to allow the appellant, further cross examine the prosecution witnesses further recalled.

3. That The learned magistrate erred in law and in fact by failing to consider the defence and dismissing it as an afterthought.

4. That he cannot recall all that transverse during trial hence for trial proceedings to adduce sufficient grounds.

6. The appellant who is unrepresented also filed amended grounds of appeal with the assistance of paralegals in the prisons and filed submissions to canvass his appeal. The amended grounds of appeal are as follows:-

i. That he pleaded not guilty to the charges.

ii. That the prosecution evidence was marred with contradictions and inconsistencies.

iii. *That the medical evidence adduced in my trial was insufficient and unsound.*

iv. *That there existed a bitter grudge between him and Pw3, the architect of my frame up.*

v. *That the trial magistrate was absolutely biased and unfair in his trial, hence misevaluating the evidence adduced before court and hence misdirecting herself to the wrong conclusion of the matter.*

vi. *That I wish to be personally present during the hearing of my humble appeal to enable me adduce more grounds.*

7. The relevant antecedent facts in this appeal are discernible from the record. However, as this is the first Appellate court, the court in determining this Appeal must fully understand its duty as was held in the Court of Appeal case of **ISSAC NG'ANG'A ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:-

“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)'

8. In the earlier case of **Kiilu and another V. R. (2005) 1 KLR 174** the Court of Appeal held:

“An appellant in a first appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions. “It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

9. What this court as a first appellate court is expected to do is to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis and draw its own conclusions, while being alive to the fact that it neither saw nor heard any of the witnesses as they testified and therefore it cannot comment on their demeanour.

10. To prove their case, the prosecution called PW1 JAA (minor, name withheld for legal reasons) a minor who testified that O is her father's name and that she was a pupil at O Primary School, in Standard Seven. She recalled on 24/7/2016 at about 9.00pm while in the kitchen alone washing utensils, the accused- **DOO** -, who is her cousin came and asked her why she had not gone to bed and she told him that she was washing dishes. He then asked her to give back a book that he had given her, which book was shown to court. That the book is about reproductive organs of a woman and the accused/ appellant opened a page which was showing the vagina of woman and asked her what it was. She went on to state that she kept quiet and he put off the tin lamp that was on, held her waist tight and pulled her to lie down but she refused and struggled with him.

11. It was PW1's testimony that the accused/ appellant herein removed her skirt and pant and put her in a bending position and inserted his penis inside her vagina and had sex with her as she screamed loudly, after which he left. It was also her evidence that after the ordeal, she lit the lamp and continued to wash dishes and later slept in the kitchen.

12. That the following day, she went to school and told her desk mate who told her teacher, Mr. A who then called and asked her. She narrated to him what the accused had done to her. He then told her to go back to class so that he can see how to help her and while in class, teacher J1 came and called her to ask about it. She narrated Teacher J1 what had happened after which the teacher took her to Siaya District Hospital where she was treated and given medicine.

13. PW1 spent the night at the home of the Chairman of her school who had told her that it would be better that way as she was endangering her life by staying with the Accused. She stated that she still stayed with him at the time of giving her testimony. She further stated that on 27/7/2016, they went to Siaya Police Station to record statements whereupon she was given a P.3 Form which was filled at Siaya District Hospital that day.

14. The P3 form was marked as **MFI 1**, Treatment Book – **MFI 2**, Pornographic book – **MFI 3** and **Page 5** – which shows female genitalia. She testified further that she had stayed with the accused for 2 years and that the Accused had a wife and 4 children. She stated that when he defiled her, the wife and children were in a separate house which they call *Nyumba Kubwa [big house]* and that the kitchen is a bit far from *Nyumba Kubwa [big house]*. She also stated that she was born in the year 2000 and identified the accused now appellant in the dock.

15. The accused had no questions to ask PW1 in cross examination. She was then **Re-examined** by the Prosecutor where she stated that it was about the 4th time that the Accused had defiled her.

16. PW2 JMO testified that he was the Head Teacher at O (full name withheld) Primary School. He recalled that on 25/7/2016 at 4.30 pm

his Deputy called him to tell him that one of their pupils had been defiled. That he then advised the Deputy to take action and also called the Chairperson of the School's Board to go to school and find out the issue. That the following day on 26/7/2016 he spoke to JAA (the Complainant) who narrated that on 24/7/2016 at 9.30 pm while in the kitchen of the guardian she lived with, the male guardian went there and he defiled her although the wife of the accused went to school later in the day to tell him that she didn't know about the incident.

17. He stated that at 3.00 pm on 26/7/2016, the Accused went to school and asked about the issue. That he told him that the girl said she'd been defiled by him and the Accused admitted he did it. He then decided to call the Deputy Head teacher and Class Teacher of the pupil and that in their presence, the accused admitted committing the offence.

18. PW2 further stated that he reported the accused to Siaya Police Station and the accused was arrested and charged. He identified the accused in the dock.

19. When **Cross examined** by the Accused, PW2 stated that the pupil is in Standard 7 and her class teacher is a lady who took PW1 to hospital for examination. That thereafter the child was handed over to the Chairman of the School who is a lady after the police had taken over the case. He stated that they did not fabricate the case against the accused and reiterated to the accused that he came and found him (PW2) in school and they spoke and he admitted the offence adding that the accused confessed before him, the class teacher and school deputy teacher that he had defiled the complainant.

20. **PW3 AAO (full name withheld)** testified that on 25/7/2016 at 5.00 pm while at home, the head teacher (PW2) called her asking her to go to school and see the deputy head teacher. That she went there and the deputy head teacher informed her that a Standard 7 girl called JAA had been defiled the previous night by her guardian. That she then called J the complainant herein from class and spoke to her and JAA narrated to her what had happened and later she and JAA's class teacher took her to Siaya Hospital after which she (PW3) took her (the complainant/ JAA) to her home as she (PW3) feared that JAA would be in danger if she went back to the home of accused who was her guardian.

21. PW3 further testified that the following day on 26/7/2016 the accused and his wife went to school to ask for the complainant. That as a school administration they sat the accused down and talked to him and the accused confessed to them that he defiled the complainant and that he stated that the devil had cheated him. They then reported the matter to Siaya Police Station and the Accused was arrested and charged.

22. When **Cross examined** by the Accused, PW3 stated that PW1's class teacher handled the case and took the complainant to hospital and also stated that she (PW3) is a female and as such was the best person to deal with the issue. She reiterated that the Head Teacher (PW2) called the police to take over the case after the accused confessed to them of having committed the offence. She further stated that the Complainant slept at the home of PW3 on 25/7/2016, after the incident and that she only interacted with the complainant after the incident hence did not fix the accused. She reiterated an earlier averment by PW1 that the accused gave the complainant a reproductive organs book.

23. On being reexamined by the prosecutor, PW3 stated that the Complainant (PW1) spoke about a book that the accused had given her and that he went to the kitchen to ask her about the diagrams of the reproductive system and that it is then that the accused got hold of PW1 and defiled her in the kitchen.

24. **PW4 VA (full name withheld)** testified that she was 16 years and a standard 7 pupil at O Primary School. She testified that on 25/7/2016 at 3.00 pm she was in the field playing with her friend JAA the (Complainant) and others. That it was then that JAA told her that she had a problem and that the previous night (on 24/7/2016) her guardian (accused) told her to bring the reproductive organs book that she had and the accused opened it. That he then asked her what the diagrams were about to which she kept quiet and her guardian held her by force and removed her pant and laid her on the ground in the kitchen where she was washing dishes and raped her. PW4 stated that JAA was in pain when they were talking. That she could not sit properly or play. PW4 then went to the Deputy Head teacher and told him. It was also her testimony that she knew that book that JAA had, as an NGO had given them during some training. She then identified the book (MFI 3), and also identified JAA's guardian as the Accused in the dock.

25. On **Cross examination** by the Accused, PW4 stated that she knew the complainant as her classmate. She also stated that the Complainant told her about her issue on 25/7/2016. She stated further that PW1 was defiled on 24/7/2016 at night.

26. It was PW4's testimony that she knew PW3 as she was a member of the School Board and also a parent in the school and that PW3 did not coach her to lie. PW4 testified further that PW1 told her that the accused forcefully removed her pant adding that they tell female teachers their feminine issues though she reported to the deputy who is a man.

27. **PW5 - NO. 83796 CPL SERA KAVATHA** testified that she was attached to Siaya Police Station and that on 27/7/2016 at 10.00 am while in the office she received the complainant and her teachers. That PW1 reported that on 24/7/2016 at night, she was washing dishes when the accused who was her guardian went and asked her for a text book. That he took it and he opened a page on the female reproductive system then asked her what that was and she kept quiet and the accused grabbed her and defiled her.

28. That the next day PW1 told her schoolmate (PW4) who reported to the Deputy Head teacher. She averred that PW1 brought her the textbook. That afterwards she took PW1 to hospital where she was examined and a P.3 form was filled.

29. It was her evidence that a teacher brought the accused who was the guardian of complainant to the station and she charged the accused later. The text book that was marked as – MFI 3 was identified and produced as exhibit. She stated that PW1 showed her page. 5 which had female genital diagrams and that she (PW5) also took PW1 for age assessment and confirmed that she was 16 years old and the Age assessment report produced as exhibit 4.

30. On being **Cross examined** by the Accused, PW5 stated that she received the accused from the teachers and that she visited the scene and saw the kitchen house. She also stated that there was a radio in the kitchen and the home has 2 houses, kitchen, main house and also a

toilet/pit latrine in the compound. It was her further evidence that the Main house and kitchen are 20m apart. She further stated reiterating what (PW4) had told the court.

31. **PW6: SILAH OMONDI OLUOCH**- testified that he was attached to Siaya Referral Hospital. He stated that he had the P.3 form for JAA the complainant who was aged 14 years. That he examined her and signed P.3 form on 27/7/2016. He added that PW1 was first treated on 25/7/2016 at Siaya Referral Hospital and stated that PW1 was allegedly defiled by someone known to her.

32. It was the evidence of PW6 that PW1 was accompanied by the school's chairlady and stated that she was defiled on 24/7/2016 at 9.00 pm, although the clothes were not submitted for examination.

33. PW6 stated that on examination of the complainant's genitalia, he observed the following: -

- Hymen was absent.
- No bruises, no tear, no lacerations noted on the vagina.
- Outer genitalia was normal.
- Whitish discharge noted on her vagina.
- No blood seen.
- Pregnancy test was -ve.
- Syphilis was -ve.
- Urinalysis showed *leukocytes* and puss cells and *tryconomes* and a fungal infection.
- No spermatozoa seen.
- Hy-vaginal swab showed puss cells and a fungal infection.
- Opinion: There was no conclusive evidence that the patient was defiled.

34. PW6 then then stated that it was him that signed the P.3 form which he produced as exhibit 1 and he also produced the Treatment notes as exhibit 2.

35. on **Cross examination** by the Accused PW6 reiterated the above stated prognosis but however stated that sex cannot be totally eliminated just coz there were no spermatozoa stating that JAA had vaginal candidiasis- an infection caused by fungus. He also stated that he would know if the patient was lying. He averred that he did not examine the accused.

36. On being placed on his defence, the accused person **DOO** testified on oath that he lived at [particulars withheld] and that he was charged with defilement and indecent act. He denied the charges.

37. He contended that on 24/7/2016 at 9.00 pm he was at their home with his wife GA and 4 children aged between 9 years and 9 months. He stated further that nobody else was in the home that day. He stated that he had 3 houses in his home; the main house, kitchen house and a house where he kept cattle. He further contended that on that material day he only saw PW1 from morning till 1.00 pm as she went to school that day and never returned home. That he did not know where she went and that she had never returned to his home.

38. The accused further stated that he knew the complainant, JAA and confirmed that she was his cousin and added that he was staying with her and that she was under his care. He stated further that he did not defile PW1 at 9.00 pm as alleged and that he had lived with her for 2½ years. He contended that PW1 lied that he defiled her and that she was being used by some people. He stated that PW3 A. wanted to fix him by using PW1 after having differed with PW3r when he and others left her church and formed their separate church.

39. On **Cross examination** by the Prosecutor, the accused person stated that on 24/7/2016, the Complainant went missing. That he called someone to tell him that PW1 was missing though that person was not his witness and that neither did he have any other witnesses to confirm his statement, not even his children. He confirmed that the Complainant was 16 years old and did not dispute the fact that when cross examining PW3 he did not ask her about the church issue and that he did not tell the police that PW1 had disappeared.

40. On being questioned by the court the accused person stated that he never reported to Police that PW3 wanted to fix him.

ACCUSED'S SUBMISSIONS IN THE LOWER COURT

41. The accused person submitted that the prosecution had not proved that he committed the offence as charged. He urged the court to acquit him as he could not imagine how PW1 could see the man removing her short yet the lamp was off. He also stated that he was arrested on 26/7/2016 and not 25/7/2016 and contended that it was not clear when the offence happened. That the Complainant alleged that she told her friend J. the following day on 25/7/2016 as such it was not clear where the offence took place.

42. The accused further submitted that he had neighbors nearby but nobody heard what had happened yet PW1 said she screamed, and that although the radio was on full volume as stated by PW1, he believed the neighbors could have heard her screams. That the complainant said she was laid on the wall, yet witnesses said she was laid on the floor.

43. According to the accused person, some witnesses whom the complainant talked to did not testify. Further that no investigation was done by police and that the Investigating Officer did not describe the scene well. That there was no covering report produced in Court by the Police.

Submissions by the prosecution

44. The prosecution submitted that the accused's submissions carried no weight as they highlighted minor inconsistencies in statements written at the police station which Accused did not address during cross examination, especially on the police and particular witnesses. That the Complainant confirmed that the date of the incident was 24/7/2016 at 9.00 pm. On the accused's allegation that he was not identified well, it was submitted that the testimony of the Complainant clearly showed that she knew the Accused as her cousin and that the accused was identified before the lamp was put off. It was further submitted that there was a struggle to lay the complainant on the floor thus there was no inconsistency when the Complainant stated that she was overcome by the accused in the struggle and defiled. That the defilement was not denied by accused and medical evidence confirms penetration.

45. The prosecution further submitted that the Accused person's contention that PW1 went missing and he searched for her was a fabricated story to cover up for the period of time when Complainant was harbored by the school staff and that the complainant did not go back home for fear of her safety and the trauma of being sexually violated.

46. In conclusion, the prosecution submitted that the Accused had no defence for his actions. That witnesses testified including the school administration that Accused pleaded with them not to take action and stated that it was convinced the Accused had committed the offence and no doubt was created by the defence and urged court to convict him accordingly.

Judgment of lower court

47. The trial court reiterated the charges the accused faced and reiterated in brief a summary of the case as per the evidence of the witnesses in the case noting that the accused in his defence stated that PW1 was used to fix him by PW3 whom he had differences with over his church leadership and that PW3 could have influenced all the witnesses to fix him yet he did not call any of his church members as witnesses and also denied that PW1 was at home at the material time as she had allegedly gone to school but never returned.

48. The trial court framed the following issues for determination:

1. *Whether penetration occurred.*
2. *Whether the age of the complainant was proved.*
3. *Whether the complainant had the capacity to consent to the act or not.*
4. *Whether the accused was properly identified.*

49. On issue 1, the court observed that PW1 stated that the accused held her waist tight and tried to force her to lie down but she resisted, it is then that the accused pulled her skirt and pant down and put her in a bending position, then he inserted his penis inside her vagina and had carnal knowledge of her as she screamed for help but nobody came to her rescue.

50. According to the trial court, this evidence when aligned with the definition of Penetration- ***“the partial or complete insertion of the genital organs of a person into the genital organs of another person”*** was proof of penetration of the complainant's vagina. The court further observed that the evidence of PW1 was corroborated by that of PW6, the clinical officer who examined her after the incident and found the hymen missing, that he also found whitish discharge in her vagina. Further, that during cross examination by the accused, PW6 stated that ***sexual intercourse could not be ruled out or eliminated just because spermatozoa was not seen*** and as such the lower court held the belief that penetration did occur.

51. On issue 2, the court stated that the prosecution produced as exhibit 4 an age assessment report dated 28/7/2016 that showed the complainant was aged 16 years at the time, and that neither did the defence challenge the evidence on age of PW1 and that in fact DW1 in his defence confirmed that he knew very well that PW1 was 16 years old hence there was no doubt as to the age of the complainant.

52. On issue 3, the court stated that since it was confirmed that PW1 was 16 years old, she legally lacked capacity to consent to any sexual act as a minor cannot be called upon to consent to anything under our laws.

53. On issue 4, the trial court stated that the complainant told court in her evidence that the accused was her cousin, a son to her aunt, whom she had lived with for 2 years before the incident. The court observed that the only evidence to be relied on was that of PW1. The court then stated that even though she was the only one who identified the accused, her evidence was sufficient and credible. That she recognized the accused as her cousin and guardian whom she had lived with as a caretaker for 2 years and that she also knew him well before the incident. The court further stated that the time the accused spent with PW1 opening the book and asking her about the genitalia of a woman in it, was sufficient enough for her to know and recognize the accused, besides the light from the tin lamp before the accused put it off. The court thus stated that the environment was conducive enough for PW1 to identify the accused and was guided by the decision in the case of ***PAUL ETOLE and ANOTHER vs. REPUBLIC C.A 24 of 2000 UR*** Pg. 2 and 3 where it was held that

“The prosecution case against the 2nd appellant was presented as one of recognition or visual identification....such evidence can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against the accused depends wholly or substantially on the correctness of one or more identification of the accused, the court shall warn itself of the special need for caution before convicting the accused. Secondly it ought to examine closely the circumstances in which the identification by each witness came to be made”

54. On this premise the court believed that PW1 properly identified the accused. That identification was by recognition and was free from any mistake owing to the circumstances. The court further stated that although DW1 denied having been with PW1 at the material time, the court did not have any reason to believe that PW1 lied to the court and stated that it did not believe that PW1 could fix a man who had been her guardian for 2 years. Further, that the complainant had narrated her ordeal well and was very consistent. The court further found that the accused person did not raise the differences he had with PW3 during cross examination and the court formed the opinion that the accused's defence was just an afterthought and meant to cover up his heinous act against PW1 and that the accused's action towards PW1 was intentional that is why he came up with the issue of discussing the female genitalia organ so as to get close to her. That he had planned it all along that is why he timed her when she was alone in the kitchen which was not close to the main house where his family was.

55. In the end the court found that the prosecution had proved its case beyond any reasonable doubt against the accused.

Appellate submissions by the accused.

56. In his written submissions the appellant submitted under the following headings;

1. Plea of not guilty

57. Here he submitted that having pleaded not guilty to the charges, the burden of proof lay squarely upon the prosecution to prove their allegations against him “beyond any reasonable doubt”. He further submitted that with all the discrepancies evident in his trial, the standard of proof therefore was not sufficient to sustain a conviction.

2. Contradictions and Inconsistencies

58. The appellant submitted that the prosecution evidence were marred with contradictions and shrouded in inconsistencies. He gave several instances; - that for instance that on page 3 line 8-9, PW1 alleged that he had given her the book and wanted it back, while on page 11 line 19-20, PW4 alleged that the book had been given to them at school. That on page 8 line 5-6 PW2 testified that he only reported the incident to the police who later arrested him while on page 12 line 25, PW5 testified that he was brought by the teacher to the police station.

59. The appellant further submits that PW1 initially recorded her statement and stated that it was one **J.** not **V.** whom she told the story. According to the appellant, this was enough proof that the whole story had been cooked up as PW1 despite being the victim, never stated in court that she was threatened or that the appellant turned on the radio as had earlier been alleged in their initial statements, the magnitude of the allegations notwithstanding.

60. It was thus his submission that those contradictions and inconsistencies demonstrate that the credibility of the prosecution witnesses was seriously questionable, thereby effectively impeached under **Section 163(1)(c) of the Evidence Act CAP 80 Laws of Kenya. The appellant relied on** the case of **Simon Kiprono Lang'at Vs. Republic CRA No. 146 of 2006**, where the Judges of the Court of Appeal stated that they could not allow the conviction to stand under all circumstances because the trial magistrate and the High Court Appellate Judges did not attempt to deal with the inconsistencies and contradictions by the Prosecution witnesses which rendered evidence untrustworthy.

3. Insufficient and Unsound Medical Evidence

61. It was the appellant's submission that the trial magistrate erred by convicting him based on insufficient and quit unsound medical evidence. That nothing was demonstrated to connect him with the allegations as he was not even examined as a standard measure to establish some facts as standard proof.

62. It was further submitted that PW6 confirmed that there “was no conclusive evidence that the complainant was defiled”, and that the witness testified that he could not establish whether the victim was lying or not. Further submission was that from the medical examination, the complainant had a sexually transmitted infection, which he says implies that she had been sexually active.

63. The appellant submitted that though the medical examination revealed that the hymen was missing, there were no signs of recent sexual activity by the victim even though she was promptly examined. He submitted that on the other hand, the medical examination fell way below the required standard of proof, as it did not disclose vital information including the age of the injury, the probable type of weapon used or causing the injury and the degree of injury thereof.

64. In conclusion he submitted that medical evidence is quite crucial in a case of such magnitude but when it falls way below the required threshold, conviction based on such evidence can neither be safe, nor fair.

4. Grudge

65. Here the appellant submitted that the trial magistrate seriously erred by overlooking the fact that there existed a grudge between him and PW3 and reiterated that PW1 disappeared on the alleged date of the alleged defilement (24/7/2016) at 1.00 pm.

5. Unfair trial, Bias and Misevaluation of Evidence

66. The appellant submitted that the trial magistrate deliberately bungled the trial in favor of the Prosecution. That he requested for the investigation diary but he however was not given. That the trial magistrate also did not get suspicious when the Prosecution floated a fake confession by the appellant which they could not produce or prove in court.

67. He submitted that the trial magistrate totally misevaluated the evidence adduced, hence misdirecting herself to the wrong determination and conclusion of the matter as the whole story had been cooked up for it was quite awkward how the rest of the family members allegedly 20 metres away in the main house could not hear the complainant's loud screams or raise eyebrows at such time of the night during the alleged defilement.

68. The appellant also submitted that PW1 alleged it was the fourth time that he had defiled her, as such it remained quite questionable and suspicious why she had kept quiet about the other times. That however, no one put her to task about this despite his insistence. Lastly he submitted that PW4 alleged that PW1 the complainant, could not sit properly or play as she was in pain, yet the medical expert who could have concurred with the allegations proved the contrary, that there was no conclusive evidence that the complainant was defiled.

69. The prosecution opposed the appeal maintaining that the prosecution proved its case against the appellant beyond reasonable doubt and that the sentence meted out was lawful and proper. Mr Okachi Senior Principal Prosecution Counsel urged the court to dismiss the appeal and uphold the conviction and sentence.

DETERMINATION

70. I have re-evaluated and analyzed the trial court record, the grounds of appeal, the appellant's submissions and the following are the issues I perceive for determination:

1. **Was the evidence by the appellant fully considered at the trial;**
2. **Whether there were material inconsistencies/ contradictions in the case;**
3. **Whether there was penetration;**
4. **Whether the identification by the complainant was sufficient?**
5. **Whether the sentence is justifiable;**

71. **On issue 1**, the trial record shows that the trial magistrate fully considered the evidence of the accused in his defence. In the trial courts judgment the trial court stated that accused in his defence stated that PW1 was used to fix him by PW3 whom he had differences with over his church leadership and that PW3 could have influenced all the witnesses to fix him but however went on to note that the Accused/ Appellant did not call any of his church members as witnesses. Further the court also took note of the fact that DW1 did not raise the alleged difference he had with PW3 during cross examination and as such the trial court was of the view that the accused person's defence was just an afterthought and meant to cover up his heinous act against PW1 which opinion this court agrees with. This is because there was absolutely no evidence that could have pointed to the alleged bias by the trial court or a grudge between the appellant and PW3 as alleged.

72. Another thing the trial court made of the Appellant's evidence then is that the Accused now Appellant denied that PW1 was at home at the material time. On this the court stated that it did not have any reason to believe that PW1 lied to the court and stated that it did not believe that PW1 could fix a man who had been her guardian for 2 years and as she had narrated her story well and was very consistent.

73. This court holds the view that the Appellant during his trial in the lower court did not have a defence and he put up a defence just because one is expected to come up with a defence, in fact, it is noteworthy that the accused did not cross-examine PW1 at all despite being given the opportunity to do so. His allegation that PW1 had not returned home from school on the material day of the defilement cannot be supported. To quote him verbatim, he said "I don't have any questions to ask". He thus did not discredit/ cast doubt on the evidence of PW1 that it was the appellant who defiled her on the material night and in the kitchen.

74. This court concurs with the decision in the *Law Society of Kenya v Faith Waigwa & 8 others [2015] eKLR*, where the usefulness or rationale of cross-examination of witnesses was stated as follows.

"First, it is a mechanism which is used to bring out desirable facts to modify or clarify or to establish the cross-examiner's case. In other words, cross-examination is meant to extract the qualifying facts or circumstances left out by a witness in a testimony given in examination in chief. Secondly, the exercise of cross-examination is intended to impeach the credit worthiness of a witness. In cross-examination a witness may be asked questions tending for example to expose the errors, contradictions, omissions and improbabilities. In the process, the veracity of a witness's averments is tested....."

75. Accordingly, I find and hold that the trial court fully considered the appellant's defence and was right in dismissing it as an afterthought.

76. **Onto issue 2, DW1** in his defence stated that he was arrested on 26/7/2016 and not 25/7/2016 thus it is not clear when the offence happened and that the Complainant alleges that she told her friend J2 the following day on 25/7/2016. The Complainant (PW1) clearly stated

that she was defiled on 24th July 2016 at night while she was in the kitchen washing dishes and all prosecution witnesses are consistent as to when PW1 informed PW4 of the incident, they even call it the following day. It is therefore only logical that if she had intended to report the matter, she would not have done it at that hour of the night considering she lived in the home of the appellant as her guardian.

77 And if indeed there was inconsistency as to his date of arrest, then the inconsistency did not materially affect the case as it was not shown that the appellant was arrested earlier than the alleged incident. The appellant further alleged that it was not clear who gave the book to the complainant. In my view, the inconsistency in the evidence of PW3 on whether the book was given by the NGO or the appellant is immaterial. It does not go to the root of the case. In addition, the alleged inconsistency on the question of whether the complainant told J. or V her fellow pupil of what the appellant had done to her was in my humble view immaterial. Moreover, the trial court in its judgment also stated that PW1 had narrated her story well and was very consistent. I have no reason to differ with that finding of the trial court which had the opportunity to hear and see the witness as she testified.

78 **Onto issue 3**, the lower court observed that PW1 stated that the accused held her waist tight and tried to force her to lie down but she resisted, it is then that the accused pulled her skirt and pant down and put her in a bending position, then he inserted his penis inside her vagina and had carnal knowledge of her as she screamed for help but nobody came to her rescue. This evidence was assessed by the trial court which aligned it to the definition of Penetration *as under Section 2* of the Act - “the partial or complete insertion of the genital organs of a person into the genital organs of another person”.

79. The trial court further observed that the evidence of PW1 was corroborated by that of PW6, the clinical officer who examined her after the incident and found the hymen missing, that he also found whitish discharge in her vagina and that during cross examination by the accused, PW6 stated that sexual intercourse could not be ruled out or eliminated just because spermatozoa was not found.

80 While the appellant in his submission contended that the trial magistrate erred by convicting him based on insufficient and quite unsound medical evidence, he submitted further that PW6 confirmed that there “was no conclusive evidence that the complainant was defiled”, and that the witness testified that he could not establish whether the victim was lying or not; and that from the medical examination, the complainant had a sexually transmitted infection, which he says implies that she had been sexually active; and further that though the medical examination revealed that the hymen was missing, there were no signs of recent sexual activity by the victim even though she was promptly examined; He however stated that on the other hand, the medical examination fell way below the required standard of proof, as it did not disclose vital information including the age of the injury, the probable type of weapon used or causing the injury and the degree of injury thereof.

81. In the humble opinion of this court, the trial court’s observation was proper that indeed there was penetration corroborated by laboratory tests/vaginal swab that showed pus, a sign of infection. In addition, I hold the view that the Appellant is applying double standards, on one hand he says the medical evidence was insufficient and unsound while on the other he relies on it to support his defence when he stated that PW6 confirmed that there “was no conclusive evidence that the complainant was defiled” and that the PW6 testified that she could not establish whether the victim was lying or not. The Appellant adds that from the medical examination, the complainant had a sexually transmitted infection, which he says implies that she had been sexually active. Earlier on in the lower court, his defence catapulted on PW6’s evidence that there was no defilement.

82. The law in the proviso to section 124 of the Evidence Act is clear that the evidence of the victim of sexual offence need not be corroborated if the court believed that the minor told the truth and recorded its reasons. The section provides;

“124. Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him.”

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

83. As earlier stated, the trial court made it clear that the complainant was telling the truth and that she had no reason to frame her guardian with such a heinous offence. Therefore, unless it was shown that the evidence of the other witnesses materially contradicted what PW1 the complainant stated, which was not the case here, as long as the trial court was convinced that PW1 was truthful which was an observation by the trial court that PW1 had no reason to lie to court and that PW1’s evidence was taken on oath after she was subjected to voire dire examination, the appellant’s claims that there was a grudge with PW3 whom he did not even cross examine on that aspect and or that the prosecution evidence was riddled and or marred with contradictions and inconsistencies does not lie.

84 In the case of *J.W.A. v Republic [2014] eKLR*, the Court of Appeal observed:-

“We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.”

85. A similar position was taken in *Mohamed v Republic [2006] 2 KLR 138* where the court stated:-

“It is now settled that the courts shall no longer be hamstrung by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”

Onto issue 4, the trial court stated that PW1 recognized the Accused/ Appellant as her cousin and guardian whom she had lived with as a caretaker for 2 years and that she also knew him well before the incident. The court further stated that the time the accused spent with PW1 opening the book and asking her about the genitalia of a woman in it, was sufficient enough for her to know and recognize the accused, and that besides, there was light from the tin lamp before the accused put it off. The court thus stated that the environment was conducive enough for PW1 to identify the accused and was guided by the decision in the case of **PAUL ETOLE and ANOTHER vs. REPUBLIC C.A 24 of 2000 UR** Pg. 2 and 3 where it was held that

“The prosecution case against the 2nd appellant was presented as one of recognition or visual identification....such evidence can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against the accused depends wholly or substantially on the correctness of one or more identification of the accused, the court shall warn itself of the special need for caution before convicting the accused. Secondly it ought to examine closely the circumstances in which the identification by each witness came to be made”

86. On the above premise the lower court believed that PW1 properly identified the accused and that identification was by recognition and was free from any mistake owing to the circumstances. Albeit the appellant claimed that the school administration tried to advance an alleged faked confession from him, the trial court did not allude to the alleged confession in conviction him. This court finds no reason to differ with the findings of the trial court on identification and recognition of the appellant by the complainant as her assailant.

87. **Onto issue 5**, the Appellant instituted this Appeal against the conviction and 15 years prison sentence. The Appellant was sentenced to 15years imprisonment as prescribed by law under Section 8 (4) of the Sexual Offences Act. No. 3 of 2006. Sexual offences attract mandatory penalties in Kenya in a bid to curb the ever rising vice. Though I hold the view that the mandatory minimum sentences should be reviewed as relates to sex between people of small difference in age, I find the sentence meted out to be lawful and being the minimum sentence, the same cannot be excessive in the circumstances of this case where the appellant betrayed the trust bestowed on him to be guardian of the complainant child who happens to be his close cousin. The sentence meted out was deserved. I decline to interfere with the same.

88. The upshot is that the prosecution proved their case beyond reasonable doubt as they proved all the necessary ingredients for the offence of defilement and I hold the view that indeed the Appellant took Advantage of a person that he was taking care of as a guardian due to her vulnerable position. There were also no material inconsistencies bearing in mind that there was no doubt in the prosecution’s main witness (PW1) evidence as the appellant did not put any question to her to enable the court reach a conclusive decision on his perceived contentious and contradictory averments made in the lower court. The appeal must fail and accordingly, this appeal is hereby dismissed. The conviction and sentence meted out on the appellant are upheld.

Dated, Signed and Delivered in open court at Siaya this 19th Day of November, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Appellant in person

Mr Okachi Senior Principal Prosecution Counsel for state

CA: Brenda and Modestar