REPUBLIC OF KENYA

IN THE HIGH COURT PF KENYA AT SIAYA

CRIMINAL APPEAL NO 29 OF 2017

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

J O O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment and conviction and sentence in Ukwala SRM criminal Case No 682 of 2016, by G. Adhiambo, SRM in Republic Versus J O OB delivered on 27th February 2017).

JUDGMENT

1. This is an Appeal against conviction and sentence of 10 years in respect of Ukwala Senior Resident Magistrate's Court Criminal case number 682 of 2016, R. vs. **J O O** delivered on 27/2/2017.

2. The Appellant - **J O O** was charged with the offence of Defilement contrary to Section 8 (1) (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, **J O O**: on 21st day of November, 2016 at [particulars withheld] Sub-location in within Siaya County, intentionally caused his penis to penetrate the vagina of PA (name withheld for legal reasons) a child aged 13years.

AND

4. **J O O**: on 21st day of November, 2016 at [particulars withheld] Sub-location within Siaya County, intentionally touched the vagina of P A a child aged 13 years.

5. After full trial the Appellant - **JOO** was found guilty of the charge of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act and sentenced to serve 10 years imprisonment.

6. Aggrieved by the said conviction and sentence of 20 years imprisonment, **J O O** – the Appellant filed a Petition of Appeal raising the following grounds:

> ***1. That, the Learned Trial Magistrate erred in law and fact by allowing the evidence of the prosecution which was marred with contradictions.***
>
> ***2. That he cannot recall all that transverse during trial hence pray for the trial proceedings and order for habeas corpus so as to adduce sufficient grounds.***

7. However, as this is the first Appellate court, the court in determining this Appeal, must fully understand its duty as held in the Court of Appeal case of **Kiilu and another V. R. (2005) 1 KLR 174 w**here the Court of Appeal held:-

> ***"an appellant in a 1st 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."***

8. Thus from the foregoing holding, this court must subject the entire evidence adduced before the trial court to a fresh evaluation and analysis and will draw its own independent conclusions, while being alive to the fact that it neither saw nor heard any of the witnesses testify and so it cannot comment on their demeanour.

9. On what transpired during the pendency of the case in lower court, the prosecution called **PW1 – G O O**,who testified that he filled the P3 Form on 23/11/2016 issued to P.A aged 12 years (Hospital Reference No. is 6766/16). That P. A went to the hospital dressed in a brown skirt with a pink top none of which were torn or blood stained, with a history of having been defiled by a person known to her at around 6.30 am. She stated that on 19/11/2016, her mouth was covered forcefully using a hand and that this took place in the house where she was sleeping.

10. On the general physical examination, PW1 stated that the patient was not intoxicated however, she was anxious and emotional with tears in her eyes. Her gait was normal, the thorax and abdomen were normal, the upper limbs and lower limbs were normal and that the approximate age of injuries was about 3½ hours. That they then gave her treatment.

11. PW1further stated that the nature of injury sustained was grievous harm and the nature of offence is attempted defilement and that the estimated age of the person examined was 12 years.

12. On examination of the genitalia, – the *labia minora* and *majora* were normal, the vaginal wall was normal, the cervix was also normal, that the hymen was -broken but it was not fresh. There was no discharge noted, there was no vaginal bleeding and there was no sign of vaginal infection on the genitalia. The laboratory findings showed that her HIV test was negative, the pregnancy test was negative, the syphilis was negative, Hepatitis B was also negative, the high vaginal swab direct observation on the lab revealed that no spermatozoa was seen.

13. An analysis was done, the urine was found to be umber in colour which was normal, the urine was non-foaming and no spermatozoa was seen. The patient reported that the defiler was the husband of her bedridden sister who were both on ARV treatment. That she had gone to visit and support the ailing sister. The doctor then stated that this put the girl at high risk of getting infected with HIV and that the girl required psychological counselling. But he urged the court to take note that penetrative coitus did not take place.

14. On ***Cross examination*** by the accused, PW1 stated that it was an attempted defilement and that the hours that the client presented to the hospital was just 3½ hours from the event and that is such a golden time to get sufficient evidence both on clinical examination and laboratory test and that is why their diagnosis is that there was attempted defilement.

15. **PW2: P.A(name withheld for legal reasons)** gave sworn testimony after *voire dire* examination that she was a pupil at B.O(full name withheld) Primary School and was in Class 5. That on 19/11/2016 at around 5.00 am, she was at the home of her Sister J.A (full name withheld) , whom she had gone to assist because she was bedridden, when O (who is J husband) came to the house where they were sleeping. That O knocked the door saying that he wanted to remove the motorcycle which was where she was sleeping with O's children. She stated that she opened the door together with C.O. (name withheld), the daughter of O, and O removed his motorcycle and placed it near the door outside the house. She testified that that was when O returned to the house they were sleeping in with his children and went directly to where she was sleeping, covered her mouth with his hand, and then forcefully removed her blouse and skirt.

16. She testified that the children of O were sleeping on the floor and she was on the bed and that O slept with her. That he removed his "thing" and put it in hers i.e. caused his penis to enter her "thing" that she uses to urinate and he later mounted his bicycle and left.

17. It was her evidence that O came into the house with a lit torch which remained on from the time he took the motorcycle and that she saw him well. That when O left, she went to the house where her sick sister was and told her what O had done to her, and her sister told her to go to their Mother so that their Mother could take her to hospital and that she was taken to Ukwala Sub-county hospital. Her mother then went to talk to O's mother. The following day, her mother reported the incident at Ukwala Police Station. She later recorded her statement at the police station. The she identified the P3 for which she said was filled by the doctor who examined her.

18. PW2 also identified the said O who was the accused person. She stated that she knew O when she started visiting her sister when her said sister fell sick, and that she had known him for one month.

19. On ***Cross examination*** by the accused, PW2 stated that she was not previously living with them and stated that she knew O for one year, and further stated that her sister could not come to court to confirm that she (PW2) told her what O did to her because she (PW2's sister) had died and that they had even buried her, and at that point, the trial court noted that the *Accused broke down and wept*. PW2 also added that her sister could not have gone to record her statement because she was very sick and she did not have a phone. That one child who was at the room is K.(full name withheld for legal reasons) who is 7 years old who even heard the commotion but that she did not record her statement. She reiterated that the accused covered her mouth with his hand and that she told the police that he covered her mouth. At that point the accused also broke down crying and on being asked by the court why he was crying, he responded that he did not know that his wife had died.

20. **PW3: F.A(name withheld)** testified that she was a farmer and had 4 children, of which the eldest was P.A. (PW2) herein who was born in the year 2003 in April but she could not recall the exact date of birth as she was born at home. She produced the Immunization Card for P. A. (PW2) indicating the date of birth as 21/4/2003 and it was marked PMFI 2. PW3 testified that on 19/11/2016, PW2 was at the home of her niece J A who was unwell and her husband JOO had requested if P. A, PW2 (name withheld) could assist his ailing wife. She stated that PW2 left their home on 17/11/2016 and went to J home which was like 20 metres from her home.

21. However, that on 19/11/2016 on Saturday at 7.00 am, PW2 arrived at home while crying and upon asking her why she was crying, PW2 told her that O went to the house where they were sleeping and woke them up saying that they should open the door of that room so that he could collect his motorcycle. That she opened the door for O and then O entered the house, removed the motorcycle and then went back to the same house again and went to where she (PW2) was sleeping and undressed her then lay on her. PW3 got shocked and feared that maybe

O had defiled her daughter and decided to take PW2 to hospital at Ukwala sub-county hospital where she was treated and given medication and that the doctor then told them to report the matter at Ukwala Police Station and O was later arrested on Wednesday.

22. PW3 stated that J O is her in-law because he married the daughter of her sister that is PW3's niece. That O's wife was critically ill and he requested her to allow PW2 care for his wife. That PW2 told her that the accused inserted his penis in her vagina.

23. On ***Cross Examination*** by the accused, she stated that she did not witness the incident and was only narrating what her daughter told her after she arrived home crying. That PW2 told her niece, that is the accused's wife and the latter told PW2 to run home and report to PW3 adding that what the accused did just made his ailing wife to be more stressed.

24. **NO. 107257 PC PW4: L A** testified that she was attached at Ukwala police station working at the Crime Office. It was her testimony that on 22/11/2016 at around 1.00 pm, while working at the station, the complainant, a child came in the company of her mother and reported that the complainant had gone to visit her sister who was sick at Uyodi village and had gone to take care of her and look after her kids and do other house chores. That the complainant said that on 19/11/2016 at around 5.00 am, the complainant together with her sister's kids were asleep in a house when the Accused who is her brother in-law went to the said house to pick his motorbike so that he could do his work as usual. That after the accused had taken the motorbike outside the kitchen where the complainant and his children were sleeping, the accused went back to the said kitchen and locked the door of the kitchen from inside. The accused then went straight to where the complainant was and ordered her to remain silent, the Accused covered the Complainant's mouth with his hands, forcefully undressed the complainant and had sex with the complainant without the consent of the complainant by inserting his penis into the vagina of the Complainant.

25. That the accused then left and the Complainant who was then crying and she went and reported the incident to her sister, the wife of the accused. That the sister told her to rush home and report the matter to her parents. That the complainant reached at her parents' home at around 7.00 am and told her mother what had happened. Her mother then took her to hospital at Ukwala Sub-County Hospital.

26. That the P3 form was filled even though the doctors were on strike and the suspect was arrested on 24/11/2016 and taken to the Ukwala Sub-County Hospital. That the date of birth from the Immunization Card she collected from the complainant's mother was written as 21.04.2003 and she produced it as an exhibit. That she interviewed the child and found out that the offence that was committed was defilement, though the results of the doctor, found that it was attempted defilement.

Defence

27. **DW1: JOO** testified that on 19th November, 2016, he had left his motorcycle and went to remove it from the house where he had kept it and went to search for medicine for his wife who was unwell. That he went back to his house at around 8.00 am and found that his wife was not at home. He went back to the centre where he operates his *boda boda* and kept checking his phone to see if his wife would call him asking for medicine but he did not find her. He then went back home at around 6.00 pm and asked his mother where his wife had gone and she told him that she had no idea. It was the accused person's evidence that he sat there until 7.00 pm and left. That he then thought that his wife may have gone to visit a neighbour or even visit her mother and at about 8.00 pm his mother served him with food and he went to bed and slept.

28. That the following morning he asked a neighbour of his wife's mother if she had seen his wife at her parent's home and the neighbour answered in the negative. That on his way back from Gem to take a customer and on reaching Kodiaga, his elder sister in-law rung him and told him that J (his wife) had carried her things and left. That upon calling the sister of the mother of J who lives in Masiwor, he was told that J was at their home and on inquiring why she had left her home with her things and yet she was critically ill, the call was disconnected and that he was arrested on 23rd November, 2016.

Judgment of the lower court

29. The trial court restated the charges facing the accused person and reiterated the evidence adduced by both the prosecution and the defence and noted that the accused opted to give unsworn evidence and not to call any witness.

30. The court then framed the issue for determination being whether on 19/11/2016, the accused while at [particulars withheld] sub-location in Ugenya Sub-county attempted to cause his penis to penetrate the vagina of the complainant (P.A) aged 13 years.

31. The alternative issue for determination as framed by the trial court was whether the accused person herein did on 19/11/2016 while at [particulars withheld] sub-location in Ugenya Sub-county touch the vagina of the complainant P.A., a child aged 13 years with his penis.

32. The trial court then noted that the o was on the Prosecution to prove beyond reasonable doubt that on 19/11/2016 the accused intentionally ***attempted t***o cause his penis to penetrate the vagina of P.A, a child aged 13 years or in the alternative, the accused intentionally touched the vagina of P.A, a child aged 13 years with his penis.

33. The court noted, that it is only the complainant who witnessed the incident thus the other ***issue for determination*** was whether the court could rely on the uncorroborated evidence / testimony of PW2 and observed that **Section 124 of the Evidence Act Cap 80 Laws of Kenya** provides that notwithstanding the provisions of **Section 19 of the Oaths and Statutory Declaration Act**, where the evidence of the alleged victim admitted in accordance with the section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him provided that when in a criminal case involving a sexual offence the only evidence is that 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.

34. The trial court reproduced the testimony of PW2 as above and framed another issue ***issue for determination*** as to whether the visual identification evidence of PW2 could be relied on by the court. In determining this, the trial court was guided by the court's decision in ***R vs***

Tumbull (1976) 3 ALL Cr. 549, where the Court stated that some of the factors to be considered before determining whether or not to rely on the visual identification evidence of a single eye witness are as follows:- whether the viewer viewed the suspect under sufficient lighting, from a close position and there was nothing which could have impeded his proper identification of the suspect, whether there was any difference between how the viewer described the suspect and the actual appearance of the suspect, whether there was lapse of long time between the time the viewer saw the suspect committing the offence and the time the viewer identified the suspect to the police. The court further drew a distinction between recognition evidence and identification of a stranger when the court stated that recognition evidence is more reliable than identification of a stranger.

35. The court thus stated that it was evident from PW2's testimony that she viewed the alleged offender from a close position for one to hold another's mouth, forcefully undress the other and cause his penis to enter the vagina, the offender must have been very close to the victim.

36. The trial court further observed that PW2 told the court that at the time the offender held her mouth, forcefully removed her clothes and inserted his penis into her vagina there was a lit torch inside the house and thus found that the complainant viewed the offender under sufficient light. She added that according to the complainant, the incident did not take place abruptly but there is a sequence of events that took place hence found that the complainant had ample time to see the offender and it was not just a fleeting glance.

37. The trial court further observed that according to the complainant the accused is her brother in-law whom she knew well. She said that she had gone to live at the home of the accused to take care of the accused's ailing wife, a fact which was not even disputed by the accused and the court thus found that the complainant identified a person she recognized and not a stranger. Noting also that not much time had lapsed between the time the complainant saw the offender who attempted to defile her and the time the complainant identified the alleged offender to the police, that the complainant described the accused by his name -O - which name the accused did not dispute was his. Therefore the court was of the opinion that in the circumstances, the visual identification evidence of PW2 though uncorroborated met the threshold set in the case ***R vs Tumbull*** (supra) and that as such it was reliable.

38. The trial court further stated that PW3 talked to the complainant shortly after the incident that is on 19/11/2016 at 7.00 am and that the same narration of the report made to her by her daughter PW2 is consistent with the testimony of PW2, meaning that at no time did PW2 change her version of what transpired. Further, the trial court observed that PW3's testimony was crucial in that she was able to avail prove of age of the complainant as at the time of the incident by availing the immunization card which was later produced by the Investigating Officer as P Exhibit 2 and that the contents thereof remained undisputed showing that the complainant was born on 21/04/2003 meaning that as at 19/11/2016 the date of the alleged attempted defilement she was 13years and 7months old.

39. The trial court further observed that the Clinical Officer who attended to the complainant at the Ukwala Sub-County Hospital on 23/11/2016 for purpose of filling the P3 form gave a narration of the history given to him by PW2 the complainant, which narration was consistent with the testimony that PW2 made before the trial court, and reiterated the fact that that at no time did PW2 change her version of what transpired to her on 19/11/2016. That the Clinical Officer confirmed that the complainant, his patient was anxious and emotional with tears on her eyes among other findings as contained in the P3 form.

40. The trial court further observed that according to the expert witness PW1 the child was defiled as there was no actual penetration that is penile penetration into the vagina of the complainant. That the doctor found that it was an attempted defilement which the court agreed with the said observation as there was no evidence of penile penetration.

41. The trial court concluded that the prosecution witnesses were credible and concerning the defence case, the trial court observed that the defence was a denial which did not shake the testimony of the prosecution witnesses in any way. That he dwelt much in telling the court how his wife (allegedly now deceased) left their home (her matrimonial home after alleged incident and evaded telling the court much about what transpired between him and PW2 on the morning of 19/11/2016. He admitted that he picked his motorcycle from the place that is the house where he kept it and as such he was not disputing that he went to the house to pick his motorcycle on the morning of 19/11/2016 and the court stated that after that, he made an evasive defence which did not shake the testimony of the prosecution witnesses in anyway.

42. The court thus found that even if PW2's testimony was uncorroborated, she stood out as a honest witness, she did not change her version of what transpired even when she told PW3, PW1 and PW4 of the incident that occurred on 19/11/2016 hence the court while being guided by the provisions of **Section 124 of the Evidence Act**, relied on the uncorroborated evidence of PW2 as a credible witness.

43. The trial court found and held that the prosecution had proved its case against the accused person beyond reasonable doubt and she convicted him for the offence of attempted defilement under section 215 of the Criminal Procedure Code.

44. Having considered the mitigation in favour of the accused, the court stated that the accused abused the trust placed upon him by the society which expected him to protect children and that a person with the character of the accused needs to be rehabilitated before he can be released back to the society. And in conclusion, the court stated that it was disheartening to note the future that the accused had authored for himself by attempting to defile a minor and sentenced the accused to serve **TEN YEARS** imprisonment hence this appeal.

Appellant's Submissions

45. The appellant who was unrepresented at the trial hired an advocate who represented him on appeal. In canvassing the grounds of appeal, the appellant's counsel filed written submissions which were adopted

46. In his submissions, counsel for the appellant asserted that the complainant was the sole eye witness called, PW1 was a medical doctor who examined the complainant for purposes of filing the P3 form, PW3 on the other hand was the complainant's mother who took the complainant to hospital following the alleged defilement and PW4 was the Investigating Officer.

47. It was further submitted that the Appellant gave sworn testimony at the trial adding that the Appellant was unrepresented at the trial

court and he prepared and filed the appeal in person.

48. **On the merits of the appeal,** it was submitted that the appeal raised the following two grounds of appeal: -

> ***(a) That the conviction and sentence is unsustainable in law and fact as it is founded on testimony that is shrouded in contradiction.***
>
> ***(b) That the appellant did not follow the proceedings before the trial court and therefore seeks an opportunity to "adduce sufficient grounds".***

49. Ground No. 2 is however incomprehensible in meaning. Nonetheless, the Petition of Appeal having been prepared by a lay person, one can only speculate what the exact import of this ground is. On the minds of the appellant, he was seeking for an opportunity to lead further evidence in the cause.

50. While submitting on the two grounds above, the Appellant's advocate considered the two grounds of appeal and formed the opinion that only the first one is well founded in law, accordingly, chose to focus on ground 1 and abandoned the second ground.

51. It was submitted they are of the view that indeed the evidence of the prosecution is full of contradictions and ought not to have been the basis of the finding of guilt returned against the appellant by the learned trial magistrate. The contradictions were listed as follows: -

i. Inconsistency in identification and Recognition of the Appellant

52. That the complainant testified that she identified and recognized her attacker as the Appellant. That this she said, she was able to do notwithstanding that the offence was committed at 5.00 am in the morning when it was still dark. That the evidence on record and which the court relied on was that the appellant is said to have had a spotlight which was switched on at the time of the attack. And the complainant says she recognized the appellant because she had known him for a while.

53. That on examination by the court as to how long the complainant had known the appellant, she responded that ***"I had known him for one month." But that*** in cross examination on the same issue of fact, the complainant stated that ***"I have known you for one year, "*** a fact the appellant's counsel contend that the trial magistrate in her judgment referred to also and that in the entire of her judgment the trial court does not make any comments on these material contradictions and how they impacted on her sense of judgment on the honesty of the witness in relation to the identification of the appellant as the perpetrator of the alleged offence. Further, it was submitted that ***in*** making this finding, the learned trial magistrate did not address herself to the glaring material contradictions aforesaid and which ought to have cast the complainant as a possible liar.

54. It was submitted further that the possibility that the complainant was not being truthful was demonstrated further by her assertion that the appellant came into the house with a spotlight which she used to identify him. That the appellant, who was carrying a spotlight, placed one hand on the complainant's mouth and undressed and defiled her and in this regard state that Critical questions arise in this respect: -

> ***(a) How did the appellant hold the spotlight, place one hand on the complainant's mouth and undress the complainant at the same time?***
>
> ***(b) Could the same individual execute the several acts contemporaneously with two hands?***
>
> ***(c) Is there a possibility that the complainant was lying in the face of the contradictions by her referred to earlier in these submissions?***
>
> **ii. Inconsistency on whether there was penetration of the complainant's private parts:**

55. It was submitted that the charge against the appellant is one of the attempted defilement and in support of the accusation, PW1 said medical evidence showed that there was no evidence of penetration of the complainant's vagina. Further that it is noteworthy that the complainant was examined a few hours after the alleged incident and PW1 relying on the evidence formed the opinion that there was no penetration.

56. It was therefore submitted that in total contrast to this evidence, the complainant's testimony was that there was penetration. That the evidence was consistent with the offence of defilement as opposed to attempted defilement, i.e. ***"O slept with me, he removed his thing and put it in mine. He caused his penis to enter my thing that I use to urinate"*** and that the trial magistrate makes a finding of fact that the appellant "put his penis into her vagina." Which they state is a clear finding of defilement as opposed to attempted defilement yet, she convicts for attempted defilement.

57. It was submitted that the evidence on record was contradictory on whether the offence committed was defilement or attempted defilement with PW1 testifying that she was defiled while PW2 categorically asserting there was no penetration. It was submitted that the trial magistrate overlooked the contradictions to find in favour of attempted defilement notwithstanding that in the body of her judgment the trial court pronounced that there was penetration of the complainant's vagina.

58. In addition it was submitted that what is more critical is the evidence of the breaking of the complainant's hymen as it was not fresh but old despite the fact that it was alleged that the appellant had just committed the indecent attack on her. That for it to be believed that the appellant had freshly defiled the complainant as asserted by her, it would be expected that the tear of the hymen would have been fresh reiterating again that the doctor found that there was no penetration, that he surprisingly rendered the opinion that the complainant sustained

"grievous harm" but stated that it was not explained how the complainant would suffer grievous harm where there was no penetration.

59. Further that from the evidence of the complainant and her witnesses that she was defiled on 19th November 2016 but that PW1 said he examined the complainant on 23/11/2016 and referred to *page 7 of the proceedings*. It was thus submitted that plainly, therefore, between the date of the alleged indecent attack and the date of examination for filling in the P3 form is about 4 days yet at page 8 of the proceedings, PW1 states that at the time of examination, *"the age of the injuries was about 3½ hours."*

60. It was thus submitted in conclusion that the failure by the trial court to address these material contradictions in the case greatly prejudiced the rights of the appellant to a fair trial and consequently the appellants' counsel urged the court to find that there was too much contradiction of material facts in the testimony of the prosecution as to render the evidence unsafe for founding a conviction against the complainant.

61. Reliance was placed on several cases i.e. **in Francis Kimani Karanja Vs Republic [2016] eKLR** where the Court found that unexplained material discrepancies in evidence weaken the probative value of the evidence and should ordinarily lead to rejection of such evidence and in **Cyrus Maina Gakuru Vs Republic [2016] eKLR** where the court observed that material contradictions in evidence must be properly explained and that in the absence of cogent explanation for the contradictions, such evidences should usually but not necessarily be rejected. That in effect, the law is that if the trial court has to rely on such evidence, it will be a departure from ordinary practice and the Court must offer an explanation for believing the evidence notwithstanding the contradictions. Further reliance was placed on the case of **Zakari Kimondo Gitari Vs Republic [2017] eKLR where** the court held that material contradictions on dates and time of the commission of the offences are fatal to the prosecution's case. The appellant's counsel urged this court to allow the appeal.

62. In opposing the appeal, Mr. Okachi Senior Principal Prosecution Counsel submitted that albeit the appellant had been charged with the offence of defilement the trial magistrate correctly exercised her discretion after finding that the offence that was proved was attempted defilement which was a lawful exercise of discretion.it was submitted that albeit the victim said that there was penetration and the doctor who examined her found that there was no penetration, the appellant could not escape the discretion of the trial court which assessed the evidence and found him guilty of a lesser offence of attempted defilement.

63. It was further submitted that PW2 testified that there was a vigorous physical contact between her and the appellant with the aim of penetrating her and that that evidence was not controverted in any manner.

64. On sentence it was submitted that the trial court considered the mitigations and the fact that the offence was serious, traumatizing to both the victim, her family and the society at large. Counsel urged this court to uphold the judgment of the lower court and dismiss the appeal.

Determination

65. I have carefully considered the appeal herein and the submissions by both the appellant's counsel and the prosecution counsel The following are the issues I perceive to flow from the foregoing evidence adduce, the grounds of appeal and the appellant's submissions thereof;

1. ***Whether the perpetrator was positively and properly identified and or recognized by the victim of the crime?***

2. ***What offence was committed if any, in the circumstances of this case, and whether the trial court erred in convicting the appellant with attempted defilement, an offence that he had not been charged with?***

3. ***Whether the prosecution evidence was marred with inconsistencies and contradictions and whether such inconsistencies and contradictions if any are material going to the root of the case;***

4. ***Was the sentence meted out appropriate;***

66. On issue number one of whether the perpetrator of the offence was positively identified and or recognized by the victim, the evidence before the trial court as adduced by PW2 was that she was sleeping in the house with children of the accused when the accused called her out saying that he wanted to collect his motor cycle and that she opened the door for the accused whom she called O and that the accused entered the house with a lit torch, picked the motorcycle and took it out of the house.

67. She stated that after that, the accused went back to the same house still with the lit torch and moved to where she was sleeping on the bed, covered her mouth with his hand and removed her clothes and slept with her by putting his thing it in her. That he caused his penis to enter into her thing that she uses to urinate after which he left the house, mounted his motorcycle and left. All that time, the torch he entered the house with was on and that she saw him. She identified the accused/appellant herein by the name of O in court and in cross examination she stated that she had known him for one year.

68. PW2 stated that she narrated the same episode to her sister the wife to the accused/appellant who had since died because from the evidence of PW2, at the material time of the incident she was critically ill, and therefore could not be a witness in this case. She also narrated the same story to her mother and to the police investigators and to the doctor who examined her and filled the P3 form. She maintained her evidence that it was the accused who was her brother in low who had invaded her and defiled her. The incident took place at 5am and immediately after she was defiled and after the accused had left, she went and reported to her sick sister who advised her to ran to her home and inform her mother.

69. The trial court on the of visual identification and on whether it could rely on the evidence of PW2 placed guidance on the decision in ***R vs Turnbull (1976) 3 ALL Cr. 549***, where the Court stated that some of the factors to be considered before determining whether or not to rely on the visual identification evidence of a single eye witness are: whether the viewer viewed the suspect under sufficient lighting from a close

position and there was nothing which could have impeded his proper identification of the suspect; whether there was any difference between how the viewer described the suspect and the actual appearance of the suspect; whether there was lapse of long time between the time the viewer saw the suspect committing the offence and the time the viewer identified the suspect to the police. The court further drew a distinction between recognition evidence and identification of a stranger when the court stated that recognition evidence is more reliable than identification of a stranger.

70. The court in its judgment stated that it was evident from PW2's testimony that she viewed the alleged offender from a close position and that PW2 told the court that at the time there was a lit torch inside the house, hence the trial court found that the complainant viewed the offender under sufficient light. The trial court further observed that, according to the complainant, the incident did not take place abruptly but there was a sequence of events that took place hence it found that the complainant had ample time to see the offender and that it was not just a fleeting glance. In addition, the trial court observed that the complainant stated that the accused is her brother in-law whom she knew well as she had gone to live at the home of the accused to take care of the accused's ailing wife, a fact which was not even disputed by the accused, hence the court found that the complainant identified a person she recognized and not a stranger.

71. On this issue, this court agrees with the trial court that identification of the accused by the complainant was by way of recognition as the appellant was a person well known to PW2 and the appellant in his defence having admitted that he went to pick his motorcycle albeit he avoided stating from whence he went to pick the motorcycle corroborates the evidence of PW2 who said that the appellant went to the house where she slept with his children and called her to open the door so he could pick the motorcycle, after which she went and opened the door for him, he picked the motorcycle and placed it outside the house then he returned inside the house and attacked her and that he had a lit torch to aid him throughout the process. The light enabled PW2 to see who it was properly hence there was proper identification. I find no mistaken identity of the complainant's assailant. She positively identified him as she knew him and had lived with him as his brother in low.

72. Albeit it was submitted by the appellant's counsel that the possibility that the complainant was not being truthful which was demonstrated further by her assertion that the appellant came into the house with a spotlight which she used to identify him, and that the appellant, who was carrying a spotlight, placed one hand on the complainant's mouth and undressed and defiled her poses the critical questions such as:

> ***(d) How did the appellant hold the spotlight, place one hand on the complainant's mouth and undress the complainant at the same time?***
>
> ***(e) Could the same individual execute the several acts contemporaneously with two hands?***
>
> ***(f) Is there a possibility that the complainant was lying in the face of the contradictions by her referred to earlier in these submissions?***

73. In my humble view, it is important to note that the trial court which had the opportunity to hear and see the complainant as she testified found her to be truthful. This was after observing her demeanor. Considering the age of the complainant, there is nothing on record suggestive of the fact that the appellant was prevented from holding a torch and at the same time covering the complainant's mouth to prevent her from screaming and attempting to defile her. In my humble view, and on the basis of the evidence on record, it is highly possible that the holding of the torch and covering of the complainant's mouth is what made the appellant not to complete the act of defiling the complainant as she was resisting the encounter. It cannot, therefore, be said that the complainant must have been lying and that the appellant could not execute those two acts of holding the torch and the complainant's mouth while attempting to defile her simultaneously. This is further supported by the fact that the incident did not take place abruptly. There was a sequence of events that took place prior to the attack and which the complainant child vividly narrated to court, that gave her sufficient time to see the offender and as it was not just a momentary glimpse.

74. Accordingly, I find and hold that the circumstances under which the incident took place were favorable for PW2 to positively identify and recognize her attacker, as the appellant herein and that her positive identification and recognition of her attacker as the appellant herein was free from any error.

75. On issue no 2 on what offence was committed if any, in the circumstances of this case, the appellant claims that albeit the complainant testified that she was defiled, the Doctor who examined her found that there was no penetration and that in any event the complainant's hymen which was broken was not fresh but old. In addition, it was contended that the P3 form shows that the injury sustained was grievous harm yet the complainant was never defiled which makes the evidence by the complainant inconsistent and not truthful.

76. The appellant was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

77. The prosecution never amended the charge sheet to reflect the offence of attempted defilement charge as stipulated in section 9(1) of the Sexual Offences Act. The trial magistrate convicted the appellant on the evidence adduced that showed that there was no penetration hence she convicted the appellant for the offence of attempted defilement under section 9(1) of the Sexual Offences Act. The medical evidence on record is clear that there was no penetration but the child testified that the appellant put his penis in her vagina. The question is whether the offence committed was defilement of a child or attempted defilement and therefore which of the two offences was allegedly committed against the child. Further, whether the trial magistrate was in error when she convicted the appellant for the offence of attempted defilement, and offence that he was not charged with.

78. Section 186 of the Criminal Procedure Code provides as follows:-

> "***When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence***

although he was not charged with it."

79. In addition, Section 214 of the Criminal Procedure Code which provides for the amendment of a charge sheet is only applicable during the trial and before the close of the prosecution's case. The charge could not, as such, be amended after conclusion of the trial.

80. On the other hand, Section 191 of the Criminal Procedure Act provides that:

> ***"The provisions of sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of sections 180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of section 179."***

81. It is essentially important to note that the provisions under Section 179 to 191 of the Criminal Procedure Code fall under a title '***Convictions for Offences other than those charged***'. Therefore, by dint of the said title, it is quite clear that the courts may convict a person on an offence not charged with. ***This leads to the question, how and when does this happen."*** The provisions of the law cited above have explained the circumstances under which such a conviction may occur. However the case law discussed here below demonstrates how the courts have applied the said provisions of the law.

82. In **BWANA KOMBO MUHATI -VS- REPUBLIC [2000] e KLR, COURT OF APPEAL AT MOMBASA, CRIMINAL APPEAL NO. 83 OF 2000**, the learned Judges Omolo, Akiwumi and O'Kubasu, JJA, reiterated as follows;

> ***"This being a second appeal, only matters of law arise for our consideration.The Appellant was originally charged with attempted defilement of a girl contrary to Section 145 (2) of the Penal Code but in the end the Magistrate found him guilty of indecent assault of the girl under Section 144 (1) of the Penal Code.The Magistrate said he was doing so under Section 179 of the Criminal Procedure Code, but that was of course not correct because, as Mr. O for the Appellant correctly points out, the two offences are not minor to each other.But the two offences are clearly cognate and Section 186 of the Criminal Procedure Code provides for the situation the Magistrate was dealing with.The facts put before him clearly proved the offence of indecent assault and he was right to convict the Appellant of that charge.***
>
> ***The superior court confirmed that conviction and there is really no point of law worth our consideration. The appeal is ordered to be and is hereby dismissed."***

83. Accordingly, a trial court has power to convict an accused person for committing an offence that the accused was not charged with, as long as the conviction is for a lesser offence.

84. The appellant further claimed that the nature of injuries could not be grievous harm since there was no penetration.in this regard, it is important to appreciate the usage and meaning of the terms "Harm and Grievous harm" as defined under **section 4** of the ***Penal Code*** which provided:

> ***"Grievous harm" means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.***
>
> ***"Harm" means any bodily hurt, disease or disorder whether permanent or temporary***.

85. The P3 form produced as exhibit 1(b) reveals that the complainant had no physical injuries but that she was anxious and emotional with tears in her eyes. The conclusion by the examining medical officer was that the injury was grievous harm. In my humble view, in arriving at the conclusion that the injury which was not physically visible was grievous harm, he must have taken into account the circumstances as a whole as narrated to him by the child victim in that on the last page of the P3 Form, it is indicated that the complainant knew that her sister, the appellant's now deceased wife who was critically ill at that time and bedridden and the appellant were on treatment for HIV and AIDS infection and therefore this alone could have seriously traumatized the complainant who, according to the Doctor, was at an increased and very significant risk of contracting HIV which currently has no cure and that she required psychological counseling as she was anxious and emotional and needed constant or continuous follow up and reassurance that she may still escape the infection noting that coitus had not taken place.

86. In the view of this court, the medical officer must have been informed by the above circumstances to classify the nature of the injury as grievous harm since psychological trauma could be as grievous as any other serious physical harm.

87. Furthermore, the meaning of grievous harm as defined under section 4 of the Penal Code encompasses ***any harm*** which amounts to a maim or dangerous harm, or seriously or permanently ***injures health, or which is likely so to injure health……,.*** In my humble view, the fears of an innocent child contracting HIV traumatized her and can safely be classified to be ***any harm*** which **is *likely to injure health.*** Furthermore, the appellant herein never questioned the Doctor who examined the child as to why he classified the injuries that were not physical as being grievous harm. Accordingly, the medical officer correctly found the complainant to have suffered grievous harm even though there was no penetration. Am therefore satisfied from the evidence that the harm suffered by PW 2 fell within the definition of grievous harm.

88. Accordingly, I find and hold that the trial magistrate did not err in convicting the appellant for the offence of attempted defilement having found that the evidence proved such offence. Further, the fact that the trial magistrate did not refer to sections 179, 180 and 184 and 186 of the Criminal Procedure Code on convictions for offences other than those charged does not render the conviction of the appellant fatal. In the end, I find and hold that the trial magistrate did not err in convicting the appellant with the offence of attempted defilement

where the evidence adduced proved such offence beyond reasonable doubt.

89. On the third issue of ***whether the prosecution evidence was marred with inconsistencies and contradictions and whether such inconsistencies if any were material and going to the root of the case;*** the essence of the appeal herein is that there were material contradictions/ inconsistencies in the prosecution evidence that cast doubt on the prosecution's case.

90. The first question that arises from this issue is whether the prosecution case was riddled with material contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe.

91. The law is clear that to found a conviction in criminal cases, the court must find that the prosecution has proved the guilt of the accused person beyond reasonable doubt. The prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars of which is a mere ***amalgam*** of inconsistent versions of the same event, differing fundamentally from one purported eye witness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. In **Phillip Nzaka Watu v Republic [2016]eKLR** the Court of Appeal stated:

> ***"However, it, must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.***

92. In **Dickson Elia Nsamaba Shapwata & Another v Republic Cr App No. 92 of 2007 the Court of Appeal of Tanzania** addressed the issue of discrepancies in evidence and concluded as follows, a view that was respectively adopted by the Court of Appeal in the **Phillip Nzaka Watu (supra)** case:

> ***"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."***

93. In the instant case, among the alleged contradictions was the period of time that the complainant child had known the appellant. The child had said in examination in chief that she had known the appellant for one month but in cross examination she stated that she had known him for one year. In my view, the contradiction was minor for reasons that the complainant was a minor and considering the appellant was her brother in low who had married her cousin which fact was not rebutted, this court cannot rule out the fact that she may have understood the questions put to her differently**. In Mocumu v the State (323/2015) [2015] ZASCA 201(2December*, 2015)*** the South African Court of Appeal held though persuasively that:

> ***"Contradictions in the evidence of child complainants in sexual offence cases are not necessarily fatal to State case. That evidence must be considered carefully and the court must be satisfied that despite the contradictions, the evidence constitutes proof beyond reasonable doubt of commission of the offence and identification of the perpetrator and that the relevant considerations include the age and capacity of the child.***

94. The Supreme Court of India in the case of State of **U.P v Naresh , (2011)4SCC, 324,** after considering a large number of its earlier judgments held:

> ***"In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to the normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omission amounts to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court such evidence cannot be safe to rely upon.***
>
> ***However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which evidence can be rejected in its entirely. The court has to form its opinion of the credibility of the witness and record a finding a finding as to whether his deposition inspires confidence. Exaggeration per se does not render the evidence brittle but it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.***
>
> ***Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/ materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited."[emphasis added].***

95. The trial magistrate who heard the testimony of PW2 found her to be truthful and therefore minor discrepancies in her testimony, being a child, cannot vitiate the whole trial, especially where it is clear that the complainant gave the same version of what the appellant did to her, to her mother PW3 and to the police officer and to the doctor who examined her medically.

96. Accordingly I find and hold that the purported contradictions were minor and not material as to go to the root of the case.

97. On the second supposed contradiction that there was a discrepancy as to the date that PW2 was defiled (19/11/ 2016) and when she was examined being that the P3 form was filled on 23/11/2016 four days later, the evidence of PW2 and PW3 was clear that the complainant was

taken to hospital immediately she reported the attack to her mother PW3 which was about three and a half hours later and PW1 stated that at the time of examination, ***"the age of the injuries was about 3½ hours".***

98. The P3 form which was produced in evidence was filled about 4 days after the complainant had already been medically examined hence the submission by the appellant that there was a contradiction on the date of defilement and filling of the P3 form is in my humble view, intended to confuse the court. This is because PW1 correctly stated that the complainant went to the hospital in a brown skirt and pink top, clothes that she had on at the unfortunate time of the incident stating that she had been defiled by a person known to her at around 6.30 a.m the same day. The evidence for the prosecution was clear that it was after the complainant and her mother had left the hospital that they later reported the matter to the police station where they were issued with a P3 form which they then took to hospital to be filled by the doctor who had attended to the complainants. Accordingly, I find no contradiction in that part of the evidence by the prosecution.

99. The appellant further in submission, alleged that there were inconsistencies on whether there was penetration of the complainant's private parts. It was submitted that the charge against the Appellant is one of attempted defilement. His counsel maintained in submissions that PW1 stated that medical evidence showed that there was no evidence of penetration of the complainant's vagina. And that the complainant was examined a few hours after the alleged incident and that PW1 formed the opinion that there was no penetration. It was his submission that, in total contrast to the evidence of PW1, the complainant's (PW2) testimony was that there was penetration and that her evidence was consistent with the offence of defilement as opposed to attempted defilement i.e. ***"O slept with me, he removed his thing and put it in mine. He caused his penis to enter my thing that I use to urinate."*** A fact that the trial magistrate made a finding of fact that the appellant "put his penis into her vagina."

100. In this regard I have already determined this issue in issue No. 1 above that the medical evidence was clear that there was no penetration therefore the trial magistrate was correct in convicting the appellant on a lesser charge other than that which he faced, a stipulated in sections 179, 180, 184 and 186 of the Criminal Procedure Code. I need not reproduce it here. Save that although from the evidence presented in court and part of the submissions of the Appellant, there was no sufficient evidence to prove that indeed penetration took place, the trial court having heard the prosecution evidence and particularly of PW2 and having satisfied herself that PW2 was truthful as per section 124 of the Evidence Act, the fact that there was no penetration does not dislodge the fact that the Accused/ Appellant had the opportunity to attempt to defile the complainant contrary to **section 9(1) and (2) of the sexual offences Act**.

101. The section provides

> ***9(1) a person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.***
>
> ***(2)A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."***

102. While penetration is a key ingredient for the offence of defilement to be sustained, the prosecution in an offence of attempted defilement under **section 9(1) (2) of the sexual offences Act** must prove the other ingredients of the offence of defilement ***except penetration;*** it must prove the age of the complainant, positive identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed. Attempted defilement is a failed defilement, failed because there was no penetration such as was the case herein.

103. By application of Section 179 of the Criminal Procedure Code which is applicable when the evidence on record establishes a minor offence than the one the accused person was charged with, I find that there was no error committed by the trial court and there was no contradiction capable of vitiating the conviction of the appellant for that lesser offence. Section 179 of the Criminal Procedure Code provides as duplicated hereunder:-

> ***"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> **(2)** ***When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."***

104. In addition ***Section 186 of the Criminal Procedure Code*** is applicable where the offence in question is defilement of a girl under the age of 14 years. The said section reads as follows:-

> ***"When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it."***

105. The complainant according to the baptismal card produced as PEx 2(a) was born on 21/4/2003 and the offence was committed on 21/11/2016 which places her age to be 13 years and 7 months. She was therefore under the age of 14 years. It is therefore my view that the trial court correctly believed that there was probable evidence that indeed the accused attempted to commit the act he was charged and not the main act of defilement of the complainant.

106. **Furthermore,** The **Black's Law Dictionar**y defines the word attempt as follows: -

> ***1. The fact or an instance of making an effort to accomplish something, esp. without success.***

2. ***Criminal law. An overt act that is done with the intent to commit a crime but that falls short of completing from the intended crime. Under the Model Penal Code, an attempt includes any act that is a substantial step toward commission of a crime, such as enticing, lying in wait for, or following the intended victim or unlawfully entering a building where a crime is expected to be committed.***

107. From the above definition it is clear that there is no need for physical evidence such as bruises or laceration on the complainant's private parts or thighs or any part of the body for the offence of attempted defilement to be proved. Section 4 of the Penal Code, Chapter 63, defines an offence to ***"mean an act, attempt or omission punishable by law"***. The appellant was convicted for the offence of attempted defilement in accordance with the law reproduced above.

108. An attempt is what is usually described as an inchoate offence. According to the Black's law dictionary:

"the common law has given birth to three general offences which are usually termed as inchoate, or preliminary crimes – attempt, conspiracy, and incitement. A principal feature of these crimes is that they are committed even though the substantive offence is not successfully consummated. An attempt fails, a conspiracy comes to nothing, words of incitement are ignored – in all these instances, there may be liability for the inchoate crime."

109. The appellant should therefore not expect any signs of defilement in the P3 form. Section 388 of the Penal Code states as follows: -

"388. (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

110. The prosecution evidence does prove that the appellant lived with PW2 who was assisting him take care of his ailing wife and that on that morning, he went to where the complainant was sleeping and asked PW2 to open the door so he could take his motorcycle. The evidence further establishes that the appellant removed his motorcycle and placed it outside the house and he returned into the house, held the complainant covering her mouth to prevent her from screaming as there were his own children sleeping in the same house with the complainant, removed her skirt and blouse and inserted his penis in her vagina in a bid to defile her. The appellant was not able to defile PW2, from the medical evidence produced in court. PW2 came out of the appellant's house and went to report to her ailing sister who advised her to go to her home and inform her mother. She went to her home and found PW3 who stated that PW2 was crying when she narrated what the appellant herein had done to her. It was, in my view, established that an attempt to defile PW2 was made by the appellant. The prosecution proved its case and the guilt of the appellant beyond reasonable doubt. There was no material contradiction between the evidence of PW1 and PW2.

111. In the case of **TYSON GEORGE NGOWA V REPUBLIC CA 16 OF 2017** the Court of Appeal faced with a similar scenario agreed with the trial court's findings that **:**

"The appellant further argued that whereas PW1 testified she was defiled, the medical evidence shows her hymen was intact. It should be noted that PW1 was born on 20th February 2009. By 31st March 2014, she was five years old. She could not be in a position to differentiate between defilement and attempted defilement. That is why the police decided to charge the appellant with attempted defilement. This cannot be an issue."

112. Accordingly, I find no inconsistency in the evidence of P1 and the allegations by the complainant child that she was defiled by the appellant as she was not in a position to differentiate between defilement and attempted defilement owing to her age.

113. **On sentence,** ***Section 9(2) of the Sexual Offences Act*** stated above is clear in its wording that:

(2)A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."

114. As the minimum sentence is set by the law, the trial court did not err in sentencing the appellant to the 10 year imprisonment term. The sentence was lawful and the minimum. It was in my humble view, lenient and appropriate a s the appellant breached the trust of an innocent child who was in his custody by attempting to defile her. The trial court could have meted out a heavier sentence than the minimum under the law but exercised her discretion to mete out the minimum which I find no ground to interfere. The same is upheld.

115. **In the end,** I find the Appeal herein is not merited and is hereby dismissed. The conviction and sentence imposed by the trial court are hereby upheld.

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

R.E.ABURILI

JUDGE

In the presence of:

The appellant JOO

Mr. Okachi Senior Principal Prosecution Counsel

CA: Brenda and Modestar