REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO 29 OF 2016

STEPHEN OTIENO MUSEWE…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

Appeal arising from the judgment and conviction and sentence delivered on 1st October, 2016 by Hon C.N. Wanyama, SRM vide Ukwala SRM Cr Case No. 365 of 2014)

JUDGMENT

1. This is an Appeal against conviction and sentence of 20 years in respect of Siaya Principal Magistrate's Court Criminal case number 365 of 2014, R. vs. **STEPHEN OTIENO MUSEWE** delivered on 1/10/2015.

2. The Appellant - **STEPHEN OTIENO MUSEWE** 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, **STEPHEN OTIENO MUSEWE**: on 30th day of June, 2014 in Ugenya District within Siaya County, intentionally caused his penis to penetrate the vagina of MAO (name withheld for legal reasons) a child aged 14 years.

AND STEPHEN OTIENO MUSEWE: on 30th day of June, 2014 in Ugenya District within Siaya County, intentionally touched the vagina of MAO (name withheld for legal reasons) a child aged 14 years.

4. After full trial the Appellant -**STEPHEN OTIENO MUSEWE** was found guilty of the charge and sentenced to 20 years imprisonment.

5. Aggrieved and dissatisfied with the judgment, conviction and sentence of 20 years, **STEPHEN OTIENO MUSEWE** – the Appellant filed a Petition of Appeal raising the following grounds:

1. ***That he pleaded not guilty to the charge.***

2. ***That the sentence was excessively harsh and manifestly excessive in the circumstances given the advanced age of the Appellant.***

3. That, the Learned Trial Magistrate erred in law and facts in convicting him by failing to find that there was an irregularity in the trial records as far as the name of the complainant was concerned.

4. That, the Trial Magistrate erred in law and facts to convict him without considering that the medical examiner who examined him was not summoned to appear in court hence Section 150 of the C.P.C was not complied with.

5. That he was not accorded a fair trial as envisaged in article 50(2) (j) of the Constitution as he was not provided with the P3 form for the victim.

6. ***That his defence statement was not given due consideration which was capable of having him acquitted.***

7. ***That he wishes to attend the hearing of the appeal and prays he be served with the trial courts proceedings.***

6. And further **Supplementary Grounds of Appeal** filed alongside his Appellate submissions, which are;-

1. ***That, I pleaded not guilty to the charge.***

2. ***That, the Learned Trial Magistrate erred in law and facts, by failing to prove the exact age of the minor.***

3. ***That, the Learned Trial Magistrate failed to consider the elements of grudge that emanated between me and PW4 (Village elder) before offence.***

4. ***That, the Prosecution failed to call the crucial witnesses who could have shaded more light on the alleged offence.***

5. ***That, the Prosecution failed to furnish him with witnesses' statement on time during hearing.***

6. ***That, the court failed to consider inconsistency on medical evidence adduced on PW1 during trial.***

7. In determining this Appeal, the court must fully understand its duty as the first Appellate court as stated in the case of **Okeno v. R** which is to subject "*the evidence as a whole to a fresh and exhaustive examination* and for this court to arrive at its own decision on the evidence, it must weigh evidence and draw its own conclusions and its own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

8. On what transpired during the pendency of the case in lower court, the **Prosecution's Case is as below:**

9. **PW1** – **MAO,** a girl aged 15 years old testified that on 30/6/2014, they went to sleep at a neighbour's house after the neighbour got permission from her mother. That Stephen the appellant herein was to be away at work in Kisumu until August but returned earlier and found them in the house. The next day, the clan elder went to the home and took her to her home. The village elder then took both PW1 and Stephen to the Chief. She stated that Stephen slept with her by force. The incident was reported at Ukwala Police Station and she went to hospital.

10. On c**ross-examination** by the accused, PW1stated that she knows it is he the accused who defiled her and that there were other small children present. One was a boy, the other a girl but very young. She stated that she knew where the accused used to work before the act.

11. **PW2** – **Calvin Otieno**, Clinical Officer produced the P3 form on behalf of Chris Opati who examined **MAO** (PW1) on 2/7/2014 who gave a history of defilement by a caretaker in his house. Medical examination revealed; She had no hymeneal ring, *Labia majora* had foul smelling discharge, HIV negative, pregnancy negative, syphilis negative, urine had some cells, no sperm cells seen and the injury was days old. She was given drugs to prevent HIV and emergency pills to prevent pregnancy and pain killers. Stephen was also examined on 2/7/2014 and it revealed that the genitalia normal, HIV negative, syphilis positive and urine had epithelial cells. The P3 form produced as Pex1.

12. On ***Cross examination,*** he stated that the victim was brought alone, that is why examination was done separately and that the results depend on individuals but instruments used are the same and stated that foul discharge does not come with menstrual discharge.

13. PW3 – VA (full name withheld) testified that on 30/6/2014, her child had not gone to school as she had a torn uniform, then her in-law requested that her children sleep at her house since the house help had disappeared and the cows left alone. She stated that the helper returned but she was not aware only to learn that her child was defiled. She stated that later the village elder asked her why the children were not going to school and she answered they had no uniform. She further stated that PW1 was born on 17/3/1999.

14. During **Cross examination** PW3 affirmed that it was PW1 that the accused had defiled. That when the child returned home, she only asked her if Steve had returned. She also stated that she did not know if there was a dispute between the accused and the village elder.

15. **PW4: WILLIAM OMONDI OGOYE** testified that he was a village elder and a farmer and that on 30.6.2014, he was investigating a matter when he was informed that a child who was supposed to be in school was locked in a house and he went to that house at 6.00am and found Steven who was working there. He asked Stephen to open the house where he sleeps and PW4 found PW1, a Class 4 student. It was his evidence that PW1 was with Tony. The children were sleeping on the bed. That he knew Stephen to be a house help and Stephen said he slept on the bed.

16. On being **Cross examined** PW4 stated that while investigating the case of a missing pupil, he got information that the accused was sleeping with a school child and stated that he did not have a dispute with the accused over his dead son. He also stated that there were 2 children in the house and that he saw the child on the accused's bed and the accused would be lying if he stated that he slept in the kitchen as he saw him come from the house where the child was**.** ***He added*** that he was aware that the children were guarding the home and the accused was away for 3 days though PW4 did not know when the accused returned from Kisumu.

17. **PW5 – Richard Ooko**, the Chief Yenga sub-location testified that on 1.7.2014, he had a report on a missing pupil from (full name of School withheld) Primary. He then asked PW4 (William) the Village elder to find where she was. Later he received a call from PW4 that he had found the missing pupil from [particulars withheld] Primary School. It is then that PW5 directed that the minor and suspect be arrested.

18. ***On being Cross examinedPW5*** stated that he asked the minor some questions and PW1 confirmed she was in the house where Stephen slept and had spent the night there.He also stated that the accused was found in the house and not in Kisumu and after the arrest, the minor was taken to the hospital for examination which turned out to be positive.

19. **PW6 – No. 67421 – Sgt. Harun Kinyua** testified that he was at Sega Police Station when the Assistant Chief and Village elder brought PW1 and Stephen to the police station after rescuing her from a house belonging to one **Peter Orega** where Stephen was a house help.

20. When ***Cross examined*** he stated that the house belonged to Peter Orega and that he never went to the house.It was his evidence that he saw the victim who was escorted to hospital and PW1 positively identified the accused and that the accused was found in the same house with the victim.

21. The accused asked for PW1 to be recalled as he was not satisfied with the initial cross-examination and on further ***Cross examination, PW1 stated that she*** used the names MAO at the police station not "Ouyanga." She stated that the defilement took place though she was not sure of the date. She reiterated that she told Court she was 15 years old and that they were told to watch the homestead as the caretaker had gone to Kisumu. That they were 4 children in the home and she slept at the end while the accused was on the other end of the bed and her 2 siblings in the centre although the 2 children were not witnesses in the case and no clothes were produced in court.

22. And on ***Re-Examination, PW1*** stated that the last time she was in court she said the truth and on that day too she was saying the truth and stated that her mother knew when she was born, reiterating that the village elder found her in the accused's house.

Defence Case

23. **DW1: STEPHEN OTIENO MUSEWE** testified that on 30.6.2014, around 8.30 am, he came from Kisumu to his Uncle Peter Orega's home and found the neighbour's children who were left there asleep i.e. M, PW1, M and T 9full names of the children withheld for legal reasons). That he chose to return at the home as that is where he used to stay. After some time, William Omondi Ongoi, a Village Elder came and he invited him in. That William asked him to search the home, to look for one Eileen and Leonard. He did not find them but only found the 3 children who guarded the home. He went on to state that William asked about the 3 children and the accused told him they were the neighbour's children. He added that William then escorted them to Yenga Chief's camp, where they met Assistant Chief Richard Ooko who sent them to Ukwala Police Station where he was placed in the cells and taken to Ukwala Hospital for medical examination on 2.7.2014. That he was later was brought to court on 3.7.2014 and charged with the offence of defilement which he is not aware of.

Judgment of the lower court

24. The trial court reiterated the charge the accused Stephen Otieno Musewe was faced with and summarized the evidence of the above six (6) prosecution witnesses and the defence of the accused who gave sworn evidence and called no witnesses.

25. The lower court framed its **Issues for determination** as follows:

1. ***Whether the victim was a minor.***
2. ***Whether there was penetration by accused person's penis into victim's vagina.***
3. ***Whether the accused touched the victim indecently.***

26. The court stated that from the evidence of VA the victim's mother, PW1 the victim was born on 17.3.1999, making her 15 years old at the time of the incident and that the estimated age by the Clinical Officer who observed her was 14 years old and generally naive and had no hymeneal ring.

27. Further that the evidence of MA was that Stephen Musewe slept with her by force. And that there was no doubt that he is the one who defiled her. That she knew him because he used to work in the home she was found in and that they slept on the same bed.

28. In reviewing the evidence of the accused, the trial court stated that it is the evidence of William Omondi that he visited the home on 1.7.2014 at 6.00am and found Stephen in the home and the children on Stephen's bed, stating also that Stephen had emerged from the said house to open the gate for him.

29. The court then stated that the provision of **Section 124 of the Evidence Act** states that conviction of sexual offences can proceed on the evidence of a child victim even without corroboration so long as the Court is certain that the evidence reflects the truth of what took place.

30. The trial court further stated that the victim MA positively identified the accused as according to her evidence he was going to work in Kisumu, and that after being recalled, she still maintained that she had been defiled by Stephen.

31. In addition, the trial court stated that the Clinical Officer found that PW1 was sexually assaulted.

32. The trial magistrate also set out the defence put forth by the accused person Stephen wherein he testified on oath that he arrived at the home of Peter Orega from Kisumu at 8.30 am and that he is a businessman which the court stated was in other words denying that he was a caretaker at Peter Orega's home and or that he slept in the said home on the night of 30/6/2014.

32. The trial court concluded that the evidence of PW1 MA is believable, that Stephen slept in the home of Peter Orega on 30/6/2014 and was found in the morning of 1/7/2014 at 6.00am by William Omondi, the Village elder.

33. In the end the trial court found that the Prosecution had proved its case beyond any shadow of doubt that Stephen Musewe defiled PW1 and that the defence is a mere denial as such the accused was found guilty of the offence of defilement contrary to **Section 8(1) (3) of the Sexual Offences Act** and convicted accordingly as provided by **Section 215 of the Penal Code. The trial court also considered the** mitigation by the accused, and observed that defilement is a very serious offence and the sentence is clearly set by the **Sexual Offences Act** hence the accused was imprisoned for a period of 20 years.

The appellant's written submissions.

34. In the written submissions filed by the appellant in support of his appeal, he urged the court to consider his supplementary grounds of appeal in its determination, grounds of which a listed above. He then proceeded to submit under the following headings;-

1. Age determination.

35. It was the Appellant's submission that the prosecution failed to conduct an expertise approach to ascertain the age of the minor. That no documents were adduced in court to prove the age and that neither was age assessment conducted.

36. The appellant submitted that the charge sheet states that minor was 14 years, yet the minor contradicted herself by saying she was 15 years, which was supported by PW3 (the mother of the minor) and as such, it was his contention that age being an ingredient for defilement was not proved beyond shadow of doubt as PW2, Clinical Officer did not carry out any age assessment at all hence the benefit of doubt shifts to him.

2. Provision of Article 50 (2) (J)

37. The appellant submitted that his rights under **Article 50 (2) (j)** of the Constitution were completely infringed. That it was the duty of the court to supply him with witnesses' statements and other relevant documents on time to ensure a fair trial and that he could have prepared more adequately with such crucial documents.

3. Shoddy Medical Examination

38. According to the appellant, the medical evidence adduced of PW1 was shoddy and hence could not lead the court to positive ends of justice. It was asserted that the P3 form was filled and signed on 2/7/2016 by Christ Opati and the same time 2/7/2014.?He thus submitted that such contradictions and inconsistencies create doubt as to whether medical examination was conducted or not.

4. Absence of Crucial Witnesses

39. The appellant submitted that some crucial witnesses were not called to testify yet it was very essential for such witnesses to appear in court to shed more light on the alleged offence. That the three people that PW4 found sleeping on the bed should have been called to testify.

5. Elements of grudge

40. The appellant further submitted that there was an element of grudge between him and PW4 (Village elder) before the alleged offence. That the misunderstanding started after the Village Elder's son, who died in unclear circumstances and that PW4 thought that the appellant had a hand in it. He submitted that the Village elder at first was investigating a different matter but coincidentally framed him into this alleged offence.

41. On the part of the State, Mr. Okachi Senior Principal Prosecution Counsel opposed the appeal herein maintaining that the prosecution had proved the guilt of the appellant beyond reasonable doubt and that the sentence meted out was lawful and merited. He urged the court to dismiss the appeal herein and uphold the conviction and sentence meted out on the appellant by the trial court.

Determination

42. The following are the issues I consider to flow from the above trial record, grounds of appeal as filed and submissions in support of and in opposition to this appeal:

1. a) Whether the age of the complainant was properly ascertained; and whether the failure to ascertain the actual age of the complainant was fatal to the prosecution's case;

2. Whether there was penetration;

3. Whether the medical examination was conclusive;

4. Whether Article 50(2)(j) of the Constitution was breached by the trial court;

5. whether crucial witnesses were not called and what effect that would have on the conviction of the appellant;

6. whether the alleged grudge between the appellant and PW4 had any bearing to the case herein against the appellant;

7. whether there any material contradictions in the prosecution case;

8. Whether the evidence adduced proved the guilt of the appellant beyond reasonable doubt that he was the perpetrator of the alleged offence of defilement;

9. Was the sentence meted out appropriate;

43. **On issue 1**, PW1 testified that she was 15 years old, while PW3 stated that M was born on 17/3/1999. On the other hand **PW4: WILLIAM OMONDI OGOYE testified that** PW1 was a Class 4 student **PW5 – RO** he had a report on a missing pupil from [particulars withheld] Primary School. The trial court also stated that from the evidence of VA the mother of PW1, the victim was born on 17.3.1999, making her 15 years old at the time of the incident and that the estimated age by the Clinical Officer who observed her is 14 years old . The appellant in his own defence testified on oath that he returned from Kisumu to his Uncle Peter Orega's home and found the neighbour's children.

44. In my humble view, there was no conclusive ascertainment of the age of the victim PW1 as no birth certificate or age assessment report was produced. Nevertheless, it is not in doubt that PW1 was a child as envisaged under the law at the time taking into consideration her evidence, that of her mother PW3 and the fact that she was a lower class primary pupil and even the appellant in his defence at the lower court grouped PW1 in the class of children where he states that **"I was from Kisumu to my uncle…*my neighbour's children were left there*….they were three. M, M and T" (full names withheld for legal reasons).**

45. However, the above is not to say that the court does not have a mind of its own and that it must rely entirely on what it hears being adduced as evidence. The court has its own intuition and inner eyes to observe and pay keen attention to its surrounding and in this case, the trial court observed the victim (PW1) and in its eyes it was satisfied that the victim was a minor alongside the evidence adduced. In his book **Meditations on First Philosophy**, **Descartes** refers to an **intuition** as ***a pre-existing knowledge gained through rational reasoning or discovering truth through contemplation.*** This definition is commonly referred to as **rational intuition.** According to **Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, "Blinking on the Bench: How Judges Decide Cases," 93 CornellL. Rev. 1(2007)** Available at: http://scholarship.law.cornell.edu/clr/v ol93/iss1/9, e**liminating** all intuition from judicial decision making is both impossible and undesirable because it is an essential part of how the human brain functions.

46. In the case of **Emmanuel Omara Jillo v Republic [2017] eKLR** the Court **of Appeal** in its words ***"adopted a more liberal approach as to what constitutes proof of age"*** and stated:

> ***"Granted, the age of a victim of a sexual assault under the Sexual Offences Act is a critical component of the charge and one which requires conclusive proof as it affects the sentencing. Section 8(2) thereof stipulates that any person found guilty of defiling a child under the age of 11years shall be sentenced to life imprisonment. In this case, the only mention of the complainant's age was in PW4's testimony and the P3 form, stated that the girl was a 9 year old. This age assessment has been questioned by the appellant, who contends that other than a birth certificate or an age assessment report, nothing else could suffice as proof of age."***

47. While determining the above case, the Court of Appeal referred to the holding in **Kaingu Elias Kasomo v. Republic in Malindi Criminal Appeal No. 504 of 2010,** and **stated that in the said case the *court acknowledged that age assessment may come in many forms***. It also noted that, ***nowhere in the Malindi judgment did the superior court declare that the only acceptable means of proof of age is by an age assessment report.***

48. Furthermore, the Court of Appeal in ***the said Emmanuel Omara Jillo v Republic (supra) case,*** in an effort to deduce the age of the victim put some reliance on the evidence of PW1 in the case, where she stated she was a nursery school pupil and the oral testimony of PW4 to the effect that PW1in that case was 9 years old.

49. The Court of Appeal in the aforesaid case stated:

> "***In addition to the P3 form, the trial court found this to be satisfactory proof that the child was under the age of 11 years. In addition, section 2 of the Children Act defines "age" to mean the 'apparent age' in cases where actual age is not known (See Evans Wamalwa Simiyu v Republic [2016] eKLR. The apparent age of the complainant to the doctors in this case, was 9 years. Though PW1's level of schooling may not be conclusive proof of her age, when it is looked at together with the fact that a medical doctor (PW4) had pegged her age at 9 years, we are not satisfied the trial court erred by concluding the complainant was below the age of 11 years…"***

50. Therefore, on issue number one, I find and hold that while the age of the victim of the sexual assault under the Sexual Offences Act is a critical component and essential for the sentence to be imposed upon conviction as the same is dependent on the age of the victim, there are other forms of reaching a near definite age of the victim and one of them is through courts' intuitive assessment by observation vis a vis the evidence adduced by witnesses on record on record. Accordingly, the apparent age of the complainant in this case was proved to the required standard and therefore failure to produce birth certificate or age assessment report for the complainant was not fatal to the prosecution's case.

51. **Onto issue 2, PW1** testified that Stephen was to be away at work in Kisumu until August but returned earlier and found them in the house. She stated that Stephen slept with her by force and on **cross-examination** by the accused, she stated that she knows it is he the accused who defiled her.

52. **PW2** produced the P3 form -Medical examination which revealed PW1 had no hymeneal ring, that her *Labia majora* had foul smelling discharge, urine had some cells, and the injury was days old. He also stated that Stephen was also examined on 2/7/2014 and his examination revealed that that the Accused's/ Appellant's urine had epithelial cells and further stated that foul discharge does not come with menstrual discharge.

53. **PW4** also stated that he found MO, a Class 4 student in Stephen's house sleeping on a bed that Stephen also slept on adding that the accused would be lying if he was to say he slept in the kitchen as PW4 saw him come from the house where the child was. The appellant **himself** confirmed that he came from Kisumu to his Uncle Peter Orega's home and found the neighbour's children who were left there asleep i.e. M., M. and T (full names withheld for legal reasons).

54. In my humble view, in as much as the trial court properly observed that **Section 124 of the Evidence Act** states that conviction of sexual offences can proceed on the evidence of a child victim even without corroboration so long as the Court is certain that the evidence reflects the truth of what took place, in a manner that implied that there was no corroboration and that it only relied on the evidence of PW1 having ascertained that she was truthful, nonetheless, there was corroboration of PW1 's evidence by the medical doctor which shows that PW1 was defiled. **PW2** stated that **PW1** had no hymeneal ring, *Labia majora* had foul smelling discharge, urine had some cells, and ***the injury was days old.***

55. The fact that PW1 clearly identified the appellant as her as her defiler, that he forcefully slept with her when corroborated with the evidence of PW2 that the hymen was broken and the injury was days old, is sufficient proof that indeed there was penetration.

56. **Onto issue 3**, PW2 testified and stated that the complainant was examined and the injuries sustained as a result of penetration were all listed in the P3 produced in evidence thus this court is unable to grasp what other medical evidence or examination remained in the open or untouched by the medical doctor. Accordingly, I find and hold that the medical evidence was sufficiently adduced to proof penetration.

57. On whether Article 50(2)(j) of the Constitution was violated, the appellant also alleged that the provisions **of Article 50(2)(j) of the** Constitution was violated because he was not supplied with witness statements and other relevant documents on time to ensure a fair trial and that he could have been more adequately prepared for the trial than he was. I have read the trial record and note that the appellant was supplied with witnesses statements after the Clinical Officer and the complainant had testified. I also note that the complainant's mother had to be arrested and brought to court for her to avail the complainant to testify as she appears to have hidden the complaint. However, there is nothing on record to show that the appellant was denied access to the witness statements and documents to prepare for his trial. The record also shows that the complainant was even recalled for further cross-examination and the P3 given to him as requested. This was on 14/4/2015. There is no evidence of prejudice occasioned to the appellant for the delayed supply of witness statements and if there was any, then he is free to petition for a remedy or violation of his rights.

58. The appellant further complained that **crucial witnesses we**re not called to testify more particularly the children that PW4 stated he found had slept on the same bed with the appellant and the complainant. The principle of law is that the prosecution is bound to call witnesses even if their testimony may be adverse to their case, as was stated in **Bukenya vs Uganda (1972) EA 549**, that failure to call a crucial witness by the prosecution entitles the court to make an adverse conclusion against the prosecution's case and acquit the accused person. In the said case the court expressed itself thus:

> ***"The prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent with its case."***

59. The court addressed itself further that:-

> ***"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.***
>
> ***(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.***

60. However, Section 143 of the Evidence Act clearly stipulates that:

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

61. The legal principle in the case of ***Keter v Republic 2007 EA 135*** is particularly appropriate to the circumstances of this case where it was stated:

> ***"That the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses are sufficient to establish the charge beyond reasonable doubt."***

62. In the instant case, the prosecution called PW1 and PW2 whose evidence was clear that the complainant was defiled. PW4 confirmed that he found the complainant in the house where the appellant had slept and the complainant stated that the appellant forcefully slept with her and defiled her. In my view, no other evidence would be necessary to prove defilement of the complainant as she stated that the other children who were sleeping with her in that house were very young. The complaint on crucial witnesses not being called is found to be baseless. It is dismissed.

63. The allegations that there was an existing grudge with the village elder does not dislodge the evidence of the prosecution witnesses though I am alive to the fact that PW4 could have been investigating an entirely different case as no questions were fronted to ascertain what matter he was investigating. However, the evidence of PW5 remains uncontroverted to the extent that it is he that called PW4 to tell him to investigate on the case of the missing child from [particulars withheld] **Primary School**. *Accordingly, I find no substance in the allegations that PW4 could have framed the appellant with such an offence.*

64. *In addition, the alleged contradictions/ inconsistencies if any do not affect the material particulars of the case.* The overwriting in the evidence of PW 2 the Clinical Officer whose evidence was recorded as the examination of the complainant having been done on 2/7/2014 was consistent with the date when the P3 was filled which was 2/7/2014 hence there was no inconsistence or contradiction.

65. On the issue of whether the prosecution case was proved beyond reasonable doubt, I am satisfied that based on the issues canvassed above, the prosecution case was never dislodged by the defence. The evidence adduced by prosecution witnesses as assessed above was watertight and sufficient to sustain a conviction of the appellant who was positively identified as the defiler.

66. Onto the issue of whether sentence meted out was proportionate, Section 8 of the Sexual Offences Act provides that a person who defiles a child aged 11 or less shall, upon conviction, be sentenced to life imprisonment, while a person who defiles a child between the age of 12 and 15 is liable to imprisonment for a term not less than 20 years. Those convicted of defiling children between 16 and 18 years are liable to not less than 15 years imprisonment while attempting to defile a child attracts a minimum of 10 years in jail.

67. From the foregoing statutory provisions, the minimum sentence that can be meted out on a possible convict in defilement cases is 10 years. This provision of the law has been ground for appeal in numerous cases and courts have had occasion to interpret the same. The Court of Appeal in **M K v Republic [2015] eKLR** clearly pronounced itself on the question of length of sentences under the Sexual Offences Act as follows:

> ***"15. Readings of the diverse provisions of the Sexual Offences Act reveal that in most sections, a minimum sentence is provided for. For example, under Section 3 (3), a person guilty of the offence of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years….; Section 4 of the Act stipulates that a person convicted of attempted rape is liable upon conviction for imprisonment for a term which shall not be less than five years….. Section 5 (2) of the Act provides that a person convicted of sexual assault shall be liable to imprisonment for a term of not less than ten years…. Section 8 (3) of the Act provides that a person convicted of defilement when the child is between the ages of twelve and fifteen years shall be liable to imprisonment for a term of not less than twenty years"***

68. . With the above in mind and taking into consideration the conclusion arrived at issue 1 herein, I am of the view that as there is evidence that the victim's age was between 14 and 15 years of age, the sentence of 10 years imprisonment meted out on the appellant was lawful.

69. Accordingly this appeal is found to be devoid of merit and the same is hereby dismissed. The conviction and sentence of the trial court is upheld.

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

R.E.ABURILI

JUDGE

In the presence of:

Mr. Okachi, Senior Principal Prosecution Counsel for State

The appellant in person

CA: Brenda and Modestar