REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO 37 OF 2017

CORAM: HON. R.E.ABURILI J

S O O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and life sentence in respect of Siaya Principal Magistrate's Court in Criminal case number 208 of 2016, delivered on 23/03/2017 By Hon….)

JUDGMENT

1. This is an Appeal against conviction and life sentence in respect of Siaya Principal Magistrate's Court in Criminal case number 208 of 2016, delivered on 23/03/2017.

2. The Appellant - **S O O** was charged with the offence of Incest contrary to Section 20 (1) 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 respectively are that, **S O O**: on 4th day of March, 2016 at [particulars withheld] sub-location in Siaya District within Siaya County, intentionally caused his penis to penetrate the vagina of P.H. **(name withheld for legal reasons) who** was to his knowledge his niece, a child aged 10 years.

AND

4. **S O O**: on 4th day of March, 2016 at [particulars withheld] sub-location in Siaya District within Siaya County, intentionally touched the vagina of **P.H.** a child aged 10 years with his penis.

5. After full trial the Appellant – **S O OG** was found guilty of the main offence of Incest contrary to Section 20 (1) of the Sexual Offences Act and accordingly convicted pursuant to Section 215 of the Criminal Procedure Code and sentenced to life imprisonment.

6. Aggrieved and dissatisfied with the conviction and life sentence, **S O O** – the Appellant filed a Petition of Appeal raising the following grounds:

> ***1. THAT, the Trial court erred in law and fact by failing to observe that the prosecution did not prove its case beyond reasonable doubt.***
>
> ***2. That he cannot recall all that transverse during the trial hence prays for the trial proceedings to assist raise sufficient grounds.***

7. And with further amended grounds of appeal filed alongside his appellate submissions. In the **Amended Grounds Appeal, the appellant claims:**

> ***1. THAT, the prosecution failed to produce any document to ascertain the age of the victim.***
>
> ***2. THAT, the trial count convicted the appellant on a contradictory evidence of the prosecution.***
>
> ***3. THAT, the prosecution failed to avail some of the essential witnesses.***

8. In determining this Appeal, the court must fully understand its duty as the first Appellate court as stated in the case of ***Pandya vs. R (1957)***

EA 336 and Ruwala vs. R (1957) EA 570.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 only the trial court had the advantage of hearing and seeing the witnesses.

9. On what transpired during the pendency of the case in lower court, **PW1-L.A. O(full name withheld),** the mother of the complainant herein testified that she recalled that on 4/3/2016 she went to a funeral and slept there then went back on 8/3/2016. That upon her return to her home, she was told by her sister in law J.A. (name withheld)-the aunt of the complainant, that the complainant had confided in her that the accused who was her uncle and a brother to her real father had been defiling her, and that the said evening when PW1 went to the funeral he defiled her again. It was also her testimony that at the material time, they were staying at the home of her husband where the accused also lived. PW1 then rushed the complainant to Siaya Referral Hospital where the complainant was treated the complainant. That she reported the matter to the head teacher of the complainant's school and the accused was later arrested by the area chief and police officers.

10. On **cross-examination,** PW1 stated that the complainant is the accused's niece and that it is the sister of the accused who informed her about what was going on and that the complainant said the accused had been doing it for many days. She also stated that she had no grudge against the accused as she even cooks for him.

11. **PW2 – P.H.(name withheld for legal reasons)**, the complainant herein gave evidence after voire dire examination and stated that she was in standard 4 and that on 4/3/2016, she was left at home with her aunt and grandmother by her mother (PW1) who had gone to a funeral and that the father was also away. That when it started raining,she ran to her parents' house to shelter and the accused who is her uncle came and found her alone. That he told her to lie on her mother's bed and she did, he then undressed her and he undressed himself and lay on top of her and did "tabia mbaya" -bad manners to her.

12. She explained further that the accused inserted his penis inside her vagina and did bad things to her and that that was the 2 nd time. And that the accused had been doing the same thing on her, on her grandmother's bed. That the accused was used to having sex with her. And that the accused had had sexual intercourse with her (5) five times, (2) twice on her mother's bed, (2) twice on her grandmother's bed and (1) once in the kitchen. She stated also that she narrated the ordeal to her aunt A. who later informed her mother PW1 and the mother informed her father. She also testified that she knew the accused well as he is her dad's brother, that the accused and her dad were children of her grandmother. She also recalled further that the accused defiled her thrice during the day and twice at night.

13. During **cross-examination, PW2** stated that one *S* was sleeping on the sofa when the accused defiled her on her mother's bed and that the accused threatened to beat her if she told anyone**.**

14. **PW3- I.O.O(name withheld)**, who is the biological father of the complainant testified that the complainant was his daughter and that the accused was his younger brother and his follower by birth. That on 7/3/2016, he was at U.(name withheld) Primary School to report that his daughter who schooled there had been defiled. He stated that on 4/7/2016 he left home and went to a funeral with his wife and the accused raped/ defiled his daughter. That PW2 narrated the ordeal to her aunt. He stated that he was the one who reported the case to the Police when PW1 narrated to him what the accused had done to his daughter.

15. On **cross-examination**, PW3 stated that he was sure the accused defiled his daughter and that the doctor confirmed when he examined her (PW2) and that the accused before he was arrested, admitted that he had defiled the child and that the accused threatened the complainant not to tell her father PW3 or her mother.

16. **PW4- F.O.O (name withheld)** who was the head teacher of U. Primary School testified that he received the report of defilement of PW2 who was his pupil on 7/3/2016 from both the mother and father of PW2. That he interrogated PW2 and she told him what the accused had done to her when the parents were not at home. He stated that the accused asked for an apology when PW4 talked to him and that he later called the Assistant Chief who came with Administration Police from Mwer AP camp and arrested the accused.

17. During **cross-examination,** he stated that the accused admitted to defiling the complainant when he was taken to the Office of PW4 and that he even asked for forgiveness.

18. **PW5 - NO. 238846 -APC MOSES WAFULA,** testified that on 8/3/2016 while at the camp, he was called by the Assistant Chief to help arrest a suspect and that the area chief had been called by the head teacher of U. Primary School. He stated that he arrested the accused and escorted him to Siaya Police Station after the accused was shown to him by PW3.

19. **PW6- No.101322 P.C -Fatuma Cherono** the Investigating Officer testified that she received a report on the case on 8/3/2016 when the complainant, a child aged 10 years went to the Police Station with her parents and her head teacher. She stated that upon interrogating the complainant PW2 the latter told her that she was left at home with her parents under the care of the accused who is her uncle and that the accused took her to her grandmother's house and forced her to undress and he defiled her then threatened her not to tell anyone. That she later told her aunt what had happened. That she PW6 then escorted PW2 to Siaya Hospital to fill the P3 form which showed that she had been defiled and penetration achieved. That she also took her for age assessment and found her to be between 9-10 years. She launched investigations and when the accused was arrested, she charged him. She produced an age assessment report for the complainant as exhibit 4, to show that PW2 was aged between 9 -10 years at the time of offence.

20. **PW7 - SILAH OMONDI OLUOCH** a Clinical Officer at Siaya Referral Hospital who examined and filled a P3 form for PW2. Testified that he found the hymen was absent, she had a bruised, inflamed reddened clitoris and epithelial cells were seen. He formed an opinion that there was clear evidence of forceful vaginal penetration. He also stated that PW2 was first treated on 7/3/2016. He produced the P3 form as exhibit 2, treatment notes as exhibit 1 and medical receipts as exhibit 3.

21. On **cross-examination**, PW7 stated that he saw the complainant 3 days after the incident hence blood could not be seen by then and only bruises could be seen and he also reconfirmed that the child was defiled.

22. At the close of the prosecution case, the accused was placed on his defence. **DW1 – S O O**, the accused herein confirmed that he knew the complainant as the daughter to his blood brother one I.O. (PW3). He re-called that on 4/3/2016 he was at home with the complainant and that her parents had gone to a funeral. He confirmed that they stayed in the same home. He denied the offence and alleged that PW1 fixed him since she had alleged that he had stolen her money.

JUDGEMENT OF THE LOWER COURT

23. The lower court reiterated the offence the Accused/Appellant was charged with and the particulars thereof and proceeded to list frame the following Issues for determination :

1. ***Whether penetration took place.***

2. ***Whether the complainant's age was proved.***

3. ***Whether consent was sought and obtained.***

4. ***Whether the assailant was properly identified.***

24. On the first issue of penetration the trial court stated that PW2 explained that the accused undressed her and he also undressed. He then told her to lie on her mother's bed, then he inserted his penis inside her vagina and did tabia mbaya" (bad manners) to her. That her evidence was well corroborated by that of PW7 the Clinical Officer who examined and filled a P.3 form for her. He examined her genitalia and found that she had a bruised, inflamed and reddened clitoris and formed an opinion that there was clear evidence of forceful penetration to the vagina. That he then produced all the treatment documents and the P.3 form as exhibits. Hence from the evidence of PW2 and PW7 the trial court found that the act of penetration was properly proved and also held that the defence did not tender contrary evidence, as far as the issue of penetration was concerned.

25. On the 2nd issue of the complainant's age, the trial court stated that an age assessment report which was done about (7) days after the defilement was produced dated 11/3/2016 which showed that PW2 was aged 9-10 years and that the evidence of age of PW2 was not contradicted by the defence. It thus concluded that the complainant was 10 years or thereabouts at the time of the offence or thereabouts.

26. On the 3rd issue the court stated that the issue of consent had been sorted in the provisions of Section 20 (1) of the Sexual Offences Act No.3 of 2006 which provides:

> ***"Provided that, if it is alleged in the information or charge and proved that the female person is under the age of (18) eighteen years, the accused shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."***

27. The trial court held that whether there was consent or not, it was immaterial and that the complainant is aged (10) ten years and cannot therefore legally issue any favour of consent to a sexual act.

28. Lastly on the issue of identification, the trial court stated that the complainant recognized the accused as her paternal uncle. That she stated clearly that the accused shares her grandmother with her own father. Further, that he had been defiling her severally and she narrated that the accused used to defile her on her mother's bed, her grandmother's bed and the kitchen. That when the accused came to her on 4/3/2016 she recognized him well and saw him well. That she even narrated to the court that one day when the accused had brought her slippers from the cobbler, he found her alone in the kitchen and ordered her to lie down, then he defiled her. Further, that the accused was also recognized by PW1 and PW3 as a brother in law and a brother respectively. That they are the parents of PW2 thus the court believed that the circumstances in the case were conclusive enough to enable the complainant to positively identify the accused herein.

29. The trial court stated that the accused in his defence had not denied that he was with PW2 on the material date. That he only denied having defiled her and as such believed that the complainant positively identified the accused and that she had no reasons whatsoever to lie to the court. The court in this regard stated that it understood the risk of relying on the identification evidence of one witness or a single witness but that in the present case all indications pointed at the accused as the defiler and that moreover, the complainant was examined and subjected to voire dire examination and confirmed that PW2 understood the act of oath-taking before she gave her evidence and as such the trial magistrate stated that she did believe her story.

30. The trial court added that the complainant was fluent and so consistent in her narrations that the court did not believe that she could have been coerced, corrupted and/or forced to tell a lie by anyone.

31. The court further stated that DW1 believed that PW, the mother of PW2 fixed him because of her lost cash, but the court held that it believed PW2 the complainant had nothing to do with their problems let alone playing to the tune of her mother hence found that the accused was properly and positively identified as the assailant in this case.

32. On the issue of incest, the trial court stated that it had been proved that the accused is the paternal uncle of the complainant. He is related to her by blood. She is his niece. A fact that the accused himself confirmed in his sworn testimony. The court thus stated that the evidence of PW1, PW2, PW3 and DW1 proved, without any cloud of doubt that the complainant is a niece to the accused and so the accused is her uncle.

The trial court considered the defence as provided by the accused and that he denied the offence and blamed his woes on PW1 whom he alleged fixed him since she had alleged that he had stolen her money. The court however stated that during cross examination, the accused

did not raise the cash issue with PW1 or PW3 and only came up with it in his testimony hence dismissed it as an afterthought and a mere denial.

In conclusion therefore, the court found and held that the prosecution had proved their case beyond any reasonable doubt against the accused and convicted him accordingly under Section 215 of the Criminal Procedure Code for the main offence of Incest contrary to Section 20(1) of the Sexual Offences Act No.3 of 2006.

The trial court then considered the mitigation in favour of the accused and meted out the sentence of life imprisonment as provided under Section 20(1) of the Sexual Offence Act No. 3 of 2006.

APPELLATE SUBMISSIONS

36. The appellant filed written submissions. He submitted that the prosecution failed to avail or produce any document to ascertain the age of the victim and although PW3 stated that the complainant 9 was born on 25-1-2006, he however stated that the victim's birth certificate got lost and that PW6 the investigation officer said that the victim was taken for age assessment and an age assessment report was produced and he thus submitted that it's only the birth certificate that proves the age of the victim and that only the age bracket determines the sentence to be imposed to the accused person hence failure for the prosecution to produce the birth certificate to determine the victims age was a miscarriage of justice. He submits that the learned trial magistrate based thehis conviction on a contradictory evidence of the prosecution. Further, that PW2 stated that the accused had sex with her and he left her, that she also said that that was the 2 nd time, that the accused also did it to her on her grandmother's bed, again that the accused was used to having sex with her, that he did it to her 5-times, twice on her mother's bed, twice on her grandmother's bed and once in the kitchen and that she further alleged that the accused did it thrice on her mother's bed. As a result of the foregoing statements, the appellant submitted that the contradictions manifested the fact that the victims were not credible witness for the evidence to be relied upon.

37. He also submitted that the prosecution failed to avail some of the essential witnesses to prove their case for instance J A who was told by PW2 that the accused had been defiling her. It was his submission that the evidence by PW1, PW4 and PW6 above should not be relied upon since the people they mentioned were not called to testify i.e. **J A** the aunt of the victim who narrated the story to the victim's mother (PW1), the **clinical officer** who did the age assessment and the Area Assistant Chief who was called by PW4 the head teacher of the victim. He thus states Section 150 of the C.P.C was not complied with as required in law and in **BUKENYA AND ANOTHER Vs UGANDA CR.A NO - 68/1972 EACA,** it was held that: the court has a right and duty to call witness as whose evidence appears essential to the just decision of the case and that in **CIDRAF THUO & ANOTHER-VS- CR.A NO 12 13 OF 2002 C.A NYERI(** OMOLLO, OKHUBASU & GITHINJI J.J.A) where the following was stated:

> ***"That the court of appeal opined that the two court is below failed to observe and find that assent teal witnesses were not summoned as witnesses and specially the clinical officer who conducted age assessment the chief and the victims aunt who confirmed the allegation to PW1 the mother to the victim."***

38. The appellant submitted that from the evidence of both PW6 and PW7, it was not indicated on the record that the absence of the hymen was due to the crime committed on the date alleged by the complainant or was it an allegation to support the victim's allegation that the appellant had been defiling her.

39. In his oral submissions in open court, the appellant submitted that he was never given statements and charge sheets and that he was taken to court two weeks after his arrest.

40. Mr. Okachi the prosecution counsel on appeal opposed the appeal stating that the offence committed was a serious offence and traumatizing to both the victim and the community and stated that the prosecution had proved the case beyond reasonable doubt. He urged the court to uphold both the conviction and sentence meted out on the appellant and dismiss the appeal herein.

DETERMINATION

41. With all the grounds raised on appeal, having had the advantage of reading through the trial court's record in its entirety and after re-evaluating the whole record the following are the issues I consider essential for determination in this appeal, taking into account the appellant's grounds of appeal and submissions and the opposition by the prosecution Counsel:

> **1. Whether the age of the complainant was properly ascertained;**
>
> **2. Whether there were substantial contradictions;**
>
> **3. Whether essential witnesses to the case were not called.**

42. **On issue 1,** this being a ground the appellant belabored on, it ought to be discussed at length. In cases falling under the Sexual Offences Act, the ascertainment or conclusive proof of age is a necessary ingredient that must be proved beyond doubt as it is used in establishing the sentence to be meted out to the accused. In the case of ***KAINGU ELIAS KASOMO -V- R MALINDI CR. APP. NO. 504 OF 2010*** the Court of Appeal stated that ***the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence. Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard…***

43. On proof of age, in the case of **GILBERT MIRITI KANAMPIUS -V- REPUBLIC (2013) e KLR, H.C. AT MERU, CRIMINAL APPEAL NO. 97 OF 2009**, Gikonyo J. while relying on the case of **FAPPYTON MUTUKU NGUI -VS- REPUBLIC, H.C. AT MACHAKOS CR. APPEAL NO. 296 OF 2010**, noted as follows:

"Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction. But see the decision by Prof. Ngugi J. in MACHAKOS HC. CR. APPEAL NO. 296 OF 2010 FAPPYTON MUTUKU NGUI -VS- REPUBLIC: "... that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

44. Further in the case of ***JOSEPH KIETI SEET -VS- REPUBLIC [2014] e KLR, H.C. AT MACHAKOS, CRIMINAL APPEAL NO. 91 OF 2011***, the learned Judge held as follows:

"It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense …."

45. In the instant appeal, although the birth certificate was not produced in evidence, the age assessment report for the complainant gives the estimated age of the victim as 9-10 years. The appellant did not challenge the production of the age assessment report. The complainant (PW2) also stated during the voire dire examination that she was 10 years old and goes to school at U Primary school and was in standard 4.

46. I thus opine that the age assessment report which was produced as exhibit 4 was evidence of proof of the complainant's age and which was corroborated by PW3 who stated as noted by the accused/ appellant that PW2 was born on 25/1/2006. I am thus satisfied that the age of the complainant was ascertained in light of the holding in the Ugandan case of ***Francis Omuroni - Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000*** mentioned above that:

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

47. In addition, it should be noted that the Sexual Offences Act adopts the definition of a child in the Children's Act. Section 2 of the Children Act defines "age" as, ***"Where actual age is not known means the apparent age".*** In this case, the trial court was satisfied that PW2 was telling the truth, therefore, she could not have said the truth about all other aspects then specifically choose to lie about her age.

48. In the end I find and hold that the age of the complainant was conclusively proved beyond reasonable doubt.

49. **On issue 2-** it was the appellant's submission that PW2 contradicts herself as to the number of times, when and where she was defiled and adds that it was not indicated on the record that the absence of the hymen was due to the crime committed on the date alleged by the complainant nor was it an allegation to support the victim's allegation that the appellant had been defiling her.

50. My humble view of the allegation by the appellant is that I do not see how the slight mix up of facts as to the number of times and where the alleged offence took place is a relevant fact of contradiction. What the police did was to leave out the aspects of the other occasions that the appellant is said to have defiled the complainant which in my view does not render the testimony of PW2 contradictory.

51. The evidence by PW2 is categorical as to the date which is 4/3/2016 when the appellant last defiled her and our main focus should be on the happenings of this date and where it was done, that is it was on her mother's bed and she vividly described the events of that day. The subsequent testimony given by her though should have occasioned more charges against the accused/ appellant went to only further shed light on the predicament that PW2 faced as a child in the hands of a sex pest. Therefore I find no contradiction in her statements as to what transpired on the material day.

52. That notwithstanding, a bit of inconsistencies in the evidence of a child of 10 years, which does not go to the core of the case and which is not material as was in this case. That in itself did not in any manner distort or dislodge the defilement of the material day subject of the charge and of the other days as there was indeed penetration. The court must consider the evidence adduced as a whole and not selectively and the victims age and ability to recollect in a concise form ought to be factored in. This expositions are confirmed in the case of In ***DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR. APP. NO. 92 OF 2007*** where the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view I respectfully adopt:

"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."[emphasis added].

53. **On Issue 3, the** Appellant is of the opinion that the Clinical Officer who did the age assessment report on the complainant the Area Assistant Chief who was called by PW4 ought to have been called.

54. This court is alive to the fact that the prosecution is bound to call witnesses even if their testimony may be adverse to the case. In **Bukenya vs Uganda (1972) EA 549**, it was held that failure to call a crucial witness by the prosecution entitles the court to make an adverse inference 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."

55. 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.***

56. In the ***Bukenya Vs Uganda*** case [supra], point (i) above clearly states that the ***prosecution must make available all witnesses necessary to establish the truth,*** the truth here being to prove the charge or test the veracity of the charge.

57. The trial court in this case dealt with the elements of the charge and was satisfied that they had been proved satisfactorily beyond reasonable doubt. In other words it found that the prosecution witnesses were credible and alluded to evidence necessary to answer to the charge that the accused as faced with.

58. However, ***Section 143 of the Evidence Act*** t provides:

> ***"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."***

59. The legal principle in the case of ***Keter v Republic 2007 EA 135*** is also relevant as it espouses that:

> ***"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."***

60. The view of this court in this regard is that the evidence that the Clinical Officer was to give to court was reiterated by PW1 and PW3 and they all gave consistent evidence of how PW2 had told her aunt of how the appellant had been defiling her in the absence of her parents. That on the material date subject of the charge he had defiled her on her mother's bed but that on other occasions he had defiled her on her grandmother's bed and in the kitchen. Furthermore, PW3 stated that he personally talked to the complainant and she reiterated what the accused had been saying. This was evidence direct from the victim and not what the aunt of hers told PW3 the father of the victim or his wife.

61. In addition, **Section 124 of the Evidence Act** is to the effect that in criminal matters relating to sexual offences, the court if satisfied that the victim is telling the truth shall proceed to convict. In essence, there need not be any other witness. The section provides:

> **S 124. Corroboration required in criminal cases**
>
> > ***Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
> >
> > ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***

62. On why the clinician who did the age assessment was not called, I hold the view that having established that age of the victim is the apparent age by way of observation, medical evidence, or other factors that support one to be of a certain age and the ascertained truthfulness of the victim, the age assessment report was not the only material form of proof of age and as such the presence of the clinician was not crucial.

63. As for the Area Assistant Chief, I do not see what probative value he would have added in proving or otherwise of the ingredients of the offence, as his only involvement was to help effect the arrest of the accused/appellant

64. Therefore, while it is for the prosecution to adduce evidence beyond reasonable doubt in any given case, once the prosecution has satisfactorily discharged the burden of proving the main elements of a charge as the trial court correctly held that the prosecution had proved the charge facing the Accused/ Appellant beyond reasonable doubt, then there is no need to unnecessarily burden the court by availing as many witnesses as possible this is bearing in mind that the tenets of a trial provide that a trial begin and be concluded in a timely, reasonable and just manner.

65. For instance in the case **Aden Dahir Nuno v Republic [2015] eKLR** the court in support of the above view stated "***…. Provided the evidence on record is sufficient to sustain a conviction, the failure of an investigating officer to testify cannot vitiate a conviction***".

66. It is therefore my view that the Clinical Officer who carried out age assessment of the complainant and or the Assistant Chief were not

crucial witnesses to the case and therefore their absence was not fatal to the determination of the case.

67. On sentence, the complainant was aged 10 years and a niece of the appellant who should have protected the child from would be sex pests. Instead he took advantage of her innocence and defiled her. He breached the trust that the child had of a father figure. He deserved the lawful sentence meted out. The sentence meted out was appropriate. I shall not interfere.

68. The upshot is that the appeal herein lacks merit and is hereby dismissed. The conviction and sentence of the lower court are upheld.

Dated Signed and Delivered in open court at Siaya this 4th Day of December, 2018.

R.E.ABURILI

JUDGE

In the presence of:

Appellant in person

Mr Okachi Senior Principal Prosecution Counsel for the State

CA: Brenda and Modestar