**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 70 OF 2015**

**H M N,::::::::::::::::::::::::::::APPELLANT**

**VERSUS**

**REPUBLIC::::::::::::::::::RESPONDENT**

***(An appeal from the original conviction in Criminal Case No. 29 of 2015 in The Principal Magistrate's Court at Kapsabet by the Hon. G. Adhiambo, Senior Resident Magistrate, dated 18th May, 2015).***

**JUDGMENT**

The appellant H M N, was charged, tried and convicted of the offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, No. 3 of 2006. Being aggrieved of the conviction and sentence, he has appealed to this court, listing 5 grounds of appeal as follows: -

**1. That the learned trial magistrate erred in law and fact in failing to hold that the prosecution did not prove its case beyond reasonable doubt as required by the law.**

**2. That the learned trial magistrate erred in law and fact in failing to consider the appellants evidence in defence.**

**3. That the learned trial magistrate erred in law and fact in failing to hold that evidence tendered by prosecution witnesses was inconsistent.**

**4. That the learned trial magistrate erred in law and fact in failing to find that the prosecution witnesses were not credit witnesses (credible?)**

**5. That the learned trial magistrate erred in law and fact in failing to consider the consequences of uncalled prosecution witnesses.**

He prays that this appeal be allowed and that the conviction and sentence be quashed and he be set at liberty. In his oral submissions in court, the appellant submitted first that the Doctor did not give his reference on the P3 form (Page 7), while the complainant was not under police escort. Secondly, that the immunization card produced was of V W and not L N as per the P3 form.

That it was the same date on 3rd that he had disagreed with mother of the complainant (PW2) that the child allegedly told her. And that the father of the child testified as to their quarrels, but that the child did not tell him of the defilement.

The appellant wondered what wet underpant the doctor examined and which one the father of the minor

had removed. And that no age assessment on the child was done by the Doctor. He summoned up that the witnesses were not reliable as the Investigating officer produced records of a different person. And that he was only charged after a disagreement with the mother of the complainant.

The state opposed this appeal. In her submissions, Ms. Kegehi maintained that the evidence on record confirms that the minor was 7 years. That the issue of name of complainant was settled by the evidence of PW2, when she gave birth to the complainant, she called her V N which her grandmother thought was not good. She had then changed the child's name to L N. That the health card (Exh – 11) shows the child was born on 22nd May, 2006 while the offence was on 1st January, 2015, while she was 7 years old.

Further, that identification herein was by recognition as the appellant is her step father. It was during the day at 4:00p.m and that on the issue of penetration, counsel relied on the evidence of the minor (Page 19). And that her mother, PW2 had testified that she had left the complainant home at 3:00pm together with the appellant. And later on examination, her inner pant was found to be wet with watery substance, she had abrassions on labia minora and her hymen had been recently broken, this being 3 days after the offence. Lastly, that the defence of the appellant was a mere denial that did not challenge the prosecution's case. She urged that the conviction and sentence be upheld.

I have considered the submissions both of the appellant and counsel for the state. From the petition of appeal filed and the submissions made by both sides, I am convinced that the following issues are up for determination in this appeal: -

**i. Identity of the complainant. Also, the age of the complainant.**

**ii. Whether indeed the complainant was defiled.**

**iii. Whether indeed it was the appellant who defiled the complainant i.e. whether the case was proved against the appellant.**

**iv. The issue of sentence.**

On the 1st issue, it was submitted by the appellant that It was not clear who the complainant herein is. That whereas the minor complainant is named herein as L N, her immunization card was in the name of V N. Clearly, these are 2 different names. However, this issue was taken up with the mother of the minor during the trial, PW2 C N, who gave an explanation that upon being born, she named the child V N, a name objected to by her mother, who had then changed the same to L N. Indeed, all the subsequent documents of the minor bear the new name of L N, including the outpatient record book (Exh-2(a) and the P3 form (Exh-2(b). It is also noted that the appellant and the complainant are very well known to each other, him being her step father. Throughout the case, the appellant never challenged the correctness or authenticity of all the other entries. He has not even challenged the name of the child who testified before court, PW1. In my view, PW2 has given a sufficient explanation on the change of the child's name from V to L. I therefore have no doubt in my mind that the minor L N who gave evidence herein (PW1) is truly the same child born and first named V N.

On the issue of age of the child, the prosecution gave various pieces of evidence. PW1, the minor testified that she was 7 years (voire dire). Her mother, PW2 gave her date of birth as 2006. The immunization card of the child (Exh -1) shows date of birth as 22nd May, 2006. And both the outpatient record book (Exh-2(a) and P3 form (Exh-2(b), clearly show that the minor was 8 years at the time they were filled.

There is no doubt in my mind that the trial magistrate took judicial notice of the apparent age of the minor. This is confirmed by the voire dire process that the court subjected the child to. I am therefore convinced that the prosecution produced sufficient proof of the age of the minor complainant herein (PW1) as having been born on 22nd May, 2006.

On the 2nd issue of whether indeed the complainant was defiled, this court notes the evidence of the minor complainant (PW1). In her testimony, the child gave a detailed account of what the appellant did to her. This incident took place during broad daylight. The complainant knows the appellant very well as her step father with who she stays in the same house. And in the evidence of PW2, her mother, she realized the awkward way in which the complainant was walking the moment she joined her at the river. On being asked the problem, the complainant immediately told her mother what the appellant had done to her.

The unchallenged evidence of the prosecution was further that the minor was taken to Hospital and examined only 4 (or 3) days later. The P3 form produced (Exh-2(b)) confirms that on examination, it was noted that her hymen was broken as well as abrassions on her labia minora, which in the opinion of the medical officer, Paul Birgen (PW5) was proof of penetration.

The sum total of this is that the prosecution produced both oral and medical evidence (opinion evidence) in proving that there was indeed penetration. I am on my part, convinced, that this fact of penetration was sufficiently proved.

As to whether it was the appellant who defiled the minor, I note once more that this incident took place in broad daylight in the same house where both complainant knows the appellant well. And it was the evidence of both the complainant (PW1) and her mother (PW2), that the complainant had remained at home only with the appellant. On record, there is absolutely no evidence to suggest that complainant was defiled by any other man or in any other way. All the evidence point to one fact. That if the complainant was indeed defiled, as I am convinced, it was the appellant who defiled her. I so hold.

This court notes that all through the trial and even in this appeal, the appellant has not denied specifically the allegations that he defiled the complainant e.g. that he had been home only with the complainant, that they stay in the same house and that he inserted his penis in her vagina. The appellant has on the other hand dwelt extensively on his alleged disagreements and disputes with the mother of the complainant. With respect, the appellant only raised these issues in his defence. When the witness (PW2) gave evidence, he never raised them as to enable the court determine whether indeed there were such ulterior motives that could make the appellant be framed. To me, his defence was clearly an afterthought which cannot challenge the prosecution's case that the child was defiled.

As to the sentence, I have considered the law under which the appellant was charged (Section 8(1) as read with Section 8(2) of the Sexual Offences Act. I do not find any fault in either the relevant sections of the law or the sentence as meted out.

This is an appeals court. An appeal court would not interfere with a finding of fact by the trial court unless: -

**a. It was based on no evidence.**

**b. It was based on a misapprehension of the evidence.**

**c. The judge was shown demonstrably to have acted on wrong principal in reaching the finding he did.**

This court is bound by these principles set out in Sumaria & Another -vs- Allied Industries Limited (2007) 2KLRI. I have perused the judgment of the Lower Court herein and I am not convinced that the same was not based on the evidence submitted. I also do not see in the judgment a case of misapprehension of the evidence or the wrong application of any legal principle. I therefore do not find any ground to set aside or overturn the decision of the lower court in this matter. I do not find any merit in any of the grounds of appeal raised by the appellant and dismiss this appeal (Criminal Appeal No. 70 of 2015, H M N,) wholly.

**DATED, SIGNED** and **DELIVERED** at **ELDORET, this 8th day of June, 2017.**

**D.O. OGEMBO**

**JUDGE**
***Judgment read out in open court in presence of: -***

*1. Ms. Rakama for the State and*

*2. The Appellant*

**D.O. OGEMBO**

**JUDGE**