REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 104 OF 2014.

PASCAL NABWANI :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(*Being an appeal from the conviction and sentence of D. Ogal – RM. in Criminal Case No. S.O. 77 of 2012 delivered on 25th July, 2014 at Kakamega***.)**

JUDGEMENT

INTRODUCTION.

1. The appellant herein PASCAL NABWANI was charged with the offence of defilement contrary to section 8 (1), (3) of The Sexual Offences Act No. 3 of 2006 and in the alternative the offence of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

2. The particulars on the first count were that on the 8th day of November, 2012 at [Particulars withheld] sub-location in Kakamega East District within Western Province the appellant intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of S M a child aged 15 years.

3. The particulars in the second count were that the appellant on the 8th day of November, 2012 at [Particulars withheld] village, in Kakamega East District within Western province intentionally and unlawfully touched the vagina of S M, a child aged 15 years. He was found guilty and the trial court proceeded and convicted him and sentenced him to imprisonment for 20 years.

The appeal.

4. Being aggrieved by the conviction and sentence by the trial court, he has filed the appeal herein through the firm of SAMBA & CO. ADVOCATES setting out the following grounds:-

> *(1) The learned trial magistrate erred in law in unlawfully accepting incredible medical evidence as conclusive evidence of defilement;*
>
> *(2) The learned trial magistrate erred in law by failing to find that the age of the complainant had not been proved beyond reasonable doubt as required by the law;*
>
> *(3) The learned trial magistrate erred in law in convicting the appellant on uncorroborated*

evidence that he committed the alleged offence;

(4) The learned trial magistrate erred in law and fact in believing the complainant's testimony as wholesale truth despite several glaring contradictions;

(5) The learned trial magistrate erred in law in convicting the appellant against the weight of the evidence;

(6) The learned trial magistrate erred in law in unreasonably rejecting the defence of the appellant without giving cogent reasons;

(7) The learned trial magistrate erred in law in purporting to shift the burden of proof to the appellant contrary to the law.

Submissions.

5. The appellant though represented filed his home made written submissions which are on record. During submissions on the 1st September, 2016 the appellant proceeded with his appeal and relied entirely on his submissions whereas Mr. Ngetich for the state orally submitted. Mr. Ngetich opposed the appeal maintaining that the evidence was credible. He submitted further on that documents produced which were the P3 form medical evidence and added that the age of PW1 was proved by the production of a birth certificate.

6. He also maintained that the evidence of the prosecution witnesses PW2, PW3 and PW4corroborated and there were no contradiction. He made mention of section 124 of The Evidence Act Cap 80 which allows court to convict on complainant's testimony provided that the same is found to be credible.

7. He submits on the appellants defence and maintains that the same was mere denial and the trial court could not rely on it. He urges this court to uphold the conviction and affirm the sentence.

8. This being a first appeal this courts duty is well set out to re-evaluate the evidence on record analyse it and make its own conclusion having in mind that it was never a part of the proceedings in the lower court and thus did not have the chance to see or hear the witnesses. See **DAVID NJUGUNA VS. REPUBLIC 2010 eKLR** where the court relying on the holding of the court in **Okeno vs. Republic [1972] E.A 32** held that:-

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

9. In re-evaluation the evidence on record this court will briefly summarize both the prosecution and the defence case.

Prosecution's case.

10. The prosecution called a total of four (4) witnesses amongst them S M the complainant. She told the trial court that she was sixteen (16) years of age and in form 2 at the time she was defiled. It was on the 8th November, 2012 at about 5.30 a.m. after taking bath that she realized she had no lotion to apply on her body. She went to borrow from one Maxmilla's house but she didn't have. She then decided to go to the appellant's shop at Vulambo. She knocked, the appellant opened but he didn't switch on the lights, he held her by her hand and pulled her inside the shop, removed her clothes including her under pants. The appellant then removed his trousers, wore a condom and inserted his penis in her vagina. All along the

appellant had his torch on. It is when she heard her mum speaking asking the shop keeper why he was keeping her inside the shop for a long time that she escaped through the window and ran. As she ran she met her parents and some villagers but hid in their farm on seeing her father. She was wearing a pant. She was later taken to Kakamega PGH where she was treated. She showed the trial court the treatment notes, post care rape form, the P3 form and a copy of her birth certificate. The case was reported at Kakamega Police Station where the P3 form was issued.

11. On cross-examination by Ms. Rautto, she reiterated her earlier statement and added that she was threatened by the appellant who had a panga and who forced her on the mattress. She added that the ordeal took about fifteen minute.

12. PW2 C M the mother to the complainant explained the events of the 8th November, 2012 from around 5.30 a.m. She woke her daughter to prepare for school. Since there was no lotion, she allowed her to go and borrow from a neighbour by the name Everlyne. She (PW1) took long to come back home and this prompted her (PW2) to search for her (PW1). Everlyne confirmed to her (PW2) that the complainant had visited her and had asked for lotion but she (Everlyne) didn't have. Everlyne told her (PW2) that the complainant had gone to the appellant's shop to borrow. She (PW2) went to the shop which was along the road and she heard the radio which was being played loudly but the shop was closed.

13. She could also hear her daughter complaining from inside. She then knocked the shop's window while screaming. Her husband then arrived at the scene and was later joined by other people. She stood at the door of the shop to prevent the appellant from getting out. She testified that it seemed her daughter either got out through the window or the accused asked her to get out through the window.

14. They immediately called the sub-chief who came to the scene and took away the accused to Kakamega. She later found her daughter and took her to Kakamega General Hospital for treatment. They then went to Kakamega Police Station where they recorded their statements. She confirmed that at the time of the incident the girl was fifteen (15) years of age and she had a birth certificate. The appellant was known to them.She reiterated her statement on cross examination and maintained that the girl was in the appellant's shop and that she escaped through the window.

15. PW3 NO. 83213 PC. ABDI DEK SHARIFF was on duty on 8th November, 2012 when the appellant was taken to the station by AP Officers from Ilesi. The mother of the complainant and other witnesses were also present. They reported that the appellant had defiled PW1 a school going child who was about fifteen (15) years old. He took the statement of the complainant (PW1) and sent her to hospital for examination. The doctor after examining her opined that there was penetration. PW2 told him that she heard her daughter complaining inside the appellant's shop and that she escaped through the window after she heard her scream.

16. PW4 Dr. Akwai Malova a clinical officer at Kakamega General Hospital examined the complainant who gave a history of having been defiled by a person known to her. He told the court that the clothes the complainant wore had blood stains and her labia minora was bruised and she had a broken hymen. He concluded that she had penetrative sex but prior to that she was a virgin. He opined that she had been defiled and signed the P3 form on the 9th November, 2012 which he produced as exhibit 3. He also produced a post rape care form – PExh. 2 also signed on the same date, treatment notes (PExh. 1) which showed that the victim had been treated.

17. After hearing the prosecution's case the trial court found that the prosecution had proved its case to warrant the accused person to be placed on his defence.

Defence case.

18. After the trial court explained the provisions of section 211 of the Criminal Procedure Code to the appellant, the appellant opted to give an unsworn statement and he called one witness. In his defence DW1 denied committing the offence. He told the trial court that on that day at 5.30 a.m. he heard several people walking around his shop. After a while he heard someone knocking on his door and window and

then he heard the lady he had purchased the plot from calling his name and asking him to open the door because the people outside wanted to confirm if there was someone else with him in the shop. He obliged and the lady searched his shop but they found there was no one. He called one Lumumba, a Children's Officer and the area sub-chief who also searched the house but found no one. The sub-chief then escorted him to Ilesi Administration Camp and informed them that he (appellant) had been suspected of defiling a girl. The A.P. then transferred him to Kakamega Police Station where he was charged. He told the trial court that the parents of the complainant were not aware where their child had gone.

19. DW2 MARY MUHATIA BABU the owner of the plot where DW1 has constructed his shop testified that on that day at 5.30 a.m. she heard people shouting outside and went to see what was happening. She met Celestine (PW2) a neighbour and she asked her what the problem was. PW2 told her that the appellant had locked her daughter S inside the shop. She woke up the accused and got into the shop and did a search but didn't find anyone. People had gathered round the shop and were threatening to burn it. The Assistant chief came and calmed the people. He (Assistant chief) also searched the house and escorted the appellant to the A.P. cells.

Analysis and determination.

20. It is not in doubt that on the 8th November, 2012 at [Particulars withheld] village at about 5.45 a.m. there was an incident around the shop of the appellant. People had gathered around the shop and wanted to burn it. The appellant testified to this and this was confirmed by DW1 and PW2. So the question that is on my mind is why were there so many people gathered so early at the appellant's shop. The answer is that there was a problem in the appellant's shop. PW1 is said to have gone to that shop. She is a minor. Her mother (PW2) after some time followed her after she realized she had taken a long time to go back home.

21. It is confirmed to PW2 that her daughter went to the appellant's shop by a neighbour. DW2 also meets PW2 and her husband at the appellant's shop. The reason for them being there is that their daughter PW1 went to buy and/or borrow body lotion from the shop. To my mind there must have been a good relation between PW1 and the appellant for her to gather confidence and go to the shop to borrow lotion. Otherwise she would not have attempted to go there.

22. It is true therefore that PW1 went to the appellant's shop her claim is corroborated by PW2 who went to the appellant's shop. She (PW2) claims to have gone there after about fifteen minutes. PW1 confirms having gone to the appellant's shop, and she explains what happened to her and how she was defiled by the appellant. She was examined on the same day and the doctor's report (PW3's) confirms that her labia minora and hymen is broken. This confirms that there was penetration of PW1's vagina. The only person who was in contact with PW1 that morning was the appellant. The doctor in his testimony opined that PW1 was defiled. All the events happened on the same day. Even though the witnesses did not find the complainant in the appellant's shop, evidence shows and/or points that she had gone to the appellant's shop.

23. The evidence is water tight. There is no other medical evidence that could have been given by the doctor apart from the treatment notes, Post Rape Care Report and the P3 form. All these were filled by the same doctor on the same date and produced as exhibits. The age of the complainant was also proved by the birth certificate produced as exhibit and the evidence was corroborated. There is no other way that one can think of/analyze what happened that day. There were no glaring contradictions at all in the evidence by the prosecution which is confirmed by DW2 except that she (DW2) didn't see PW1 in the appellant's shop.

24. I find that the trial court was right in convicting the appellant against the weight of the evidence and he also considered the evidence by the defence. The appellant has raised the issue as to why the prosecution didn't call the complainant's father to testify. To answer this I am guided by the case of **UKENYA and OTHERS VS. UGANDA (1972) EA 550 551** where the court held:-

"..... it is well established that the director has a discretion to decide who are the

material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

Secondly, the court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of this case.

Thirdly, while the director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of those witnesses, it called, would have been or would have tended to be adverse to the prosecution." (Emphasis mine)

25. I find that the evidence of the father of the complainant would have been adverse to the prosecution case if he were called.

26. Lastly, the appellant has raised a very important issue on the evidence of a minor. I think he refers to the examination of a minor before he/she is allowed to testify on oath in other words voir dire examination. The minor herein was aged 15 years of age. The trial court observed her demeanor and concluded as follows:-

"PW1 was the victim and eye witness. She testified in court and I got the opportunity to examine her demeanor. She seemed to be truthful when she stated that she was defiled by the accused. I found no reason to doubt her."

27. The trial court was satisfied that she was telling the truth. I find and hold that even though the trial court did not take the 15 year old girl through a voire dire examination, it found that she knew the meaning of telling the truth on oath. See **MOHAMED VS. REP. [2006] 2KLR 138 and GEOFFREY KIOJI VS. REPUBLIC Crim. App. No, 270 of 2010 Nyeri** where the trial court specifically noted in the judgment that it was impressed by PW2 as a witness of truth who spoke nothing but the truth.

28. I therefore find no reason to disturb the judgment by the trial court in this case. The grounds set out by both the appellant and his advocate cannot stand the test of time. They have no merit and are dismissed. The appellant was properly convicted of the offence of defilement as charged. I uphold the conviction and sentence and dismiss the appeal.

SIGND, DATED AND DELIVERED at **KAKAMEGA** this **10TH** day of **NOVEMBER**, 2016.

C. KARIUKI

JUDGE.

In the presence of:-

.....In person .....for the Appellant.

.....Ng'etich .....for the Respondent.

.....Anunda ..... Court Assistant.