REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 232 OF 2013.

OLIVER ODARI :: APPELLANT.

VERSUS

REPUBLIC ::: RESPONDENT.

(Being an appeal from the original conviction and sentence of G.A. Mmasi – AG. SPM in Criminal Case No. 441 of 2012 delivered on 27th November, 2013 at Vihiga.)

JUDGEMENT

INTRODUCTION.

1. The appellant herein OLIVER ODARI was charged with the offence of defilement of a girl contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 8th day of May, 2012 at Jebhebuk village Galona sub-location in Vihiga County within Western Province he intentionally and unlawfully defiled a girl child namely M.C. by causing his genital organ namely penis to penetrate into her genital organ namely vagina of the said girl aged 4 years old. The alternative charge was that of Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

2. The particulars in this charge were that on the 8th day of May, 2012 at Jebhebuk village Galona sub-location in Vihiga County within Western Province he willfully and unlawfully caused his genital organ to make a contact with a genital organ of a girl child by namely M.C. aged 4 years old and by touching her vagina.

3. The trial court heard both the prosecution case and the defence and found that the prosecution had proved its case against the appellant on the first count beyond reasonable doubt and sentenced him to life imprisonment.

The appeal.

4. The appellant being aggrieved by both the conviction and sentence filed the present appeal on the following homemade grounds:-

(1) I pleaded not guilty;

(2) That I was not supplied with copies of the prosecution witness statement;

(3) That I pray to be present at the hearing of this appeal and also wish to be furnished with

certified copy of proceeding.

He wants the appeal herein allowed, conviction quashed and sentence set aside.

Submissions.

5. The appellant relied on his written submissions filed on 29th February, 2016.

6. Mr. Oroni, prosecution counsel relied on the evidence of the prosecution on record in opposing the appeal and in support of the conviction and sentence. He wants the appeal dismissed.

7. This being a first appeal the court's duty will be to re-evaluate the evidence on record analyse it and come up with its own conclusion (see **OKENO VS. REPUBLIC [1972] E.A. 32).** In doing this the court is aware that it never took part in the trial to observe the demeanor of the witnesses and therefore will give consideration/allowance to this.

The prosecution case.

8. The prosecution called a total of five (5) witnesses to prove its case. PW1 C C, the mother to the victim herein M.C. told the trial court that her daughter was born on 8th April, 2008 and she produced the clinic card which was marked as "PEX. 1 (1)". She testified that the appellant was their neighbour and she knew him.

9. On the 8th May, 2012 she left the children i.e. M.C. and his brother T M playing on the verandah and went to fetch water from the river which is about 300 kms from her home. When she came back home, she found the girl missing and the brother who is 1 ½ years old was in the house. She called out M.C's name who responded at a distance of 200 metres away. She was crying. She PW1, enquired from her harshly and she told her that the appellant had defiled her. She, PW1 checked her private parts and saw mucus and blood stains on her pants. She (PW1) then went to the appellant's home but did not find him. She enquired from the mother of the accused who told her that that was not her headache. She later found the appellant and on enquiring from him the appellant remained silent.

10. She then took the child to Mbale District Hospital. A report was then made to the Assistant Chief by her husband and the Assistant chief went ahead and arrested the appellant with the help of Administration police from Gisambai.

11. She testified that they were referred to Vihiga Police Station where she was issued with a P3 form that was filled by the doctor. She identified the panty M.C. was wearing PEX. 2, and also produced the child's health card PEXH. 1, treatment notes PEXH. 3, P3 form PEXH. 4, Post Rape Care Form PEXH. 5. She claimed that she had no differences with the appellant.

12. PW2 C S told the trial court that on the 8th May, 2012 at 5 p.m. Chelagat and M went to her house. When C went to urinate she started screaming saying she was feeling pain in her private parts. She checked her private parts and saw it was wet with whitish discharge. She also saw her panties which she observed had blood stains. She called the mother (PW1) and enquired from her and the mother (PW1) told her that she was looking for money and had been informed by the girl on what happened to her. PW1 took the child to hospital at Mbale and PW2 went the next day. She also identified the child light blue panty and then pointed out the appellant. She testified on cross-examination that the child told her that the appellant "madividi" defiled her.

13. PW3 APC MOSES AKOKO NO. 232125 told the court that on the 9th May, 2012, the Assistant Chief of Galona sub-location went to their offices and informed him of the arrest of the appellant who had defiled a minor. The assistant chief was with the child's mother who told him that the child had been admitted at Vihiga District Hospital. He re-arrested the appellant and escorted him to Vihiga Police Station.

14. PW4 SAMMY CHELULE examined the child M.C. after the child gave him a history of being defiled by a relative on 8th May, 2012 in a maize plantation. He observed that she was penetrated and no protection was used and that the act was intentional. He further observed that the victim was apprehensive when he was examining her. He estimated her age to be four (4) years as per the child's health card. The hymen was torn and there was a superficial reddening on the perennial. Labia was painful with no visible discharge at the time of examination.

15. H.I.V. and Syphilis were negative, no spermatozoa was seen and urine was normal. He concluded that the girl had been defiled with evident physical injuries to the vagina, the same was intentional and without consent and unprotected sex. He signed the P3 form on 10th May, 2012 which he produced as PExh. 4 together with the Post Rape Care Form PExh. 5.

16. He told the trial court that he also examined the appellant, who was brought to him 72 hours after the incident he observed that the penis had no bruises and he filled the P3 form and signed it on the 10th May, 2012. He produced his treatment notes and P3 forms as exhibits 6 and exhibit 7 respectively.

17. PW5 NO. 92477 PC JOY WAWIRA stationed at Vihiga Police Station investigated this case which was minuted to her. Accused had already been arrested and in police custody. She called the mother to the victim (PW1) and the victim whose statements she recorded. From the statement, the child M.C. stated that she was defiled by Madavid. She took the accused to hospital where he was examined and a P3 form filed. She identified the child's panty in court which had been taken to her by the mother (PW1).

Defence Case.

18. The trial court found that the prosecution had established a prima facie case against the accused which warranted that he be placed on his defence.

19. Section 211 of the Criminal Procedure Code was explained to him. He gave an unsworn statement and called one witness. In his defence he told the trial court that it is her aunt who arrested her. He opined that her aunt arrested her because she was annoyed with him since he refused to work for her. He stated that the chief arrested him and took him to Gisambi A.P. Post and later he was taken to Vihiga Police Station and charged.

20. DW2 JOSHUA ALUGA, the Assistant Chief of Galona sub-location told the court that he received information of the defilement sometime in May, 2012 from the complainant's father and that it was the appellant who had defiled her. He arrested the appellant but the mother of the complainant did not want the matter to be taken to the police because appellant was a relative. He took the appellant to the A.P. camp at Gisambai and left the matter at that. He claimed on cross-examination that he didn't know whether the child was defiled or not.

Issues for determination.

21. The issues for determination in this appeal are mainly derived from the submissions of the appellant. They can be summarized as follows:-

(a) *Whether the names of the victim are tallying with the charge and the effect;*

(b) *Whether absence of sperms negates the findings in the medical reports by PW4;*

(c) *Whether it was fatal to the prosecution's case not to call all witnesses*.

22. Before making a finding on the above issues, this court notes that the victim M.C. testified. She gave an unsworn testimony and was not asked any question. She told the trial court that she was four (4) years old and that she was in nursery school.

23. She knew the accused who was her neighbour at home. She explained that it was the appellant who

took his penis and penetrated her vagina. She explains that she was playing with his brother T M at their veranda on that fateful day and the appellant told the child to go and sleep and he (appellant) took her to the maize plantation, removed her pants and placed her on the ground. He then removed his trousers and defiled her and left her on the ground. He went home and told her mother that it is the accused who had defiled her. Her mother took her to hospital. All these happened to her during the day when her mother had gone to the river.

24. Now to the first issue. The appellant claims that the names of the victim do not tally. I note that the child's name on the charge sheet is M C and on the proceedings she is referred to as M C. The other documents i.e. PEXH. 1, 3, 4 & 5 refer to the victim as M C. M and M one and the same person and there must have been a typographical error on the proceedings. This issue of the victim's namecannot change or affect the charges against the appellant. It is the child M.C. who testified and to whom all the documents produced as exhibits referred to. I therefore find no merit on the submission by the appellant on the issue of names.

25. The second issue that would be of interest is whether sperms were found on the victim's vagina. PW1 and PW2 both examined the child's vagina and saw mucus like substance. PW4 told the trial court that there was no visible discharge at the time of examination. He further explained that the victim had passed urine before he examined her. His conclusions were that there was penetration of the victim's vagina because the hymen was torn, there was superficial reddening on the perennial and the labia was painful with no visible discharge.

26. A look at the P3 form on the general medical history, PW4 wrote that there was penile penetration with ejaculation, sperm around the vagina. It is therefore clear that there were sperms around the vagina of the victim which were seen by the victim's mother (PW1) and PW2 – and confirmed by the medical officer PW4. Therefore the assertion by the appellant on whether sperms were found on the victim cannot stand. It has been proved and corroborated that there were sperms on the vagina of the victim. The court also found and concluded that whitish discharge from the victim aged four (4) years was abnormal.

27. On the last issue on witnesses on whether it was fatal to the prosecution not to call all witness this court is guided by the finding in **BUKENYA & OTHERS VS. UGANDA [1972] E.A. 549** where the court held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent, that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case.

28. While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to section 124 of the evidence act and the medical evidence must be borne in mind as well as section 143 of the Evidence Act Cap 80 which provides that, in the absence of any requirements by provision of law no particular number of witnesses shall be required for the proof of any fact.

29. Apart from the above issues, the appellant also claims that he was not issued with statements of the prosecution witnesses. This is a right of an accused person as enshrined in Article 50 (2) (1) of the Constitution of Kenya 2016. It is upon the accused to enforce the said right by requesting for the documents the prosecution intends to use/rely on during the prosecution. All through the proceedings, the accused, now appellant did not request for the statements. It is not for the court to request for him, the court only makes an order upon an application or request by the accused.

30. For those reasons, I find no merit in the appeal herein. The conviction and sentence were safe and the trial court was right in finding that the prosecution had proved the charge of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offence Act No. 3 of 2006 beyond reasonable doubt. The appeal is accordingly dismissed.

SIGNED, DATED and **DELIVERED** at **KAKAMEGA** this **1ST** day of **DECEMBER**, 2016.

C. KARIUKI

JUDGE.

In the presence of:-

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

...............................Juma SC.............. for the Respondent.

................................Lilian .... Court Assistant.