IN THE HIGH COURT

AT MIGORI

CRIMINAL APPEAL NO. 2 OF 2014

FORMERLY KISII HCCR APPEAL NO. 134 OF 2013

BETWEEN

WILLIAM MAINA OJWANDO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 395 of 2011 at

Senior Principal Magistrates Court at Migori, Hon. D.K. Kimei, SPM dated 30th October 2012).

JUDGMENT

1. The appellant, **WILLIAM MAINA OJWANDO**, was charged with the offence of defilement contrary to **section 8(1)(4)** of the ***Sexual Offences Act, Act No. 3 of 2006***. The particulars of the offence were that on 26th July 2011 in Migori County he intentionally caused his penis to penetrate the vagina of LAO, a child aged 16 years.

2. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(11)** of the ***Sexual Offences Act*** based on the same facts.

3. After the trial, he was convicted and sentenced to serve fifteen years in prison. He now appeals to this court against the conviction and sentence on the following grounds set out in the petition of appeal filed on 21st February 2013;

1. *That the learned Magistrate erred in law and facts by giving a sentence though there was no genuine proof of the complainant's case; this led to a gross miscarriage of justice.*
2. *That the learned Magistrate erred in law and facts by judging, convicting and ordering a sentence basing on circumstantial evidence.*
3. *That the learned Magistrate erred in law and facts by failing to note that there was lack of credibility and consistency in the prosecution witnesses.*
4. *That the learned Magistrate erred in law and facts by passing a strong sentence on me though I was not the defiler or assailant.*
5. *That the learned Magistrate erred in law and facts by convicting and passing a sentence not considering that section 200 of CPC was wrongly entered.*
6. *That the learned Magistrate erred in law and facts by reading a ruling in a manner that is not accordance to the law.*

7. *That the learned trial magistrate failed to honour my alibi defence together with the tendered submissions leading to a gross miscarriage of justice.*

4. The appellant also filed supplementary grounds of appeal dated 25th July 2014 which stated as follows;-

1. *That the learned Magistrate erred in law and facts when he convicted and sentenced me though there was no substantial proof of defilement.*
2. *That the learned Magistrate erred in law and facts when he convicted and sentenced me basing on the evidences of PW 1 (complainant) and PW 2 (father) who were not consistent and credible witnesses. This led to gross miscarriage for justice.*
3. *That the learned Magistrate erred in law and facts by convicting and sentencing me while relying on medical evidence which in any way did not link me to the alleged offence.*
4. *That the learned Magistrate erred in law and facts when he gave a conviction and a sentence while relying on exhibits which did not link me to the alleged offence and the same exhibits had no merits before the court of law.*
5. *That the learned Magistrate erred in law and facts while analyzing and determining the outcome of the case. He relied on some immaterial factors which finally made him arrive at unsafe conviction and sentence.*
6. *That this honourable court be pleased to accept my written submission as a document to be used to support and strengthen the tabled grounds of appeal.*

5. The appellant also relied on written submissions at the hearing. On its part, the State opposes the appeal on the ground that there was sufficient evidence to support the conviction. The appellants grounds outlined above call upon the court to assess and evaluate the facts upon which the conviction was entered. This is consistent with the duty of this court exercising its power as the first appellant court which was summarized in ***Okeno v Republic*** **[1973]EA 32** as follows, *"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957]EA 336) and the Appellate Court's own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v R [1957]EA 570). It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post, [1958]EA 424."*

6. The prosecution called 6 witnesses to prove its case. PW 1, the complainant, testified that she was 16 years old and had just completed standard eight. She recalled that on 25th July 2011 at 9.45 am, while in school, the appellant, a teacher, asked her to go to his house at night. She went there after midnight and they had sexual intercourse. After about 40 minutes he went out and she heard him talking to her father, PW2. Her father opened the door and found her sleeping on appellant's bed. He started beating her with a panga whereupon she ran out as her father raised alarm. She ran out with a top and biker and left her uniform. Later on she was taken for examination at Karungu Sub-District Hospital for examination and the matter reported to the police.

7. PW 2, the complainant's father, testified that on 26th July 2011 at about 3.00 am, he was awoken by dogs barking. When he went to the place where his daughters were sleeping, he found PW 1 was missing. His other daughter informed him that PW 1 had gone to school for early morning preps. He went to the school and at about 4.00 am, he saw the appellant emerge from one of the staff houses. He spoke to him about his missing daughter. When appellant locked the door, PW 2 suspected something was amiss. He went into the house and found PW 1 lying on the appellant's bed half naked with her uniform beside the bed. He called her out and beat her as she fled. In the meantime, the appellant escaped as PW 2 raised alarm. The villagers came. He reported the matter to the chief. He also went to alert the head teacher, PW 4, and they came back to the school together. He also reported the matter to the Police who took the PW 1's clothes. He testified that villagers apprehended PW 1.

8. One of the people who lived next to the school responded to the alarm raised by PW 2. PW 3, a motorcycle rider, heard the alarm, armed himself with a club and *panga* and rushed to the school where he found PW 2, a person known to him. After being informed what happened, he and other villagers stormed the house and found PW 1's school uniform; a blue skirt and white blouse. He testified that a search was mounted for PW 1 and she was flushed out of a nearby bush dressed in a biker and a vest top. In cross examination, PW 3 stated that he had seen the appellant the previous day at about 7.00pm.

9. The head teacher, PW 4, recalled that while he was at home sleeping, on 26th July 2011, he was alerted by PW 2 about the incident concerning PW 1. He accompanied PW 2 to the school compound, entered the appellant's house and recovered a girl's uniform which included a blue skirt, a white blouse and a blue sweater. He reported the matter to the police who visited the school and collected the uniform.

10. PW 5, a clinical officer at Karungu Sub-district Hospital, recalled that PW 1 came to the hospital on 26th July 2011. He examined her and noted that there were pus cells although no blood or epithelial cells were seen. He observed semen and a high vaginal swab confirmed the presence of spermatozoa. He also observed minor bruises on the vagina walls of the complainant and some virginal discharge. He recorded these findings in the treatment notes, post rape case form and P3 form which were produced in evidence. He confirmed that sexual intercourse had taken place.

11. The final prosecution witness, PW 6, the investigating officer, recalled that PW 2 and PW 4 came to report the incident at Karungu Police Post on 26th July 2011 at about 6.30 am. He went to the school and found that a large crowd had gathered. He collected the uniform from the appellants house after it had been identified by PW 1 who was dressed in an under pant. He later escorted PW 1 to the police station and issued a P3 form. He also recorded statements from witnesses. He stated that the appellant was at large and a search was mounted for him but he later surrendered to the OCS Macalder Police Station.

12. The appellant was put on his defence. He gave sworn testimony and called two witnesses. The appellant testified that, although he sometimes resided at the school, on 26th July 2011 he was at his home in Sori. At about 6.00 am, he received a call from a colleague from a nearby school enquiring about his whereabouts. He attempted to reach the head teacher as well as the school chairman but could not. He received another call from a colleague from a nearby school inquiring about his whereabouts. He finally talked to the head teacher who informed him of the allegations against him and told him that he should not go near the school for his life would be in danger. After seeking legal advice from his lawyer, he filed an application in the Magistrates Court at Rongo seeking an order to prevent his arrest. On 29th July 2011, the application was allowed by the court and as a result he was arrested and released on bond. On 1st August 2011, he presented himself to Macalder Police Station to allay any fears that he was on the run. He also stated that on the material night he was at home with his wife. He had left his brother at the staff resident.

13. The appellant's wife, DW 2, testified that the appellant came home at about 7.30 pm on 25th July 2011. They retired to bed together at about 9.00 pm. She recalled that the appellant received a phone call from a fellow teacher at about 6.00am and that he also spoke to the head teacher. She denied that the appellant would have sneaked out of the house at night without her knowledge.

14. DW 3, the accused's brother, testified that the appellant was at school until around 5.00 pm and then left for Sori leaving him to spend the night at the staff quarters. He recalled that the school watchman came and rested at the house until about 3.00 am, when he heard murmurs outside the house, he left the house and did not return. DW 3 also heard noise outside and someone shouting the appellant's name. As he feared for his life, he sought refuge in a nearby house. He denied that PW 1 had slept in the house. He called the appellant on someone's phone and informed him of the incident at the school.

15. After reviewing the evidence the learned magistrate found the appellant was the person who defiled the complainant. He also dismissed the appellant's alibi defence and convicted the appellant.

16. The ingredients of the offence of defilement which the prosecution must prove are in **section 8(1)** of

the ***Sexual Offences Act*** which provides that a person who commits an act which causes penetration with a child is guilty of an offence termed as defilement. Under **section 2** of the ***Act***, *"penetration"* means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

17. The first issue raised in this appeal is that of identification of the appellant as the person who committed the felony. In his written submissions, the appellant contends that circumstances prevailing at night and entire evidence is inconsistent, contradictory and does not support the conviction. The evidence of identification in this case rests on the testimony of PW 1 and PW 2. PW 1's evidence is that she had had sexual intercourse with the appellant and that this was the second such encounter that led to the charge. The appellant was therefore not a stranger to her which precludes the opportunity for mistaken identity. As regards the testimony of PW 2, he confirmed that he knew the appellant and even though it was dark and he did not flash his torch, he engaged the appellant in a brief conversation. This was an instance of recognition. I therefore find that the prosecution evidence on the issue of identification cannot be assailed.

18. Related to the issue of identification, is the appellant's defence of alibi. The appellant's alibi was supported by the testimony of DW 2 and DW 3. In considering the alibi defence the learned trial magistrate held that the appellant had not raised the defence of alibi early in the proceedings. He found that it was advanced late in the day and did not shake the prosecution evidence. Although the appellant neither raised nor notified the prosecution of its intention to raise the alibi, the proper approach was to evaluate the evidence of the alibi as against the prosecution case. The accused need only raise reasonable evidence of the alibi while the prosecution must disprove it beyond reasonable doubt (see ***Sekitoleko v Uganda*** **[1967]EA 531)**.

19. The appellant, supported by DW 2 and DW 3, asserted that he was at his home in Sori and was only informed of the incident by a fellow teacher and was told not to come to the school for fear of his life. PW 3 and PW 4 confirm he was at the school on the previous day and PW 1 and PW 2 saw him in the morning of the incident. This evidence puts the appellant at the school in the evening of the previous day, at the time the offence was committed and after the offence was committed. Two material facts that undermine the appellant's defence. First, he states he called the headmaster, PW 4, who told him not to come to the school. This material fact was not put to the headmaster when he testified as he would have confirmed that in fact he was called by the appellant and advised him not to go to the school. Second, DW 3 testified that he called appellant that morning and informed him of the incident. The appellant did not allude to this material fact that his brother called him to appraise him of the situation at the school. I therefore dismiss the appellant's alibi.

20. The second issue is whether the prosecution proved penetration as an ingredient of the offence of defilement. PW1's testimony is that she had sexual intercourse with the appellant. The testimony was clear and leaves no doubt as to that element particularly given that the act had occurred on a previous occasion. Although corroboration was not necessary to confirm the complainant's evidence, corroboration of the act of penetration is to be found in the evidence of PW 5 who examined PW 1 on the same day. He concluded that there was evidence of sexual intercourse as there were few bruises on the vaginal wall and the presence of spermatozoa confirmed by the high virginal swab.

21. The appellant submitted that there was a contradiction in the evidence of PW 1 and PW 5. PW 1 testified that she was not injured while PW 5 detected a few bruises on the vaginal wall. I do not find any contradiction in the evidence. Both parties were giving evidence in different contexts. PW 1 was testifying to injury in the common sense, that is that she was not injured by the sexual encounter. The testimony of PW 5 was technical in nature and referred to the internal state of the vagina upon examination. The vaginal bruises referred to confirmed that there was penetration.

22. The appellant contends that a DNA test was not carried out to establish the identity of the complainant's assailant. In ***Andrew Cauri Ndungu v Republic*** **NAI CA Criminal Appeal No. 132 of 2008 [2013]eKLR,** the Court of Appeal stated that; *"We agree that there are instances in which an accused person ought to be medically examined before a court of law can positively connect him to commission of an offence, but we do not think that in this particular case there was dearth of evidence to*

enable the two courts below reach a conclusion that it was the appellant who defiled the complainant. Even in the absence of a medical examination on the appellant, there was sufficient evidence to enable the trial court reach the finding that it arrived at. We must, therefore, reject the third ground of appeal." As the evidence pointed to the fact that the appellant is the one who has sexual intercourse with PW 1, a DNA test to establish the identity of the perpetrator was unnecessary in light of this evidence.

23. The third issue, also raised by the appellant in his submissions, is that of the age of the child was not proved. Proof of age of the child is an essential part of the offence on two grounds. The first is to confirm that the victim is a child and the second to determine the appropriate sentence. The determination of the age of the child is a matter of fact to be proved by the available evidence. The learned magistrate, in his judgment, stated as follows, *"Although there was no production of a birth certificate or a child health card regarding the age of the complainant, I find the voir dire examination conducted on the complainant as well as her entire evidence together with that of the doctor who examined her plus the P3 form, treatment notes and post rape care form, all confirmed the age of the complainant to be sixteen years old. The complainant knew her exact age and by the time of her testimony in court she had even, sat for her Kenya Certificate of Primary education. This court therefore cannot treat her as a toddler but one who knew her correct age."* I agree with this reasoning. I would also add appellant's counsel did not cross examine the PW 1 on the issue of age and her testimony was therefore uncontested and was accordingly proved.

24. The appellant, in his defence, alluded to the fact that the head teacher had collided with his elder brother over some issues and the incident was plot hatched by the head teacher and another teacher who was eyeing the position of deputy head. These issues were dismissed by the learned magistrate as it is not possible that the two would have used PW 1 to set him up. Furthermore, these critical issues of the defence were not put to PW 1, PW 2 and PW 4 in cross examination. I therefore find that the defence lacked merit.

25. The appellant contests the conviction on the basis that there were several contradictions and inconsistencies in the evidence. He points to the exact time the intercourse took place. PW 1 testified that she went to the appellant's house at midnight while in cross-examination she admitted that the statement she recorded at the police station stated that the time was about 3 am. PW 2 stated that he went to the school at 3 am and was there upto about 4 am. PW 3 stated that the time was about 3 am while the PW 6, the police officer, came to the school at about 6.30 am. DW 2, stated that he heard some murmurs outside the door at about 3.00 am.

26. The approach to contradictions and inconsistencies was dealt with by the Court of Appeal stated as follows in ***Erick Onyango Ondeng' v Republic*** **NAI CA No. 5 of 2013 [2014]eKLR**, *"Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial court, after hearing all the evidence accepted that the offence was committed at "about 7 pm" in accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in* ***Twehangane Alfred v Uganda, Crim. App. No 139 of 2001, [2003] UGCA 6*** *it is not very contradiction that warrants rejection of evidence. As the court put it: "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."*

27. In my view, the prosecution case must be looked at as a whole. It is clear that the incident happened after midnight and in the early morning hours. The events as explained by the various witnesses tell one continuous set of events that culminated in the case against the appellant. I do not find any facts which point to deliberate untruthfulness on the part of any of the witnesses.

28. As regards the sentence, the learned magistrate was guided by **section 8(4)** of the ***Sexual Offences Act*** which provides for a minimum sentence of 15 years imprisonment where the child defiled is aged 16 years. The sentence imposed is one provided by law and it is neither harsh nor excessive. It is also affirmed.

29. I affirm the conviction and sentence and therefore dismiss the appeal.

DATED and DELIVERED at MIGORI this 1st day of September 2014.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Principal Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.