Arugut v Republic (Criminal Appeal 45 of 2019)
[2022] KEHC 14369 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14369 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL 45 OF 2019

WK KORIR, J

OCTOBER 27, 2022

BETWEEN

ELIJAH AENGWO ARUGUT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Original Conviction and Sentence delivered on 17/7/2019 in Kabarnet SPM Criminal Case No. 28 of 2018 by Hon P. Biwott, SPM)

JUDGMENT

1. The Appellant, EAA, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2006. The particulars of the charge being that on diverse dates between August 11, 2018 and August 15, 2018 at [Particulars Withheld] Sub-County within Baringo County, he unlawfully and intentionally caused his penis to penetrate the vagina of FJK, a girl aged 16 years.

2. The Appellant faced an alternative charge of indecent act with a child contrary to Section 11 of the *Sexual Offences Act*, 2006. The particulars being that on the dates and place mentioned in the main count, the Appellant caused his penis to touch the vagina of FJK.

3. An abridged version of the Appellant's grounds of appeal filed on July 24, 2019 shows that he challenges his conviction on the grounds that the complainant's evidence was not corroborated, the prosecution evidence was contradictory, failure by the trial court to conduct voir dire examination of the complainant, and lack of consideration of his defence.

4. The appeal proceeded by way of written submissions.

5. Through submissions filed on June 10, 2021, the Appellant claimed that the charge sheet was defective, the judgement invalid and that his conviction was based on nullified evidence. The Appellant

submitted that the charge sheet was defective because it did not have an OB number to confirm that the case was indeed reported at a police station.

6. The Appellant also submitted that the charge sheet was defective because he was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2003 while the particulars of the charge and the documentary evidence showed that the complainant was 16 years old and he therefore ought to have been charged for contravening Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The Appellant relied on the case of *Yengo v Republic [1983] eKLR* for the submission that a charge sheet is defective if it does not accord with the evidence given at trial.

7. The Appellant additionally faulted the trial magistrate for amending the charge in the judgment and submitted that the action denied him a fair trial and offended Section 214 of *Criminal Procedure Code*, Cap 75 (CPC) which requires that an accused must be given notice of the intention to amend the charge and given an opportunity to plead to the charge afresh.

8. On another ground of appeal, the Appellant argued that the judgment delivered by the trial court did not meet the parameters set by Section 169 of the CPC which requires that a judgment shall contain the points for determination; be dated, stamped and signed; and contain the section of the law under which the accused person is convicted. According to the Appellant, the trial magistrate did not outline the points for determination meaning that he had made up his mind to convict him. The Appellant placed reliance on the case of *James Nyanamba v Republic [1983] eKLR* where the Court of Appeal found that the trial court judgement did not comply with Section 169(1) of the CPC because the court simply believed the prosecution case and rejected the defence case without giving reasons.

9. Turning to his claim that the trial court convicted him on null and void evidence, the Appellant submitted that on January 15, 2019 when PC Biwott, SPM took over the case from SO Temu, PM, he complied with Section 200 CPC and directed the case to start afresh. It is the Applicant's case that the decision to start the matter afresh meant that all the evidence that had been adduced before the outgoing magistrate was discarded. The Appellant therefore contended that since PW2 was the only witness recalled to testify, it was erroneous for the court to convict him on the evidence of PW1, PW3, PW4 and PW5 who had testified before the first magistrate but had not been recalled to give evidence before the succeeding magistrate who eventually convicted him. The Appellant submitted that the only evidence that was properly on record was that of PW6 and his defence and the same could not sustain a conviction. The Appellant cited authorities to stress the importance of complying with Section 200 CPC whenever there is a change of the officer hearing the criminal case.

10. The Appellant further submitted that even after PW2 was recalled to testify, she simply adopted the testimony that she had given before the outgoing magistrate thus making it difficult for him cross-examine her. According to the Appellant, this violated his right to a fair trial as protected under sections 150 and 208 of the CPC and Article 50(2)(b), (j) & (k) ofthe *Constitution*.

11. The Appellant also asserted that his right not to be retried for the same offence as provided by Section 207(5)(a) CPC and Article 50(2)(o) of the *Constitution* was also violated.

12. The Appellant further submitted that the amendment of the charge against him by the trial magistrate in the judgment violated his entitlement to notice of any intended amendment of the charge and to take the plea afresh as provided by Section 214(1) CPC.

13. The Appellant submitted that the testimony of PW1 who was a child aged 16 years violated the law as voir dire examination was not conducted prior to the recording of her testimony. The Appellant stated that any person aged below 18 years is a child and the evidence of a child cannot be received prior to voir dire examination to confirm the competency and understanding of the meaning of an oath

by the potential witness. The Appellant asked this Court to find that the trial court failed to comply with Section 19(1) of the Oaths and Statutory Declaration Act and Section 125 of *Evidence Act*. The decision in *JGK v Republic [2015] eKLR* was cited in support of the submission that so long as the witness is below 18 years voir dire examination is necessary. The Appellant cited the decision in the case of Gamaldene Abdi Abdiraham & another v Republic [2013] eKLR in support of its assertion that where a voir dire examination was not conducted, the conviction should be set aside.

14. Turning to his claim that the testimony of the prosecution witnesses was contradictory, the Appellant argued that during cross-examination PW2 contradicted her claim that she reported the disappearance of the complainant. It was further the Appellant's case that the complainant testified that she was at the home of her friend C from Saturday to Tuesday before proceeding to the home of the Appellant hence contradicting the prosecution's case that she was with the Appellant from Saturday when she was alleged to have disappeared.

15. The Appellant asserted that the failure to call the complainant's friend as a witness was detrimental to the prosecution case. He also wondered why out of the seven men that had gone to rescue the complainant from his home, only PW3 and PW4 who were the cousins of the complainant were called as witnesses. According to the Appellant, PW6 never conducted any investigations apart from arresting him from the members of the public.

16. The Appellant argued that owing to the fact that he was a boda boda rider and a businessman there was a grudge against him by his arresters. He stated that this fact was confirmed by the failure to tell him the reason of his arrest as he was simply told 'utajualia mbele'.

17. As to whether the complainant was penetrated, the Appellant argued that the P3 form simply confirmed that complainant was assaulted but there was no evidence of penetration. According to the Appellant, the P3 form showed that the external genitalia was normal and there were no bruises, injury, blood or spermatozoa seen. The Appellant submitted that the medical evidence only confirmed that the complainant had been assaulted by her cousins. The Appellant relied on the decision in *David Mwingirwa v Republic [2017] eKLR* in support of his argument that a broken hymen alone is not conclusive evidence of defilement. The Appellant consequently urged this Court to allow the appeal.

18. Through submissions dated June 18, 2021 the Respondent rejected the Appellant's claim that he was convicted on the evidence of a single witness. According to the Respondent, there was material corroboration because the Appellant was found and arrested with the complainant in the same house. The Respondent referred to the case of *Joseph Mwangi Kariuki v Republic [2018] eKLR* in support of its submission.

19. On the failure by the trial court to conduct voir dire examination on the complainant, the Respondent contended that at 16 years the complainant was mature enough and there was no need of subjecting her to examination by the court to test her intelligence and understanding of the meaning of an oath. The Appellant also relied on Section 125 of the *Evidence Act*, Cap 80 which provides that all persons shall be competent to testify unless the court considers that they are prevented from understanding questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause. It was urged by the Appellant that none of the conditions that can make a witness incompetent existed in the case of the complainant.

20. On the Appellant's assertion that the evidence of the prosecution witnesses was contradictory and inconsistent, the Respondent argued that the alleged contradictions and inconsistencies were not identified. Further, that its review of the record does not disclose any material contradictions. In support of this point, reliance was placed on the case of *Samuel Warui Karimi v Republic [2016] eKLR.*

21. On the Appellant's argument that not all the necessary witnesses were called, the Respondent submitted that the prosecution called the witnesses that were sufficient to convince the court to convict the Appellant.

22. As for the Appellant's assertion that the judgement did not meet the provisions of Section 169(1) CPC, the Respondent simply reproduced the section without making any comment on the Appellant's argument.

23. This is a first appeal and the duty of this Court as a first appellate court has been outlined in several decisions. From the decisions I have read, I form the opinion that the role of a first appellate court is to analyze the evidence adduced at the trial while applying the relevant laws to the facts; re- appreciate the evidence that was presented by both sides at the lower court with a view to reaching its own decision while bearing in mind that unlike the trial court it did not have the opportunity of hearing and seeing the witnesses testify so as to gauge their demeanour; and, give cogent or appropriate reasons where it decides to reverse the decision of the trial court.

24. The Appellant has raised several grounds of appeal anchored on both legal and factual foundations. I will straight away delve into the grounds of appeal.

25. I start by considering the effect of the failure by the trial court to administer voir dire examination on the complainant.

    There is no dispute that the trial court did not conduct voir dire examination on the complainant before receiving her evidence. The Appellant's argument is that voir dire examination is compulsory for all children and that a child is defined under the *Children Act*, 2001 as a person under the age of 18 years.

26. The voir dire examination of children of tender years prior to the recording of their testimony is conducted in fulfilment of the provisions of Section 19(1) of the *Oaths and Statutory Declarations Act*, Cap 15 which provides that:

> 'Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap 75), shall be deemed to be a deposition within the meaning of that section.'

27. The words used are 'child of tender years'. The courts have grappled with the meaning of the term 'child of tender years' in various decisions. I will only cite two authorities that will lead me to what I believe is the correct definition of 'child of tender years'. In Gamaldene Abdi Abdirahman & another v Republic [2013] eKLR, the High Court considered the issue whether the term 'child of tender years' as used in Section 19(1) of the *Oaths and Statutory Declarations Act*, Cap 15 is the same with a 'child of tender years' as used in the *Children Act*, 2001 which at Section 2 defines such a child as one 'under the age of ten years'. The Court concluded that:

> 'Does the definition of a 'child of tender years' by the *Children Act*, 2001 therefore oust the jurisprudence that has been developed in criminal trials? The first thing to note is that in passing the *Children Act*, Parliament was trying to address issues touching on the welfare

> of children. We do not think Parliament was concerned about the rights of accused persons as relates to the testimony of child witnesses. As already stated, there are specific reasons why voir dire examination is necessary before the evidence of a child of tender years can be accepted by the courts. We would therefore hesitate to agree with Mr Mulama that in view of the definition of 'a child of tender years' by the *Children Act*, any child over the age of ten years should now testify on oath without the trial court conducting a voir dire examination.'

In our view, the jurisprudence established over a long period of time is still good jurisprudence despite the definition provided by the *Children Act*. In saying so, we are guided by the fact that a child's development both physically and intellectually is governed by the social, cultural and economic environment under which the particular child is brought up. Some children are slow developers while others are fast learners it would therefore be prudent to test the intellectual capacity of a child witness before putting the child in the witness box.'

28. In Samuel Warui Karimi v Republic [2016] eKLR, the Court of Appeal considered several decisions before defining a 'child of tender years' as follows:

> '[16] Which definition should guide the courts in determining who is a child of tender years, is it the *Children Act*, or the precedents set by the Court of Appeal? The requirement by the aforementioned provisions of the *Evidence Act* and the *Oaths and Statutory Declarations Act* of voire dire examination of a witness of tender years in a criminal trial is meant to guarantee an accused person a fair trial. A fair trial is guaranteed by the *Constitution*. We have done the aforementioned review of the law and decided cases in an attempt to ascertain in this case whether failure by the trial magistrate to conduct voire dire examination on the complainant a child aged 12 years affected the credibility of her evidence. We are persuaded the definition of a child of tender years under the Children Act cannot globally be imported for offences under the criminal law. This is because children develop and mature differently depending on their social economic and other factors such that, some children of 11, 12 or 13 years can be very sharp and intelligent witnesses whereas others in the same age bracket may not at all comprehend what is a court of law. This explains why the Courts have held on the age at 14 years and sometimes even a higher age as the age below which a child is of tender years for purposes of criminal trials and insisted the competency be tested through questions that must be put to the child and answers given by the child be recorded verbatim. The definition of a child of tender years provided under the Children's Act has remained a guide in regard to criminal responsibility.

29. In a recent decision of the Court of Appeal sitting in Nyeri the case of; *Patrick Kathurima v Republic, [2015] eKLR*; it was

held:

> ' We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes'.

30. The above decision supported the definition of a child of tender years to be 14 years and below and contextualized that definition within the Oaths and Statutory Act and under the Children's Act. On our part, we have no good reason to depart from this well-trodden path, as we are in agreement the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances we find the evidence by the complainant was not properly received thus, the conviction of the appellant becomes unsafe to sustain as she was the complainant and not any other witness.'

31. The cited Court of Appeal decision confirms that in respect of criminal trials, a child of tender years is one under the age of 14 years. It follows therefore that it is compulsory to conduct voir dire examination of all witnesses under 14 years. Although the Court of Appeal in Samuel Warui Karimi (supra) indicated that a child of tender years is one of '14 years and sometimes even a higher age', I believe that the decision as to whether voir dire examination should be conducted on a child above 14 years will be decided by the trial court based on its observation of the witness.

32. In the appeal before this Court, the trial record shows that the complainant was aged 16 years when she testified. The trial magistrate was therefore not required to carry out a preliminary interview before recording her evidence. A perusal of the record also shows that the witness knew what she was talking about. In the circumstances, I find the Appellant's argument that the trial magistrate erred by receiving the evidence of the complainant without administering voir dire examination to be without any merit.

33. Before I leave this issue, I wish to point out that the decision of JGK v Republic [2015] eKLR which the Appellant relied on to advance the argument that voir dire examination is compulsory for all witnesses under 18 years was considered and rejected by the Court of Appeal in Samuel Warui Karimi (supra) when it held that:

> ' (15) In the above case it was apparent the court did not distinguish the difference between two definitions of a 'child' and a 'child of tender years'. There is distinct and fundamental difference between the two definitions.'

34. There was an argument by the Appellant that his conviction violated Section 207(5)(a) CPC and Article 50(2)(o) of the *Constitution*. The cited provisions protect the right of a person not to be tried for an offence in respect of an act or omission for which he has been either acquitted or convicted. I am at a loss as to why the Appellant argued that the stated law was violated. There is no evidence on record that he had been tried and either acquitted or convicted for the same facts and offence. I will exit this argument by finding that it has no merit.

35. Another argument by the Appellant is that once PC Biwott, SPM took over the case from SO Temu, PM and directed that the matter starts afresh it meant that all the evidence that had been adduced before the outgoing magistrate was abandoned. There is no dispute that the incoming magistrate complied with Section 200 CPC on January 15, 2019. Here, I am using the handwritten proceedings which shows that the matter was before Biwott, SPM and not Temu, PM as indicated in the typed proceedings. On that day, Biwott ordered the matter to start afresh after the Appellant indicated that was his wish. The meaning of this, as correctly submitted by the Appellant, was that the case was to start anew. The consequence of the decision was that the evidence of all the witnesses who had testified was abandoned and that evidence could not be the basis for the determination of the case against the Appellant. However, I will shortly demonstrate why the Appellant's argument will not carry the day in this case.

36. It is important to also point out that the manner in which PW2 testified after being recalled on February 13, 2019 was improper. The record shows that on that day the witness introduced herself and asked the Appellant to cross-examine her on her previous evidence. As already stated, the slate had been wiped clean and there was no material on record upon which the Appellant could cross-examine the witness. When a matter starts afresh pursuant to Section 200 CPC the witnesses testify as if they have never testified before. It is only where an accused asks for the witnesses to be recalled for further cross- examination that the evidence adduced before the outgoing magistrate is retained on record and is useable by the incoming magistrate. I therefore agree with the Appellant when he states that the manner in which PW2 testified after she was recalled denied him an opportunity to cross-examine her.

37. The Appellant's argument in regard to Section 200 CPC must, however, be determined based on the entire record of the trial court. In that regard, I note that the proceedings of February 13, 2019 show that after PW2 testified, the Appellant without any prompting is captured as having told the trial court that the matter should proceed from where it had reached, presumably before the outgoing magistrate. The prosecutor then states that she had no objection. The new magistrate then indicates that 'matter to proceed from where reached. I take over under section 200 CPC'.

37. There is no background to the proceedings of February 13, 2019 in respect to Section 200 CPC considering that the same provision had previously been complied with by Biwott, SPM and an order issued that the matter starts afresh.

    Be that as it may, the Appellant made no reference to the proceedings of February 13, 2019. The only conclusion I can reach is that on February 13, 2019 the Appellant changed his mind and requested the trial magistrate to proceed from where the matter had been left by the previous magistrate. Indeed, on March 14, 2019 PW6 testified meaning that the case proceeded before Biwott, SPM from where Temu, PM had left the matter after recording the evidence of PW5. The Appellant was entitled to change his earlier decision to have the matter started afresh and ask for it to proceed from where it had reached before the outgoing magistrate. This is what he did on February 13, 2019 and he cannot now turn around and allege that the evidence of PW1 to PW5 had been discarded by the order of January 15, 2019. This ground of appeal therefore fails.

38. I now turn to the argument by the Appellant that the charge was defective. He raised two arguments in support of this ground of appeal. The first point is that the charge sheet was defective because it did not have an OB number to confirm that the case was indeed reported at a police station. The second point is that the charge sheet was defective because he was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2003 while the particulars of the charge and the documentary evidence showed that the complainant was 16 years old. He contends that the facts disclosed an offence contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*.

39. The Appellant's claim that the charge sheet is defective for want of the Occurrence Book (OB) number was not supported by any law or decision. I have looked at the charge sheet that was presented to the trial court and although the space provided for the OB number is not filled, the charge sheet has a police case number and this confirms that the charge sheet originated from Kabartonjo Police Patrol Base. There is also a stamp for the Patrol Base and the Appellant cannot be heard to say that the police unit that presented the charge sheet is not known. All the other particulars of the charge sheet namely the charges against the Appellant; the date of the commission of the offence; the Act and the section alleged to be breached; the particulars of the charge; the name of the complainant; the signature of the police officer issuing the charge; the date the Appellant was taken to court; and the list of the witnesses are all there. I therefore find the claim by the Appellant that the charge sheet is defective because of a missing OB number to be without merit.

40. I now turn to the Appellant's argument that the amendment of the main charge by the trial court in the judgement violated his rights under Section 214 CPC. The Appellant's complaint is without merit because what the trial magistrate did is allowed by Section 179 CPC which states that:

> '179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.'

41. The magistrate's action was also within the provisions of Section 186 CPC which provides that:

> 'When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the *Sexual Offences Act*, he may be convicted of that offence although he was not charged with it.'

42. From the cited provisions, it is clear that the trial magistrate was empowered by the law to convict the Appellant for the offence of defilement and impose the lesser sentence provided by Section 8(4) of the *Sexual Offences Act*. I consequently find that the action of the trial court to amend the charge in the judgment did not contravene Section 214 CPC.

43. Despite my finding that there is no merit in the Appellant's claim that the trial magistrate erred by finding that he had violated a provision that carries a lesser sentence, I must state that the drafter of the charge was careless. The main charge stated that the Appellant defiled the complainant contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. It is important to appreciate that Subsection (1) of Section 8 creates the offence of defilement whereas subsections (2), (3) and (4) provide the sentences for the offence based on the age of the victim of the crime. The punishment for an accused person who commits an offence of defilement with a child aged eleven years or less is provided by sub-section (2). Sub-section (4) provides the sentence for an accused person who commits an offence of defilement with a child between the age of sixteen and eighteen years. The drafter of the charge clearly indicated in the particulars of the main count that FJK was sixteen years and the correct punishment provision from the word go was Sub-section (4). I will say no more on this issue apart from concluding that the Appellant's argument has no merit.

44. There was the argument by the Appellant that the judgment delivered by the trial court did not meet the parameters set by Section 169 CPC which requires a judgment to contain the points for determination; be dated, stamped and signed; and contain the section of the law under which the accused person is convicted. I have looked at the judgment of the trial court and it is clear that the same complied with Section 169 CPC. This will be demonstrated by my analysis of the evidence adduced at the trial.

45. The case against the Appellant as presented to the trial court was that on August 11, 2018, PW2 IK, the mother of the complainant went for an engagement ceremony with her children who included FJK. At about 6.00pm she told the children to go home. When she reached home, FJK was nowhere to be seen. She enquired about her from neighbours but received no positive feedback. She kept looking for her and on August 13, 2018 she went and reported the incident to the village elder. PW3 SKC later went and informed her that he had located FJK.

46. PW3 SKC and PW4 SB were among the seven men who rescued FJK by raiding the home of the Appellant on the night of August 15, 2018. Their testimony was that when they arrived at the house of the Appellant he denied being with FJK. However, upon searching the house they found her naked under the bed. They arrested the Appellant and FJK and took them to the home of FJK. From there the two were escorted to a holding place until morning when they were escorted to Kabartonjo Police Station where PW6 Senior Sergeant Hamisi Mdoe rearrested the Appellant. PW6 issued a P3 form to FJK. The P3 form was filled by PW5 Robert Kekwai.

47. In his defence, the Appellant denied having sex with FJK. He stated that on the night he was arrested he had arrived home late from his boda boda errands. He was alone in the house and those who arrested him assaulted him before taking him to where FJK was. He denied having met or seen FJK before his arrest.

48. As correctly submitted by the Appellant, the medical evidence adduced in this case did not corroborate the evidence of the complainant that he had sex with her. No spermatozoa were seen and although the hymen was broken the breakage was not new and could not therefore be attributed to the Appellant. The argument of the Appellant find support in the holding of the Court of Appeal in David Mwingirwa (supra) that:

> ' From that reasoning of the learned judge, it would seem that the certainty or confidence with which the asserted that there was overwhelming evidence of L K having engaged in sexual activity came in no small measure from what she considers the corroboration afforded by the evidence of PW4 on the broken hymen. According to the learned judge, PW4 was of the view that 'there was continuous process of defilement.' With respect, we do not think that this was entirely correct. The Clinical Officer PW4 noticed that the hymen was broken but there were no other injuries to L K's genitalia. Nor was there spermatozoa or any male emission in her vaginal carnal. He merely stated that the broken hymen was suggestive of an ongoing process of defilement. He did not suggest that his said conclusion was based on any other observation beyond the broken hymen. Then this brings to the fore the issue raised by the appellant whether, in the absence of any other medical or physical evidence, a broken hymen is conclusive proof of penetrative sexual intercourse as PW4 seemed to suggest (his remarks in the P3 and his testimony in Court do not go beyond a suggestion) and as the learned judge seemed to have concluded, we think it was an error for the learned judge to form a firm conclusion of defilement from the fact alone of the broken hymen.'

49. In the absence of medical evidence to corroborate the complainant's case, the only evidence that could have nailed the Appellant was that of the complainant. The complainant's testimony was that after the engagement ceremony ended at 7.00pm on August 11, 2018, she was afraid to go home and instead went and slept at the home of her friend CC. She was there from Saturday up to Tuesday. That means she was at her friend's home from 11th to August 14, 2018. The complainant went ahead and testified that she went to the home of the Appellant on Tuesday at 7.00pm and was there until Thursday night when her cousins went and took them to the home of a friend where they assaulted them. They were there up to 6.00am when her parents arrived and also assaulted them before taking them to the District Officer's office then to Kabartonjo Police Patrol Base from where they were taken to the hospital. The complainant testified that she had sex with the Appellant who had been her boyfriend for two years. The Appellant did not challenge the complainant's evidence by way of cross- examination. This, however, did not discharge the burden hoisted upon the prosecution to prove its case against the Appellant beyond reasonable doubt.

50. The testimony of PW2 was that on August 16, 2018 at about 6.00pm PW3 went and reported to her that they had identified the place where FJK was. At midnight PW3 went to her again and told her he knew where the girl was. She did not go with him. In the morning she went to the place where celebrations are normally held and found her daughter with a boy she did not know.

51. On his part PW3 stated that after they arrested the Appellant and the complainant they took them to their village. They then called the parents of the complainant who went and saw them before going home. The parents of the complainant went back in the morning and they proceeded to the police station. PW4 gave evidence similar to that of PW3. When cross-examined by the Appellant, the two witnesses denied assaulting the complainant.

52. Looking at the evidence as summarized above, there are contradictions that weakens the prosecution case. PW3 and PW4 testified that the parents of the complainant joined them at night after they arrested the complainant and the Appellant. This evidence was contradicted by the complainant and her mother (PW2). This contradiction may appear minor but it becomes important when one considers the Appellant's defence.

53. The Appellant stated that he was alone when he was arrested and told the reason for his arrest would be disclosed ahead. His testimony was that he was taken to where the complainant was. There is no reason why the Appellant's evidence could not be believed, considering that PW3 and PW4 did not tell the truth when they said they called the parents of the complainant to where the Appellant and the complainant were at night. PW3 and PW4 were also not truthful when they denied assaulting the Appellant and complainant considering that the P3 form that was produced by PW5 confirmed that the complainant sustained injuries and reported that she was assaulted by her cousins. The fact that the complainant was assaulted also calls into question the veracity of her evidence as she may have testified under duress.

54. Taking into account the contradictions in the evidence of the prosecution witnesses, and considering that the alleged defilement of the complainant was not backed by medical evidence, it follows that the case against the Appellant was shaky. He ought to have been given the benefit of doubt by the trial court.

55. In light of what I have stated in this judgment, it follows that I find merit in this appeal. The appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant is set at liberty unless otherwise lawfully held.

DATED AND SIGNED AT NAKURU THIS 24TH DAY OF OCTOBER, 2022.

W. KORIR,

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT KABARNET THIS 27TH DAY OF OCTOBER, 2022.

H.K. CHEMITEI,

JUDGE