



(v) That the learned trial magistrate erred in both law and fact when it (sic) did not confirm whether the person who was before the court was indeed the one who was purported to have been raped as the one before the court was a child named **P.N** and not **P.A** of 10 years (the child's statement), 14 years (medical examination report - front page), 15 years (medical examination report on page 3) and 20 years (testimonies of witnesses).

(vi) That the evidence of key (sic) witness **E.O.** was wanting since he told the court that the complainant explained to him that he was raped, the same complainant who could not explain the same thing to court. How could she explain what happened and by whom to other people and fail to explain the same thing to court feigning insanity?

(vii) That the trial magistrate erred in both law and facts by relying on hearsay and rumours as there was no one who saw the appellant commit the offence and the complainant never raised an alarm (sic);

(viii) That the court confirmed that PW1 was very nervous meaning that could be she was forced to testify and implicate the appellant with the offence and opted to act insane;

(ix) That the trial magistrate erred both in law and fact by relying on the evidence of the exhibit (the medical examination report) that puts the date and time of the alleged offence as 8th January, 2009 at 1311hrs and time reported to police as unknown while the charge sheet puts it as being on 8th January 2009 at around 8.00 a.m.;

(x) That the trial magistrate erred at both law and facts when the medical report stated that the person who was alleged to have been defiled was a child/minor while the charge sheet puts the age as being 20 years;

(xi) That the trial magistrate erred in both law and facts when he failed to notice that the (sic) PW3 Fibi (sic) Atieno) testified that there was blood in the private parts of the complainant while the medical doctor never saw blood;

(xii) That the appellant was not tested medically to confirm if indeed it was him who committed the offence ;

The appellant prayed that his appeal be allowed, conviction quashed and sentence set aside and that he be set at liberty.

### **The appellant's submissions**

4. At the hearing of the appeal, the appellant relied on his written submissions. In addition, he orally submitted that PW1 was not sworn in to give evidence and she did not say anything in court. He further submitted that when PW1 went to hospital, she was given a patient No. 20013/2003, yet the offence occurred in the year 2009. The appellant submitted that he saw the patient book bearing the said number was a very old book. PW1 said that her name was **P.N** and that she was 10 years old. The evidence adduced in court was for one **P.A** who was 20 years old. This was inconsistent as it was not clear to the appellant if the complainant was **P.A** of 20 years of age or **P.N** of 10 years of age. The appellant submitted that he was shown a letter in court by the prosecutor showing that PW1 was mentally sick. He got mixed up on how they were following up a case brought about by a mentally sick person. The appellant informed the Court that this was not in the proceedings. The appellant asked for his conviction to be quashed and the sentence set aside.

### **The respondent's submissions**

5. Mr. Oroni, learned counsel for the State supported the conviction and sentence. He submitted that:-

- i. PW1 was a minor who did not understand the meaning of an oath and that is why she was not sworn;
- ii. The appellant took advantage of a young girl of 10 years. On page 16, there was a treatment note book produced in court to prove that the appellant defiled the young girl;
- iii. The court took the appellant through due process of the law and he was properly convicted. Mr. Oroni supported the conviction and sentence.

### **Analysis and Re-evaluation of the evidence**

6. The duty of the first appellate court was explained in the case of **Okeno vs. Republic [1972] EA 32** where it was held that:-

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate’s finding 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.”***

7. It is apparent that Mr. Oroni for the state did not thoroughly read the proceedings before the lower court as some of the submissions he made are not supported by the evidence recorded in the said court.
8. When the complainant was called to give evidence on 20th April, 2010, the court conducted a voir dire examination and observed that the complainant was anxious and excited at the same time and she appeared to be of unsound mind. The magistrate made an order for the complainant to undergo mental psychiatric evaluation and age assessment.

### **Prosecution's case**

9. On 23rd December, 2010, when the hearing of the case in the lower court commenced, the prosecutor applied for the complainant's mother to testify as the complainant had been declared mentally disabled.
10. PW 2, P A testified that she was the complainant's mother. She gave the age of the complainant as 20 years of age having been born on 26th January, 1989. PW2 had the original child card with her in court which was marked as MF3. She informed the court that the appellant is her brother-in-law, a brother to her husband, who stays about 20 metres from where she stays. She testified that on 8th January, 2009 she went to work on her farm at around 6.00 a.m. and left the complainant with her son E (PW3) at home. She returned home at 10.00 a.m. when PW3 told her that the appellant had called him and told him to get for him the complainant. That the complainant went to the appellant's house but after a while came out of the house crying and carrying a black pair of panties.
11. It was the evidence of PW2 that she talked to the complainant who at times talks to her and she told her that the appellant pushed her into bed, pulled out her panties and penetrated her vagina using his penis. PW2 checked the complainant's vaginal area and saw some whitish substance. There were also some traces of blood. She reported the incident to the Assistant Chief who referred her to hospital. PW2 took the complainant to the nearest hospital where she was examined and treated by PW1. The complainant was issued with a P3 form. PW2 reported the incident to Etenje A.P Post on 8th January, 2009. PW2 informed the court that the appellant's wife was not at their home when the incident occurred. She stated that she had not differed with the appellant.

12. On cross-examination, PW2 told the court that she was told that the complainant cried when outside the appellant's house. She denied that her husband is the one who defiled the complainant. She also stated that she did not wash the complainant before going to hospital on the date of the incident and that she refused to settle the matter home (sic) since the child had been defiled.
13. PW3, **E.O** was a child of 10 years of age. He was taken through voir dire examination and gave sworn evidence. He testified that on 8th January, 2009, at 8.00 a.m. while at home with the complainant, his uncle, the appellant, called him and told him to get for him the complainant who is his sister. The complainant went to the appellant's house which is nearby. The appellant closed the door after PW2 entered. The two were in the house alone. After some time the complainant came out of the house crying, holding her black pair of panties which were identified by PW3. At that time their mother PW2 was in the shamba. On returning home, the complainant told her about the incident and PW3 narrated to her what had happened. PW2 took the complainant to hospital on the same day. PW3's evidence was unshaken and consistent even under cross-examination.
14. PW1, Raphael Oduor was working as a Registered Clinical Officer at Bukhaya health Centre when on 8th January, 2009, he received a patient, (the complainant) by the name **P.O** (sic) who was reported to be 14 years old and to have been defiled by her uncle. The complainant was stable and looked somehow mentally retarded. On examining her, PW1 saw some discharge around the vaginal area. He sent the complainant to the laboratory for further examination and the laboratory report indicated that the discharge was sperms and epithelial (sic) cells were noted. PW1 concluded that there was penetration since the sperms were present and the wall of the vagina had bruises. The complainant was injected with preventive medicine for HIV and Sexually Transmitted Diseases. She was given patient No.20013/2003. PW1 produced the treatment notes and P3 form in evidence.
15. On cross-examination, PW1 testified that it was the complainant's mother who reported to him about the incident as the complainant was not in a position to give information.
16. PW4, A police officer attached to Musanda police station received the report from PW2 on 9th January, 2009 about the rape incident. PW2 was accompanied by the complainant and an A.P Officer by the name Dorice Mwangi. The complainant had been examined and treated at Bukhaya Health Centre. He issued PW2 with a P3 form. The complainant was examined and found to be mentally unstable. The clinic card availed by PW2 showed that the complainant was 20 years old. PW4 produced the pants, clinic card and mental assessment report in evidence.

### **The Defence case**

17. The appellant denied having committed the offence and informed the court that on 8th January, 2009 he left home in the morning and went to do his work of a boda boda operator at Musanda Centre. He returned home in the evening to be told that he had raped **P.A**. That Administration Police Officers from Etenje went to his house and conducted a search where they recovered bhang and arrested him. He was taken to Etenje Police Post and to Musanda Police post the following day where he saw **P.A** and PW2. He was then accused of raping **P.A**. He also said that he has land disputes.

### **Determination of the appeal**

18. The appellant was correct in submitting that the charge leveled against him was defective. The evidence adduced in this case was at variance with the charge as framed. The appellant was charged with the offence of rape of a person with mental disability contrary to section 7 of the Sexual Offences Act, No. 3 of 2006. The particulars of the charge were that-

***" On the 8th day of January 2009 at about 8.00a.m at [Particulars Withheld] village, Eshakalame sub-location, Musanda location in Mumias District within Western Province***

***intentionally without any consent from the complainant caused his penis to penetrate the vagina of P.A, a woman aged 20 years with mental disability".***

Section 7 of the Sexual offences Act No.3 of 2006 reads as follows:-

***"A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years".***

It is evident that the prosecution got it wrong from the word go. The evidence adduced in the lower court does not show that the offence of rape occurred "***within the view of a family member, a child or a person with mental disabilities***".

19.This court notes that the appellant should have been charged with the offence of incest by male persons under the provisions of section 20(1) of the Sexual Offences Act No.3 of 2006. The said section provides as follows:-

***"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed as incest and is liable to imprisonment for a term of not less than ten years.***

***Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life, and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."***

20.The Criminal Procedure Code at section 382 provides as follows-

***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings before or during the trial or in any inquiry or other proceedings under this Code , unless the error, omission or irregularity has occasioned a failure of justice:***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings".***

21.This court finds that the appellant did not suffer any prejudice as a result of being charged with the offence of rape. He was aware that the offence he was charged with related to sexual assault, he cross-examined the witnesses. In his defence, he denied having raped the complainant. The only difference between a charge of rape and incest by males is that the latter relates to sexual assault of a ***daughter, granddaughter, sister, mother, niece, aunt or grandmother***. This court holds that the defect in the charge is curable under the provisions of section 382 of the Criminal Procedure Code.

22.On the issue of the age of the complainant, it was apparent that different ages were cited in the P3 form and in the report made to PW4. The record shows that the mental assessment report produced in court gave the age of the complainant as twenty (20) years. The complainant's mother informed the court that the complainant was twenty (20) years old, having been born on 26th January, 1989. This court has no reason to doubt the age given by the complainant's mother as she is the one who gave birth to her. I have also no reason to doubt the age given in the mental assessment report. The complainant's birth card was produced in evidence by PW4. It showed that she was 20 years old. I find that the ground of appeal premised on the age of the complainant without basis.

23. The appellant also raised the issue of PW2 having noted traces of blood on the vaginal area of the complainant, yet the PW1 did not observe any blood on the complainant's private parts. This court notes that PW2 observed traces of blood on the complainant's vaginal area at 10.00 a.m. She reported the matter to Assistant chief of Shikalame. The Assistant Chief referred her to hospital. PW2 however reported the incident to Etenje A.P post first before going to hospital. She was at all times accompanied by the complainant. This shows that the complainant was not taken to hospital right after PW2 was informed that she had been raped. She first followed due process. The non observance of the traces of blood by PW1 does not vitiate the fact that the complainant was sexually assaulted.

24. The appellant submitted that the Assistant Chief was not called to give evidence. This court is alive to the fact that the prosecution only calls to court witnesses that they deem to be material in proving their case. In this regard, I am guided by the provisions of Section 143 of the Evidence Act which states as follows:-

***“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of a fact”***

In the case of **Cliff Bikeri Mokuu and Another Vs. Republic [2014] eKLR**, the Court of Appeal stated that ***“the duty of the prosecution is to present before the trial court such witnesses as it thinks will establish its case beyond reasonable doubt”***.

It therefore follows that the prosecution did not consider Elisha, the Assistant chief of Shikalame to be a material witness in their case and this court cannot hold that Elisha was not called because he would have given evidence adverse to the prosecution.

25. The evidence on record shows that it was PW2 and not PW3 to whom the complainant explained that the appellant had raped her. PW2 stated thus ***“I asked the complainant who sometimes talks to me. She told me that the accused man pushed her into (sic) his bed. Pulled out her panties, and then proceeded to penetrate her vagina using his penis”***. When the complainant was giving the said information to PW2, PW3 was present and he also told his mother, PW2, what he knew about the incident.

26. This court finds that although there were no eye witnesses to the rape incident, the complainant who was certified as being mentally retarded thus unable to give evidence on her own behalf, was raped by her uncle. The learned trial magistrate believed the evidence of PW3, who was a minor. The magistrate found his evidence credible, clear, consistent and cogent. This court has no reason to doubt what the magistrate observed in court on the demeanour of PW3, who appeared thoroughly honest.

27. It is my finding that the evidence of PW3 on what happened on the material day is corroborated by medical evidence that was adduced by PW1 which showed that the complainant had been raped. This court finds that the appellant is the one who had the opportunity to rape the complainant after he sent PW3 to tell her to go to his house. After a while, the complainant came out of the appellant's house while crying and holding her black panties in her hands. PW3 did not say that the complainant was holding her black panties as she entered into the appellant's house. It is therefore evident, that the appellant removed the complainant's panties for ease of access in raping her. The evidence of PW2 was to the effect that the appellant's wife was not at home when the incident occurred. It is thus clear that the appellant planned and executed his plan to rape the complainant when she was defenceless with the only person in the compound being an unsuspecting 10 year old boy, PW3. The appellant knew that his niece, the complainant, was mentally retarded and pushed his luck too far by taking advantage of her mental retardation.

28. The appellant's alibi defence was considered by the trial magistrate who dismissed it as the evidence of PW3 put the appellant right at the scene of crime. In the case of **Victor Mwendwa Mulunge vs. Republic [2014] eKLR**, the Court of Appeal stated the following on the issue of

alibi:-

***“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution, see also Karanja vs. Republic [1983] KLR 501 – where the court held that in a proper case a trial court may, in testing a defence of alibi and in weighing it with all other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”***

29.The Court of Appeal in the case of **Moses Nato Raphael vs. Republic [2015] eKLR** relied on the decision of **Victor Mwendwa Mulinge (supra)** in upholding the conviction and sentence in a defilement case. This was on finding that the prosecution placed the appellant right at the scene of the incident through the testimony of the complainant. This court finds that the alibi defence was an afterthought and is dismissed accordingly.

30.Section 184 of the Criminal Procedure Code provides that:-

***“When a person is charged with rape and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections of the Sexual Offences Act, he may be convicted of that offence although he was not charged with it”.***

31.I invoke the provisions of section 184 of the Criminal Procedure Code and substitute the charge the appellant was originally charged with, with the charge of incest by male persons contrary to the provisions of section 20(1) of the sexual offences Act No. 3 of 2006. Having found that the appellant committed the offence, I hereby convict him for the said offence and sentence him to serve twenty years imprisonment as from 23rd February, 2011, being the date of his conviction and sentence in the lower court.The appeal fails in its entirety. The appellant has the right of appeal.

**DELIVERED, DATED and SIGNED at KAKAMEGA on this .....18<sup>TH</sup> ..... day of .....DECEMBER, ....., 2015.**

**NJOKI MWANGI.**

**JUDGE.**

**In the presence of:-**

..... **for the Applicant.**

..... **for the Respondent.**

..... **Court Assistant.**