

reported to the village elders who advised them to report to the police. The complainant was examined by Robert Langat, a clinical officer attached to Lodwar District Hospital. He produced a P3 form that showed the complainant had no physical injuries to the genitalia but her hymen was broken which was suggestive of a sexual act. The age assessment of the complainant was also given as 14 years old at the time, thus the offence was proved to the required standard.

5. This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing, this court should bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **NJOROGE VS. REPUBLIC [1987] KLR 19**. I now wish to set out, albeit briefly the evidence before the trial court which led to the conviction and sentence of the appellant. The evidence that led to the conviction of the appellant was principally read by the complainant **G.A**, a young girl aged 14 years.

6. The learned trial magistrate after conducting a *voire dire examination* of the complainant found that she possessed sufficient intelligence and understands the essence of being sworn. She was accordingly sworn and gave evidence of how on the 2nd January, 2010 she had gone to sleep in the house of **Akosa**, a neighbor who had travelled and left the complainant to watch over her three small children. While the complainant was sleeping with the three young children at the middle of the night, the appellant sneaked into the house, the complainant found somebody lying on top of her. She tried to struggle but the appellant overpowered her. He pulled her skirt and under pants and defiled her for about five minutes and after the appellant had ejaculated, he walked away to his home. The complainant woke up crying and went to the house of PW2 and reported to them that she had been defiled by the appellant.

7. The complainant told the trial court that she recognized the appellant because they were together the previous day and he was wearing the same clothes he had during the day. Further the appellant was also from the same village with the complainant. When the appellant finished defiling the complainant, she said that she saw him walk towards his home and there was moonlight which enabled the complainant identify her attacker. The following morning the matter was reported to the elders who searched for the appellant but he had disappeared and was arrested on 3rd January, 2010.

8. The complainant was examined by **Robert Langat**, a clinical officer who testified as PW4. He produced the P3 form that showed the complainant had no physical injuries to the genitalia but her hymen was broken which was suggestive of a sexual act. The age assessment of the complainant was carried out by Gabriel Momanyi, PW5 from Lodwar District Hospital. He confirmed that the complainant was aged 14 years. The learned trial magistrate also referred the appellant for age assessment and a report which was apparently compiled by the same PW5 (although it was done informally) concluded that the appellant was aged 17 years. The appellant was arrested by Patrick Ndungu, PW3 after he was brought to the police station by the members of the public. The appellant was put on his defence. He gave a sworn statement and denied having had anything to do with the offence.

9. This trial only exposes one serious anomaly; the proceedings show that on the 9th February 2010, the learned trial magistrate noted that the appellant appeared to be a child. He directed an age assessment be conducted before he could deliver a judgment. On 16th February, 2010, the court indicated that the age assessment of the accused person was done and his approximate age was given as 17 years. The learned trial magistrate delivered the judgment but referred the matter to the **Senior Resident Magistrate** who is a dully gazetted children's magistrate to determine the sentence. It appears the Learned Senior Resident Magistrate did not refer to the provisions of the Children's Act in sentencing the appellant.

10. Under the provisions of the Children's Act, the Senior Resident Magistrate was supposed to deal with this case which was remitted to his court, as if he had tried the appellant who was a minor. Thus the best interest of the appellant should have been the guiding principle in determining the sentence. The methods of dealing with a child offender and the sentences provided for under section 191 of the Children's Act were not followed. The sentence of 20 years is not provided for under the Children's Act for a child offender. It is for that reason I will allow this appeal, quash the conviction and set aside the sentence of 20 years. Unless the appellant is otherwise held he is to be set at liberty.

Judgment read and signed this 25th day of February, 2011.

M.K. KOOME.

JUDGE.