REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E002 OF 2020

BETWEEN

JM.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Tigania Principal Magistrate's Court Criminal SO Number 16 of 2018 by Hon. G.Sogomo (SRM) on 18th September, 2018)

JUDGMENT

The Trial

1. **JM (*Appellant*)** has filed this appeal against conviction and sentence on a charge of incest by male contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006.The offence was committed on 02nd February, 2018 against **TKM,** Appellant's daughter aged 12 years.

2. The prosecution called 5 witnesses. **PW1 TKM**, the complainant stated that she was 12 years and in class 4 at [Particulars withheld] Primary School. She recalled that on 23rd February, 2018 at about 03.00 pm, she was at home with her siblings KJ, M, P and K when their father, Appellant herein arrived home, picked a gunny bag, chased away her siblings, spread the gunny bag in the living room and defiled her there. It was her evidence that she reported the matter to her mother. **PW2 RMM** complainant's mother reported she arrived home at home at about 05.00 pm and was in the process of questioning complainant who appeared to be in pain when Appellant arrived and chased her and the children away. The matter was reported to police and Appellant was subsequently arrested on 01st March, 2018 by **PW4 PC STANLEY KIPCHUMBA** and charged. Complainant's mother stated that complainant was born in 2011 on a date she could not recall.

3. Complainant was examined on 01.03.2018 by **PW3 Geoffrey Muthomi,** a clinical officer who found that her hymen was torn upon which he formed an opinion that complainant had been defiled. He tendered complainant's P3 form as PEXH. 1.

THE DEFENCE CASE

4. In his sworn defence, Appellant stated he was employed by one Njeru Kabina and was away at his place of work when the offence was allegedly committed. He stated he returned home on 01.03.2018 to find a police officer one Mugo fondling his wife and when he went to report the incident to his superiors, he was arrested and framed with this offence.

5. The learned trial magistrate considered the evidence and finding the charge proved sentenced Appellant to 20 years' imprisonment.

The Appeal

6. By his amended grounds of appeal, Appellant raises two main issues that: -

   i. **That the prosecution case was not proved**

   ii. **Defence of alibi was not considered**

7. Appellant contended that the evidence by complainant and her mother was contradictory as to the events of the day with complainant stating that she reported the incident to her mother and her mother stating that she is the one that questioned the complainant as to why she

was lying on a gunny bag. He faulted the prosecution for not availing crucial witnesses, and the court, for wholly relying on evidence that complainant's hymen was broken and for disregarding his defence of alibi.

8. Ms. Mbithe, learned State Counsel submitted that prosecution proved that complainant was 12 years old and had been defiled by Appellant who was her father.

Analysis and determination

9. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (See **Okeno vs. Republic [1972] E.A.32**).

10. I have considered the evidence on record in the light of the grounds of appeal and the submissions on behalf of both parties will address the issues as hereunder.

11. Complainant was the sole witnesses to the commission of the offence.

12. I have considered the provisions of **Section 124** of the Evidence Act Cap 80 Laws of Kenya which provides that:

> **notwithstanding the provision of section 19 of the Oath and Statutory Declaration Act**, **where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in a proceeding against any person for an offence, the accused person shall not be liable to conviction of such evidence unless it is corroborated with other material therefore implicating him.**

13. **Further; Section 124** of the Evidence Act Cap 80 Laws of Kenya provides that:

> **Provided that in criminal cases involving a sexual offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.**
>
> **In light of section 19 of the Oath and Statutory Declaration Act, if the court is receiving the evidence of a child of tender age, it must be of the opinion that she/he possessed of sufficient intelligence to understand the duty of speaking the truth. If such a child willfully gives false evidence on oath, he/she will be guilty of perjury.**

14. From the evidence on record, the trial court did not make a finding or record in the proceedings the basis on which it satisfied itself that the complainant was telling the truth.

15. The P3 Form tendered as evidence demonstrates that complainant's labia minor and majora were intact but an opinion was formed that she had been defiled because the hymen was torn. On the basis of the P3 Form, the trial magistrate observed as follows:

> **"The testimony of the complainant in regard to sexual violation was confirmed by the medic through the entries in the P3 form"**

16. The issue for determination is whether a broken hymen is *primafacie* evidence of penetration. In **PKW versus Republic [2012] eKLR**, the Court of Appeal observed that:

> **"Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen."**

17. From the foregoing, it is apparent that the evidence of broken, ruptured, or torn hymen is not automatic proof of penetration through a sexual act. In this case, it was upon the prosecution to establish, beyond reasonable doubt, that complainant's hymen was torn by an act of defilement by the Appellant.

ii. Defence of alibi was not considered

18. Tied to the first issue of determination is the 2nd issue where the Appellant denied the offence and raised the defence of alibi.

19. The trial court rejected the Appellant's defence of alibi on the ground that at one instance Appellant stated he was at his employer's homestead and in another that he had gone to school to pay fees.

20. I have considered the defence as recorded in the trial file and whether Appellant was at his employer's home or at school, he maintained

that he was not at home when the offence was allegedly committed.

21. The Court of Appeal in the case of **Kiarie v Republic [1984] KLR** held:

> **"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."**

22. In the case of **Victor Mwendwa Mulinge vs Republic [2014] eKLR** the Court of Appeal held: -

> **"Even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with Section 309 of the Criminal Procedure Code to rebut the appellant's defence".**

23. Section 309 of the Criminal Procedure Code provides that: -

> **"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."**

24. It was alleged that the complainant was with her siblings when Appellant arrived and chased them away remaining only with the Appellant. The prosecution did not tender or apply to the court to obtain evidence for the purpose of rebutting the alibi of the Appellant more particularly by calling Appellant's other children to confirm that Appellant was indeed at the scene of the alleged crime on the material date and had sent them away and remained with the complainant.

25. I have considered the judgment of the trial court and I find that the Appellant's defence of alibi was not appropriately considered. I am of the considered opinion that the alibi cast a reasonable doubt on the uncorroborated prosecution case and the learned trial magistrate ought to have given the Appellant the benefit of the doubt in view of the fact that the prosecution case against the Appellant cannot be said to have been overwhelming.

26. In the end; I hereby reach a conclusion that the case against the Appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. Accordingly, the conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held. It is hereby so ordered.

DELIVERED AT MERU THIS 13th DAY OF May 2021

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Appellant - Present

For the State - Ms. Mbithe