**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM: A.K NDUNG'U J**

**CRIMINAL APPEAL NO. 63 OF 2019**

**DOMINIC ANGOTE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from the original conviction and sentence of Hon. R.M Oanda – PM dated 9th July, 2019 at the Principal Magistrate's Court at Kilgoris in Criminal(Sexual Offences)Case No. 6 of 2018)***

**JUDGEMENT**

**1.** The appellant was charged with **defilement** contrary to **Section 8(1)** and **(3)** of the **Sexual Offences Act No. 3 of 2006** and an alternative count of **indecent act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 21st and 23rd January, 2018 at [particulars withheld] Village in Migori County intentionally and unlawfully caused his penis to penetrate the vagina of JN, a child aged 15 years.

Alternatively, at the said time and place he intentionally and unlawfully touched the vagina of the said JN.

**2.** The appellant was tried and convicted in a judgement dated 9/7/2019 and sentenced to 20 years imprisonment.

**3.** Aggrieved by the conviction and sentence, the appellant vide a memorandum of appeal dated 22/9/2019 preferred an appeal against the whole decision/judgement of the trial court. He raised 24 grounds in support of the appeal.

**4.** These grounds can be summarized and condensed into the following;

1. **The conviction was based on insufficient evidence.**
2. **The trial court relied on forged evidence.**
3. **The trial court misapprehended the applicable law.**
4. **The trial court denied the appellant the opportunity to state his case.**
5. **The trial court relied on the prosecution evidence in total disregard of the evidence tendered by the appellant.**
6. **The sentence meted out was not proportional and commensurate to the alleged wrong.**

**5.** The appeal was canvassed by way of written submissions by learned counsel for the appellant, Mr. Oyagi which were highlighted orally on 25/2/2020 and a response made orally by Mr. Otieno for the DPP.

**6.** This is a first appellate court and I bear the onerous duty to re-evaluate the evidence adduced at trial and reach my own independent conclusion(s) all the while alive to the fact that I never saw or heard the witnesses testify and give due allowance in that regard.

**7.** That duty was well enunciated in the case of **Okeno –vs- R [1972]EA 32** where at page 36 the court stated;

*"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 –vs- R [1975] E.A 336). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusions; 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 –vs- Sunday Post (1958)E.A 424."*

**8.** The brief summary of the case at the trial court is as follows;

PW 1, a 15 years old, was at home on 21/1/2018. The appellant who had married her that Sunday came to her home. At 9.00 pm PW 1 and the appellant went to the appellant's house where they slept in the same bed and engaged in sex twice in the night. The father and mother of PW 1 (PW 2 and PW 3) pursued the matter leading to the arrest of the appellant.

**9.** Diana Masereti a clinical officer examined the complainant and filled out a P3 form. Her findings were that the hymen was broken but not freshly. There were no bruises or tears.

**10.** In an unsworn statement, the appellant stated that he did not know why he was in court. The charges were trumped up. The accusation was not true.

**11.** The only direct evidence linking the appellant to the offence herein is that of PW 1, the minor allegedly defiled. In her testimony, she states that the appellant took her away to his home. The appellant had married her. They engaged in sex twice.

**12.** The ingredients of the offence of defilement that need to be proved for a conviction to lie are;

1. Penetration
2. Identification or recognition of the assailant and
3. Age of the victim.

**13.** In our instant case the age of the minor raises no controversy and there is adequate evidence in support that she was 15 years old.

**14.** On identification (recognition) and penetration, PW 1's evidence is not corroborated by any other independent evidence. This on its own is not fatal to the prosecution's case. I place reliance on the decision in **Sahali Omar –vs- R [2017] eKLR** where the Court of Appeal stated;

*"The appellant contends that in order to be reliable, their testimony had to be corroborated. It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR).*

*In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:*

*"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."*

*The appellant has not taken any issue with the reasons recorded by the trial court."*

**15.** But there is a rider to this general exception. The trial court shall proceed to 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.

**16.** The minor in this case testified that she engaged in sex with the appellant twice in the night. This general statement *"engaged in sex"* is not explained further at all. PW 1 never adduced evidence that the appellant penetrated her.

**17.** Under the Sexual Offences Act penetration is defined as;

*"Penetration" means the partial or complete insertion of the genital organ of a person into the genital organ of another person."*

**18.** In the absence of a satisfactory graphic description of the act of the appellant, medical evidence would have come in handy to support penetration.

**19.** The trial magistrate at page 15 of the proceedings states;

*"Penetration can only be established by testimony of the child supported by the medical evidence."*

From this conclusion it is not explicable how the trial court proceeded to find that there was penetration. This for the following reasons.

**20.** The trial magistrate was not entirely correct to state that penetration can only be established by testimony of the child supported by medical evidence.

It is trite law under the proviso of **S 124** of the **Evidence Act**, a trial court can convict on the evidence of the victim of a sexual offence alone (See **Mohamed –vs- Republic [2008] KLR** and **Jacob Odhiambo Omuombo vs Republic**). However, the court is duty bound to satisfy itself that the victim is telling the truth and it must record the reasons for such belief.

**21.** As held in **John Mutua Munyoki vs Republic [2017] eKLR** it is not sufficient for the court to state that it believed the child was telling the truth of the occurrences of the material time. In the words of the Court of Appeal in the above case;

> *"What is required as we have already pointed out is for the trial court to be satisfied first, that the victim is telling the truth and thereafter record reasons for such belief."*

**22.** PW 1 did not testify that the appellant penetrated her. Even if one was to believe that she was telling the truth, her truth as seen in her evidence did not lead evidence showing that the appellant penetrated her.

**23.** Whereas the evidence of the minor falls short of establishing whether there was penetration, the medical evidence produced (P3 form) throws the question of penetration into sheer uncertainty.

**24.** In the medical report PW 4 notes there was no obvious discharge, no tears, no bruises. Hymen broken (not freshly broken), no spermatozoa, no pus cells.

In her testimony in court, she confirmed these findings and stated that from the history and examination she established the minor had been defiled.

**25.** This conclusion is not supported by the medical findings and the clinical officer needed to go a step further and explain why she in her view established that the minor was defiled. Penetration needed to be established or proved by the testimony of the child and supported by medical evidence would have come in handy to bolster it.

**26.** It is worthwhile to note that a broken hymen is not conclusive prove of penetration.

**27.** The Court of Appeal in **David Mwingirwa –vs- R [2017] eKLR** the Court of Appeal addressed this aspect of evidence and stated;

> *"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."*

**28.** The court made reference to its decision (Maraga and Rawal JJA, as they were) in P.K.W vs R on the issue of the proper view that courts ought to take on the fact of a broken hymen, without more. The court in that case stated;

> *"15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified" Is hymen only ruptured by sexual intercourse"*
>
> *16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) 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 riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769."*

**29.** Fortified by the finding above I am of the view that the fact of a broken hymen as seen in the P3 form herein without more is undeserving of serious weight in the absence of other corroborating evidence and had the trial magistrate not attached undeserved weight to this piece of evidence, he would have reached a different conclusion.

**30.** The onus to prove the case beyond reasonable doubt squarely lay on the shoulders of the prosecution and that remains so even where the

accused opts to say nothing in defence.

**31.** On the basis of the evidence on record, my evaluation leads me to the conclusion that the conviction herein was unsupported by evidence and was unsafe.

**32.** I find merit in the appeal. I accordingly allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Dated** and **delivered** at **Kisii** this **13th** day of **May, 2020**.

**A.K NDUNG'U**

**JUDGE**