**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL APPEAL NO. 35 OF 2020**

**WILSON MUTITU NJAU.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**{Being an appeal against the Judgement of Hon. C. N. MUGO – SRM Gatundu**

**dated and delivered on the 25th day of September 2019 in the original**

**Gatundu Chief Magistrate's Court Sexual Offence No. 36 of 2017}**

**JUDGEMENT**

The appellant was sentenced to fifteen (15) years imprisonment for the offence of gang rape contrary to Section 10 of the Sexual Offences Act. This appeal contests his conviction and the sentence imposed. The grounds of appeal are: -

**"1. That the learned trial magistrate erred in both law and facts on where the prosecution case was not proved beyond reasonable doubt in pursuant to *Section 107* of the evidence act.**

**2. That: the learned trial magistrate erred in both law and facts on where no exhibits were produced in court to ascertain indeed the minor was defiled i.e. the skirt and the pants, thus was no put into adequate consideration.**

**3. That: the learned trial magistrate erred in both law and facts on where minor was not examined within the 72 hours stipulated time as per the required law.**

**4. That: the learned trial magistrate erred in both and facts on where the appellant was not involved, thus no medical evidence [nexus] to link the appellant with the incident.**

**5. That: the learned trial magistrate erred in both law and facts on where penetration was not proved to have been committed beyond reasonable doubt.**

**6. That: the learned trial magistrate erred in both law and facts on contravention *of section 198 of the C.P.C.* where the language used appellant was not confrontable with to understand the court proceedings.**

**7. That: the learned trial magistrate erred in both law and facts on contravention *of article 49 of the constitution of Kenya* where he was taken to court after 24 hours of his detention.**

**8. That: the learned trial magistrate erred in both law and facts on where the charges were preferred only after appellant was already charged in court [already taken plea].**

**9. That: the learned trial magistrate erred in both law and facts on where there was no medical documentary evidence given to the appellant and neither during trial of appeal namely: p3, form among other documents.**

**10. That: the learned trial magistrate erred in both law and facts on where the mode and nature of arrest was doubtful.**

**11. That: the learned magistrate erred in both law and facts on where force used on the victim [minor] was not proved by the prosecution.**

**12. That: the erred (sic) trial magistrate erred in both law and facts on the issue of advisability of the p3 form in accordance with the law.**

**13. That: the erred (sic) trial magistrate erred in both law and facts on contravention of Section 163 [c] of the evidence act where there was contradictory, inconsistent, and incredible evidence.**

**14. That: the erred (sic) trial magistrate erred in both law and facts on issue of initial report investigation diary as stipulated by the law.**

**15. That: the erred (sic) trial magistrate erred in both law and facts on the issue of production of photographic evidence of the scene of crime which was doubtful and questionable.**

**16. That: the learned magistrate erred in both law and facts on where essential and crucial witness were not availed or summon by the court in contravention of *section 150 of the C.P.C.***

**17. That: the learned magistrate erred in both law and facts on where the appellant defense was rejected with no cogent reasons in contravention of *section 169 [2]* of the C.P.C.**

**18. That the learned magistrate erred in both law and facts on where there were no points or point of determination and the reasons for reaching such a decision in pursuant to *section 169 [1] of the C.P.C.***

**19. That: the learned magistrate erred in both law and facts on failing to observe the issue of sentencing policy and guideline and on the issue of *minimum mandatory sentence.”***

The appeal proceeded by way of written submissions. The appellant’s contention is that the case against him was not proved beyond reasonable doubt; that he did not understand the language used by the court; that he was not brought before a court of law within 24 hours as prescribed by the constitution, that the charges are trumped up, that his defence was ignored and that the sentence imposed is unconstitutional as it is a mandatory minimum sentence.

On his part, Learned Prosecution Counsel Stephen Kasyoka submitted that the prosecution evidence established all the requisite elements of the offence and that the conviction was safe and the sentence legal.

As the first appellate court my duty is to reconsider and analyse the evidence in the court below so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses ***(see Okeno v Republic [1972] EA 32).***

Before the court can determine that the offence of gang rape was proved it must be satisfied beyond reasonable doubt that there was penetration. **Section 2 of the Sexual Offences Act** defines penetration as follows: -

**“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.**

The testimony of the complainant in this case is that the appellant and his co-accused raped her after dragging her into a maize plantation. She stated that they took turns with her with two keeping watching while the other raped her. She stated that they covered her mouth so that she could not raise the alarm. From the language used it is difficult to determine whether wat took place was indeed defilement. Nowhere in her testimony did she mention that there was insertion of the perpetrator’s genital organs into hers. It behoved the trial Magistrate to ask the complainant what she meant by the words “rape and defiled” which she used interchangeably in her testimony. In the case of **Muganga Chilejo Saha v Republic [2017] eKLR** the Court of Appeal observed: -

**“Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like,** *“alinifanyia tabia mbaya”,* **(IE V R, Kapenguria H.C Cr. Case No. 11 of 2016),** *“he pricked me with a thorn from the front part of this body.”,* **(Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), “he used his thing for peeing”, (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), “he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), “he used his munyunyu”, (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like “he defiled me”, which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M M v R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her.”**

In the face of the technical language used and whereas **Section 124 of the Evidence Act** removes the requirement for corroboration in sexual offence, I find it difficult to conclude that the complainant was in fact defiled. This is more so in light of the medical evidence that the complainant had no injuries and even the bruises she and her mother (Pw2) alleged she sustained on the legs were not seen by the doctor. Dr. Far Mudachi (Pw3) testified that the doctor (Dr. Omoi) who examined the complainant arrived at the conclusion that she was raped based on the fact that her hymen was broken. In the judgement, the trial Magistrate also made it clear that she made the finding that there was

penetration because the doctor confirmed the complainant's hymen was broken.

In determining a similar issue in the case of **PKW v Republic [2012] eKLR** the Court of Appeal 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"***
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> ***16. 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 the 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 natural tearing of the hymen. See the Canadian case of*** The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769.
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> ***17. In this case the doctor who examined the complainant child was not asked whether or not the rupture of her hymen was as a result of sexual intercourse or any other factor."***

It is therefore clear that a broken hymen perse is not evidence of penetration and the trial Magistrate therefore erred in relying on that evidence alone. I have perused the judgement and I do not find anywhere where the court stated that it believed the complainant meaning that the court did not base its conviction on **Section 124 of the Evidence Act.** On my part I have stated that in view of the technical language used by the chid and given that there is no other evidence from which penetration can be established it is difficult to conclude there was penetration. I must therefore give the accused the benefit of doubt in so far as the charge of gang rape is concerned.

I would have convicted the appellant on the alternative charge of indecent act with a child but for the fact that her evidence did not support the particulars of that offence because while I believed her testimony that the appellant fondled her breasts, the particulars of the offence of indecent act were that the appellant and his co-accused touched her vagina with their penises. The evidence adduced does not therefore support the charge and accordingly this court is not in a position to convict the appellant even on the alternative charge.

In the premises the appeal is allowed, conviction quashed and the sentence of imprisonment for fifteen (15) years is set aside and the appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Signed and dated this 28th day of October 2020.**

**E. N. MAINA**

**JUDGE**

**Judgement dated and delivered Electronically via Microsoft Teams on this 9th day of November 2020.**

**MARY KASANGO**

**JUDGE**