



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 36 OF 2019**

**BETWEEN**

**CALVINS OGINGA JAGERO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against judgment, conviction and sentence in Winam Criminal SO Number 36 of 2017 by Hon. J. Mitey (SRM) on 05<sup>th</sup> July, 2019)**

**JUDGMENT**

**Background**

1. **CALVINS OGINGA JAGERO** (*Appellant*) herein has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (*the Act*). The offence was allegedly committed against **VAO** a girl aged 13 years on 04<sup>th</sup> December, 2017.
2. The prosecution called 6 witnesses in support of the charges. **PW1** the complainant herein stated that she was born on 04.09.04 as shown by her certificate of birth **PEXH. 1**. She recalled that on 04.12.17 at about 09.00 pm, she was going to Mama A's home where she normally spent nights when the Appellant who was their neighbour called her to his house allegedly to pick something but when she got there, he defiled her. She stated that she spent the night in Appellant's house where she was rescued by her father and other people the following day after which she was taken to the police station where she reported the matter and was later taken to hospital where she was examined.
3. **PW2 W O O**, the complainant's father recalled that on 04.12.17 at about 09.00 pm, he escorted complainant and her 4-year-old sister to go and sleep in a neighbour's house and that he left after ensuring that they were safely in the house. That after a short while, the 4-year-old returned home and reported that the complainant had gone away with Calvin. It was his evidence that he reported the matter to police the following day and upon arrest the Appellant led them to his house where the complainant was locked up. stated that the complainant was born on 25.01.98 as shown on her immunization card. She recalled that on 08.07.13, complainant disappeared from home at about 07.00 pm and she found her in the house of the Appellant and took her back home. It was her evidence that complainant disappeared a week later and was traced months later and arrested together with the Appellant. **PW4 J A O** was in company of PW3 when Appellant led them to his house where complainant was found locked up.
4. **PW3 DR. JOY KALONDU** produced complainant's P3 form filled by her colleague Dr. Joyce Omondi on 01.03.18 which showed that complainant had no injuries but the hymen was broken.
5. **PW5 CHRISTINE LUREMBE** a clinical officer produced the complainant's PRC form filled by her colleague Austin on 05.12.17 which showed that complainant had no injuries but the hymen was broken.
6. **PW6 PC STEPHEN WAFULA** took over the case long after accused was arrested and charged.
7. In his sworn defence, the denied the offence. He said he was framed by the complainant's father to whom he sold a phone and he refused to pay. He stated he met complainant's father on 04.12.17 and threatened to report him to the police if he did not pay him. He stated that on 05.12.17, complainant's father and PW4 took him to a house which they opened and complainant came out and together they were taken to the police station where it was alleged he had defiled complainant.

8. In a judgment dated 05<sup>th</sup> July, 2019, the Appellant was convicted and sentenced to 20 years' imprisonment.

### **Appeal**

9. Being dissatisfied with the sentence, the Appellant lodged the instant Appeal on 11.07.17. From the grounds of appeal and submission filed on 05.11.19, the Appellant asserts that the prosecution case was not proved to the required standard.

10. The state submitted that the prosecution case was proved and urged that the appeal be dismissed.

### **Analysis**

11. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that: -

**"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."**

12. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under **the Act**. These are the age of the victim, penetration and identity of the offender.

13. Complainant's certificate of birth born on 04.09.04 and was therefore allegedly committed. **PEXH. 1.** established that she was 13 years when the offence was

14. Section 2 of **the Act** defines penetration to entail: -

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

15. Both the P3 form and the PRC forms showed that complainant had no injuries but that her hymen was broken.

16. I have considered the events of the material night as explained by the complainant and her father. Whereas complainant's father stated that he escorted complainant and her 4-year-old sister to go and sleep in a neighbour's house and that he left after ensuring that they were safely inside the house, complainant stated that he was walking to the neighbour's house alone when he was called by the Appellant. Complainant does not make reference to her father escorting her to the neighbour's house nor was it explained at what point she left the house that her father left her so as to go into the Appellant's house.

17. On the other hand, whereas complainant's father and PW4 alleged that Appellant opened the house where complainant was allegedly found, complainant told court that the house was broken into.

18. Witnesses whose sole evidence the state wholly relies upon in support of its case should not raise any doubt in the mind of the court that they are untruthful witnesses. The variance between the evidence by the complainant and her father should have raised judicial antenna in the mind of the trial court that complainant and her father were either being economical with the truth or untruthful especially in view of the Appellant's defence that he had been framed after complainant's father failed to pay for a phone that he had sold him, the court ought to have treated the evidence of complainant and her father with caution.

19. Although complainant was found with a broken hymen, I am unable to agree with the trial court that the Appellant had been identified as the assailant.

20. In view of the foregoing analysis, I find and hold that the prosecution case was not proved to the required standard and that the conviction and sentence were unsafe. Accordingly, I quash the conviction and set aside the sentence. Unless otherwise lawfully held, I order that appellant shall be set at liberty forthwith.

**DATED AND SIGNED THIS 11<sup>th</sup> DAY OF December 2019**

**T. W. CHERERE**

### **JUDGE**

In the presence of-  
Court Assistants - Amondi/Okodoi  
Appellant Present in person  
For the State - Ms. Gathu