REPUBLIC OF KENYA
IN THE HIGH COURT

AT SIAYA

CRIMINAL APPEAL NO. 52 OF 2016

BETWEEN

ELLY OTIENO OGWANG.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of

Hon. M. Obiero, PM dated 26th April 2016 at Bondo Principal

Magistrates' Court Criminal Case No. 1113 of 2014)

JUDGMENT

1. The appellant, **ELLY OTIENO OJWANG**, was charged, tried and convicted of the offence of defilement contrary to **section 8(1)** and **(4)** of the ***Sexual Offences Act***. The particulars of the offence were that on 25th November 2014 in Rarienda Sub-County the accused intentionally caused his penis to penetrate the vagina of **MAO** a child aged 16 years. He was alternatively charged with committing an indecent act with a child contrary to **section 11(1)** of the same ***Act***. The particulars of the offence were that on the same day and at the same place, he touched the vagina of the said **MAO**.

2. In his petition of appeal, the appellant raised several grounds of appeal. He contended that the trial magistrate erred in making a finding that there was penetration when the medical evidence did not support such finding and that the prosecution did not adduce sufficient evidence to support the conviction. He further contended that the trial magistrate erred in finding that the testimony of the complainant and accused were corroborative when in fact they were in total variance. Counsel for the appellant faulted the trial magistrate for failing to consider that the complainant's evidence was influenced by her incarceration. He submitted that the trial magistrate did not consider the appellant's defence.

3. Counsel for the respondent supported the conviction and sentence on the ground that all elements of the offence were proved to the required standard and that complainant gave clear and convincing testimony to support the conviction.

4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see or hear the witnesses testify as to form its own opinion on their demeanor (see ***Okeno v Republic*** **[1972] EA 32**).

5. The summary of the prosecution case is that on 23rd November 2014, the complainant, PW 1, accompanied her grandmother and other girls to a church in Asembo where the appellant was a pastor. After church, the girls remained behind while their grandmother went back home. In the evening, PW 1 went to spend the night at the appellant's house. On 25th November 2014 while PW 1 was still at the appellant's home, the appellant approached her and told her that he was interested in marrying her. PW 1 recalled that on the same night the appellant called her out of the house and led her to a nearby bush where he proceeded to defile her. The clinical officer, PW2, who examined her concluded that she had been sexually assaulted as the hymen was broken. On 3rd December 2014, the area Assistant Chief, PW5, arrested the appellant and he was later arraigned in Court.

6. In his defence the appellant, gave an alibi and stated that on the material date, he was away in Seme where he had gone to preach. He testified that he left home on 23rd November 2014 and was arrested on 3rd December 2014 while still in Seme. The appellant called two witnesses to support his alibi. DW 2 testified that he invited the appellant to the fellowship which was to begin on 23rd November 2014 in Seme. The appellant arrived there at around 4:00pm and was there for two weeks. The appellant's wife, DW 3, also testified and stated that the appellant was away in Seme for two weeks starting on 23rd November 2014. On cross examination, DW 3 stated after the appellant left for Seme, PW 1 came to her home in the company of other girls for choir practice and to work in the church farm.

7. The main issue for determination in this case is whether the prosecution proved its case beyond doubt. The appellant contended that penetration was not proved as the trial court erred in relying medical evidence that did not support a case of defilement. Counsel for the appellant submitted that the absence of hymen *per se* is not proof of penetration. PW 3 testified that after carrying out a medical examination he arrived at the conclusion that PW 1 had been defiled because the hymen was missing. I agree with the appellant that the absence of a hymen is not conclusive proof of penetration as the same could be caused by other physical exertions and as such the medical evidence cannot be solely relied on to prove penetration (see ***PKW v Republic*** **[2012]eKLR** and ***David Kasuti v Republic*** **BGM HCCRA No. 40 of 2015 [2017]eKLR** and ***D v East Berkshire Community Health NHS Trust*** **[2005] 2 AC 373**).

8. The other ground of appeal is that the trial court relied on the evidence of a hostile witness. The record shows that after PW 1 was sworn in and had given part of her testimony, the prosecution applied for her to be declared a hostile witness and to be remanded at the Juvenile Remand Home for 8 days. The trial magistrate obliged and remanded her for 7 days. She returned and proceeded to testify. Before I deal with the substance of the evidence, let me comment on the procedure adopted by the trial magistrate.

9. From the record, the trial magistrate erred in the manner it treated PW 1. **Section 152** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** sets out who a refractory witness is and provides how such a witness should be dealt with. It states:

> *152 (1) Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence*
>
> *(a) refuses to be sworn;*
>
> *(b) Having been sworn, refuses to answer any question put to him; or*
>
> *(c) Refuses or neglects to produce any document or thing which he is required to produce; or*
>
> *(d) refuses to sign his deposition, without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for any period not exceeding eight days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him.*
>
> *(2) If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again adjourn the case and commit him for the*

same period, and so again from time to time until the person consents to do what is so required of him.

(3) Nothing contained in this section shall affect the liability of any such person to any other punishment or proceeding for refusing or neglecting to do what is so required of him, or shall prevent the court from disposing of the case in the meantime according to any other sufficient evidence taken before it.

10. PW 1 was not a refractory witness as she was able to answer the questions put to her. The complaint by the prosecutor was that she was retracting the statement she had earlier made to the police. In substance, she was a hostile witness thus the trial magistrate therefore erred in remanding her in custody. The trial magistrate ought to have declared her a hostile witness. Once the witness was declared hostile, the prosecutor was entitled to cross-examine the witness by putting to her the previous statement she recorded with the police in accordance with **sections 153**, **154**, **161** and **163** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***.

11. Although the trial magistrate did not declare PW 1 hostile, she was for all intents and purposes a hostile witness particularly given the fact that the prosecutor had already applied for her to be declared as such and her testimony was affected by the stint in the Juvenile Remand home for 7 days. I now turn to the weight to be given to evidence of a hostile witness.

12. The evidence of a hostile witness is of little value as the court stated in ***Batala v Uganda*** **[1974] EA.402** that;

The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable it enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile and it can be given little, if any, weight.

13. In the case of ***Daniel Odhiambo Koyo v Republic*** **KSM CA Criminal Appeal No. 182 of 2010 [2011]eKLR,** the Court of Appeal held that the probative value of such evidence is negligible and may only be relied upon in clear cases to support the prosecution or the defence case. Quoting ***Maghenda v Republic*** **[1986] KLR 255**, the Court observed that, *"[T]he evidence of a hostile witness must be evaluated in particular if he intends to favour the accused though it may not necessarily be acted upon by the court"*.

14. The question then is, if the correct weight was placed on the testimony of PW 1 could the court have still convict the appellant? Apart from the medical evidence of the clinical officer, the only direct evidence was that of PW 1 who was a hostile witness. In these circumstances, I am constrained to adopt what the Court of Appeal stated in ***Abel Monari Nyanamba & 4 Others v Republic*** **NRB CA Criminal Appeal No. 86 of 1994[1996]eKLR** that;

The evidence of a hostile witness is indeed evidence though generally of little value obviously, no court found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.

15. In light of the findings I have made, the conviction is unsafe. The appeal is allowed and the conviction and sentence quashed. The appellant is set free unless otherwise lawfully held.

DATED and SIGNED at SIAYA this 2nd day of February 2018.

D. S. MAJANJA

JUDGE

Appellant in person.

Ms Odumba, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State

Court Assistants: L. Odhiambo and L. Atika