IN THE COURT OF APPEAL

AT NYERI

SITTING AT MERU

(CORAM: GITHINJI, KARANJA & KIAGE, JJ.A.)

CRIMINAL APPEAL NO. 23 OF 2015

BETWEEN

DAVID MWINGIRWA…………………………...…………….APPELLANT

AND

REPUBLIC ....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Meru (Wendo, J.), dated 6th March, 2015

in

H.C.CR.A. No.155 of 2010)

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JUDGMENT OF THE COURT

This is an appeal by the appellant **D M** against the judgment of the High Court of Kenya at Meru **(Wendoh, J.**), dated 6th March, 2015 by which it dismissed his first appeal against conviction and the life sentence imposed by the Principal Magistrate at Isiolo for the offence of incest by a male person contrary to **Section 20(1) of the Sexual Offences Act**.

The particulars of the offence, as rather inelegantly crafted, were ***"that on the 3rd and 4th days of March, 2012 at [Particulars withheld] in Isiolo District within Eastern Province, the appellant committed an act namely penetration of the genital organ of L K by his genital organ who to his knowledge was a daughter."***

Following the appellant's plea of not guilty, a trial was conducted in which the prosecution called a total of four witnesses including **L K** herself who testified on oath after a *voir dire* examination which satisfied the trial magistrate that she was possessed of sufficient intelligence and understood the solemnity of an oath. The gist of the prosecution case, which the two courts believed, was that on the night of 3rd July, 2010, **L K** was asleep on the bed she shared with her younger sister ***O*** in the single room house they ordinarily shared with their parents. That house was partitioned into three with the aid of some *lessos*. The appellant was at home but not so **L K** 's mother (PW2) who had gone to visit her parents at Timau earlier in the week.

At about 10.00 p.m, while **L K** was asleep, the appellant went to her part of the house and carried her from her bed to his. He told her to keep quiet while he removed her biker and panties and lay on top of her. As she cried he increased the volume of the radio that was on. He then unzipped the fly of his trousers and inserted his penis into her vagina. She felt pain as he penetrated her but her screams could not be heard due to the loud radio. She did not bleed however. When he finished he told her to go back to her bed which she did.

In the morning **L K** woke up and made tea which the three of them took together. She then proceeded to school where she did examinations before returning home in the afternoon. She mentioned in the appellant's hearing that she could not sleep in that house. She wanted to go and sleep with another girl but the appellant prevented her from doing so. That evening, the three had supper and retired for the night. At about 3.00 a.m., the appellant went and carried her to her house again and she came to realize it when he penetrated her. When he finished he allowed her to go back to her bed.

When PW2 came back the next day, **L K** narrated to her what the appellant had done to her. PW2 asked **L K** to take a bath, which she did and then escorted her to Isiolo Police Station where the incident was reported. **L K** was sent to the General Hospital where she was examined by **Mohammed Duba** (PW5), a Clinical Officer who filled and issued her with a P3 Form. The hymen was found to be broken but there was neither discharge nor any other visible sign of physical injury.

A neighbour of the appellant one **Jackson Mahiu** (PW3) who lived in the single room adjacent to the appellant's testified that on 3rd March, 2010, at about 10.00 p.m. he was resting in his house when he heard the appellant's house creaking. Peeping through a crack in the timber wall he saw the appellant atop **L K** and having sex with her, which he repeated at 1.00 a.m. He did nothing about what he saw but the following night at about 9.00 p.m. he heard the appellant's bed creaking, and **L K** groaning and coughing as before. He called another neighbour named **Kathur**e and her husband who also came, peeped and saw the appellant atop **L K** but on hearing the neighbours the appellant asked aloud if the children had slept, to which **L K** replied they had not. The three neighbours went to **Kathure'**s house and discussed the matter, agreeing that she would report in the morning.

The following evening, PW3 met PW2 and narrated to her what he had seen and advised her to take the child for medical examination. He was to learn from PW3 that when she questioned the appellant about the incident he beat her and she had to go sleep at **Kathure**'s house. This **Kathure** and her husband were not called as witnesses.

When he was placed on his defence, the appellant denied the charge and contended that the charge against him was fabricated by his wife because she and he had fought and he beat her over her coming late and being unable to explain the disappearance of money from where the couple kept it. In cross-examination he stated that a grudge existed between him and PW3 but denied the existence of an affair between PW3 and his wife (PW3) even though he had put it to PW3 when he was cross-examining him.

As this is a second appeal, we are required by law, specifically **Section 361 of the Criminal Procedure Code**, to confine ourselves to a consideration of matters of law only. Consequently, our approach to the findings of fact by the two courts below was as was stated in **<u>KAINGO VS R</u> [1982] KLR 213, at 219**;

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two Courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. (<u>Reuben Karari s/o Karanja vs R</u> [1956] 17 EACA 146)."***

See also **<u>CHEMAGONG VS R</u> [1984] KLR 611**, **<u>NJOROGE VS R</u> [1982] KLR 388**. We can only interfere if shown that the concurrent findings are on no evidence and so perverse. This may require an examination of the evidence especially where, as here, the appellant is unrepresented. See **<u>CHRISTOPHER KANGETHE VS R</u> [2010] eKLR**. The appellant has been unrepresented throughout his encounter with the judicial system. In the appeal before us, he filed some self-authored grounds of appeal in which he complains that the learned judge erred by;

(i) failing to observe that there was a grudge between the appellant and PW3.

(ii) failing to observe that the prosecution did not prove its case beyond reasonable doubt.

(iii) failing to call vital witnesses.

(iv) failing to adequately address the issue of contradictions.

At the hearing of the appeal, the appellant did not address us but relied on written submissions he had previously filed in which he elucidated on the grounds of appeal. On the issue of the findings, the appellant's submissions were that the charges against him were trumped up and emanated from the disagreement he had with his wife PW2 who is **L K**'s mother and the two conspired to get back at him for beating PW2. He pointed out that he had put the issue of the grudge to PW1, PW2, PW3 and PW4 in cross-examination and that he raised it during his defence under oath. We understand those submissions on this point to merge with the ones he made on sufficiency the evidence or failure to address the contradictions in the prosecution evidence. The appellant was essentially questioning the learned judge's discharge of her duty as first appellate court which was very succinctly put thus in **OKENO VS REPUBLIC [1972] EA 32, at p36**.

> ***"The High Court on the face of it appears to have approached the matter on the basis of whether the magistrate's findings could be supported by the evidence, instead of whether they should be supported… The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions, in deciding whether the judgment of the trial court should be upheld, as well, of course as deal with any questions of law raised in the appeal, see Selle v. Associated Motor Boat Co. [1968] EA 123."***

An appellant in a first appeal is entitled to expect that the Court will discharge that duty faithfully and it is a matter of law to be properly taken on a second appeal when he complains that the duty was not properly discharged as evidenced, in the appellant's view, by a failure to resolve such issues as the credibility of witnesses or the existence of a reason to consider their evidence unreliable and a failure to notice contradiction and inconsistencies in the prosecution case or, if they were noticed, a failure to resolve them in the appellant's favour if they be material.

Some of the contradictions and inconsistencies the appellant pointed out in his submission include;

(i) Whereas L K with regard to the first incident says she screamed, PW3 testified that he only heard the appellant's bed creaking and heard **LK** groaning and coughing but not screaming.

(ii) **L K** says she was defiled twice, on 3rd March, 2010 at 10.00 p.m. and on 5th March, 2010 at 3.00 a.m., yet PW3 testified that he witnessed three incidents; on 3rd March, 2010 at 10.00 p.m., on 4th March, 2010 at 1.00 p.m. and 9.00 p.m.

(iii) PW3 states that in the late night incident he peeped through the cracks in the timber and saw the appellant wearing underwear only while **L K** had testified that she found herself awake in the appellant's bed and saw him with his trousers on but unzipped.

(iv) The beating the appellant inflicted on PW2 when she returned from Timau had nothing to do with the alleged defilement about which she did not ask him, but due to PW2's frequent visits to her parents.

(v) The absence of any bleeding or spermatozoa upon examination of **L K.**

The appellant also took issue with the fact that the prosecution did not call **Kathure** the other person who is said to have witnessed the defilement, contending that the two courts below ought to have drawn the inference that their evidence if called would have been adverse to the present case. He cited the case of **BUKENYA VS UGANDA [1972] EA 549**. The appellant also cited the case of **P. K.W VS**

REPUBLIC [2012] eKLR to assert that the broken hymen was not sufficient to prove that **L K** had been defiled.

For the Republic, Mr. Mugo, the learned Senior Prosecution Counsel opposed the appeal by first arguing that no grudge existed between the appellant and PW3 as there was no truth on the allegation that the latter was the appellant's wife's lover. He also contended that the failure to call **Kathure**, her husband (alleged eye-witnesses) and **L K**'s sister who was in the house was not fatal to the prosecution case as it was not obliged to call any number of witnesses in order to prove a fact as recognized by **Section 143 of the Evidence Act**. Counsel denied that there were any material contradictions in the present case. He stated there was medical evidence showing that **L K**'s hymen was broken and the absence of spermatozoa was explainable by PW2's having asked her to take a bath.

When we asked him about the legality of the life sentence imposed by the trial court and confirmed by the High Court, Mr. Mugo responded that is so far as the relevant section stated that a person found guilty of the offence is liable to life imprisonment, then the penalty for the offence is a mandatory life imprisonment. In this we think, with respect, that he was clearly in error as 'liable to' connotes a maximum as opposed to a mandatory sentence. See **DANIEL KYALO MWEMA VS R [2009] eKLR**.

Having given the rival submissions and the entire record full consideration, this is the view we take of the matter: it turn on the simple question of whether the learned judge properly discharged her duty as a first appellate court. We have seen from the judgment of the learned judge that she was cognizant of her said duty. In fact she cited a paragraph from **Okeno vs R** (Supra) on the same as follows;

> ***"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 Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R. (1957) EA. 570) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evident to support the lower court's finding and conclusion; 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."***

We note that by way of analysis of whether **L K** was defiled, the learned judge delivered herself thus;

> ***"There is overwhelming evidence on record that the complainant was involved in a sexual activity. PW1 narrated in detail how her father defiled her on two consecutive nights when the mother was away. PW1's testimony was further corroborated by the findings of PW4 who examined PW1 and found that she had a broken hymen and was of the view that there was continuous process of defilement."***

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. The appellant very helpfully drew our attention the decision of this Court (**Maraga and Rawal, JJA**, as they then were), on **P.K.W VS R** (supra) on the issue of the proper view that courts ought to take on the fact of a broken hymen, without more.

> ***"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 (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 <u>The Queen vs Manuel Vincent Quintanila</u> [1999] AB QB 769."***

We respectfully agree with those sentiments and are of the view that they apply in equal measure to the case before us. We think that had the learned judge not attached undue and undeserved weight to the state of **L K's** hymen, she would have been less confident about the strength of the prosecution case against the appellant.

That case ought to have been juxtaposed with the appellant's defence which was to the effect that the entire case against him was a fabrication by **L K**., her mother (PW2) and the neighbour (PW3), who was a person married to PW2's cousin, to get back at the appellant for beating PW2. The fact of the quarrel in which PW2 was beaten was never doubted having been established by PW2 herself and admitted by the appellant as revolving around money. It is therefore strange that the learned judge not only doubts the fact of the fight, but also went ahead to attribute it, without evidence, to **L K**.'s allegation against the appellant as follows;

> ***"I do not believe that PW2 framed the appellant because they fought over money. If at all they fought on 5th March, 2010, it was over the allegation made by PW1 against the appellant."***

With respect, in this the learned judge appeared to proceed on a theory of her own and quite contrary to the evidence, which is all she could legitimately base her decision on, and that was not only a reversible error but was in fact inadvisable and dangerous. See **<u>OKETHI OKALE VS R</u> [1965] EA 555**.

We are equally concerned that the learned judge seems to have accepted the prosecution case wholesale without giving any or sufficient consideration to the appellant's defence. Indeed, she gave his defence short shrift in a single, peremptory sentence;

> ***"Whether the defence was considered; I find the court did consider the defence and found it to be false and a mere denial."***

With the greatest respect, that is no way to treat the defence of an appellant in a first appeal. The job of the first appellate court is not merely to agree with the trial court; it is to freshly, exhaustively, comprehensively and deliberately analyze, weigh, consider and independently arrive at its own conclusions on the matter, in this case the defence of the appellant had tendered. Evidently, that did not occur in the instant case.

Apart from the complaint we have addressed at length the appellant did raise the issue of the appellant's failure to call relevant witnesses. Dealing with this aspect, which was raised before her as well, the learned judge stated as follows;

> ***"The appellant complained that all material witnesses were not called. The appellant did not mention who was not called as a witness that should have been called . PW3 mentioned that on the night he saw the appellant defiling the complainant, he called one Kathure together with her husband to come and witness what the appellant was doing. The said Kathure was not called as a witness. However failure to call Kathure does not amount to miscarriage of justice because there is no requirement that the prosecution calls many witnesses to prove a fact. Under section 143 of the Evidence Act, one witness is sufficient to prove a fact unless a particular law requires otherwise."***

Once again, and with respect, we are unable to agree with the learned judge. We think it was quite obvious from the record that the evidence of **Kathure** would have been crucial in at least two respects;

> (a) She would have been the second and more independent eye-witness to the alleged act of defilement.
>
> (b) She could have lent credence and consistency to PW2's claim that after the quarrel with, and beating by, the appellant, she slept in **Kathure**'s house. The evidence of **Kathure**'s unnamed husband would also have served the same purpose. There was no explanation given for the prosecution's failure to call the couple or one of them. Nor is it explained why **L K**'s six-year old sister **O**, was not called as a witness since she was in the house during the alleged acts of defilement.

We think that where, as here, the evidence on record is the say-so of the complainant **L K**., which is at variance with the 'eye-witness' testimony of her uncle PW3 in some material respects, the evidence of **Kathure** and/or her husband would have been critical. It would have shed light on whether it was possible by peeping through the cracks in the timber wall to see goings on in the appellant's house from PW2's house and, more, on the rather strange conduct of three adults allegedly catching the appellant *in flagrante delicto* defiling his daughter but doing nothing to stop it. Did they merely derive a voyeuristic satisfaction from the unfolding deed?

We think that the state of the evidence called for the adverse inference that the predecessor of this Court spoke of in **<u>BUKENYA VS UGANDA</u> [1972] 549, at 550 to 551**;

> ***"…It is well established that the Director [of Public Prosecution] has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three was. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case… Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that these were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses if called, would have been or would have tended to be adverse to the prosecution's case. If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them without success…"***

Even though in **<u>BUKENYA</u>** the non-calling of some two witnesses by the Chief Justice of Uganda at the trial was found to have been non-fatal, the evidence having been sufficient, we think that in the instant case the evidence was barely adequate and the non-calling of the crucial witnesses was fatal to the appellant's conviction. We do not think that **Section 143** of the **Evidence Act** divests the prosecution of the duty to call a sufficiency of evidence before a finding of guilt can be entered.

The upshot of our consideration of this appeal is that the appellant's conviction was unsafe. We accordingly allow the appeal, quash conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Meru this 23rd day of March, 2017

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR