REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL APPEAL NO. 117 OF 2011

HARRISON MUNDIA KABURU…….. APPELLANT

VS

REPUBLIC …….. RESPONDENT

(Appeal from the judgment of the Nyeri Chief Magistrate's Court delivered by D.O.Ogembo SPM on 24/06/2011 in Criminal Case No.30 of 2009)

JUDGMENT

1. The Appellant, **Harrison Mundia Kaburu** was charged with the offence of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(2)** the **Sexual Offences Act.** The particulars of the charge was that on the 8th of October, 2009 at *[particulars withheld]* Village in Nyeri District within Central Province he intentionally and unlawfully did an act of penetration to **LMN** and that he inserted his genital organ into the genital organ of **LMN** a child aged 16 years.

2. In the alternative, the appellant was charged with Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006.**

3. The facts of the case as recorded by the trial magistrate are that the prosecution called a total of five (5) witnesses; the evidence of the complainant **(PW1)** was that on 8/10/2009 at about 8.30am she was on her way to school when she met the appellant who held her hand and led her to his house; at the house he placed **PW1** on the sofa set removed her panties and proceeded to defile her; that after the incident she proceeded to school and told the teacher **PW2** about the pain she felt after having been defiled by the appellant;

4. The teacher sent **PW1** home to her grand-mother who then reported the matter to the Gachaga Police Post; she was later escorted to Nyeri PGH for medical examination.

5. The Appellant was arrested and subsequently charged, tried and convicted on the main charge and sentenced to fifteen (15) years imprisonment.

6. Being aggrieved by both conviction and sentence, the appellant filed a Petition of Appeal on the 28th June, 2011 and raised the following grounds of appeal;

i. That the evidence of **PW1** was not corroborated;

ii. That there were inconsistencies in the evidence adduced by the prosecution witnesses ;

iii. That there were no medical laboratory tests;

iv. That the prosecution did not prove its case beyond reasonable doubt and;

v. That the trial magistrate disregarded the appellants' defence.

7. The appeal was heard on the 7/06/2016 with Ms Gicheha appearing for the State and the appellant was represented by Mr.A.Karuiki; both Counsel made oral presentations; hereunder is a brief summation of their respective submissions.

APPELLANTS' SUBMISSIONS;

8. The prosecution did not prove its case against the appellant beyond reasonable doubt; the conviction was unsafe as there was no eye-witness;

9. There was bad blood between the appellant and the chief witness **(PW2)** and that there was a possibility that **PW1** may have been influenced to give false testimony;

10. That no samples were taken to the laboratory for scientific testing to establish any physical link; that the P3Form that was produced had nothing to link the appellant with the offence;

11. That there were inconsistencies in the evidence of **PW1**; she had testified that on the material date she went to school she was accompanied by her teacher **(PW2)** who was the chief witness; and **PW1** also stated that on this material date the appellant held her hand and took her to his house and defiled her; that after the incident she went to school and told the same teacher what had happened;

12. Under cross-examination she said that she went to her grand-mothers **(PW3)** house and told her what had happened; but the evidence of **PW3** was that she got a call from **PW2** that the complainant had been defiled;

13. That with these glaring inconsistencies in the evidence of **PW1** the conviction was utterly unsafe;

14. The appellant prayed that his appeal be allowed.

RESPONDENTS SUBMISSIONS

15. The appeal was opposed by the State; Counsel submitted that the appellant had been properly convicted and sentenced.

16. That the complainant despite being mentally retarded understood what had happened; that her testimony was consistent and that it was corroborated by the evidence of **PW2** and **PW3** to the extent that the complainant knew her defiler; that the complainant was honest in her testimony and that any inconsistencies were minor in nature and did not go to the root or materially affect the prosecution's case.

17. The allegation that **PW2** used the complainant to frame the appellant was an afterthought as the appellant never raised the issue in his defence during the trial; under cross-examination **PW2** had indicated that her involvement was only by virtue of being the **PW1's** teacher; that under the provisions of Section 108 and 109 of the Evidence Act the appellant ought to have raised the issue either through cross-examination or in his defence;

18. That the failure to subject the appellant to a medical/laboratory test was not fatal to the prosecutions' case; that there was no gap in the prosecutions' case that would have necessitated the taking of specimens from the appellant for the laboratory tests;

19. The trial court observed the provisions of Section 124 of the Evidence Act and rightfully convicted the appellant;

20. Counsel urged the court to dismiss the appeal in its entirety as it had no merits.

ISSUES FOR DETERMINATION

21. After taking into consideration the above submissions these are the issues framed for consideration;

i. Whether there were material inconsistencies and contradictions in the prosecution's case;

ii. Whether the prosecution proved its case to the desired threshold;

iii. Whether a grudge existed between PW2 and the appellant.

ANALYSIS

22. This being the first appellate court it behoves me to re-evaluate the evidence on record and to reach an independent conclusion. Refer to the case of **Okeno vs R (1972) EA 32.**

Whether there were material inconsistencies and contradictions in the prosecution's case;

23. The only inconsistency the trial court noted was that **PW1** had poor orientation about time; the complainant could not correctly ascertain whether she met the appellant at 8.30am or that she had in fact reached school at 8.30am; this fact that confirmed by the teacher **(PW2)** and the grandmother **(PW3)** and the doctor **(PW4)** as well;

24. The evidence of **PW1** was that on the material date 8/10/2009 as she walked to school she met the appellant who grabbed her and pulled her into his house wherein he defiled her on the chair; the trial magistrate who had the opportunity to observe **PW1** noted her disability and made the following observation in his judgment;

> **"In my assessment this witness despite her condition was very consistent and her evidence clearly pointed to the accused as the one who had defiled her;**
>
> **From her evidence however, she remained firm even in the face of cross-examination that it was indeed the accused who had confronted her on the way to school and pulled her to his house and defiled her while warning her not to tell anyone."**

25. This court opines that in cases of defilement the key ingredients are identification, age and penetration; upon evaluation of the evidence on record the contradictions or inconsistencies on timing and/or whether the complainant was accompanied are found to be minor and do not raise any doubt in the prosecutions' case;

26. This court is satisfied that any contradictions or inconsistencies on the issue timing and escort are not material as it does not go to the root of the prosecutions' case; and finds no good reason that warrants interference with the trial courts findings.

27. This ground of appeal is found lacking in merit and is disallowed.

Whether the prosecution proved its case to the desired threshold;

28. This court reiterates that the prosecution must prove three key ingredients; identification, penetration and age;

29. Was the appellant positively identified; the evidence of **PW1** was that there had been three (3) previous sexual encounters; that the appellant was from the same neighborhood, known as Kihora; that she also knew the appellant by name and referred to him as **"Baba Caro"** and also as **"Mundia".**

30. The evidence of **PW2** was that the appellant was well known to her as she had handled the previous cases involving the appellant and **PW1**; that he also had a child named Caro who was a pupil attending

Kiharo Primary School where she was a teacher; that in this instance **PW1** had reported to her in front of the head-teacher that the appellant had stopped her and defiled her as she headed to school.

31. PW3's evidence on identification was that she knew the appellant as he lived nearby; that she had known him since the time he was young; she referred to him by the name **"Mundia"**; that on the material day **PW1** and **PW2** told her that the appellant had defiled **PW1**.

32. Upon re-evaluating the evidence on identification this court is satisfied that circumstances of recognition were favourable and that it was free from the possibility of error as the appellant was a person well known to **PW1, PW2** and **PW3**; that the evidence of **PW1**, **PW2** and **PW3** on identification is that of recognition; and this court is satisfied that the appellant was positively identified;

33. On the issue of penetration; **PW1** testified to there being three previous sexual encounters; **PW1** gave a narrative on what transpired on that day; that on this last occasion the appellant met her as she was going to school and held her hand and led her into his house; that he placed her on a sofa and that he removed her under pants and **"did a bad thing to her";** that she felt a lot of pain; when the appellant was through he wiped her and told her not to tell anyone; that she did not scream as she had been ordered by the appellant not to do so; upon reaching school she felt a lot of pain and wanted to be taken to hospital and she asked for **PW2** and told her what had happened;

34. The evidence of **PW4** a doctor from Nyeri Provincial Hospital where **PW1** was examined stated that she had lacerations on her labia minora, white discharge and confirmed that her hymen was broken and made a finding of defilement; a P3Form was tendered as evidence and was marked **"PExb.1"**;

35. Section of the Sexual Offences Act defines penetration as follows;

> **"….as the partial or complete insertion of the genital organs of a person into the genital organs of another person"**

36. This court is satisfied that the prosecution proved that there was penetration;

37. The appellant raised the issue that no sample or specimen was taken from him to a laboratory for testing to establish any physical link between the appellant and **PW1**; that the P3Form was not sufficient to establish any link;

38. This court reiterates that the prosecution only has to prove identification, age and penetration; and concurs with the Prosecuting Counsels submission that failure to conduct a laboratory test for scientific testing was not fatal to the prosecutions' case; nor was there any gap in the prosecutions' case that would have necessitated the taking of specimens from the appellant for such tests;

39. The appellant contended that there were no eye witnesses and that the witness may have been coached; the record shows that the trial court conducted a **'voire dire'** examination and allowed **PW1** to testify on oath due to her age; in his judgment he stated that despite her condition she was very consistent and her evidence clearly pointed to the accused as the one who had defiled her; that she remained firm even in the face of cross-examination; the trial court was indeed satisfied that she had told the court the truth and gave good reasons for believing her testimony; and it invoked the proviso to Section 124 of the Evidence Act and made a finding that it was indeed the appellant who had confronted her on the way to school and pulled her to his house and defiled her;

40. On the issue of the age of PW1; the trial court conducted a '***voire dire***' examination and found **PW1** was capable of understanding the meaning of an oath; she gave sworn testimony and stated that she was fourteen (14) years old; **PW3** also testified and stated that **PW1** was aged fourteen (14) years; **PW4** evidence was that he estimated the complainants age as being fourteen (14) years; the age indicated on the P3Form produced by **PW4** is that the complainant was aged fourteen (14) years;

41. The P3Form is a medical document it clearly stipulated the age of the complainant; the other evidence

that corroborates **PW1's** evidence on her age is that of her guardian **PW3**; this court is persuaded by the decision in the case of **Musyoki Mwakavi** where Mutende J held that age can be proved by the oral evidence of such a guardian.

42. This court is satisfied that the age of PW1 was proved.

43. This court takes cognizance of the fact that **PW1** had several sexual encounters with the appellant; the same notwithstanding **PW1** being a minor lacked the capacity to consent; this court makes reference to Section 42 of the Sexual Offences Act which reads as follows;

> **Section 42: For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.**

44. This court is satisfied that the trial court made a proper finding that the issues of identification, age and penetration had been proved by the prosecution proved its case to the desired threshold.

45. The ground of appeal that the prosecution failed to prove its case to the required standard is found lacking in merit and is hereby disallowed.

46. The appellant also raised the issue of the existence of a grudge and having been framed by **PW2;** Prosecuting Counsels submissions were that the appellant when invited to cross-examine PW2 ought to have explored the issue of being framed due to an existing grudge; he could have also raised it in his defence;

47. Counsel for the appellant conceded that this issue had not been brought up or explored at the trial court; therefore there is no reason for this court to belabor itself in addressing this ground of appeal;

48. The ground of appeal is found lacking in merit and is hereby disallowed.

FINDINGS

49. For those reasons this court makes the following findings;

i. There were no material inconsistencies or contradictions in the prosecution's witnesses evidence that go to the root of the prosecutions' case;

ii. The prosecution proved its case to the desired threshold;

iii. There was no evidence tendered to demonstrate the existence of a grudge existed between **PW2** and the appellant.

DETERMINATION

50. The appeal is found to be lacking in merit in its entirety and it is hereby disallowed.

51. The conviction and sentence are hereby affirmed.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 13th day of October, 2016.

HON. A. MSHILA

JUDGE