IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.)

CRIMINAL APPEAL NO. 71 OF 2014

BETWEEN

GUYO JARSO GUYO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Kenya

at Meru (Lesiit, J.) Dated 12th November, 2011

In

H.C C.R.C. NO. 130 OF 2011

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JUDGMENT OF THE COURT

1. The appellant ***Guyo Jarso Guyo*** was tried and convicted on 2nd August, 2011 by the Senior Resident Magistrate, Marsabit (***S.O. Mogute***) for the offence of defilement contrary to **section 8(1) (2)** of the Sexual Offences Act of 2006. It was alleged in the charge sheet that on the 15th day of June, 2011 at Bank Quarters in Marsabit Central District within Eastern Province he intentionally and unlawfully committed an act which caused penetration with his male genital organ into the female genital organ of ***H.M.*** a child aged 11 years.

2. The brief facts are that, on the material date of 15th June, 2011 at around 1 pm while on her way home from school, **H.M.** met the appellant whom he knew very well, riding a motor cycle. The appellant stopped the motor cycle and invited her for a ride but she declined. He then forcefully got hold of her, placed her on the motor cycle and rode off with her into Marsabit forest where he defiled her.

3. PW2 ***Galgalo Guyo (Galgalo)*** and PW3 ***Mohamed Kalelo (Mohamed)*** who were herding cattle in the same forest heard cries and went to find out what the cries were for. On arrival at the scene they saw the appellant standing while ***H.M.*** was lying on her back already defiled. They took the appellant and ***H.M.*** to the police station, and reported the offence. The appellant was detained while ***H.M.*** was referred to

hospital for treatment. She was examined by PW5 Dr. ***John Mwanzia (Dr. Mwanzia***) whose findings confirmed that the minor had been defiled.

4. In his unsworn testimony the appellant, inter alia, had this to state:

> "**I did not have bad intentions against the young girl. I had taken liquor on the material date. This is what led me to do that evil things** (sic)**. I was found by 2 men who testified here in. They beat me up and escorted me to Marsabit Police Station where I was charged"**

He was found guilty convicted and sentenced to twenty years imprisonment. Aggrieved by that decision he appealed to the High Court (***Lesiit, J***.) which in its judgment of 13th day of November, 2013 dismissed the appeal and enhanced the sentence to life imprisonment. The appellant is now before us on a second appeal raising six (6) homemade grounds of appeal namely that the High Court Judge fell *(sic)*

- ***in law and facts by not finding that the prosecution failed to avail vital witnesses.***
- ***in law and facts by not finding that the prosecution witnesses gave contradictory evidence.***
- ***in law and facts by not finding that section 169(1) of the Criminal Procedure Code was violated.***
- ***in law and facts by not finding that the conviction was not backed by the weight of evidence tendered.***
- ***in law and facts by not finding that the trial was conducted partially and irregularly.***
- ***by rejecting my own defence without giving cogent reasons.***

5. The appellant who appeared in person urged us to allow the appeal on the grounds that he was kept in custody for more than 24 hours before being arraigned in court; he pleaded not guilty to the charge; crucial witnesses were not called; he is a lay man and simply asked for forgiveness in his mitigation so as to be released as he had never been in court before.

6. Mr. Kariuki Mugo, the learned Senior prosecution counsel urged us to dismiss the appeal on the grounds that it does not lie as it seeks the intervention of this Court on matters of fact and sentence contrary to **section 361 (1) (a)** of the Criminal Procedure Code the prosecution case was proved beyond reasonable doubt as it was based on overwhelming, consistent and well corroborated evidence that placed the appellant at the scene of the crime as the perpetrator. The appellant supported the prosecution's case by admitting in his defence that he committed the offence due to alcohol consumption and he was also found at the scene of the crime by PW2 and 3.

7. This is a second appeal. **Section 361** of the Criminal Procedure Code restricts the mandate of this Court to matters of law only. This Court has itself crystallized this position in numerous of its decisions that it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings. In ***Karingo versus Republic [1982] KLR 213*** at pg. 219 this Court stated *inter alia* thus:-

> "***A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at by 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 finds as it did Reuben Karari S/O Karanja versus Republic [1956] 17 EACA 146).*** See also the case of ***Mwita versus Republic [2004] 2KLR 60.*** for the proposition that:-
>
> ***"An invitation to depart from concurrent findings of fact by the trial and first appellate court***

should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so which are that no reasonable tribunal could on the evidence adduced have arrived at such findings or in other words the findings were perverse and therefore bad in law."

8. The appellant's complaint on the prosecution's failure to arraign him in court within 24 hours of his arrest was neither raised before the two courts below nor in his grounds of appeal. He has raised it orally before us for the 1st time. In ***George Gikundi Munyi versus Republic CRA 101 of 2011 (UR***) this Court said:-

"We cannot help but note that the appellant never raised the aforementioned allegation in the two lower courts. That being the case, we find that the prosecution did not have an opportunity to offer an explanation for the said delay so as to enable the two lower courts to determine whether it was reasonable. This being a second appeal, we are unable to determine from the record whether the said delay was reasonable or not. Hence this ground must fail."

We associate ourselves fully with those sentiments. The appellant's oral complaint therefore stands dismissed on that account.

9. Section 8(1) of the Sexual Offences Act No.3 of 2006 provides:.

" A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

Under **section 2** that Act, a child has the meaning assigned thereto in the Children Act, which ***"any human being under the age of eighteen years". (section 2)***

The key element in the commission of an offence under **section 8(1)** of the Sexual Offences Act (supra) is ***"penetration".*** It is defined in **section 2** of the same Act as:

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

From the above provision and definitions, the two courts below were obligated to satisfy themselves first that there was penetration; second that ***H.M.*** was a child, and third that the penetration was perpetrated by the appellant. ***H.M.***, identified the appellant as the perpetrator. **Galgalo** and **Mohammed** found the appellant where **H.M.** was lying down. PW5 ***Dr. Mwanzia*** upon examination of ***H.M.*** concluded that she had been defiled **H.M.** gave her age during her testimony as eleven (11) years, an age confirmed by her immunization clinic card which indicated the date she was born, and the P3. All went go to confirm that PW1 was a child in terms of the definition in the Sexual Offences and the Children Acts. The totality of the above evidence demonstrates that **H.M.** was a child and she had been defiled through penetration.

10. The proviso to **section 124** of the evidence Act provides;-

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused a person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

11. The two courts below made concurrent findings that ***H.M.*** and the other witnesses told the truth and were consistent. That evidence formed the basis of the appellant's conviction which he did not challenge before the High Court. He seems to be attacking the credibility of the witnesses. In the case of ***Irungu versus Republic Criminal Appeal No. 24 of 2008 (UR***) the court stated inter alia thus:

"As this Court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses."

The trial court saw and heard the witnesses and believed them to be truthful and consistent. The Appellant reinforced that belief by admitting that he was found at the scene by PW2 and 3 and blamed alcohol for it. The first appellate court affirmed that belief. We find no basis to upset those concurrent findings.

12. The appellant did not name the vital witnesses that the prosecution failed to call. **Section 143** of the Evidence Act cap 80 Laws of Kenya provides that:-

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

See also the decision in ***Bukenya and others versus Uganda [1972] EA 549*** Applying the above principle we find that this complaint was neither raised before the trial court nor the High Court. Moreover, the prosecution evidence was not barely adequate. It was overwhelming and supported the charge.

13. With regard to alleged contradiction in the prosecution evidence, we find none. Contradictions (if any) must go to the root of the prosecution's case. See the case of ***Josiah Afuna Angulu versus Republic Nakuru CRA 277 of 2006 (UR)*** and ***Charles Kiplang'at Ngeno versus Republic Nakuru Criminal Appeal No.77 of 2009 (UR).***

14. With regard to the failure to comply with the provision of **section 169(1)** of the Criminal Procedure Code, the section provides:-

> ***"Every such judgment shall, except as otherwise expressly provided by its code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determinations the decision thereon and reason for the decision and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***".

The judgments of the two courts below are before us. We have gone over them. We find both courts set out facts, analyzed them, drew up issues for determination, determined those issues and then gave reasons for their determinations. We find no fault in the judgments.

15. With regard to partiality and irregularity in the conduct of the proceedings in both courts below, particulars of these were not given. However, the record shows clearly that the appellant was given an opportunity to cross-examine witnesses. He was present throughout the trial. At the close of the prosecution evidence the trial court took time to write a ruling determining whether the appellant had a case to answer and complied with the provisions of **section 211** of the Criminal Procedure Code. The appellant then elected to give unsworn evidence with no witnesses to call and the court delivered a reserved judgment. When the appellant appeared before the High Court he elected not to pursue his appeal against conviction but only proceeded with his appeal against sentence. The appellant's election notwithstanding, the first appellate judge set out the section of law under which the appellant had been charged, his complaints to the High Court (grounds of appeal), representations on those complaints; the respondent's responses there to. In its judgment the court applied the correct principles and found that the penalty section had been couched in mandatory tone thereby robbing the trial magistrate the discretion of a sentence other than that provided for by the law; reversed the sentence originally awarded by the trial magistrate and substituted it with the lawful sentence. We therefore, find no trace of any partiality or irregularity in the way proceedings were conducted by the two courts below.

16. We state for emphasis that the first appellate court was at liberty to correct the illegal sentence imposed by the trial court. This court stated the principle in the case of ***SNT versus Republic Criminal Appeal No. 20 of 2012 (UR),*** thus:-

> "***The evidence is clear that the complainant was aged 11 years old at the time of the sexual assault. The High Court was entitled to correct the sentence because under section 20(1) of the Sexual offences Act provides for a mandatory sentence of life imprisonment for the offence of***

incest where a female child below 18 years is concerned. Consequently, was the appellant required to be served with a notice of enhancement of the sentence in respect of the illegal sentence? In Stanley Nkunja Vs. Republic Criminal Appeal No. 280 of 2012, this Court held:

"While it is prudent, and fair, to warn the appellant and give him a notice of enhancement, we are of the view that such a notice is not required in respect of an illegal sentence. This is because by virtue of the provisions of Section 347(2) of the Criminal Procedure Code, appeals to the High Court may be on matters of facts and law. Illegality of a sentence is a matter of law and therefore, the learned Judge was correct in enhancing the sentence to life imprisonment."

In this case the sentence of 20 years imprisonment which had been imposed by the trial court was plainly illegal in view of section 8(2) of the Sexual Offences Act which provides:

Any person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to life imprisonment." *Emphasis added.*

17. As for alleged dismissal of the appellant's defence without giving reasons, we find this is not borne out by the record as the trial court considered the appellant's defence set out above and ruled it was an admission. The first appellate court did not go into it because the appellant had abandoned his appeal against conviction. This complaint is baseless and we reject it accordingly.

18. The upshot of the above is that we find no merit in this appeal. It is dismissed.

Dated and Delivered at Nyeri this 9th day of July 2015.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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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 to the original.

DEPUTY REGISTRAR