IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, MURGOR & KANTAI, J.JA)

CRIMINAL APPEAL NO. 122 OF 2019

BETWEEN

GODFREY MUDULIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction, Judgment, decree, order, or as the case may be of the

High Court of Kenya at Nairobi (Kimaru, J.) dated 22nd September 2019

in

High Court Criminal Case No. 151 of 2014)

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JUDGMENT OF THE COURT

Godfrey Mudulia, ***the appellant***, was charged with the offence of defilement contrary to ***section 8(1)*** as read with ***section 8(2)*** of the ***Sexual Offences Act*** No. 3 of 2006. The particulars of the offence are that on the 24th October 2012 at [particulars withheld], Nairobi County, he intentionally and unlawfully caused penetration of his male genital organ namely, his penis into the female genital organ namely vagina of the complainant ***AK, PW 1*** a girl child aged 11 years.

The alternative charge was that he committed an indecent act with a child contrary to ***Section 11(1)*** of the same Act.

The appellant denied committing the offence, and after considering the evidence, the trial magistrate convicted and sentenced him to life imprisonment upon finding that the offence was proved to the required standard. The appellant was dissatisfied with the decision, and appealed to the High Court (Kimaru, J.), which upheld the conviction and sentence. The appellant was aggrieved, and appealed to this Court against that decision.

Relying on amended grounds and lengthy submissions, the appellant complained that the medical evidence did not prove beyond reasonable doubt that there was penetration, particularly since the Post Rape Care form indicated that her hymen was intact while the P3 form specified that it was torn, which evidence was contradictory. That further contradictions were apparent in the time the incident is supposed to have taken and on whether the AK was able to see and identify the appellant. Other issues were that a vital witness namely, Baba Kariuki was not called to testify; that the prosecution did not prove its case to the required standard; that the trial court wrongly disregarded his defence and alibi evidence, and wrongly shifted the burden of proving his alibi to him. Finally, it was contended that the trial court failed to take into account the surrounding circumstances as required by ***section 33*** of the Act. The appellant prayed that the appeal succeeds and in the event he was not acquitted, that the sentence to be reconsidered.

Appearing on a virtual platform from Kamiti Prison owing to the COVID-19 pandemic, the appellant, in person, stated that he would rely on his written submissions. ***Mr Gitonga Muriuki*** learned counsel for the State opposed the appeal and submitted that he would adopt the judgment of the High Court which comprehensively and exhaustively assessed all the grounds of appeal. Counsel further added that the life sentence imposed by the trial court was in accordance with the law, and that this Court should not interfere with either the conviction or the sentence.

We have considered these submissions and carefully read the record of appeal. This being a second appeal only matters of law are to be

considered ***see*** **section 361(1)(a)** of the ***Criminal Procedure Code***. It is trite law that in a second appeal the appellate court will not normally interfere with concurrent findings of fact by the two courts below unless it is apparent that on recorded evidence no reasonable tribunal could have reached that conclusion – see ***M'Riungu v. R. [1983] KLR 455***; and ***Karingo v. R. [1982] KLR 213***. It is also trite law that an appellate court would not normally interfere with the findings by the trial court which are based on credibility of witnesses unless it be shown that no reasonable court could have made such findings - see ***Republic v. Oyier*** **[1985] KLR 353**.

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

In view of the above, we consider that the questions for determination are i) whether penetration was proved since there were two conflicting medical reports; ii) whether the prosecution's evidence was contradictory, given the inconsistencies and the discrepancies; iii) whether vital witnesses were not called to testify; iv) whether the prosecution's case was proved to the required standard; v) whether the trial court rightly disregarded the appellant's defence and alibi evidence and shifted the burden of proof to the appellant.

Before addressing the issues raised, a consideration of the evidence is important. The evidence the prosecution led was that on 5th July 2013, as the complainant, AK a class 4 pupil was returning to her house from an external toilet located on the plot on which she resided with her parents, the appellant accosted her, blindfolded her, covered her mouth with a cloth and carried her into his house, also located on the same plot. Whilst in his house, he removed her clothes pushed her onto the bed and then defiled her. She stated that the act of defilement went on for a long time and that she suffered a lot of pain; that after defiling her the appellant dressed her up, and then before allowing her to leave peeped out of the house to check whether the area was clear.

On reaching her home, she immediately informed **Annceta,** ***PW1,*** of what the appellant had done to her. And when ***PW3,*** her father arrived home, AK told him that the appellant had defiled her. She was thereafter taken to a nearby private clinic based in Kawangware and after she was examined, they were advised to report the incident to Muthangari Police Station. The following day, she was taken to Nairobi Women's Hospital where she was again examined and treated by ***Dr. Daniel Nguku PW4*** who thereafter completed a Post Care Rape form which stated that AK's genitalia was found to be hyperemic red and sore occasioned by friction, although her hymen was intact.

Two days later, she was examined by ***Dr. Joseph Maundu PW5,*** the Police Surgeon based at Nairobi Area who completed and signed a P3 form. In his testimony, he stated that he had examined AK and found that her external genitalia was normal, with no bruises, lacerations or tears noted, but her hymen was broken with fresh margins visible. No discharge was present. On cross-examination, he explained that because he conducted the medical examination 2 days after the assault, the inflammation had subsided and the freshly broken hymen was visible, and that the edges had not healed.

AK further testified that the appellant was a person known to her as she would see him around their house, and that his room was located near the toilet. She had seen him on the material day with the aid of security lights located near the toilet.

In his defence, the appellant denied committing the offence. He stated that he was a painter and that on the material day he went to work at Chiromo; that he had left his workplace at 4.00 pm and arrived back at his house at 8.00 pm. He had barely put his bag down when he heard a knock at the door, and when he checked, he saw a woman and a child both of whom were not known to him. The woman asked him what he had done to the child, and threatened to teach him a lesson. At about midnight, he was awakened from sleep by a knock at his door. The knocking persisted forcing him to open the door, whereupon he was met by a crowd including AK's father. He stated that he was attacked and marched to the Police Station where he was later charged with the offence.

Returning to the issues, we begin by determining whether the prosecution proved it case to the required standard that the complaint was defiled. For this to be achieved, the prosecution must prove the complainant's age, that the appellant was properly identified and that there was penetration.

As to whether AK's age was ascertained is not contested. A Birth Certificate was produced that showed that she was born on 4th September 2002. She was therefore, 11 years old when the incident took place. With respect to the appellant's identity, much as he has sought to controvert this fact, both the trial court and the High Court found that AK properly identified him as the perpetrator. In analyzing the evidence, the courts below satisfied themselves that since the appellant lived on the same compound as AK, PW1, and PW3, and AK specified that she had encountered him on different occasions, so that he was well known to her. After the assault, she led her parents and neighbours straight to his house which was located next to the common toilet. Her evidence was clear that it was the appellant who had defiled her, and that he had defiled her in his house.

The question of penetration was strongly contested. The appellant made heavy weather on what he considered to be contradictions between the Postcare Rape form produced by Dr. Nguku and the P3 form produced by Dr. Maundu. The crux of his contestation was that penetration was not proved since the Post Care Rape Form indicated that though there was hypercemia and tenderness, the hymen was intact, while, that on the other hand, the P3 form and Dr. Maundu's evidence indicated that though there were no bruises, or lacerations or tears, the hymen was torn with fresh margins; that these were glaring discrepancies that should be resolved in his favour.

Upon considering the evidence, the trial court discerned that when AK's evidence and the two medical reports were considered together, it was clear that there *"…must have been forceful attempt to penetrate which left the complainants (sic) genital hymen with soreness, forceful attempt which caused friction and redness which amounted to defilement."*

Addressing the same question, the High Court stated thus;

> ***"Upon evaluation of these medical evidences, this court is of the view that the contradiction between the two medical reports was***

explained by PW5 when he testified before the court. What is not in doubt is that the complainant's vagina was bruised and sore and had a freshly broken hymen. These injuries were sustained at the contemporaneous period that the complainant claimed that she was defiled. This court therefore holds that penetration was established to the required standard of proof beyond any reasonable doubt."

So was penetration proved? ***Section 2*** of the ***Sexual Offences Act*** provides that penetration may be partial or complete. Dr. Nguku's evidence showed that AK's genitalia was red and sore with the hymen intact, and Dr Maundu's examination observed that the hymen was torn with fresh margins. When cross examined on the disparity between the reports, the latter explained that he had examined AK, 2 days after the incident when the inflammation had started to subside so that the tear in the hymen was visible. For our part, we do not discern any discrepancies between the two reports, since both reports show that AK's genitalia suffered trauma which pointed to there having been penetration, either partial or complete.

When the medical evidence is placed alongside AK's evidence, which was accepted by the trial magistrate as truthful and credible, and which described in explicit detail how the appellant had defiled her, as were the courts below, we too are satisfied that penetration was undoubtedly proved to the required standard. Accordingly, we reject this ground.

The appellant has sought to highlight other discrepancies with a view to dislodging the prosecutions' evidence. For instance, the appellant alleged that according to PW1, AK had complained to her that the appellant had tried to defile her on 4 other occasions, yet in her evidence, AK had stated that *"…This is the first time the accused defiled me"*. Another alleged contradiction that was pointed out was that PW1 was told that the appellant had locked AK up in his house since 2:00 p.m on that day, yet, the Investigating Officer, PC Veronica stated that, *"… the complainant alleged that the accused raided her as she left the toilet which is 15 metres from the accused's house at around 7:00pm"*.

Our assessment of the alleged contradictions is that they are not material, and do not in any way detract from the totality of the evidence. In effect they are capable of being cured by ***section 382*** of the ***Criminal Procedure Code.***

In answer to the allegation that Baba Kariuki was not called to testify, the proviso to ***section 143*** of the ***Evidence Act*** which specifies that no particular number of witnesses is required to prove a fact is pertinent. Since both courts below concluded that the offence was proved to the required standard, Baba Kariuki's testimony would have been superfluous to the prosecutions' case. As a consequence, this ground fails.

The appellant also contended that the trial magistrate was wrong to disregard his defence and term it as an afterthought, and to also wrongly, shift the burden of proving his alibi to him. As his alibi, the appellant claimed to have left his Chiromo workplace at 4.00 pm and arrived back at his house 8.00 pm meaning that he would not have been in the compound when AK was defiled. However, AK's evidence is clear. She identified the appellant as the person who defiled her, and that he defiled her in his house. In addition, the medical evidence, supported her evidence that she was defiled. The evidence considered in its totality squarely placed the appellant in his house at the time the incident occurred. Consequently, the alibi defence did not dislodge the prosecutions' case, and the trial court was right in rejecting his defence, as an afterthought. The complaint is without merit as is the allegation that the trial court sought to shift the burden of proof of his alibi.

In conclusion, we find that both the trial court and the High Court having taken all the circumstances into consideration, rightly concluded that the appellant defiled AK and as a consequence, we have no reason to interfere with those decisions.

As concerns the sentence, the trial court sentenced the appellant to life imprisonment as by law prescribed. The appellant urges that it be reconsidered.

Since the sentence was imposed, the Supreme Court's decision in ***Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 15 of 2015,*** held the mandatory death sentence to be unconstitutional, for the reason that it deprived courts of the discretion to impose sentences having regard to the circumstances of each case. As such, the appellant having mitigated that he was a young man of 22 years at the time of the offence, and a first offender, who has since learned his lesson, we consider it appropriate to interfere with the life sentence imposed and substitute it with a sentence of twenty-five years.

For the reasons aforestated, the appeal against conviction is dismissed. We set aside the life sentence and substitute it therefore with a sentence of twenty-five years' imprisonment from the date of conviction.

It is so ordered

DATED and delivered at Nairobi this 29th day of January, 2021.

R.N. NAMBUYE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR