IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, KARANJA & SICHALE, JJA]

CRIMINAL APPEAL NO. 77 OF 2017

BETWEEN

JNO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at

Machakos (Lucy Njuguna, J) dated 22nd July, 2015 in HCCRA NO. 154 OF 2013

****

JUDGMENT OF THE COURT

The appellant, **JNO,** was charged with two (2) counts of the offences of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No.3 of 2006. In count I, it was alleged that on **30th August, 2012** at about 11.00 p.m. at [particulars withheld] township within Kajiado County, he caused his genital organ namely, penis to penetrate into the female genital organ namely, vagina of SK (name withheld) a child aged 11 years old.

In count II, it was also alleged that on **12th September, 2012** at about 11.30 p.m. at [particulars withheld] township within Kajiado Couty, he did cause his male genital organ namely, penis to penetrate into the female genital organ namely, vagina of SK (name withheld), a child aged 11 years old.

In the alternative charges, the appellant was charged with the offences of an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the first alternative charges were that on 30th August, 2012 at about 11.00 p.m at [particulars withheld] County within Kajiado County did intentionally and unlawfully cause his male genital organ, namely penis to come into contact with the female genital organ, namely vagina of SK (name withheld), a child aged 11 years old. In the 2nd alternative charge to count II, it was alleged that on **12th September, 2012**, at about 11.30 p.m. at [particulars withheld] township within Kajiado County, the appellant caused his male genital organ (penis) to come into contact with the female genital organ (vagina) of SK (name withheld), a child aged 11 years old.

The appellant denied the commission of the offences. In a trial conducted by Honourable **Odera,** the then Principal Magistrate at Mavoko Law Courts, the appellant was found guilty of counts I and II and sentenced to serve twenty (20) years imprisonment. The learned magistrate did not however, provide sentence for each of the counts save to state that he merely sentenced the appellant to serve twenty (20) years imprisonment.

Aggrieved by the conviction and sentence of the trial court, the appellant filed an appeal at the High Court of Kenya at Machakos which appeal was dismissed by **Njuguna, J** on **22nd July, 2015.** In a judgment delivered on **22nd July, 2015**, **Njuguna, J** stated:

> ***"In the upshot, I come to the conclusion that the appellant was properly convicted and sentenced. This appeal lacks merit, it is dismissed with the result that the appellant will serve the twenty (20) years sentence ordered by the trial court".***

Undeterred, the appellant filed this appeal before us. In the undated Memorandum of Appeal as well as the undated supplementary grounds of appeal, the appellant raised five (5) grounds faulting the learned judge for:

(i) failing to reconsider and re-evaluate the evidence

(ii) failing to consider that the charges against him were not proved to the required standard

(iii) failing to consider that the evidence adduced was contradictory

(iv) failing to comply with the provisions of S. 169 of the CPC, and finally

(v) failing to find that the appellant's constitutional rights under Article 25

(c) of the Constitution were violated.

On **8th October, 2019**, the appeal came up before us for plenary hearing. The appellant who appeared in person relied on his written submissions and denied committing the offences. It was his position that the charges against him were framed up as he had refused to marry the mother of P.W.1.

Mr. Gitonga, the learned Senior Public Prosecution counsel (SPPC) opposed the appeal contending that on the age of P.W.1, the age assessment report produced in court placed her age at thirteen (13) years and the trial magistrate also examined the minor and was satisfied that she was 13 years. On identification of the appellant, counsel submitted that there was no dispute that the appellant was a step father to the victim; that on the dates of the alleged incidents, they were only the two of them in the house and the appellant was properly placed at the scene. Further, that the trial magistrate observed the victim's demeanor and was impressed with her as a truthful witness. On penetration, the learned counsel contended that the appellant penetrated SK on two different occasions which was confirmed by the medical examination report produced in evidence before the trial court; that on section 169 of the Criminal Procedure Code, the learned counsel was of the view that the section dealt with the contents of a judgment; that the judgment of the trial court and that of the 1 st appellate court complied with the provisions of the said section. The learned state counsel conceded that the two courts below erred on sentencing as the appellant was sentenced on count I only.

However, he was quick to add that no prejudice was occasioned to the appellant as in any event, no cross-appeal had been preferred by the state and finally, that there were concurrent findings of facts by the two courts below. On violation of the appellant's rights, learned counsel contended that the rights complained of were not particularized but suffice to state that the appellant had a fair trial.

We have considered the record, the oral and written submissions and the law. The appeal before us is a second appeal and our mandate is as stipulated for in ***Section 361(I) (a)*** of the ***Criminal Procedure Code***. It provides:

> ***" 361 (I) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:***
>
> ***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
>
> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section***
>
> ***7 to pass that sentence."***

In so far as case law is concerned, the decision of **David Njoroge Macharia vs. Republic [2011] eKLR** sums up the said mandate. In the said decision, it was stated:

> ***"Only matters of law fall for consideration and the court 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 the courts below are shown demonstrably to have acted on wrong principles in making the findings. (****see also* ***Chemagong vs. Republic [1984] KLR 213)."***

Similarly, in ***Karingo versus Republic [1982] KLR 213*** it was held as follows:

> ***"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 unless 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 Karoti S/O Karanja versus Republic [1956 17 EACA 146]."***

P.W. 1 was a child aged 12 years old. She lived in [particulars withheld] together with her mother and the appellant who was her step-father. Sometime in **August, 2012**, her mother left to go to upcountry and she remained behind so as to do tuition. In one of the nights in **August, 2012**, the appellant did "***tabia Mbaya***" on her. On **12th September, 2012** at about 11.30 p.m., the appellant did the same thing to her. She reported the two incidents to one **L** who also reported the incident to the caretaker of the estate, **HMM** who testified as P.W.3.

On **20th September, 2012**, P.W.1's grandmother **MKW** (P.W. 2) came for her and took her to Nairobi Women's Hospital. P.W. 2 had been called by P.W3.

P.W.5, Corporal **Margaret Chepchumba** of Kitengela Police Station received P.W.1 and her grandmother on **20th September, 2012**. She sent her for age assessment which showed that she was thirteen (13) years old. **Geoffrey Magoma** (P.W. 4) a clinical officer at Kitengela Health Centre examined P.W.1 on **20th September, 2012**. He found that there was evidence of sexual intercourse

"*in recent times*"

In his defence, the appellant denied defiling P.W.1. He told the trial court that on **19th September, 2012** at about 9 p.m., he was called by the caretaker of the estate as there was a problem. On **20th September, 2012**, P.W.1's grandmother insisted to P.W.1 that she must "***say what you were told".*** As far as the appellant was concerned, the charges against him were a frame up as he had refused to marry P.W.2's daughter who is the mother of P.W.1.

In our consideration of the evidence, we find that P.W.1 was a girl of about 13 years. She remained with the appellant when her mother left to go up- country. She narrated to the trial court how she was defiled by the appellant, her step-father whom they shared a house together. Being a person well known to her, there is no dispute as regards identification of the appellant. As for penetration, P.W.1 told the trial court how on these occasions, the appellant did "*tabia mbaya*" to her. The clinical officer (P.W.4) found that P.W.1 had been defiled. We find that the 1st appellate court properly re-analyzed and re- evaluated the evidence and came to the conclusion that the appellant defiled P.W.1. In our view, the findings at the trial court and the 1st appellate court were based on the evidence adduced. We see no reason to disturb those findings and the appellant's appeal is devoid of merit.

However, before we conclude, we hasten to add that the trial court failed to mete out sentence in respect of counts I and II. All that the court did was to pass a sentence of twenty (20) years imprisonment without specifying whether this was in respect of count I or II. However, as there was no cross-appeal by the State, the matter shall lie.

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

Dated at Nairobi this 6th day of March, 2020.

R.N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR