IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, MURGOR & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 80 OF 2017

BETWEEN

JM.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Machakos (Thuranira Jaden, J.) delivered on 12*th* *June, 2014 in High Court Criminal Appeal No. 126 of 2013)*

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JUDGMENT OF THE COURT

1. In a judgment delivered on 31st May 2013, the Magistrates Court at Mutomo found the appellant, JM, guilty of the offence of defilement under Section 8(1) of the Sexual Offences Act. He was convicted and sentenced to imprisonment for a term of 15 years. The particulars of the offence were that on 16th January 2013 at 8:00 PM in Kitui District within Kitui County he intentionally caused his penis to penetrate the vagina of JNS, a child aged 16 years. His first appeal was dismissed by the High Court at Machakos (***B. Thuranira Jaden, J***.) in a judgment delivered on 12th June 2014 after which he lodged the present second appeal.

2. On 9th December 2019, the appellant filed an amended supplementary memorandum of appeal in place of his earlier one dated 30th July 2015. His grounds of appeal in the amended memorandum are that the prosecution evidence was insufficient to sustain the charge; that the prosecution case was based on a fabrication of evidence which was contradictory; that the complainant was coached to testify against him; that the courts below overlooked that there was a grudge against him; that the medical evidence tendered was unsatisfactory as it was gathered after the period required by law; that the courts below failed to consider his defence and shifted the burden of proof to him; and that the offence was not proved to the required standard.

3. Based on the evidence before the trial court, it is not contested that JNS was a student at UVTI in Kitui; that on 16th January 2013 at about 2.00 p.m., JNS left home in Mutomo in the company of the appellant, who she described as her *"stepfather"*, who was to escort her to school; that they boarded a vehicle at Mutomo destined for Kitui; and that they got to Kitui Town at about 6.00 p.m.

4. The contest is what happened when JNS and the appellant got to Kitui Town. According to JNS:

> **"*He* [the appellant] took me to a hotel where we eat. After him eating, he took me to a lodge. He booked one room. I showered. He also showered. I lay on the bed. He removed my pant. He came on top of me and defiled me. I felt a lot of pain. I screamed but nobody came to my help. He defiled me three times that night. On 17th January 2013, we woke up. I showered and he took me to school. I never told anyone what happened. I came home on 23rd February 2013 during mid-term. I told my mom what had happened."**

5. The appellant's version of events when they reached Kitui town is materially different. In his words:

> **"On 16*th* *January 2013…we left Mutomo at 2.00 pm* and reached Kitui at 6.00pm. I shopped for her. I hired a boda boda to take us to uncle's home in Matinyani. On 17*th* January 2013, boda boda took us to school. I left her at School."**

6. JNS's further testimony was that she did not disclose to anyone what had happened to her until she returned home for midterm break on

23rd February 2013 when she told her mother who in turn reported the matter to the area chief at Mutomo.

7. JNS's mother, who testified as PW 2, stated that the appellant, to whom she referred as her "*husband*" and also as "*my friend*" and her daughter JNS reached Kitui at 6.00 p.m. on16th January 2013; that the appellant telephoned her and told her that he had "*insufficient credit*"; that when she attempted to call him back, "*the number was not in use*"; that on 17th January 2013, the appellant called her and informed her that he had slept at an aunt's at Museve and that he had paid the school fees for JNS.

8. PW2 testified further that on 22nd February 2013, her daughter JNS came home "*but she refused to tell me anything" but told an elder called Phillip that the accused had defiled her in a lodging room in Kitui*."; that she reported the matter to the area chief and later to Mutomo Police Station after which JNS was taken to hospital and the appellant subsequently charged with the offence.

9. Phillip Mwanzia Kimanzi (PW5) a village elder at Mutomo village recalled that on 15th March 2013, he went to PW2's house in connection with a case with the appellant; that PW2 informed him that the appellant was her friend and had taken her daughter, JNS, to school in Kitui and in the process defiled her in a hired room in a lodge; that he referred them to the area chief and to the police; that the area chief then summoned the appellant and he admitted defiling JNS and sought forgiveness.

10. Robert Kusinga (PW4), the chief, Mutomo Location, stated that PW2 went to his office on 13th March 2013 and reported that the appellant had defiled her daughter, JNS; that he referred her to the police station and the children office; that on 15 th March 2013, PW2 was again in his office when he summoned the appellant and enquired from him what had transpired on 16th January 2013 when he took JNS to school; that the appellant informed him that "*he took the girl to Kitui hired one room but slept on the floor*"; that when he later asked JNS, she said that the appellant had defiled her; that he then took the appellant to the police.

11. Police constable Japheth Kidiavai (PW6) who was stationed at Mutomo Police Station recalled that on 15th March 2013 at 3.00 p.m., the area chief, PW4, accompanied by PW2 and PW1 reported that the appellant had on 16th January 2013 defiled PW1; that after interrogations he preferred charges against the appellant.

12. Daniel Mulwa (PW3) a clinical officer at Mutomo Health Center examined JNS on 15th March 2013. On examination PW3 noted that her hymen was missing. He filled out the P3 Form which was produced.

13. In his defence, the appellant stated that he left Mutomo for Kitui town with his daughter, JNS, at 2.00 pm on 16th January 2013 and reached Kitui at 6.00 p.m.; that after shopping for JNS, he hired a boda boda which took them "*to uncle's home at Matinyani*"; that the following day on 17th January 2013, they took a boda boda to school where he left JNS; that he then returned to Kitui, did shopping, went back to school, paid school fees and returned to Mutomo at 8.00 p.m.; that on returning home PW2 picked a quarrel with him over why he had switched off his phone; that when he told PW2 where he had slept, she threatened him and brought a witch doctor to the house; that he was then summoned to the chief's office and to the police station where he was arrested and charged with the offence. He denied having defiled the complainant and stated that it was illogical for an incident that allegedly took place on 16 th January 2013 to have been reported 15th March 2013.

14. As already noted, the trial court was satisfied that the charge was established to the required standard, convicted the appellant and sentenced him to imprisonment for a term of 15 years after which his appeal to the High Court was dismissed.

15. Urging the appeal before us via video link on 2nd June 2020, the appellant relied on his written submissions in which he argues that: the prosecution evidence was a fabrication; that JNS did not tell the court how she met the appellant; that JNS was coached by PW2 to implicate the appellant and lied to the court that they had slept in a lodging when in fact they spent the night at an auntie's house and it is therefore not true that they spent the night at a lodging; that JNS's testimony that she informed her mother of the incident was contradicted by her mother who said that she refused to say what had happened but informed an elder; that the lower courts failed to appreciate that it is inconceivable that JNS would have remained silent about the incident when she got back to school and did not tell anybody in school about it; that the chief (PW4) and the elder (PW5) who testified for the prosecution are his enemies and caused PW2 to separate from him.

16. The appellant submitted further that the offence was not proved to the required standard. He reiterated that it is incredible that an incident that allegedly occurred on 16th January 2013 was not reported to the chief until 15th March 2013; that no investigations were conducted by the prosecution; and that the offence was allegedly committed in Kitui town and that is where the trial ought to have taken place but the appellant was charged in a court in Mutomo in a bid to conceal material facts.

17. He urged that the prosecution wrongly relied on evidence that he (the appellant) had previous convictions and the appellant's right against double jeopardy under Article 50(2)(o) of the Constitution was thereby violated; that the medical report that was submitted was invalid as the complainant was examined two months after the alleged defilement; and maintained that the lower courts below erred in failing to find that there was grudge that resulted in his prosecution.

18. Opposing the appeal ***Ms. Magdalene Ngalyuka*** learned counsel for the respondent submitted that the charge was proved to the required standard; that appellant and the complainant were in agreement that on 16th January 2013 they traveled to Kitui town from Mutomo and that the complainant got to school on 17th January 2013; that the only contention is where they spent the night of 16th/17th January 2013 and whether defilement took place; that whilst the appellant asserted that they slept at an uncle's house, the complainant, JNS, asserted that they slept in a lodging where the appellant defiled her.

19. Counsel submitted that there are concurrent findings by the courts below; that both courts found the complainant to be credible and this Court has no basis for interfering with those findings. That the testimony of the complainant was corroborated by that of the mother and the chief. It was submitted that the ingredients of the offence, namely the age of the complainant, penetration and the identity of the culprit were established beyond reasonable doubt; that the first appellate court properly reviewed and analyzed the evidence and arrived at the correct decision.

20. We have considered the appeal and the submissions. Under Section 361(1) of the Criminal Procedure Code, the mandate of this Court on a second appeal is restricted to matters of law. We cannot interfere with the decision of the High Court, the first appellate court, unless the appellant is able to show that that court considered matters it ought not to have considered or that it failed to consider matters it ought to have considered or that looking at the entire decision on such matters that court was plainly wrong. As stated by the Court in ***Karani vs. R [2010] 1 KLR 73***:

> **"By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."**

21. Furthermore, as held by this Court in ***Adan Muraguri Mungara vs.*** **Republic [2010] eKLR**, we have:

> **"…a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."**

22. Bearing that in mind, the appellant has in his written submissions before us, in effect sought to adduce evidence in a bid to demonstrate that evidence against him was fabricated in order to implicate him in the offence. He argues that there was a grudge and a conspiracy between PW2 on the one part and PW4 and PW5 on the other; that PW4 and PW5 are responsible for what he says is his estranged relationship with PW2; and that the courts below overlooked that his arraignment was driven by a grudge. Quite apart from the fact that no evidence was tendered before the trial court on these claims, we cannot at this stage entertain matters of fact which have hitherto not been canvassed before the lower courts.

23. In our view, the only question of law that arises for our consideration is whether the offence was proved to the required standard. In that regard there is no dispute, as already stated, that on 16th January 2013, at 2.30 p.m. the appellant and JNS boarded a vehicle at Mutomo and reached Kitui town in the evening at about 6.00 p.m. It is also not contested that the appellant took JNS to school the following day on 17th January 2013. The only question the trial court had to determine was whether the duo slept in a lodging or at the auntie's place and whether the appellant defiled JNS. In that regard, the learned trial magistrate expressed that the prosecution evidence was "*strong and compelling*" and directly linked the appellant to the offence. The learned magistrate stated as follows:

> **"I find that the evidence of the complainant (PW1) is fully supported by the evidence of PW2, PW3, PW4, PW5, and PW6 respectively in the same confirms that the accused actually defiled the complainant on 16 January 2013 while in lodge room in Kitui. I do also find that the treatment card and P3 form produced as exhibits by PW3 clearly shows that there was penetration of the complainant's genitalia because of the missing hymen."**

24. The learned Judge of the High Court, upon reviewing and evaluating the evidence reached the same conclusion stated:

> **"*The defence by the appellant does not deny having* escorted the complainant in school but denies the offence. Although the appellant in his defence stated that they spent the night in question at the uncle's place, this is not believable in view of the complainant's strong and corroborated evidence that they spent the night in the lodging room."**

25. There are, therefore, concurrent findings by the courts below that are demonstrably supported by evidence. The identity of the assailant is not in question. The appellant was well known to the complainant. The complainant's age was also not at all in question. Her mother was categorical she was 16 years old. As regards penetration, the complainant narrated in graphic detail what transpired in lodging room; that after showering, "*I lay on the bed. He removed my pant. He came on top of me and defiled me. I felt a lot of pain. I screamed but nobody came to my help. He defiled me 3 times that night*." The trial court was satisfied that the complainant was truthful and credible.

26. Under the proviso to Section 124 of the Evidence Act, the complainant's testimony would have sufficed to support the conviction. Section 124 of the Evidence Act which requires corroboration of evidence of minors has a proviso that states as follows:

> **"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 person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

27. As already noted, the trial magistrate believed that the complainant was speaking the truth and gave reasons for doing so. Moreover, there was corroborative medical evidence, if any was required, that the complainant's hymen was missing not withstanding that the medical examination was carried out sometime after the incident. The discrepancy between the testimony of JNS and that of her mother, PW2, regarding whether it was to PW2 or to the village elder PW5 to whom JNS first reported the incident when she returned home for mid-term break is in our view not material having regard to the overwhelming prosecution evidence establishing the appellant's guilt. There is

therefore no merit in the appellant's complaints that the charge was not proved to the required standard.

28. In conclusion therefore, the appeal is devoid of merit and is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 6*th* day of November, 2020.

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

A.K. MURGOR

…….……

JUDGE OF APPEAL

F. SICHALE

……..……

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR