IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED JJ.A.)

CRIMINAL APPEAL NO. 147 OF 2014

BETWEEN

JAMIN WAFULA WAMBILANGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being and Appeal from a judgment of the High Court

of Kenya at Kakamega (Chitembwe, J.) delivered on the 2nd day of June, 2012

in

HCCRA NO. 18 OF 2011)

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JUDGMENT OF THE COURT

[1] The appellant, **Jamin Wafula Wambilanga**, has appealed to this Court against the judgment of the High Court which upheld his conviction for defilement of a child, ZK (name withheld) contrary to **Section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act No. 3 of 2006** and affirmed a sentence of twenty (20) years imprisonment thereof meted out in Criminal Case No.166 of 2010 at Butere, by the then Senior Resident Magistrate, D.O. Ogembo.

[2] In his judgment, the learned judge of the High Court found that the evidence adduced against the appellant was sufficient to prove the charge of defilement against the appellant to the required standard of proof beyond any reasonable doubt; that the appellant was caught red handed in the act; and that the defence of the appellant did not in any way dent the strong case against him.

[3] In his appeal to this Court, the appellant through his advocates **Mr. B. Onsongo,** relied on his Supplementary Memorandum of Appeal in which he raised ten grounds of appeal. We reproduce the same herein verbatim.

> ***"1) The 1st Appellate Court erred both in law and fact failing to undertake with the thoroughness required, its duty to re-evaluate and re-analyse the evidence and arrive at its independent decision or conclusion.***
>
> ***2) There were serious and weighty contradictions in the prosecution case which were sufficient to raise reasonable doubt in the mind of any court which doubt ought to have been resolved in favour of the accused/appellant.***
>
> ***3) The medical evidence relied on by the prosecution contained questionable gaps and inconsistencies that made it totally unreliable and could not be a basis of sound conviction.***
>
> ***4) The defence by the accused person/Appellant was never considered by both courts and the aid courts shifted both the burden of proof and the incidence of proof to the accused Person/ Appellant against his Constitutional rights of presumption of innocence.***

5) Both the lower court and the superior courts erred both in law and fact in totally misunderstanding and or failing to appreciate the accused/Appellants defence thereby coming to a wrong conclusion.

6) The court relied on hearsay evidence and other inadmissible evidence hence the prosecution did not discharge it onus of proving their case beyond a reasonable doubt.

7) The circumstantial evidence set out by the prosecution was capable of several hypothesis and hence not to the required standards to be the basis of a sound conviction.

8) The 1st Appellate Court erred in both law and fact capitalizing on the alleged weakness in the defence case to buttress an otherwise weak prosecution case.

9) The judgment of the 1st Appellate court was against the weight of evidence on record.

10) The sentence imposed upon the Appellant is manifestly harsh and excessive in the circumstances and this matter should be remitted back to the High Court for re-sentencing accordingly."

[4] The appeal came before us for plenary hearing on 28th January, 2019. The appellant was represented by learned counsel **Mr. Richard Onsongo**, while the respondent was represented by learned Senior Assistant Principal Prosecution Counsel, **Mr. L. K. Sirtuy. Mr. Onsongo** wholly relied on the appellant's written submissions filed on 6th September, 2018.

[5] In the written submissions, the appellant, contends that, the superior court failed to re-analyze and re-evaluate the evidence. He contends that while the ZK and her mother testified that indeed there was defilement the evidence of the persons who alleged that they were present at the scene is to the effect that there was attempted defilement.

[6] Mr. Sirtuy opposed the appeal. He submitted that both courts below made concurrent findings and properly analysed the evidence in reaching a fair decision with regard to the testimonies of the witnesses who testified. Learned counsel further contended that the sentence imposed on the appellant was sound, as the minimum sentence for the offence committed is 20 years imprisonment. Therefore, the lower court properly exercised its discretion in sentencing. In concluding, Mr. Sirtuy urged the court to uphold the conviction and sentence as the appeal lacks merit.

[7] This is a second appeal and hence we are restricted to addressing ourselves to matters of law only. We will not normally interfere with the concurrent findings of fact by the two courts below unless such findings are based on no evidence or they 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 page 219 this Court stated thus:-

"A second appeal must be confirmed 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 rest to be applied on second appeal is whether there was any evidence on which the trial court find as it did (Reuben Karoti S/O Karanja versus Republic [1956 17 EACA 146]."

[8] We have perused the record of appeal, and considered the submissions by counsel and the authorities cited. The particulars of the offence against the appellant were that on the 9th of March, 2010, at Sabatia Market in Butere district, he intentionally caused his penis to penetrate the vagina of ZK, a child aged 14 years.

[9] Section 8(1) of the **Sexual Offences Act No. 3 of 2006** states as follows:

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

[10] This means that the elements for the offence of defilement that require proof are:

(i) that the victim is a child.

(ii) that there has been penetration of the child's genital organs, by the genital organs of the perpetrator (such penetration need not be complete or absolute as partial penetration suffices).

(iii) that the perpetrator of the offence is established to be the accused person.

[11] The record of appeal shows that ZK at the material time was a standard 7 pupil at [*name withheld*] Primary School. She told the trial Court that she was 14 years old. Dr. Stafford Ochango (Dr. Ochango) of Butere District Hospital assessed ZK's aged as between 13-14 years at the time of examination. According to ZK on the material day at about 7.00pm she was sent by her mother to purchase vegetable oil from the local shopping centre and as she was passing by the appellant's house, the appellant called her into his house. She accepted the invitation and while inside his house the appellant first touched her breasts before locking the door and proceeding to defile her on his bed. ZK testified that it was her first time to have sexual intercourse, and that as a result she bled. During the incident she was unable to raise an alarm as the appellant had covered her mouth. The blood stained undergarments that she wore on the material evening, were produced in evidence by the prosecution.

[**12] Joyce Toya Amukasa (Joyce)** and **Violet Andayi (Violet),** the appellant's then neighbours testified that they were curious when they

saw the young girl in the appellant's house. Joyce summoned other neighbours including Violet to come and witness the suspicious incident in the appellant's house. Joyce and Violet testified that they saw the appellant touching the breasts of ZK by peeping through the glass window as the curtain had not been drawn. The sun had set so it was dark and the lights in the appellant's house were switched on. When the two witnesses saw the appellant take ZK to the side of the room where the bed was situated and because ZK's countenance was one of distress, they raised alarm. Joyce and Violet further testified that they saw the appellant unzip his trousers but were unable to see if he actually penetrated ZK. They proceeded to lock the appellant's house from the outside, while proceeding to call **AN (A)** ZK's mother, to the scene of the incident.

[13] When the appellant was put on his defence, he denied defiling ZK. He cast aspersions on the authenticity of the P3 form, medical treatment papers, laboratory test results that were produced in evidence by **Dr. Ochango** who had established that ZK's labia minora and the labia majora were bruised, the hymen was broken and spermatozoa and pus cells were seen including blood spots at the external vaginal orifice. In his defence, the appellant denied defiling ZK. He testified that the medical evidence tendered was fabricated by his colleague with whom he had serious differences. He said that it is the doctor who made up the evidence to settle old scores at their place of work.

[14] In its judgment, the first appellate court came to the conclusion that the appellant was caught red handed while in the act; that the prosecution proved its case on the charge of defilement against the appellant to the required standard of proof of beyond reasonable doubt; and that the defence of the appellant could not stand in light of the strong evidence adduced by the prosecution.

[15] It is clear from the evidence on record that the appellant was found with ZK in circumstances that left no doubt that he was up to no good. ZK testified that the appellant not only touched her breasts, but also took her to his bed and did "bad manners to her". ZK explained that she meant that the appellant defiled her. The appellant's neighbours, Joyce and Violet both confirmed that the appellant went into his house with ZK, and that out of curiosity and suspicion, they peeped into the appellant's house and saw the appellant touch ZK's breasts, then lead her into his bed side where there was a curtain but they were partially able to see him touching her private parts.

[16] The appellant submitted that there was contradiction between the evidence of Joyce and Violet and the evidence of ZK as Joyce and Violet maintained they never saw the appellant undress or remove his trousers, and that when they entered his house, he was still in his trouser and ZK in her clothes. We have considered the evidence of these witnesses, it is evident to us that Joyce and Violet were peeping through the window. Joyce admits that at some stage, the appellant had pulled the child into the curtain side where the bed was and that at that stage they ran to call the child's mother. It is possible that the appellant caused his penis to penetrate the vagina of ZK during that short time that Joyce and Violet ran to call ZK's mother. Indeed, they testified that when ZK's mother entered the appellant's house it was at that stage that he zipped his trouser and they saw that his front part was swollen an indication that he was caught in the act.

[17] The evidence of Dr. Ochango confirmed ZK's evidence that there was penetration as there were bruises on the vaginal area, blood spots and broken hymen. The age of ZK was also clearly confirmed by the age assessment done by Dr. Ochango, who placed her age at between thirteen and fourteen. Although the appellant claimed that the evidence against him was fabricated, we find no reason why the doctor and his neighbours could have testified falsely against him.

[18] We agree with the analysis by the trial court stated:

> ***"..In my view, the neighbours must have only got involved in this matter after seeing the accused sexually assaulting the minor. Had accused (sic) been with the child innocently as claimed, the inner garments of the child (Exh 1 and 2) would not have been blood stained. Similarly, no injuries, stains or spermatozoa would have been detected on the organs of the child since there is no evidence or record to show if the minor had had sexual intercourse with any other man, but the accused."***

[19] We are satisfied that the learned judge of the High Court properly considered and re-evaluated the evidence that was adduced before the trial court; and that there was sufficient evidence to prove that ZK was a child under the age of fifteen years; that her genital organs were penetrated; and that the appellant was identified as the person who caused his genital organ to penetrate the genital organ of ZK. Accordingly, the appellant's conviction was safe.

[20] In regard to sentence, the appellant contended that the sentence of twenty (20) years was manifestly harsh and excessive. Under **section 361(1)(a)** of the **Criminal Procedure Code**, severity of sentence is a matter of fact that is not open for consideration by this Court on a second appeal. In addition the sentence was the minimum provided by law. The upshot of the above is that we find no merit in this appeal.

It is accordingly dismissed in its entirety

Dated and delivered at Kisumu this 27th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR