IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 17 OF 2017

BETWEEN

STEPHEN GITAU NJOKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court at Nairobi (Kimaru J.) delivered on 3rd July, 2015 **in H.C. CR. A No. 147 of 2012)**

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JUDGMENT OF THE COURT

1. In this second appeal, **Stephen Gitau Njoki** (the appellant), is challenging his conviction and sentence by the Principal Magistrate's Court, Kiambu. He was charged with the offence of defilement contrary to **Section 8(1) as read with (2)** of the **Sexual Offences Act No.3 of 2006** and an alternative charge of indecent act contrary to ***Section 11(1)*** **of the Sexual Offences Act No.3 of 2006.**

2. The particulars of the offence were that on the 24th day of May 2011 in Kasarani Division within Nairobi County, the appellant intentionally and unlawfully committed an act which caused penetration of his male genital organ namely penis into the female genital of J.W., a girl aged three years old.

3. During the trial, the appellant denied the charge and gave unsworn evidence and did not call any witnesses. The trial court, having considered the entire evidence on record, found that the prosecution had proved its case beyond reasonable doubt. It convicted the appellant and sentenced him to life imprisonment.

4. Aggrieved by that conviction and sentence, the appellant preferred an appeal to the High Court. That appeal was unsuccessful. Subsequently, the appellant preferred this second appeal to this Court. His supplementary memorandum of appeal dated 14th June 2017 raises seven grounds of appeal that may be summarized as follows: that the 1st appellate court erred in law by: failing to reconsider and re-evaluate the whole evidence; failing to appreciate that the prosecution did not prove its case beyond reasonable doubt; admitting prosecution evidence which was contradictory and inconsistent; failing to comply with **Section 198** of the **Criminal Procedure Code;** shifting the onus of proof to the appellant; failing to appreciate that critical witnesses were never called by the prosecution; applying wrong principles and drawing erroneous conclusions prejudicial to the appellant; failing to consider and/or disregarding the

appellant's defence.

5. When the appeal came up for hearing before us, the appellant, who was unrepresented, chose to argue his appeal by way of written submissions. First, the appellant submitted that the evidence adduced did not support the charge of defilement by dint of **Section 8(1)** of the **Sexual Offences Act.** He stated that the prosecution failed to prove beyond reasonable doubt that there was penetration into the complainant's genital organ. The appellant argued that if indeed there was defilement PW1 (the complainant's mother) ought to have witnessed the act, as she alleged that it was committed in broad daylight.

6. It is the appellant's case that **Section 150** of the **Criminal Procedure Code** was contravened by virtue of the fact that the High Court failed to consider that **PW5 (Dr. Catherine Mwangi**) testified yet she did not have the advantage of examining the complainant, but only relied on **PW4?s report (Dr. Thuo)** to testify. In this regard, the appellant contended that **PW3 (Dr. Zephaniah Kamau)** confirmed that the child's hymen was intact, which is proof that there was no penetration. He further contended that no semen was taken for DNA testing in accordance with the provisions of **Section 36** of the **Sexual Offenses Act**.

7. As regards the age of the child, it is the appellant's submission that by dint of **Sections 163** and **165** of the **Evidence Act**, the evidence adduced to prove the child's age was contradictory; that it was not proved that the child was a minor as no age assessment was conducted. To support this argument he relied on the case of **KENNETH KIPLANGAT RONO v REPUBLIC [2010] KLR**.

8. Finally, while relying on the case of **THOMAS GILBERT CHOLMONDELEY v REPUBLIC [2008] KLR,** the appellant asserted that his right to a fair hearing as enshrined in **Article 50(2) (j)** of the **Constitution 2010** was violated in view of the fact that he was not afforded the right of disclosure of the prosecution evidence. He prayed that the appeal be allowed, conviction quashed and sentence set aside.

9. Opposing the appeal, **Mr. O?mirera**, **Senior Assistant Director of Public Prosecutions (SADPP),** submitted that the two courts below made concurrent findings on the issue of identification, commission of the offence and the appellant's defence.

10. On the issue of defilement, Counsel argued that the trial court relied on the evidence of PW1, the mother of the child, that the appellant was caught red handed, as she found the child sitting on the appellant's lap with her panty pulled to her knees. Further, that there is no law that states that the act of defilement can only be proved by medical evidence; and that the child was examined by PW5 on the same day and confirmed that she had been defiled.

11. He urged the Court to disregard PW3's medical report as he examined the child on 17th June 2011 when she had already healed, the defilement having occurred on 24th May 2011. Counsel reaffirmed that the appellant was arrested at the scene of crime; his identity was not in doubt as he was well known to PW1; and that the appellant's defence was an afterthought because he did not raise the issue of his alleged broken relationship with PW1 in the lower court.

12. Counsel refuted the appellant's argument that there was shifting of the burden of proof and submitted that the appellant failed to explain the circumstances under which he was found with the child. He urged that the appeal be dismissed.

13. In his reply, the appellant maintained that the child was not examined on the alleged day of defilement. He stated that if indeed there was defilement the child would have been badly injured. He relied on PW3's medical report which indicated that the child was not defiled.

14. We have carefully perused the record of appeal. We have also considered the respective submissions of the appellant and the respondent as well as the authorities cited.

15. Section 361 of the **Criminal Procedure Code** enjoins this Court to consider matters of law only when hearing and determining a second appeal. In **KARINGO v REPUBLIC [1982] KLR 219,** this

Court stated the principle underpinning **Section 361** of the **Criminal Procedure Code** 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".***

16. This was also restated by this Court in **DZOMBO MATAZA *v.* R, 2014 eKLR** where the Court stated:

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see Okeno v Republic (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code, our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong".***

17. We are of the view that only two issues turn for our consideration in this appeal. The first one is whether penetration was established to prove the charge of defilement by dint of **Section 2** of the **Sexual Offences Act**. The second one is whether the High Court duly performed its duty as required of a first appellate court.

18. As we have noted, the learned judge identified the three elements of the offence of defilement as the age of the complainant, identity of the assailant; and proof of penetration. At this point, judging from the evidence on record we shall only dwell on proof of penetration as the elements of age of the complainant and identity of the assailant have clearly been established and are not in dispute.

19. The learned judge cited **Section 2** of the **Sexual Offenses Act** which defines penetration to mean **„the partial or complete insertion of the genital organs of a person into the genital organs of another person**.**?**

20. He re-analysed and re-evaluated the evidence adduced before the trial court on the three elements and came to the conclusion that the prosecution had proved its case beyond reasonable doubt. The learned judge remarked thus:

> ***"In the instant case, PW1 on that material day saw the complainant sitted on the appellant?s laps. Her dress was lifted. Her panty had been pulled down. The complainant?s vagina was soiled. There was mucus like discharge. PW1 took the complainant to Nairobi Women?s Hospital. She was examined by Dr. Thuo. His examination revealed there was bleeding of the introitus. This proved partial penetration of the genital organs of the complainant. There was also spermatozoa. According to the above definition, penetration was proved."***

21. Similarly, as was held in the case of **MARIPETT LOONKOMOK v REPUBLIC [2016] eKLR**, penetration can be confirmed by medical evidence. The learned judge found that the medical evidence corroborated the evidence of PW1. Further, the evidence of PW1 sufficiently, supported the charge. PW1 testified as follows:

> ***"I went there. I saw somebody who used to sell bananas holding J on his lap. Her pant had been pulled to her knees. Her dress had been lifted up. The child was soiled on her private parts. She had mucus like discharge".***

22. The trial court also formed the opinion that PW1 was a credible witness. The court stated:

> ***"I have no reason whatsoever to discredit the evidence of her mother who caught the accused person in the act***".

23. From the evidence on record, that is, medical reports and witness testimonies, we are persuaded that indeed partial penetration was established which proves that the complainant was sexually assaulted.

24. Having perused the record, we note that the issue raised by the appellant about violation of his right to be informed in advance of the evidence the prosecution intends to rely on as per **Article 50(2)(j)** was neither raised before the trial Court nor before the first appellate court. The appellant therefore sought to introduce this issue for the first time before us. This Court in **ALFAYO GOMBE OKELLO v REPUBLIC [2010] eKLR Criminal Appeal No. 203 of 2009**, when faced with similar circumstances as those now before us stated as follows:

> ***"….the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."***

25. We therefore decline to deal with this issue and make a finding that the appellant should have raised the issue of violation of his right in the two courts below where a determination could have been made regarding the issue. In any event, the trial was not vitiated by failure to avail the evidence as there was sufficient and independent evidence to support the charge and the alleged failure did not render the prosecution's case fatal.

26. The appellant also challenged the decision of the High Court on the ground that the High Court failed to perform its duties as a first appellate court by failing to re-consider and re-evaluate the evidence adduced. The duty of a court sitting on a first appeal has time and again been stated as

> "***to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence"***. See **OKENO v REPUBLIC [1972] EA 32.**

27. From our own consideration of the record and the judgment of the High Court, we cannot find anything to suggest that the High Court failed in its duty as stated above. It is succinctly clear that the learned judge fully and carefully considered all the evidence before upholding the trial court's decision. From the judgment, it is evident that the learned judge understood his duty as the first appellate court. In this regard the learned judge stated as follows:

> ***"This being a first appellate court, it has a duty to re-evaluate and re-consider the evidence adduced before the trial magistrate?s court to make its own independent determination noting it never saw any of the witnesses as they testified. See Njoroge Vs Republic [1987] KLR 19.The court raised one issue for determination. Did the prosecution prove its case on the charge of defilement to the required standard of proof beyond reasonable doubt?"***

28. In view of the above findings, we consider that the reasons we have stated are more than adequate to decline the appellant's invitation to interfere with the concurrent findings by the trial Court and the High Court. Accordingly, we find that this appeal lacks merit and hereby dismiss it in its entirety.

Dated and delivered at Nairobi this 26th day of January, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR