IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, MUSINGA & GATEMBU JJ.A

CRIMINAL APPEAL NO. 191 OF 2016

BETWEEN

JAMES MURIITHI GITAU...APPELLANT

AND

REPUBLIC............................RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi

(Mbogholi, J) dated 15th July, 2014

in

HC. CR. A. 87 OF 2011*)*

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JUDGMENT OF THE COURT

1. The appellant, James Muriithi Gitau, was on 29th March 2011 convicted by the Principal Magistrate's Court at Githunguri for the offence of defilement and sentenced to life imprisonment. The particulars of the offence were that on 24th February 2010 in Githunguri within Central Province, he unlawfully committed an act, which caused penetration with his genital organ (penis) into the genital organ (vagina) of LNM a child aged 9 years. His first appeal was dismissed by the High Court (A. Mbogholi Msagha, J) in a judgment delivered on 15 July 2014. This is a second appeal.

Background

2. On 24th February 2010 at about 6:30 a.m., LNM (PW1) then a standard three student at [particulars withheld] Primary School was on her way to school in the company of two other girls, PW3 and PW4. On the way they met a man who, according to PW1, enquired who had taken his pencil. They responded by stating that they had not taken his pencil. PW1 then started to run. The man pursued her, held her and took her to a maize farm where he removed her clothes; removed his own clothes and then lay on top of her. In her words, "he then did bad manners to me. He used a thing which looked like a stick to do bad manners on me. He inserted his stick into my vagina five times. I felt pain in my vagina. I bled when he inserted his stick. When he was finished he went up the hill." She stated that her companions PW3 and PW4 fled when the appellant held her.

3. It was her further evidence that after putting her uniform back on, which was bloodstained, she went towards her school and then turned back towards her home. On the way she met her neighbour, Teresia Wangare (PW6) to whom she narrated what had happened and how she had been defiled. There after they went to Githunguri Police Station and later to Githunguri Health Centre. She identified the man as the appellant and stated that she had previously seen him near a river smoking bhang.

4. Teresia Wangare (PW6) stated that on 24th February 2010 at about 7:30 a.m. She was in her house when LNM came crying. She had the keys to LNM's parents house. After letting LNM into the house, she narrated that she had been defiled. She took her to hospital and reported the matter to the police. She called LNM's mother who joined them at the police station.

5. LNM's mother testified as PW2. She stated that in the morning of 24th February 2010 she received information that her daughter had been

defiled and proceeded to the hospital where her daughter was receiving treatment. She confirmed her daughter's age, was then 10 years.

6. EW (PW3) and (PW4) who were school mates of LNM stated that on 24th February 2010 about 7 am they were with LNM on their way to school when someone emerged from a place called Jamaica. That as they approached where he was, he started to move from side to side and they began to run away. That the person ran after them and enquired who had seen his "bro" (while in the typed record of proceedings it is recorded that appellant asked PW3 and PW4 who had taken his "biro", the original record is clear that the question attributed to the appellant is who took the biro). That the person then held LNM and accused her of taking his "bro" before dragging her to a maize farm. That they then ran to school and informed their teacher (PW5) what had happened. They stated that the person who held LNM and dragged her to the maize farm was the appellant. That he was wearing blue jeans with a print of a gun on it and a black sweater. That the appellant was brought to school and they were asked to identify him. PW4 said she could not identify him at first as he was wearing a cap but on removing the cap she was able to identify him. PW3 said she identified the appellant at the school when he was brought.

7. L K K (PW5) is the teacher at the school to whom EW (PW3) and AM(PW4) reported that on their way to school, a person emerged, held LNM and dragged her into a maize farm. She involved the headmaster. They mobilized a search party comprising of Standard 8 pupils to go in search of LNM. On receiving a report that LNM had been defiled, they went to the hospital where she was receiving treatment. A few days later, the appellant went to the school; the headmaster called the police and LNM and EW (PW3) and AM(PW4) identified the appellant in the presence of the police officers as the person who had held LNM.

8. Dr. Caroline Nguru (PW7) examined LNM at Kiambu District Hospital on 24th February 2010. Her school uniform was blood stained. Her panty was dirty. She had normal external genitalia. Her vulva was reddish and was bruised. She had blood on the vulva. Red blood cells were seen. She concluded that the LNM had been defiled.

9. Police Sergeant Livingstone Kiguza (PW8) testified that on 3rd March 2010 learnt that a person who had been arrested by members of the public was at [particulars withheld] Primary School. He proceeded to the school. There, he found the appellant. The appellant was identified by 3 girls. The appellant directed him to his brother's house where he (PW8) retrieved a red jacket that LNM and EW (PW3) and AM (PW4) claimed the appellant was wearing during the commission of the offence. PW 8 produced the red jacket as an exhibit. LNM was recalled to the witness stand where she identified the red jacket that was produced by PW8 as the one the appellant was wearing on the day of the incident.

10. Police Constable Robert Ochola (PW10) then attached to crime duties at Githunguri Police Station was the investigating officer. He was at the Police Station on 24th February 2010 when Teresia Wangare (PW6) in the company of LNM reported that LNM had been defiled. After booking the report in the occurrence book, he escorted them to Githunguri Health Centre where LNM was examined. After recording witness statements and putting together the exhibits the appellant was charged with the offence.

11. In his defence, the appellant denied having committed the offence. He stated that he left Limuru for Githunguri on 22nd February 2010 and went to his sister's home. His sister gave him Kshs. 2,000. He went home and left his jacket for his brother. He then went to Githunguri to buy another jacket and then went back to Limuru where he stayed. He returned home in Githunguri in March when he learnt that he was being sought by the Police for allegedly defiling a minor and stealing a phone. That he learnt that the child who alleged that he had stolen her phone was in [particulars withheld] Primary School. He went to the school accompanied by his brother and went into the head teacher's office. The child, and her friends were called in but they could not identify him. The police were called and he took them to his house where they collected his jacket.

12. Upon reviewing the evidence, the trial court was satisfied that the appellant was positively identified by LNM and that her evidence was corroborated by that of her two class mates EW (PW3) and AM(PW4); that the jacket that LNM said the appellant was wearing during the commission of the offence was recovered from the appellant; that the defence put forth by the appellant did not have probative value; and that the charge was proved to the required standard. He accordingly found the appellant guilty of the offence and convicted him before sentencing him to imprisonment for life. As already indicated, his appeal to the High Court was dismissed.

The appeal and submissions

13. In his memorandum of appeal, the appellant complains that the lower courts did not sufficiently scrutinize the entire evidence with the result that they reached a decision that was not supported by evidence; that the prosecution did not prove its case beyond reasonable doubt and that the trial court failed to comply with Section 169(1) of the Criminal Procedure Code.

14. Appearing before us, the appellant who was in person argued that he was not in Githunguri when the alleged crime was committed but in Limuru; that he had left the jacket that was recovered from his house and with which he was purportedly identified with his brother on 22nd February 2010 while the alleged crime was committed on 24th February 2010.

15. Regarding his identification, he stated that when he learnt that he was being sought, he went to the police to enquire and learnt that it had been alleged by a certain boy, Muiruri, that he had snatched a phone; that he went to the school where the boy was, but the boy could not identify him; that in the process the victim of the alleged defilement was called to identify him but she could not do so.

16. He concluded by saying that his defence was not considered by the courts below.

17. Opposing the appeal, Mr. M. O'Mirera, learned Senior Assistant Deputy Public Prosecutor, submitted that the appellant was properly convicted; that LNM was clear in her evidence that her assailant was wearing the red jacket that was recovered from the appellant and that she used to see him smoking bhang; that the evidence of LNM was corroborated by that of PW3 and PW4; that although there are some

inconsistencies or weak points in their evidence, the same are not material; that the appellant's defence was duly considered and properly rejected; that there are concurrent findings by the lower court and this Court should not interfere unless there is a misdirection that has resulted in a miscarriage of justice.

Analysis and determination

18. We have considered the appeal and the submissions. As this is a second appeal, our authority is limited by Section 361(1) of the Criminal Procedure Code (CPC) to considering matters of law. In ***Dzombo Mataza vs. R, [2014] eKLR*** 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.***
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> ***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."***

19. Guided by that principle, the appellant's appeal raises two issues for our consideration. The first is whether he was positively identified as the perpetrator of the offence. The second is whether his defence was considered.

20. Beginning with the issue of identification, this Court has often stated that where the case against an accused person depends on the correctness of his identification, the trial court must exercise great care and caution before convicting an accused person in reliance of such evidence. See ***Anjononi and Another vs. Republic [1980] KLR 59*** and also ***Edwin Chagali Musiega vs. Republic [2015] eKLR.*** In the often-cited case of ***Wamunga v Republic (1989) KLR 424*** this Court stated that:

> ***"Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."***

21. And in ***Joseph Ngumbao Nzaro Vs. Republic [1982] 2 KAR212*** the Court stated that, ***"It is possible for a witness to believe genuinely that he had been attacked by someone he knows very well and yet be mistaken. So the possibility of error or mistake is always there whether the case be of recognition or identification…"***

22. In the present case both courts below were satisfied that the appellant was positively identified. The trial court found that "*the complainant positively identified the accused person as the person who defiled her" and "that" her evidence was corroborated by that of her two school mates…who witnessed the accused person abducting the complainant and dragging her into the maize farm*." In reaching that finding, the court also took into consideration that the complainant informed the court that the person who defiled her was wearing a red jacket; and that the jacket, which was identified by the complainant, was recovered from the appellant. The High Court, on its part, agreed entirely with the assessment of the evidence by the trial court to the effect that the appellant was positively identified.

23. We have, on our part, reviewed the evidence with a view to establishing whether the conclusions reached by the lower courts that the appellant was positively identified as the perpetrator of the offence is supported by the evidence. There is no dispute regarding two of three ingredients of the offence namely that LNM was defiled and that she was 9 years old when she was defiled. LNM was clear that the person who waylaid her and dragged her into the maize farm was the appellant. He was not a total stranger to her. She was familiar with him having previously seen him smoking bhang. She described the clothing he was wearing and identified him to his teacher and the police at the school when he removed the cap that he was wearing. Although she initially stated that the appellant was wearing a black jacket, she was categorical when she was later recalled that he was wearing a red jacket. She was able to identify the jacket in court. That jacket was recovered from the appellant's house. PW3 and PW4 were in the company of LNM on their way to school on that fateful morning. Although there were discrepancies between their testimonies regarding the colour of clothing worn by the appellant, their evidence substantially supported that of the complainant.

24. As stated by this Court in ***Karingo v Republic [1982] KLR 219,*** the Court does not, in a second appeal, ***"interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."*** We are satisfied that there was sufficient evidence on the basis of which the lower courts concluded that the appellant was positively identified. We do not have any basis for interfering with that finding.

25. The next issue is whether the defence put forward by the appellant was duly considered. In his defence, the appellant asserted that he was away in Limuru as the offence was committed in Githunguri. In effect, an alibi. It is needless for us to mention that the setting up of an alibi did not shift the burden of proof from the prosecution. The lower courts were under a duty, to consider the evidence tendered by the prosecution and by the appellant in his defence as a whole and to determine whether at the end, any reasonable doubt was raised as to the guilt of the appellant.

26. In **Anthony Magua Gituchu v Republic [2011] eKLR** this Court cited with approval the holding in **Sekitoleko v Uganda [1967] E A 531** that as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else. Neither does the burden of proving an alibi lie on the prisoner. See also the decision of this court in **David Muturi Kamau vs. Republic [2015] eKLR** to the effect that the prosecution has the burden throughout of negating the alibi. Once the defence of alibi is raised, the court should weigh that defence against the prosecution evidence. See **Ganzi & 2 others vs. Republic [2005] 1 KLR 52**.

27. The trial court was undoubtedly alive to the defence put forth by the appellant. The court noted that, "*when accused person was placed on his defence*…[he]…*told court that on 22.2.2010 he went to his home area from Limuru and returned to Limuru shortly thereafter*." In rejecting that defence, the trial court concluded that it had been displaced by the overwhelming prosecution evidence. In our view, considering that the evidence of the complainant LNM and that of PW3 and PW4 placed the appellant at the scene of crime, the alibi was in our view rightly rejected.

28. The result of the foregoing is that the appellant's appeal is devoid of merit and the same is hereby dismissed.

Orders accordingly.

Dated and delivered at Nairobi this 27th day of April, 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