IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, NAMBUYE & OKWENGU, JJA)

CRIMINAL APPEAL NO. 5 OF 2015

BETWEEN

STANLEY MATHENGE KARANI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at

Keroguya (Limo, J.) dated 9th December, 2014).

in

(H. C. CR. A. No.243 of 2013)

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JUDGMENT OF THE COURT

The appellant ***Stanley Mathenge Karani*** was arraigned before the Principal Magistrate's Court at Baricho with the main offence of defilement contrary to **Section 8(1) & (2)** of the Sexual Offences Act. The particulars were that, on the 31st day of January, 2012 in Kirinyaga West District within Central Province, he intentionally caused his penis to penetrate the vagina of ***C.M.*** a child aged five years. In the alternative, the appellant faced an offence of committing an indecent act with a child contrary to **Section 11(1)** of the Act. The particulars were that on the same date and place he intentionally touched the vagina of ***C.M***. with his penis. The appellant denied both offences prompting a trial in which the prosecution called four (4) witnesses while the appellant was the sole witnesses in his defence.

The brief facts are that on the 1st day of February, 2012 ***A, (PW2)*** who is the mother of ***C.M***, PW1 and a neighbour of the appellant left for Baricho Township at about 7.00 pm to buy a match box, leaving ***C.M*** in the house with her brother. She did not find ***C.M*** on her return. She searched for ***C.M*** in the neighbourhood without success. She decided to return to her house and that is when she found ***C.M*** at their gate. She ***(C.M.)*** informed ***Ann*** that the appellant had gone to their house, carried her to his house, removed her black under pant, laid her on his bed, removed his trousers, lay on her and then defiled her. She was crying and in pain. On hearing the narrative ***A*** screamed attracting neighbours who gathered and on hearing the narrative left for the appellant's house. They removed him from the house, while assaulting him, to a spot five (5) meters from his house where they wanted to lynch him. A report was

made to the OCS Baricho police station regarding the incident by an unnamed person. The OCS instructed ***Nixon, (PW4)*** to rush to the scene in the company of other police officers. On arrival at the scene, they found the mob assaulting the appellant who had sustained injuries in the process. The mob dispersed when they saw police.

The Appellant was hand-cuffed but before being led away to the police station he requested police to escort him back to his house just five (5) meters away to lock it as he lived alone in the said house. PW4 obliged and on reaching the one roomed house PW4 decided to search it. It was in the process of the said search that PW4 recovered a black under pant under the pillow on the appellant's bed. It was identified by both ***C.M*** and her mother PW2 as the pant ***C.M*** had worn before her ordeal. She had none on at that time. Both ***C.M*** and appellant were escorted to Baricho Health Centre where they were treated and discharged. ***C.M*** was issued with a P3 which was filled on the next day by ***David,*** (PW3). The injuries noted by ***David*** were that the child could not walk and had to be carried as she was in pain. Examination revealed lacerations on both labia majora and minora. The hymen was missing. In ***David's*** opinion the child had been defiled. ***David*** also explained that the fact of bathing the child accounted for the absence of spermatozoa, but presence of blood was detected because it was high up in the child's vagina.

When cross-examined, ***A*** admitted she had hit the appellant with a stone because he had quarreled and slapped her twice. A was aware the appellant reported the matter to the police but she was never arrested in connection with that incident. ***A's*** evidence was confirmed by PW4 who stated that indeed the appellant reported the assault on him by ***A,*** in respect of which PW4 issued appellant with a P3 which the appellant never returned to the police for action.

The appellant gave unsworn evidence. The sum total of his testimony was that A (PW2) had been his wife. Issues arose between them in the month of January, 2012 forcing them to part ways. The appellant took on another wife, to the knowledge of ***A***, but then ***A*** did not keep off. Instead she kept on pestering him both for money and material things. He concedes he at one time slapped ***A*** who retaliated by hitting him with a stone. He reported the matter to police as confirmed by PW4 but later withdrew the complaint. He conceded having been rouged? by members of the public on the day of the incident but denied the allegation that it was on account of him having defiled ***C.M.*** He also conceded to have been taken back to his house to pick up a jacket but skirted the issue of the recovery of ***C.M's*** black under pant from the said house.

The learned trial magistrate (***S. Jalango (Ag. SRM***) having assessed, evaluated and analyzed the evidence before him, and found the prosecution case proved beyond reasonable doubt, and the appellant guilty of the main offence as charged. He therefore convicted the appellant and sentenced him to life imprisonment.

The appellant was aggrieved by that decision and he appealed to the High Court vide Criminal Appeal No. 243 of 2012. The first appellate judge ***R. K. Limo*** upon re-evaluating, re-assessing and re-analyzing the evidence before him found the appellant's appeal unmeritorious and dismissed it in its entirety. The appellant is now before us on a second appeal raising three (3) grounds of appeal. In summary the appellant faults the first appellate court for; basing his conviction on the prosecution case which was riddled with doubts and inconsistencies and therefore incredible; failure to find that his prosecution arose from an existing grudge between the appellant and the mother of the victim; and failure to comply with the mandatory requirements in **Section 169** of the Criminal Procedure Code in the discharge of its appellate jurisdiction.

In support of his appeal, the appellant made oral submissions in which he adopted and reiterated his written submission that he had been fixed. He relied on the case of ***Abel Monari and others versus Republic CRA 86 of 1994; Charles Kibara Muraya versus Republic CRA No.330 of 1987 and Peterson Gatheru Wachira versus Republic CRA No.319 of 2011 (UR)*** to support his submissions. Briefly the appellant argued that, since PW2 the mother of the victim admitted assaulting the appellant prior to the alleged defilement as confirmed by PW4, it was necessary for the prosecution to call members of the public to testify as to why they arrested him. It was the appellant's view that had the evidence from the members of the public not been withheld, it would have demonstrated that the case of defilement was a

fabrication against him. Secondly that, had the discrepancies, inconsistencies and contradictions on how the complainant left her home for the appellant's house and back, and the alleged recovery of the complainant's black underpant by the members of the public as per the testimony of PW2 and by PW4 been reconciled by the two courts below they would have demonstrated that the entire prosecution case was a fabrication and unworthy of credit. Thirdly that, he had no obligation to disprove any *alibi* pleaded by him as a defence as that burden always lies on the prosecution which burden the prosecution never discharged.

In response to the appellant's submissions ***Mr. J. Kaigai*** the learned ADPP supported both the appellant's conviction and sentence contending that PW1 recognized the appellant who was their neighbour as the person who defiled her on the material date; that the complainant was aged five (5) years and could therefore comprehend things; that there was sufficient corroboration from the medical evidence; that PW1's narration of the defilement to PW2 her mother immediately PW2 sighted her at the gate is evidence of consistency; that there was corroborative evidence from the recovery of PW1s' under pant under the pillow in the appellant's house; PW1 and 2's identification of the underpant as the one PW1 was wearing on the material day was not controverted; that issues of fabrication of the case against the appellant were considered by the two courts below and rejected. On that account, ***Mr. Kaigai*** urged us to find that the appellant's conviction was safe, sentence lawful and dismiss the appeal in its entirety.

In reply to the respondent's s submissions, the appellant argued that PW2 never found her child in his house; nor did any one else see him with the said child on the material day.

This being a second appeal and by dint of **Section 361** of the Criminal Procedure Code, this Court is restricted to address itself on matters of law only. This Court has stated many times before, it 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 ***Chemagong versus Republic [1984] KLR 611***. Also ***Karingo versus Republic [1982] KLR 213 at Pg.219*** where in this Court had this to say:-

> ***"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 a second appeal is whether there was any evidence on which the trial Court could find as it did. Reuben Karari S/O Karanja versus Republic [1956] 17EACA 146."***

We have revisited the record on our own and considered it in the light of the rival arguments set out above. On lack of corroboration; there is no dispute that ***C.M*** who is a child of tender years (aged five (5) years then) was the sole witness to the defilement ordeal. In terms of the proviso to **Section 124** of the Evidence Act Cap 80 Laws of Kenya, the learned trial magistrate could base a conviction on the sole testimony of ***C.M*** if for reasons stated on the record, the trial magistrate is satisfied that such evidence is truthful and the evidence has been properly received in evidence.

When ***C.M*** took the witness stand, this is what transpired:-

> ***"PW1 examination by court. I am C. I do go to church. I do go to school. I do go to Glory Academy. I don't know the meaning of an oath.***
>
> ***Court:***
>
> ***The child does not understand the meaning of (sic) oath. The child to give unsworn statement.***

There is no doubt that the above responses were in respect to questions administered in what has become popularly to be known as *voir dire* examination. This Court in a recent decision in the case of ***Patrick Kathurima versus Republic Nyeri CRA 131 of 2014 (UR)*** had occasion to revisit both the law and case

law on the proper administration of the *voir dire* examination. The Court in its context was of the view that a proper practice of this should entail the reflection on the court record both the questions put by the court and the responses given to each question by the minor though this was not mandatory. Such a proper administration of the *voir dire* affords an opportunity to both the trial court and the appellate court (s) to form an opinion on the minor's intelligence, ability to understand the nature of the oath and the obligation to speak the truth to avoid a miscarriage of justice especially in instances where the trial court elects to invoke the proviso to **Section 124** of the Evidence Act. In the instant appeal both the trial court and the first appellate court did not rely on the proviso to **Section 124** as a basis for the appellant's conviction. They were concurrent in their findings that the minor's testimony would have been inadequate in supporting the prosecution case had they not found corroboration both in the medical evidence and the recovery of the minor's black underpant in the appellant's house.

The appellant has taken issue with the above findings on account of alleged contradictions, discrepancies and inconsistencies in the prosecution case touching on how the minor left her mother's house to the appellant's house where she was defiled and then returned to the mother's gate where she was found by the mother after she had found her missing and searched for her in vain. Further, the contradictions in the alleged recovery of ***C.M's*** black under pant from the appellant's house in respect of which PW2 said it was recovered by members of the public (none of whom was called to testify), against the appellant as opposed to PW4's assertion that he is the one who recovered it, in the appellant's house.

The role of a court of law when confronted with allegations of contradictions, discrepancies in the prosecution case has now been crystallized. See ***Joseph Maina Mwangi versus Republic CRA No.73 of 1993; Njuki & 4 others versus Republic [2002] 1KLR 771, Vincent Kasyula Kingoo versus Republic Nairobi Criminal Appeal No.98 of 2014***, all for the proposition that when confronted with such allegations an appellate Court should apply the guidelines set in **Section 382** of the Criminal Procedure Code Cap 75 Laws of Kenya to determine whether such discrepancies, contradictions or inconsistencies are such as to cause prejudice to the appellant or that they are inconsequential to the conviction and sentence. Where these do not affect an otherwise proved case against an appellant, they should be ignored. In addition, an appellate Court has an obligation to reconcile these where the trial court failed to do so and determine the effect of that reconciliation on the appellant's conviction and sentence. See the case of ***Josiah Afuna Angulu versus Republic Nakuru Criminal Appeal No. 277 of 2006 (UR)*** and ***Charles Kiplang'at Ng'eno versus Republic Nakuru CRA No.77 of 2009 (UR)***, both of which this Court sitting as a first appellate court reconciled discrepancies resulting in the substitution of the appellant's conviction for the disclosed offence in the ***Angulu*** case and an outright acquittal in the ***Charles Kiplang'at Ng'eno's case.***

We have on our own reconciled what the appellant alleged to be unreconciled inconsistencies, contradictions, and discrepancies. Our findings with respect thereto are as follows. With regard to the first one we find no variance in the testimony of ***C.M*** and **A** as regards the allegation that the appellant removed ***C.M*** from her mother's house, took her to his house, defiled her and then returned her to her mother's house where he left her. That is because ***C.M's*** testimony on the removal was confirmed by ***A's*** uncontroverted testimony that she did not find her daughter when she came back, unsuccessfully looked for her at her neighbour's place, and on coming back found ***C.M*** at the gate crying. That is when C.M. narrated to her the defilement ordeal. The only minute detail missing from ***C.M's*** narrative in court was the alleged possession of five (5) shillings allegedly given to her by the appellant after the defilement. We find this inconsequential to the appellant's conviction as it was after the act of defilement.

As for partial as opposed to complete penetration of C.M. during defilement, we find it is David, PW3 who had the medical expertise to determine what was partial or complete penetration. ***A*** had no such expertise. The two courts below rightly ignored ***A's*** opinion in favour of that of ***David*** as a basis for the appellant's conviction.

As for the recovery of the **C.Ms** black underpant in the appellant's house, it is our finding that what is in controversy is the mode of recovery as between the testimony of ***A*** who said it was recovered by members of the public who responded to her distress screams, on being told by C.M. that she had been defiled by the appellant as opposed to that of ***Nixon,*** PW4 who said he is the one who recovered it under

the pillow in the appellant's house. ***A*** never said that she accompanied the members of the public or PW4 and his colleagues to the appellant's house for the recovery of the said under pant. She could not therefore vouch on how the under pant was recovered. In contrast, ***Nixon,*** PW4 said that upon rescuing the appellant from mob justice he (appellant) requested him (PW4) to accompany him to his house (appellant's house) to lock it. It was following that request that PW4 carried out a search and recovered the underpant under the pillow in the appellant's house. We find of the two versions that of PW4 was the most plausible and was properly accepted and acted upon by the two courts below as a basis for the appellant's conviction.

It was correctly contended by the appellant that no member of the public came to give evidence against him to explain as to why he was arrested in order to oust his assertion of fabrication of the case against him on account of an existing grudge between him and ***A***. Considering that members of the public came to the scene after ***A*** screamed on learning that her daughter had been defiled by the appellant, their testimony if any would have been limited to their responding to ***A's*** screams and perhaps assaulting the appellant to which PW4 testified. It is our considered view that its exclusion caused no miscarriage of justice to the appellant.

As for the defence of fabrication of the charges against the appellant on account of an existing grudge between him and ***A, A*** admitted hitting the appellant with a stone after he had assaulted her. She also recalled the appellant reporting her to police but she was never prosecuted for that assault. It is PW4 who filled up that gap when he revealed that although the appellant had reported the assault on him by Ann and was issued with a P3 he later withdrew the complaint against ***A.*** In this regard, there was no grudge existing as between the two as at the time the offence subject of this appeal was committed. We therefore agree with ***Mr. Kaigai's*** submission that the issue of the grudge was sufficiently addressed by the two courts below and rejected. We affirm that rejection as find that the rejection was based on sound evidence.

As for the appellant's *alibi*, it was correctly asserted by the appellant that he was not bound to either prove or disprove any *alibi* raised by him. Se***e Saidi S/O Wanga versus Republic [1963] EA6,*** and ***Sekitoleko versus Uganda [1967] EA531.*** It was the appellant's testimony that shortly after coming home from work he left shortly thereafter to have a drink with friends at a nearby market. It was only on his way back home that he was set upon and assaulted by members of the public for no apparent reason. He went back to his house that day under police escort to lock it. He was therefore nowhere near his house at the time ***C.M*** alleged she was defiled by him in that same house.

The two courts below relied on the testimony of the recovery of the black underpant that was positively identified by ***C.M*** and ***A*** to be the one ***C.M*** wore before the defilement, to place the appellant at his house which was the scene of the defilement. We have already ruled as truthful PW4s' assertion that he is the one who recovered the said underpant under the pillow in the appellant's house. This evidence amounts to circumstantial evidence. In order to justify reliance on it by the two courts below, we have to satisfy ourselves that it met the thresh hold set by the applicable principles. These have been crystalized in numerous cases including ***Rex versus Kipkering Arap Koskei & 2 others [1949] EACA 135 Simon Musoke versus Republic [1958] EA 71; Abanga Alias Onyango versus Republic CRA 32 of 1990 (UR); Mohammed & 3 others versus Republic [2005] 1KLR 722.*** In sum, a court of law should satisfy itself that the evidence is of surrounding circumstances capable of accuracy in proving a proposition; evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact in issue; facts that are incompatible with the innocence of an accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt; it must be certain to such an extent that it excludes existence of any doubt; and when taken cumulatively the evidence forms a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused.

In the instant appeal, there was demonstration that ***C.M*** and the appellant were known to each other. The time ***A*** left to buy a match box from the nearby shopping centre was close to 7.00pm. She left ***C.M*** at home. On returning shortly thereafter C.N. was not there. ***A*** searched around for her in the neighbourhood to no avail. On coming back she found ***C.M*** at the gate crying holding five (5) shillings in

her hand and promptly narrated the defilement ordeal to ***A***. At this point in time ***C.M*** did not have on the black under pant she had been wearing that day**.** ***C.M*** was only five years old and although she knew where the appellant's house was, we doubt as did the two courts below, if ***C.M.*** could have ventured to the appellant's house at night on her own considering her revelation that her mother ***A*** had warned her not to go to the appellant's house.

It was also not controverted that when found at the gate by her, mother, CM was in pain and could not walk which fortifies her assertions that she was carried to the gate by the appellant. ***C.M's*** under pant was found under the pillow in the appellant's house with no allegation of a break in by an intruder who could have used the appellant's house to facilitate the commission of the defilement on ***C.M.*** and then quickly return her ***(C.M.)*** to her mother's gate and then escape. The Appellant says he lived alone which means he is the only one who had access to that house. All the above form an unbroken chain which leaves no doubt that the appellant was the perpetrator of the offence charged.

Although the appellant was not obligated in law to prove his innocence in this regard the circumstances demonstrated above are ideal for the application of **Section 111 (1)** of the Evidence Act Cap 80 Laws of Kenya. It provides

> ***"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to the operation of the law creating the offence with which he is charged and the burden of proving any facts especially within the knowledge of such person is upon him"***

The law is that the prosecution has to prove its case beyond reasonable doubt. Section 111(1) (supra) however makes exception and/ or exemption of matters within the knowledge of an accused person. Herein, matters pertaining to how ***C.M 's*** under pant got to be recovered from the appellant's house, a house she did not live in, an under pant she wore before defilement and she was found without shortly after her defilement were within the appellant's knowledge and called for an explanation from the appellant. As was observed by this Court in ***Douglas Thiongo Kibocha versus Republic [2009] eKLR*** section 111(1) above places an evidential burden on an accused to explain those matters which are especially within his knowledge even if it amounts to an admission of a material fact necessary, in aiding in the investigation into the issues in controversy in the case and also to avoid an accused person escaping punishment even if the evidence suggests otherwise. See also the case of ***Nicholas Mutula & another versus Republic Mombasa CRA 373 of 2006 (UR***) in which the court observed:

> "***The law placed a duty on them not to establish their innocence but to offer a reasonable explanation as to how the deceaseds' body came to be in their residence and how injuries were inflicted. Those were matters peculiarly within their knowledge. The appellants did not offer any explanation.***

Likewise in this case, the law placed an evidential burden on the appellant to explain how ***C.M's*** underpant came to be found in his house under the pillow shortly after ***C.M*** narrated to her mother that she had been defiled by the appellant.

All the above circumstances pointed to the appellant as the perpetrator of the offence of defilement on ***C.M***. and all the inculpatory facts could not be explained on any other hypothesis other than that of the appellant's guilt for the offence charged.

The upshot of all the above is that there is no merit in this appeal. The same is dismissed in its entirety.

Dated and delivered at Nyeri this 3rd day of February, 2016

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR