



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, KIAGE & KANTAI, JJA)**

**CRIMINAL APPEAL NO. 42 OF 2013**

**BETWEEN**

**DAVID GACHOGI MWAI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Kerugoya*

*(Ong'udi J.) dated 27<sup>th</sup> July, 2013*

**in**

**H. C. Cr. A. No. 94 OF 2013)**

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**JUDGMENT OF THE COURT**

The appellant David Gachogi Mwai was charged, tried, convicted and sentenced to life in prison by the Baricho Senior Resident Magistrate on a charge of defilement contrary to **Section 8 (1)** of the **Sexual Offences Act No. 3, of 2006** in that on the 10<sup>th</sup> day of May 2009 at *[particulars withheld]* Village, Kerugoya West District within the former Central Province, he defiled **G.W.M** a child aged 6 years. He faced an alternative count of indecent act with a child contrary to **Section 11 (1)** of the same Act in that at the same place and time, he inserted a finger into the girl's vagina.

Aggrieved by that conviction and sentence, the appellant appealed against both to the High Court at Kerugoya (**H. I. Ongudi J**) which, by a judgment delivered on 25<sup>th</sup> July 2013, dismissed it, hence this appeal by which the appellant, in self-crafted grounds, has faulted the learned judge as having erred in law by:

- **Failing to hold that the complainant's age was not proved, documentary evidence not having been tendered.**
- **Failing to hold that the age of the allegedly broken hymen was not stated**
- **Failing to hold that there was no evidence directly connecting him to the offence.**

The appellant subsequently filed some supplementary Grounds of Appeal -cum-submissions which he fully relied on at the hearing of the appeal, whereby he urged that the age of the complainant was not established and that the offence of defilement had not been proved and that he did not commit the offence.

For the respondent, the learned Assistant Director of Public Prosecutions, **Mr. Kaigai** opposed the appeal stating that the appellant's conviction was proper and pointing out that the complainant (PW1) gave graphic details of how she was defiled by the appellant which was, moreover, witnessed by PW2 another child; which went to confirm the consistency of the evidence adduced.

PW2 found PW1 on the appellant's bed and informed her mother (PW3) who came and found her hiding behind the door. Counsel asserted that there was no mistaken identity and that the P3 form produced by PW5 confirmed that PW1 had been defiled. He urged us to dismiss the appeal.

As this is a second appeal, our jurisdiction is limited to a consideration of matters only by dint of **Section 361** of the **Criminal Procedure Code**. For precisely that reason, we defer to the concurrent findings of fact by the two courts below, seldom interfering therewith except in instances where the said findings are based on no evidence; are arrived at by a misapprehension of the evidence; or the two courts are shown demonstrably to have erred on point of principle and arrived at patently erroneous conclusions, see **CHEMAGONG VS. REPUBLIC [1984] KLR 213**.

Having considered the entire record before us, the submissions by the appellant and by the ADPP as well as the relevant law, we do not think that we are at all justified to dislodge the findings and conclusions reached by the trial and first appellate courts. The evidence tendered by the prosecution established quite beyond a doubt that the appellant, a person very well known to PW1, PW2, PW3 and PW4 as an employee of *Mama Toni's*, asked PW1, a class 1 pupil at Mt. **[particulars withheld]** Academy to light him a fire so he could warm water for milking cows. As she lit the fire, yet another fire lit in his loins and he took the little girl to his bed, unclothed her, applied some ointment on her vagina, covered her with a blanket and proceeded to penetrate her with his penis.

As he so ravished the girl, PW2, a cousin and age mate of PW2 came to *Mama Toni's* home looking for a comb. Finding no one in the outer room, he went into the bedroom and found the appellant literally pants down in the very act of defiling PW1. PW2 ran home and informed his mother, PW3, who rushed to the scene, found PW1 hiding behind the bedroom door and carried her away. On examining her, she saw a watery discharge from her private parts which had stained her little blue dress. As PW2 walked with PW1 on her back, she met PW4, who is PW1's father and they together took her to hospital and later to the Police Station. PW5, the Clinical Officer, established that her vagina had been penetrated and that she was six (6) years of age.

That evidence was quite straight forward and consistent. It was in no way shaken in cross-examination and we, on our part cannot find any basis upon which we can interfere with the careful judgments of the two courts below.

The prosecution case was nothing less than iron clad and the appellant's unsworn statement to the effect that he was framed up by PW1's parents over monies they owed him cast no shadow over it and was properly rejected by the two courts below. The damning evidence came from PW1, PW2 and PW3 without involvement of PW1's parents. He was found in *flagrante delicto* by PW2.

In the result, this appeal is devoid of merit and we accordingly dismiss it.

***Dated and delivered at Nyeri this 2<sup>nd</sup> day of March, 2016.***

**P. N. WAKI**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**S. Ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original

**DEPUTY REGISTRAR**