**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)**

**CRIMINAL APPEAL NO. 288 OF 2012**

**BETWEEN**

**PAUL LOKITARI ……. APPELLANT**

**VERSUS**

**REPUBLIC ……..... RESPONDENT**

***(Appeal from the Judgment of the High Court of Kenya at Kitale, (J. R. Karanja, J.) dated 17th July, 2012* In HCCRA. NO. 120 OF 2011)**

**JUDGMENT OF THE COURT**

1. On 17th August 2011, the appellant Paul Lokitari was convicted by the Magistrate's court at Kapenguria for the offence of defilement contrary to Section 8(1) of the Sexual Offences Act. He was sentenced to 15 years imprisonment. He appealed to the High Court. That appeal was dismissed in its entirety in a judgment delivered on 17th July 2012.

2. This is his second appeal. Under Section 361(1) of the Criminal Procedure Code, our mandate on a second appeal is restricted to matters of law. [See **M'Riungu vs. R [1983] KLR455**]. See also **Karingo vs. Republic [1982] KLR 213**] where the Court stated:

> ***"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 (*Reuben Karari s/o Karanja vs. Republic* (1950) 17 EACA 146)"***

3. The appellant appeared before this Court in person. He referred to his grounds of appeal and complained that the prosecution did not prove the offence to the required legal standard. He asserted that the age of the alleged victim was not proved; that key witnesses were not called; that his identification was mistaken and that an identification parade ought to have been conducted.

4. Opposing the appeal, Mr. Zachary G. Omwega, Assistant Deputy Public Prosecutor, submitted that the offence was proved beyond any reasonable doubt; that the appellant was identified as the perpetrator of the offence; and that the age of the victim was proved.

5. We have considered the appeal. The only question in this appeal is whether, based on the

evidence, there is any reasonable doubt as to the appellant's guilt.

6. The prosecution called four witnesses. PW1 was EC the complainant. She stated in her testimony that when the offence was committed, she was aged 16 years and was in class 6 at [partculars withheld] School; that on 25th April 2010, she was at Kapenguria District Hospital taking care of her younger sibling who was an in- patient at that hospital; that at about 8.00 p.m. on that date, the appellant held her hand and made her *"fall down by force"* outside the room where she was taking care of the sick child, removed her undergarment, opened his zip and inserted his penis into her vagina; and that the appellant warned her not to tell anyone. She stated that whilst at the hospital, the appellant *"used to pass and see how I was taking care of the sick child"*; and that on the previous day, she had repulsed the appellant's advances towards her. She was categorical that she "was able to see *[the appellant] clearly for he even held by hand and I saw him on top of me"* adding that there "*was security light in the hospital corridor."*

7. The following day, EC's sibling was discharged from hospital. EC did not tell anyone of the incident on 25thApril 2010.

8. Subsequently a teacher at [particulars withheld] School discovered that EC was pregnant. EC and her brother were summoned to the school. EC then revealed what had happened. Fearing for her life, she left and went to live with an uncle until she gave birth.

9. In her evidence, EC's mother, LC, (PW 2) stated that EC, then in class 6 at [particulars withheld] School, was at Kapenguria District Hospital on 25th April 2010 looking after her younger sibling who had been admitted there; that in October 2010, the head of school at [particulars withheld] School summoned her son to the school; that EC thereafter ran away due to embarrassment; that LC was able to trace her daughter who informed her that she was pregnant and that EC showed her the appellant as "the one who did that" after which the appellant was arrested and charged. EC subsequently gave birth in February 2011.

10. Jeremiah Kisang, a clinical officer at Kapenguria District Hospital, testified as PW3. He stated that on 30th October 2010, he examined EC at that hospital with a history of having been defiled by a person known to her; that he carried out tests and confirmed that EC was six months pregnant. He produced a medical examination report in which he indicated the expected date of delivery to be 23rd January 2011. He also carried out age assessment and stated that EC was 16 years old.

11. The last prosecution witness was Police Constable Newton Njihia (PW4) who was attached to Crime office, Kapenguria Police Station. He stated that the appellant was arrested on 29th October 2010 after EC who was accompanied by her mother LC, reported on that date that the appellant had defiled her at Kapenguria District Hospital on 25th April 2010 at about 8.00 pm. He narrated to the court what EC had informed him had transpired on 25th April 2010 when the incident took place. He concluded his testimony by stating that he charged the appellant with the offence after EC was examined at the hospital where it was confirmed she was pregnant.

12. In his defence, the appellant stated that he is a farmer and that he knew nothing about the alleged defilement.

13. After reviewing the evidence the trial magistrate found that:

> *"PW1 managed to identify accused for accused had earlier on approached her and she declined. Accused laid on top of PW1. PW1 has been seeing accused checking their room severally and as a staff of Kapenguria District Hospital used that opportunity to defile her outside the room where the sick sibling laid but just on the corridor. Also that security lights*

*were on the corridor where defilement took place. I reach a finding that accused's identification was proper."*

14. The trial court was satisfied that the inculpatory facts were incompatible with the appellant's innocence and not capable of any other reasonable explanation than that of his guilt.

15. The High court, on its part, reviewed the evidence before concluding that the fact that EC was defiled was not in doubt; that it was established by medical evidence that she was approximately 16 years old at the time of the commission of the offence; and that the appellant was positively identified by EC as the offender. The High Court concluded thus:

> "*This Court would hold that the evidence by the complainant was credible and sufficient to prove beyond reasonable doubt that the appellant was the person responsible for defiling her."*

16. There are, therefore, concurrent findings by the two courts regarding the commission of the offence, the identification of the appellant as the perpetrator of the offence and the age of the victim at the time the offence was committed.

17. As we have already stated, in a second appeal, we can only interfere with the concurrent findings of fact by the lower courts if such findings are not based on evidence, or are based on a misapprehension of the evidence, or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings.

18. In our view, the evidence supported those concurrent findings by the two courts below. Given the evidence of EC on identification; the fact that she named the appellant as the assailant when she finally reported the matter to her mother and to the police station, we are satisfied that the conclusions reached by both lower courts were well supported by the evidence. We are unable, as a matter of law, to find fault with both judgments regarding the approach taken and the conclusions reached as pertains to the identification of the appellant and the age of the victim.

19. As this Court stated in **Adan Muraguri Mungara vs. R [2010] eKLR**, we must:

> "**Pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere**."

20. For those reasons, this appeal is devoid of merits. It is hereby dismissed. Orders accordingly.

**Dated at Eldoret this 29th day of April, 2016**

**D. K. MARAGA**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**