IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, KIAGE & KANTAI, JJA)

CRIMINAL APPEAL NO. 53 OF 2015

BETWEEN

F.K.N..... APPELLANT

AND

REPUBLIC.....RESPONDENT

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

Embu (Muchemi, J.) dated 25th June, 2015).

In (H. C. CR. A. No. 32 of 2012)

JUDGMENT OF THE COURT

This is the second appeal by the appellant **F.K.N** following the dismissal by the High Court at Embu **(F. Muchemi, J)** of his first against the conviction and sentence imposed on him by the Resident Magistrate's court at Embu for the offence of Incest contrary to **Section 20 (1)** of the **Sexual Offences Act**. He was sentenced to serve life imprisonment upon being found guilty of causing his penis to penetrate the vagina of **C.N.K,** a female person aged ten years who was, to his knowledge, his daughter on 11th June, 2011 in Embu Municipality. He was found to have called her into the house, put her on the bed and painfully defiled her. He afterwards warned her not to tell anyone or else he would beat her. In the event she did, telling first her grandmother and then her mother leading to his arrest. Medical evidence confirmed she had been defiled.

The grounds on which the appellant challenges the judgment of the learned Judge are found in his self-authored 'Grounds of Appeal'. As he relied entirely on those grounds, without more, at the hearing of this appeal, we set them out in full;

1. ***"THAT the first appellate court judge erred in law and facts when she upheld the conviction without considering that the mentioned mob never availed the appellant in police the same day they arrested him.***
2. ***THAT the first appellate court judge erred in law and facts when she upheld the conviction without considering that vital witnesses were never called to testify.***
3. ***THAT the first appellate court judge erred in law and facts when she upheld the conviction without considering that the complainant's age was not proven in court.***
4. ***THAT the first appellate court judge erred in law and facts when she upheld the conviction***

without considering that the appellant was not medically examined.

5. ***THAT the first appellate court judge erred in law and facts when she upheld the conviction without considering that the complainant did not voluntarily adduce her evidence but was forced.***
6. ***THAT the first appellate court judge erred in law and facts when she upheld the conviction without considering the appellant's defence which contained reasonable facts contrary to sec 169 (1) and section 212 violated.***
7. ***THAT the first appellate court judges still erred in law when they failed to consider the appellant's fundamental rights were violated under sec 72 (3) since the appellant was kept in police custody for more than 24 hours before appearing before court.****"*

Mr. Kaigai, the learned Assistant Director of Public Prosecutions opposed the appeal submitting that the evidence against the appellant was overwhelming. The complainant **(PW2)** testified that the appellant had indeed defiled her and that she told her mother **(PW1)** about it the very next day. It was not contested that he is her father and her age was assessed at 11 years. Counsel also asserted that the appellant participated in the proceedings fully and there can be no doubt that he understood them. He tendered a defence which was considered and rejected, correctly, in Mr. Kaigai's view. We were therefore urged to uphold the concurrent findings of the two courts below.

This being a second appeal, we are jurisdictionally constrained by Section 361 of the Criminal Procedure Code to a consideration of matters of law only. See **DZOMBO MATAZA vs REPUBLIC [2014] eKLR; M'RIUNGU vs. REPUBLIC [1983] KLR 455**. The appellant's grounds of appeal, except the last, in so far as they purport to state that the learned judge erred "in law and fact" in stated respects proceed from a misapprehension of our jurisdiction. We have nevertheless considered them cognizant that the appellant is unrepresented, to see whether they do raise any issues of law for our consideration.

That the mob that arrested the appellant after the deed did not take him to the police immediately is not a matter of law. Nothing turns on it. It is not clear to us whether that mob constituted the "vital witnesses" that the appellant complains were not called to testify. Even assuming that there were such vital witnesses, the law does not compel the prosecution to call a multiplicity of witnesses to prove a fact. See Section 143 of the Evidence Act. It is only where the prosecution evidence is barely adequate that, as was stated by the predecessor of this Court in **BUKENYA & OTHERS vs. UGANDA [1972] EA 549** the Court may be entitled to infer that had the uncalled vital witnesses been called, their evidence would have been adverse to the prosecution case. The inference does not come into play where the evidence is far beyond adequate or, as Mr. Kaigai urges in this case, overwhelming.

Regarding the complainant's age, we do not see that it is relevant to the conviction for incest. So long as the filial relationship is proved together with sexual intercourse, the offence of incest is complete regardless of the age of the parties. The age becomes relevant only on a consideration of the sentence to be imposed so that if the female person is under the age of eighteen years, the sentence is enhanced to life imprisonment under the proviso to **Section 20 (1)** of the **Sexual Offences Act.** In the present case, there is no doubt that the complainant was well below the age of 18 years and her age was, moreover, properly proved as eleven years as stated by herself in her voluntary testimony, contrary to the appellant's complaint, and her mother **(PW1)** without much contest, and specifically by Dr. Kimeu who examined her dental formula and assessed her age at 11 years. There is no substance in the claim that age was not proved.

Nor is there any substance in the complaint that the appellant was not taken for medical examination. There is no apparent utility in such examination as the offence of incest is not provable by mere evidence that a male accused has had penetrative sexual intercourse with the female victim. That proof is not dependent on medical examination of the male.

In our perusal of the record, the two courts below did consider and reject the appellant's defence which was a brief statement that he was not at home on the material day having *"gone away to work"* and that he was HIV positive and it was thus not possible that he could defile his own daughter who simply framed him up. His mother, **DW2** did not much aid his case as she stated, under re-examination by the

appellant himself, that she could not testify as to his movements on the day because they did not live together. Long after his assertion that he was HIV positive, the appellant made no mention of it to the prison authorities and has never sought any treatment, as he informed this Court at the hearing of the appeal. In all probability, the assertion was a ruse.

We cannot interfere with concurrent findings of fact by the two courts below unless they are based on no evidence; or are based on a misapprehension of the evidence; or the two courts are shown demonstrably to have acted on wrong principles in making those findings. See **CHEMAGONG vs. REPUBLIC [1984] KLR 214** and **DAVID NJOROGE MACHARIA vs. R [2011] eKLR**. There is nothing in the case before us that would justify our interference with those concurrent findings.

In the result, we find this appeal to be devoid of merit and it is accordingly dismissed.

Dated and delivered at Nyeri this 6th day of April, 2016

P. N. WAKI

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

S. KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR