IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), VISRAM & AZANGALALA, JJ.A)

CRIMINAL APPEAL NO. 68 OF 2015

BETWEEN

DAVID KAMAU GICHARU……...…..……..APPELLANT

AND

REPUBLIC…….RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Mbogholi Msagha, J.) dated 17th July 2014

in

H. C. Cr. A. 53 of 2012)

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JUDGMENT OF THE COURT

1. David Kamau Gicharu, hereinafter referred to as the appellant, was charged before the Chief Magistrate's Court at Kiambu with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act. The particulars of that charge were that on the 6th May, 2010 in Kiambu District within Central Province, he unlawfully and intentionally committed an act which caused penetration with his genital organ (penis) into the genital organ (vagina) of F.M.M., a child under the age of 11 years. He was also charged in the alternative with indecent act with a child under the age of 11 years contrary to **section 11(1)** of the Sexual Offences Act. The particulars of that offence were that on the 6th day of May, 2010 in Kiambu District within Central Province, he unlawfully and indecently assaulted F.M.M., a child under the age of 11 years by touching her private parts.

2. The evidence as presented by the prosecution was as follows: on the 6th May 2015, L N N (PW2) left home at about 11:00 am, leaving her daughters F.M.M. (hereinafter referred to as the complainant) and her sister J.W.M. behind. The complainant heard the appellant call out to her from the bathroom, and when she went to check on him, he grabbed her by the neck. He removed her blue jeans and her underpants and proceeded to defile her. While he was committing this act, L came home and the appellant ordered the complainant to stand up and leave the bathroom. L saw the appellant, with his trousers down, in the bathroom. She inquired from him what he was doing there and he said that he had been washing a panga. L also noted that the complainant was walking

with her legs parted and that she was not dressed from the waist down. L threatened to punish the complainant if she did not disclose what had been happening, so the complainant told her mother that the appellant had defiled her.

3. L started screaming which attracted members of the public to the scene. She also examined the complainant's private parts and noted that she was bruised and that she was bleeding. The members of the public arrested the appellant and took him to Karuri Police Station. The complainant and her mother also went to Karuri Police Station where they reported the incident to Corporal Lucy Kanjiru (PW4).

4. Corporal Kanjiru referred the complainant and her mother to Karuri Health Centre where the complainant was treated by Richard Munene (PW3). His examination revealed that the complainant had injuries on her neck due to strangling, that her labia was bruised and that she had a freshly broken hymen. He conducted a vaginal swab which showed the presence of spermatozoa. He therefore concluded that the complainant had been defiled.

5. The appellant was placed on his defence. In his unsworn statement, the appellant denied committing the offence with which he was charged. He claimed that the complainant's mother forced the complainant to implicate him because she did not want him to inherit any property from their relatives.

6. The trial court considered this evidence and found that the prosecution had proved its case beyond a reasonable doubt. The appellant was therefore convicted on the main charge of defilement, and thereafter sentenced to serve life imprisonment as provided by law.

7. Being aggrieved, the appellant preferred an appeal to the High Court. In that appeal, he contended that the prosecution did not prove its case beyond a reasonable doubt because: the complainant's age was not conclusively established; there was a material discrepancy between the evidence of the complainant and her mother's evidence; and there was no documentary medical evidence in the form of a P3 form tendered in evidence to support the prosecution case.

8. The first appellate court agreed entirely with the assessment of the trial court and found that there was sufficient evidence that placed the appellant as the person who committed the crime. That first appeal was therefore dismissed.

9. The appellant, aggrieved with that dismissal of his first appeal, now comes to this Court in this second appeal asking us to quash his conviction and set aside his sentence. The appellant, acting in person, relied on his amended supplementary grounds of appeal filed in this Court on the 11th June 2016. His grounds of appeal are that the first appellate court erred in law by: upholding the conviction and sentence and overlooking the provisions of **section 163(1)** of the Evidence Act in accepting the contradictory evidence of the complainant and her mother; upholding the conviction and sentence in the absence of essential witnesses in contravention of **section 150** of the Criminal Procedure Code; sustaining the conviction in the face of insufficient medical evidence; and in failing to appreciate that the trial was unfair and contravened Article 50 of the Constitution of Kenya, 2010 because the appellant did not know of his right to cross-examine the complainant.

10. The appeal was opposed by Mr. Moses O'Mirera, Senior Assistant Director of Public Prosecutions. He urged that this Court ought not to interfere with the concurrent findings of the two courts below unless it perceives that those findings are prejudicial to the appellant or if they were made in error.

11. On the allegation that there were discrepancies in the evidence of the complainant and her mother, learned counsel for the state submitted that the discrepancies were immaterial and did not go to the core of the prosecution case. He further submitted that the appellant never offered an explanation as to why he was found in a state of undress, and neither did he cross-examine the complainant

after she gave a graphic description of how the appellant had defiled her.

12. Counsel therefore contended that the evidence of the four prosecution witnesses was credible and the appellant's defence was rejected for being a mere denial and an unproved allegation of a grudge between the parties. He further contended that there was nothing to indicate that the appellant's trial was unfair, and therefore urged us to dismiss this appeal.

13. In a second appeal, this Court's jurisdiction is limited by **section 361** of the Criminal Procedure Code to the consideration of only matters of law. As such, the Court has a duty to accept the findings of fact of the lower courts, unless those findings cannot be supported in evidence. This duty has been well articulated in various decisions of this Court in the line of ***Patrick Macharia v Republic [2010] eKLR (Criminal Appeal No. 120 of 2008)*** where the Court, citing with approval the holding in ***M'Riungu v Republic [1983] KLR 455***, expressed itself in the following manner:

> ***"By Section 361(1) of the Criminal Procedure Code a second appeal, like the present appeal, should be on a matter of law and not on a matter of fact. …Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law and should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal or court could have reached that conclusion."***

14. We have carefully considered the evidence of the complainant and that of her mother L (PW2). We have noted that there are some discrepancies in their evidence. In particular, the complainant claimed that when her mother returned home, she (the complainant) was still lying down on the bathroom floor, while L testified that when she returned home, she found the complainant sitting down on a carpet inside the house. We find this to be a minor discrepancy which does not affect the tenor and the weight of the evidence of the prosecution. We are fortified in our finding by the holding of this Court in ***Joseph Maina Mwangi v Republic [2000] eKLR (Criminal Appeal No. 73 of 1992)***, where this Court stated that:

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."***

15. In the present appeal, the discrepancy with regard to exactly where the complainant was found when her mother returned home does not negate the evidence on record that both the complainant and the appellant were found in a state of undress, and that the complainant was found to have been defiled when examined. We therefore reject this ground of appeal.

16. This leads us to the appellant's complaint that the prosecution failed to prove its case beyond a reasonable doubt as material evidence was not tendered. In this regard, the appellant contends that since members of the public who aided in his arrest were not called to testify, the evidence of the prosecution was weakened. In addition, he contends that because no medical tests were done on him, there was no medical evidence that linked him to the offence. We disagree. The law is that no particular number of witnesses is required to prove any fact – see **section 143** of the Evidence Act which provides that:

> ***"143. Number of witnesses***
>
> ***No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

(17) In addition, the proviso to section 124 of the Evidence Act provides that:

> ***"...where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

(18) The complainant testified that she was defiled by the appellant, a person who she knew well as she had previously been seeing him around her house. The complainant's evidence was sufficiently corroborated by that of the clinical officer who stated that she had been recently defiled.

Moreover, L evidence placed the appellant, undressed, at the scene where the complainant was found also in a state of undress. The evidence on record establishes beyond any doubt that the appellant grabbed the complainant and defiled her. We draw no adverse inference from the lack of evidence from the members of the public who arrested him; the fact that they were not called to testify did not weaken the prosecution's case. This ground of appeal accordingly fails.

19. Finally, we will now deal with the appellant's final complaint that his defence, which was that he was implicated because of a grudge between him and the complainant's mother, was not properly considered. We note that the appellant did not raise any issue of a grudge between him and L when he cross-examined her. We are satisfied that the trial court properly considered the defence, and finding no merit in it, accordingly dismissed it.

20. In the circumstances, we find that there is no reason to warrant our interference with the concurrent findings of both the lower courts. The conviction of the appellant was proper and the sentence meted out was lawful. Consequently, this appeal is devoid of merit, and we accordingly order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 19th day of May, 2016.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR