IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 58 OF 2015

JOSEPH KIURA NJAGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(*Appeal from a conviction, judgment, decree, order or as the case may be of the*

High Court of Kenya at Embu (Muchelule, J) dated 29th September, 2011

in

***H.C.CRA. NO. 50 OF 2007*)**

****

JUDGMENT OF THE COURT

The appellant **Joseph Kiura Njagi** was arraigned before the Resident Magistrate's Court at Runyejes for the offence of defilement of a girl contrary to **Section 8(1)(2)** of the **Sexual Offences Act no. 3 of 2006**. The particulars were that on the 22nd day of August, 2016 at ***[particulars withheld]*** village, Kawanjara sub-location Kagaari south location in Embu District within Eastern Province he unlawfully had carnal knowledge of D K a girl under the age of 11 years.

The appellant denied the charge prompting a trial. The brief facts were that at the material time the appellant was employed as a farm hand in a home neighbouring the home of the complainant D.K. D.K. knew him very well as she used to draw water from the said homestead. On the 22nd day of August, 2006 D.K. left for the said homestead at around 9.00 a.m. to draw water as usual. It was her testimony that she found the appellant alone in the compound. He grabbed her and then dragged her into the house where he lived; forcefully tore off her underpants, and covered her mouth with a piece of cloth to prevent her from screaming. He removed something and put it on his penis and then proceeded to defile her. Once through, he released her to go away but not before warning her of dire consequences if she divulged to anyone what she had undergone. He then gave her five shillings (5/=) for doughnuts which she threw away in the appellant's house and then left for her home crying. On the way she met with her great grandfather N M (*N*) PW3, who upon inquiring from her what the matter was, she replied that the appellant had defiled her. PW3 informed both her grandmother and mother M W (*M*) PW4 and other members of the public who then left for the appellant's home. On arrival they found him busy pruning coffee bushes in the shamba. When he was told about DKs allegations of defilement by him, he denied

any involvement. He was subsequently persuaded to accompany PW3 and others to the police station which he did. On arrival at the police station, they were received by Pc Said Oshe (Pc Said) who booked the report in the OB and then referred the victim to Dr. Stephen Maina (Dr. Maina) PW1, for examination and treatment. The findings were that there were bruises on the external genitalia; the hymen was broken. The vaginal swab and laboratory test revealed nothing. PW1 filled the P3 on 22nd day of August, 2006 and produced it in evidence. When put to his defence, the appellant gave sworn evidence denying the offence and alleging a fabrication against him because of a grudge. He swore that he never saw DK on the morning of the material date until N came with her with allegations of defilement which he knew nothing about.

In a judgment dated the 21st day of March, 2007 the learned trial magistrate D.O. Onyango, Resident Magistrate, found the prosecution case proved to the required threshold, dismissed the appellant's defence, found him guilty of the offence charged, convicted him and sentenced him to life imprisonment. The appellant's appeal to the High Court against both conviction and sentence was dismissed on the 29th day of September, 2011 by A.O. Muchelule, J. He is now before us on a second appeal. His submissions were based on four (4) homemade grounds filed on the 27th day of July, 2016.

In these the appellant complains that the learned Judge fell into error:

i. ***in acting on evidence that was doubtful and a number of inconsistencies and contradictions***

ii. ***in affirming the conviction and sentence on the basis of PW1 and PW6 examination report and uncertain (sic) its contents thereon***

iii. ***in upholding the trial courts decree despite the prosecution had not proved that the complainant was 11 years old***

iv. ***in failure (sic) to give his statement of defence sufficient consideration.***

The appellant handed in written submissions and invited us to adopt these in support of his appeal. On ground one (1), the appellant urged that the prosecution case fell short of the required threshold of proof beyond reasonable doubt because (i) it was based on mere suspicion; (ii) the investigations were shoddy as these left the prosecution case inconclusive for the failure to recover the under pant the minor wore on the day of her defilement to show that it had been damaged in the process of her defilement as alleged by her; the five shillings (5/=) given to the minor by the appellant after defiling her and which she threw in the appellant's house; the condom the appellant put on his penis before defiling the minor; the failure by both civilians and the police to visit his house to confirm whether any offence had been committed therein and lastly that all the prosecution witnesses were inconsistent and contradictory.

On ground 2, the appellant took issue with the medical evidence for its failure to indicate that the complainant suffered any injuries in her private parts; or that she felt pain and discomfort during the defilement or that she lost her virginity and suffered any bleeding from her private parts; vulva irritation or experienced a burning sensation when passing urine. No treatment card or notes were produced nor was the P3 form to support PW6's evidence that she examined him physically and noticed a whitish discharge both on his thighs and penis especially when PW5 never mentioned that he referred him for a medical checkup. Lastly, he submitted, that the fact that he was told to bathe before being taken to the police station was a clear indication that the case had been fabricated against him because in his own view a person facing such an offence could never have been told to bathe before being taken to the police station as that would have been a way of destroying evidence.

In support of ground 3, the appellant argued that without proof of the complainant's age to be eleven (11) years as indicated in the charge sheet and ten (10) years as indicated in the P3 a conviction under **Section 8(1)(2)** of the **Sexual Offences Act** could not be sustained.

In support of ground 4, the appellant urged that both his alibi and allegation of a grudge between him and

the wife of N PW3 were plausible and these should not have been rejected by the two courts below without giving cogent reasons.

In response to the appellants submissions, Mr. J. Kaigai the Senior Assistant Director of Public Prosecutions (SADPP) urged us to dismiss the appeal on the grounds that the conviction was based on cogent evidence as PW3 and 4 saw the complainant crying and when asked as to what the matter was with her she pointed to the appellant as her defiler; the fact of defilement was corroborated by medical evidence; the age of the complainant was properly proved through her own testimony as supported by that of her grandfather PW3, her own mother PW4 and as confirmed by the estimate given by the medical doctor PW1; mention of the word rape in connection with the offence the appellant faced was an error which does not go to the root of the prosecution's case; the two courts below were justified in rejecting the appellant's alibi defence as implausible as they gave cogent reasons for such rejection.

In reply to the respondent's submissions, the appellant stated that they were all lies which should be disregarded; evidence of existence of a grudge that formed the basis for the fabrication of the charge against him had been proved by the failure to call the wife of PW3 to give evidence and be cross-examined. He was never taken to any doctor for medical examination in connection with the offence he faced and lastly he claimed that the clinical officer PW6 lied to court when she stated that she had examined him physically and noticed a whitish dry substance on his thighs and private parts.

This is a second appeal. As a general rule, we are enjoined not to interfere with the concurrent findings of fact of the two courts below unless they were not based on evidence. See **David Njoroge Macharia versus R. Criminal Appeal no. 497 of 2007** for the holding that:-

> ***"only matters of law fall for consideration and the court will not normally interfere with the concurrent findings of fact by the 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."***

We have considered the record, grounds of appeal and the submissions of either side. In our view, only three issues of law fall for our consideration namely:-

> *1.* ***whether the age of the complainant was properly proved***
>
> *2.* ***whether the appellant's alibi was properly considered; and***
>
> *3.* ***whether the prosecution case met the thresh hold of proof beyond reasonable doubt.***

On proof of the age of the complainant, the approach, we take is that taken by the court in **Kaingu alias Kasomo versus Republic *Criminal Appeal No. 504 of 2010*** in which the court reiterated that:

> ***"sexual assault under the Sexual Offences Act is a critical component as it forms part of the charge which must be proved in the same way as penetration in both rape and defilement. In order for such proof to hold, there has to be demonstration that such proof is based on credible evidence as any sentence imposed is dependant on the age of the victim. Approved mode of proof is through medical evidence where this is professionally determined by a medical doctor. Other approval modes, are through a birth certificate, clinic card as well as oral testimonies through parents and guardians. The Court of Appeal of Uganda in Francis Omoroni versus Uganda Criminal Appeal Number 2 of 2000 added by observation and common sense."***

In the instant appeal, the complainant D.K. gave her age as ten (10) years. Her close relatives N PW3 and M her mother PW4 made no mention of her age in their testimonies. Nor were they cross-examined on that issue. Neither a birth certificate nor clinic card was called for by either side to prove her age. In addition to D K's evidence there is the evidence of PW1 which stated that he was a professional doctor of twelve years standing. He had examined the victim and arrived at the conclusion that she was ten (10) years of age. He was never challenged on that finding. It is our view that the age of the victim was

properly proved in line with the principle set out above in the Kaingu case (supra).

As for the proof of the alibi defence, the approach we take is that taken by the court in **Lenyesio Lekuipe & another versus Republic Nakuru** ***Criminal Appeal No. 145 of 2011*** that by the appellant raising an alibi he is in effect saying that he was not present at the scene of the commission of the defilement in respect of which he was convicted. The principles of law we bear in mind are as follows:

> (1) the prosecution has the burden of negating an alibi defence see Anthony Kinyajui Kimani versus Republic [2011] eKLR
>
> (2) an accused person who puts forth an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer see Said versus Republic [1963] E.A. 6.
>
> (3) as a general rule of law, the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether or the offence set up is an alibi or something else see Sekitoleko versus Uganda [1967] E.A. 531

In rejecting the appellants alibi, the learned Judge had this to say:-

> ***"It is material that the testimony of the complainant that she was sexually known was materially corroborated by the results of the medical examination which found her hymen broken and genitalia injured. She testified that the assailant was the Appellant. I find it material that when the appellant was examined at the hospital the same day he was found with a dry whitish discharge on his penis and thighs. That finding was consistent with the girl's version that she had been sexually attacked the same morning by him. The trial court considered the evidence, involving allegation by the appellant that he has been framed. It believed the girl and disbelieved the appellant. I find that the court was entitled on the evidence to reach that verdict. The fact that the torn pants or condom were not retrieved was not important. They would have in any case supported the fact of sexual act which the medical evidence eventually did. I find the conviction safe".***

The factors that the two courts below took into consideration when rejecting the appellant's alibi were that the complainant knew the appellant very well as he used to frequent her home and she frequented his home where she used to draw water; the offence was committed in broad day light; the complainant immediately named the appellant as the perpetrator both to her grandfather and her mother M; the trial court believed the above witnesses as truthful with no demonstrated grudge against the appellant. The allegation of a grudge by the wife of N was found displaced by the appellant's failure to put it to the witnesses in cross-examination. The above findings are what was weighed against the appellant's alibi and found it displaced. On our own, we find them sound and well founded. We affirm them as these were based on sound evidence on the record.

The factors that the appellant put forth as negating the credibility of the prosecution evidence were the failure to visit the appellant's house both by PW3, PW4 and the police to confirm whether an offence took place there; lack of recovery of the condom he allegedly used in defiling the complainant; failure to recover the 5/= the appellant allegedly gave to the complainant to buy doughnuts and which she threw in the house and lastly the failure to produce the P3 in which PW6 noted the observation of a whitish discharge on his penis and thighs as factors that negate the credibility of the prosecution evidence.

As found by the two courts below, all the above are factual issues thoroughly interrogated by the two courts below. The appellant is in effect inviting us to revisit this factual base, which invitation we must decline. See **Daniel Kabiru Thiong'o versus Republic** ***Nyeri Criminal Appeal No. 139 of 2002*** **(UR)** wherein the court held inter alia that;

> ***"An invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate, court unless it is shown that there are***

compelling reasons for doing so."

Secondly these were inconsequential to the fact that the complainant knew the appellant very well; the incident took place in broad daylight; there were no circumstances negating positive identification and sexual violation was proved both through the oral testimony and medical evidence.

The upshot of all the above is that we find no compelling reasons interfere with the concurrent findings of the two courts below. This appeal has no merit. It is accordingly dismissed in its entirety.

Dated and Delivered at Nyeri this 9th day November 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR