IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 49 OF 2014

JKM……………………………. ……………………...………….. APPELLANT

AND

REPUBLIC ………………………………………………….….….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Lessit, J.) dated 2nd May, 2013

in

H.C.CR.A No. 215 of 2010)

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JUDGMENT OF THE COURT

1. ***JKM,*** the appellant, was charged with one count of defilement contrary to ***Section 8(1)*** as read with ***Section 8(3)*** of the ***Sexual Offences Act*** and an alternative count of indecent act with a child contrary to ***Section 11(1)*** of the ***Sexual Offences Act*** in the Chief Magistrate's Court at Meru.
2. The particulars of the charge of defilement were that on 13th June, 2009 in Meru Central District within the then Eastern Province, the appellant committed an act that caused penetration of the genital organ of a child namely GKM aged 9 years. The particulars of the alternative charge were that on the aforementioned date and place, the appellant committed an act of indecency with GKM, a child aged 9 years by touching her genital organs.
3. The appellant pleaded not guilty to both counts and the prosecution called a total of six witnesses. It was the prosecution's case that on 13th June, 2009 at around 4:00 p.m. while PW1, GKM (G) and PW3, JK (J) were heading home they saw the appellant walking towards them. When the appellant got near the girls he held both of them with his hands. Juliet bit the appellant on his hand and managed to run away. G also bit the appellant but was not fortunate as the appellant slapped her three times and dragged her into a nearby bush. According to G, the appellant laid her down

on her back and stuffed leaves in her mouth; he removed her underpants and his trousers and proceeded to defile her. After he finished he threatened G with death if she told anyone what happened. G testified that she bled and had difficulty walking. When she got home due to fear she did not tell her grandmother who she lived with at the time.

4. On 17th June, 2009 while PW5, JK (K) and G were walking home from [Particulars Withheld] Primary School. K noticed that G was walking with difficulty. Upon inquiry G told K that she had a stomachache. K carried G on her back and took her to her mother, PW4, TJ (T). It was T's evidence that when she asked G what was wrong she said that it was her biker which was hurting. Upon further inquiry G told T that the appellant had defiled her on 13th June, 2009 and threatened her to keep silent. T reported the incident to the police and took G to hospital.
5. PW2, Isaac Macharia (Isaac) examined G and observed that she had septic bruises on her thighs, infected wounds on the external genetalia and a whitish discharge from her genetalia. He concluded that G had been defiled. Subsequently, the appellant was arrested, arraigned in court and charged.
6. The appellant was placed on his defence and gave a sworn statement. He also called two witnesses in his defence. While admitting that G was his neighbour he denied committing the offences he was charged with. DW2, MK (M), the appellant's wife testified that on the material day the appellant went to Ruiri Market in the morning and returned home at 2:00 p.m. DW2, EG (E), the appellant's daughter, testified that on the material day she went to school and came back home at around 1:00p.m. she found her parents at home; at 2:00p.m she went to the farm to help her parents water the plants. It was her evidence that she went back home at 4:00 p.m. to prepare tea and she took it to her parents and then went back home. Her parents came back home at around 6:00p.m.
7. The trial court convicted the appellant for the offence of defilement and sentenced him to 20 years imprisonment. Aggrieved with both the conviction and sentence, the appellant preferred an appeal in the High Court. The High Court vide a judgment dated 2nd May, 2013 dismissed the said appeal. It is that decision that has provoked this second appeal.
8. At the hearing of this appeal the appellant appeared in person while Mr. Mungai, Senior Prosecution Counsel, appeared for the state. The appellant submitted that there was no medical proof connecting him to the alleged defilement of the complainant. He argued that he was never medically examined. According to the appellant, he was never given an opportunity to properly defend himself. He urged us to allow the appeal.
9. In opposing the appeal, Mr. Mungai submitted that the offence of defilement was proved and the appellant was properly convicted. He maintained that the appellant was given an opportunity to defend himself; both lower courts considered his defence and properly rejected the same.
10. We have considered the record, submissions by counsel and the appellant and the law. By dint of ***Section 361*** of the ***Criminal Procedure Code*** we are restricted to only consider matters of law in this second appeal. In ***Chemagong -vs- Republic (1984) KLR 213*** at page 219 this Court held,

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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 17 EACA146)."***

11. ***Section 8(1)*** of the ***Sexual offences Act*** provides:-

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"***

Section 2(1) of the ***Sexual Offences Act*** defines penetration as follows:-

> ***"'Penetration 'means the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

From the foregoing provision, it was imperative for the prosecution to prove that there was actual

penetration on G and the identity of the perpetrator. Both lower courts made concurrent findings that the complainant, G, had been defiled by the appellant.

12. From the record it is not in dispute that the G had been defiled. G's testimony in this regard was as follows:-

> ***" … I am nine years old. On 13th June, 2009 at about 4:00 p.m. I was going from compassion to my grandmother's home. I was with J. ..When we reached near Jericho Church we saw JK (appellant) the father of P. We go to the same school with P. She is in Std. 2. I know their home…. He had a stick and was singing 'Ntirimiti'. He was waving the stick he had. When we were near him he held J and I. J bit him on the hand and he released her. When I bit him, he slapped me on both sides of my cheeks thrice. J ran away home. JK took me to a bush. He lay me down on my back. He opened his trousers and removed his thing that urinates. He put in mine that I use to urinate with. He had removed his underpants by this time. I felt pain. He then told me if I said what happened he was going to beat me until I die. I then dressed. I was feeling pain as I walked and I was bleeding from the place I used to urinate."***

Further, medical evidence tendered by PW2 (Isaac) revealed that the complainant had been defiled.

13. The issue in contention is the identity of the perpetrator. It was G's evidence that while she was on her way home in the company of PW3 (J), the appellant held both of them with his hands; J managed to run away leaving G with the appellant. J in her evidence corroborated the foregoing. The only evidence in respect of what actually happened after J ran away was that of the complainant. We are cognizant of the proviso to ***Section 124*** of the ***Evidence Act*** which provides:-

> ***"Provided 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 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."***

14. G gave a detailed account of what transpired and what the appellant did. She testified that the appellant was well known to her prior to the incident. She told her mother that it was the appellant who had defiled her. We cannot help but note that the complainant led the police to arrest the appellant. The appellant in his defence also confirmed that the complainant was his neighbour and he knew her. Therefore, this was a case of recognition. In ***Anjononi & others -vs- Republic (1976-80) 1 KLR 1566***, this Court held at page 1568,

> ***"This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."***

We find that there was no possibility of a mistaken identity and the recognition of the appellant was positive.

15. It was the appellant's contention that there was no medical evidence connecting him to the alleged defilement. In ***Evans Mokua Ndega –vs-Republic – Criminal Appeal No. 143 of 2011*** this Court expressed itself as follows:-

> ***"We find that M's evidence on recognition was free from error and connected the appellant to the offence. The fact that there was no medical proof of spermatozoa linked to the appellant found on N did not in any way diminish M's evidence that it was the appellant who had defiled N."***

See also ***Simon Ngiri Thiogo –vs- Republic – Criminal Appeal No. 20 of 2012.***

16. The appellant also contended that the fact that the complainant was found to be HIV negative while he was HIV positive exonerated him. On this issue we can do no better that reiterated this Court's observations in ***Letto Machaki Mbiti –vs- Republic- Criminal Appeal No. 94 of 2013:-***

> ***"We take judicial notice that in certain circumstances the HIV virus is not transmitted from one person to another despite sexual intercourse. We find that the appellant's HIV status did not in any way displace the overwhelming evidence against him."***

17. On the defence of alibi that was raised by the appellant the trial court stated in its judgment as follows:-

> ***"The accused did not give any explanation as to his whereabouts on the material day but left the explanation to his wife and daughter. The explanation given does not strike me as truthful. Whereas the wife of the accused testified that the accused went to Ruiri Market and returned at 2:00p.m. his daughter testified that when she returned home at 1:00 p.m. she found the accused at home. Apart from the issue of the contradiction on the time, the evidence of EG (DW2) of what they were doing from 2:00p.m to 6:00 p.m. appears to be fiction."***

In ***Nelson Julius Irungu –vs- Republic- Criminal Appeal No. 24 of 2008***, this Court held,

> ***"As this Court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses."***

We see no reason to interfere with the trial court's finding on the credibility of the appellant's witnesses.

18. Where an accused person raises a defence of alibi the same ought to raise reasonable doubt in the prosecution's case. In this case the evidence against the appellant was overwhelming and rendered his alibi improbable. See ***Andrew Kiprotich Mustuni & Another –vs- Republic- Criminal Appeal No. 232 0f 2011.*** We find that the two lower courts were correct in dismissing the defence of alibi.
19. The upshot of the foregoing is that we find no merit in the appeal and it is hereby dismissed.

Dated and delivered at Meru this 26th day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

………………………

JUDGE OF APPEAL

J. OTIENO-ODEK

………………………

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR