IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 89 OF 2013

BETWEEN

MICHAEL MUGO MUSYOKA ……..... APPELLANT

AND

REPUBLIC …….……..……...……. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Majanja, J.)dated 30th October, 2013

in

H.C.CR.A No. 195 of 2011)

****

JUDGMENT OF THE COURT

1. The appellant was charged with one count of attempted defilement contrary to ***Section 9(1) & (2)*** 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 Senior Resident Magistrate's Court at Siakago.
2. The particulars of the charge of attempted defilement were that on 14th October, 2010, in Mbeere South District within Embu County, the appellant attempted to cause his penis to penetrate the vagina of CM a child aged 2 ½ years. On the alternative count, the particulars were that on the above mentioned date and place, the appellant committed an act of indecency with a child namely CM a child aged 2 ½ years by touching her private parts with his hands and penis.
3. The appellant pleaded not guilty and the prosecution called a total of four witnesses. It was the prosecution's case that at all material times the appellant had been employed by PW2, PWK (P) as a house boy. On 14th October, 2010, at around midday Purity was in her farm in the company of the appellant and her 2 ½ year old daughter, CM. P noticed that C was sleepy and she sent the

appellant to take the child to sleep in the house which was 50 meters away and to also get batteries. After a while P heard C screaming and she told the appellant to bring the child back to the farm. According to P, C informed her that the appellant had hit her and demonstrated how the appellant hit her. P examined the child's private parts and noticed that she was wet. P testified that when she confronted the appellant he denied defiling the child.

4. P reported the incident to the police and took C to hospital. PW1, Bridget Kimanthi (Bridget), a clinical officer, examined C on the material day. She testified that she observed that C had a tear on the vagina and her cervix was intact; she had no vaginal discharge. Her conclusion was that there was no penetration on the child.
5. After carrying out a *voire dire* examination on C who was by then 3 years old the trial court expressed itself as follows: -

> ***"I note that the witness is not fluent in communicating. She is young and probably not able to remember what may have transpired".***

Following the foregoing observation the trial court did not take the evidence of C.

6. In his defence, the appellant gave a sworn statement. He denied committing the offence he was charged with. The appellant maintained that he was framed by P.
7. After taking into consideration the evidence on record, the trial court convicted the appellant of the offence of committing an indecent act with a child and sentenced him to 10 years imprisonment. The appellant preferred an appeal in the High Court which was dismissed by a judgment dated 30th October, 2013. It is that decision that has provoked this second appeal.
8. At the hearing of this appeal the appellant appeared in person while the State was represented by Mr. Kaigai, the Assistant Deputy Public Prosecutor. The appellant relied on his written submissions. The appellant faulted the two lower courts for placing reliance on the evidence of PW2 (P). According to him, her evidence did not establish what actually transpired. He submitted that P was not a credible witness. He argued that had the High Court properly re-evaluated the evidence on record as required by law it would have arrived at a different conclusion. The appellant maintained that the prosecution had not proved its case against him to the required standard. He urged us to allow the appeal.
9. Mr. Kaigai in opposing the appeal submitted that the appellant was caught red handed by PW2 (P) holding the child; defilement was proved by PW3. He maintained that the prosecution had proved its case beyond reasonable doubt. He urged us to dismiss the appeal.
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. At this juncture it is important to point out that the appellant was convicted of the offence of committing an indecent act with a child and not defilement as submitted by Mr. Kaigai. ***Section 11(1)*** of the ***Sexual Offences Act*** provides:-

> ***"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable to imprisonment for a term not less than 10 years".***

Section 2 of the ***Sexual Offences Act*** defines an indecent act as:-

> "***Indecent act means any unlawful intentional act which causes-***

a. ***Any contact between the genital organs of a person, his or her breasts or buttocks with that of another person;***

b. ***….”***

12. Based on the foregoing the onus was on the prosecution to prove that the appellant had unlawful and intentional contact with the child’s genital organs. In this case C did not testify because the trial court found that she was not capable of giving evidence. Therefore, the only evidence against the appellant was that of PW2 (P). P testified as herein under: -

> ***“I am PWK. I come from [Particular Withheld] Village where I carry out farming. On 14.10.2010 at midday I was planting crops with my houseboy. He was called Michael; he is the accused before court. At some point I sent him to the house to get batteries. I asked him to go along with my daughter CM. She is aged 3 years old during the time of the incident she was 2 ½ years old. Her father is K. ….. Once they were in the house which was 50 meters away, I heard the child screaming. I informed the accused to avail the child at the shamba. The accused alleged that the child had refused to sleep. The child told me that she had been hit using a blow by the accused. When at home she demonstrated on where the accused hit her. I looked at her private parts, they were wet and had tears. I called the accused and asked him why he had slept on top of my daughter. The accused denied having committed any sexual offence. Later I escorted my daughter to Kiritiri health centre. We had the mater reported at the police station…”.***

13. We have looked at the evidence on record. There is no evidence or testimony to prove that there was any contact between the genital organs of the appellant with that of the minor. We are of the considered view that the evidence of P was hearsay and did not carry much weight. We say so because she was not present at the house and did not witness what actually happened. She relied on what her daughter C had allegedly told her. Without the evidence of the said child or an eye witness we find that the prosecution did not prove that the appellant had intentionaly and unlawfully indecently touched the child.
14. The P3 form tendered in evidence refers to defilement of the minor. It is our considered view that once the trial court found that defilement had not been proved, the medical evidence as contained in the P3 form collapsed and carried no evidential weight. PW1 (Bridget), the clinical officer, testified that there was a tear on the vagina. This in our view is oral testimony not supported by the findings in the P3 Form which make no reference to a tear. We note that PW2 testified that she examined the minor and noticed that her private parts were wet. It is our view that a wet private part is not proof of an indecent act.
15. We cannot help but note that Mr. Kaigai submitted on behalf of the state that the appellant was caught red handed. This submission is not supported by the evidence on record.
16. The High Court in its judgment expressed itself as follows:-

> “***The identity of the appellant was not in doubt as he was known to the child’s mother as the house boy. At the time the act was committed, he was the only one with the child and he was caught by PW2 holding the child”.***

Having perused the record, we cannot help but note that it was the child’s mother, P, who had sent the appellant with the child to the house. We also note that contrary to the aforementioned findings of the High Court, P never testified that she caught the appellant holding the child. We are of the considered view that the fact that the appellant was with the child when she cried was not sufficient proof that he had indecently assaulted her.

17. We find that the case against the appellant was based on mere suspicion. In ***Mary Wanjiku Gichira –vs- Republic, - Criminal Appeal No. 17 of 1998***, this Court held that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of

taking away the accused's freedom and at times his life. We are of the view that the evidence on record was not sufficient to sustain the appellant's conviction.

18. The upshot of the foregoing is that we find that the appeal has merit and is hereby allowed. We hereby quash the conviction against the appellant and set aside the sentence meted out to him. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 24th day of February, 2015.

ALNASHIR VISRAM

……

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