IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 82 OF 2013

BETWEEN

NJAGI NDWIGA JOHN alias NGAI MAGATI …….....APPELLANT

AND

REPUBLIC …….…….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Ong'udi, J.)dated 7th November, 2013

in

H.C.CR.A No. 194 of 2011)

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JUDGMENT OF THE COURT

1. The appellant herein was charged with one count of defilement contrary to ***Section 8(1)*** of the ***Sexual Offences Act*** and an alternative count of committing an indecent act with a child contrary to ***Section 11(1)*** of the ***Sexual Offences Act*** in the Chief Magistrate's Court at Embu.
2. The particulars of the charge of defilement were that on 21st December, 2010 in Embu Municipality within Embu County, the appellant intentionally caused his penis to penetrate the vagina of MW a child aged 10 years. On the alternative count, the particulars were that on the above mentioned date and place, the appellant intentionally touched the vagina of MW a child aged 10 years old with his penis.
3. The appellant pleaded not guilty to both counts and the prosecution called a total of four witnesses. It was the prosecution's case that on 21st December, 2010 at around 2:00 p.m. while PW1, MW (M) and her younger sister, N, were on their way to Mbuvori to call their grandfather, PW2, NT (N), the appellant grabbed M and dragged her into his house that was nearby. According to M, the appellant locked the house, undressed her and placed her on top of his bed. The appellant then proceeded to defile her and when he was done he released her. M went home and informed her grandfather what had happened. It was PW2's (N's) evidence that M informed him that it was the appellant who had defiled her. From the prosecution's evidence the appellant was well known to M prior to the incident.

4. The incident was reported to the police and M was taken to hospital. PW4, Dr. Stephen Mwangi (Dr. Stephen), testified that he examined M on 23rd December, 2010 and observed that she had bruises on her genitalia and that her hymen had been broken. In his opinion M had been sexually assaulted. Subsequently, the appellant was arrested, arraigned and charged in court.
5. After the prosecution closed its case, the trial court placed the appellant on his defence. The appellant gave an unsworn statement and called one witness. The appellant denied the charges against him and maintained that he had been framed. He called his wife, PWN as his witness. She testified that on the material day she was at home; the appellant was not home at 2:00 p.m. when the incident was alleged to have happened; on the material day the appellant came back home at around 7:00 p.m.
6. The trial court convicted the appellant for the offence of defilement and sentenced him to life imprisonment. Aggrieved with the trial court's decision, the appellant preferred an appeal in the High Court which was dismissed vide a judgment dated 7th November, 2013. It is that decision of the High Court that has provoked this second appeal which is based on the appellant's homemade grounds.
7. At the hearing of this appeal, the appellant appeared in person while the state was represented by Mr. Kaigai, Assistant Deputy Public Prosecutor. The appellant relied on his written submissions which were filed in this Court. The appellant submitted that the two lower courts erred in convicting him based on evidence that was full of contradiction. According to him, the complainant testified that after she had been defiled she went home and informed her grandfather, N (PW2), what had happened; N took her to Karau Health Centre and then reported the incident to the police. While on the other hand, PW2 testified that on the material day on his way back home he met the complainant and her mother at Karau stage; they informed him they were going to the police to report the incident. He accompanied them to the police station and later took the complainant to Karau Health Centre. He submitted that contrary to the evidence adduced by PW2, PW3, Cpl. Lucy Ikiara (Cpl. Lucy) testified that the incident was reported on 23rd December, 2010.
8. The appellant argued that there was no evidence that proved that the complainant was defiled by him since no medical examination was conducted on him to establish the same. He submitted that the age of the complainant had not been proved to the required standard since her birth certificate was never produced in court. According to the appellant, the High Court erred in failing to properly re-evaluate the evidence on record and consider the appellant's defence. He urged us to allow the appeal.
9. Mr. Kaigai in opposing the appeal submitted that the complainant's evidence was consistent and had been corroborated by the evidence of her grandfather. The doctor confirmed that the complainant had been defiled. He argued that there were concurrent findings of fact by the two lower courts and there was no reason for this Court to interfere with the same.
10. On our part, we have taken into account the submissions made by the appellant and the State; we have also considered the record of appeal and the judgement by the two courts below. This is a second appeal which must be confined to points of law. As was stated in ***Karingo – v – R, (1982) KLR 214,*** a second appellate court will not interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. (See ***Chemagong –vs- Republic, (1984) KLR 213***).
11. From the record, M testified that after the appellant released her she went home and informed her grandfather what had happened. On the other hand, M's grandfather (PW2), testified that on the material day as he was heading back home he met the complainant and her mother at the stage. After inquiring where they were going he was informed that M had been defiled by the appellant and they were going to the police station to report the incident. We note that there is a discrepancy as to how and where the complainant's grandfather was informed of the incident. This Court has held that a mere discrepancy is immaterial in a case if the same does not cause prejudice to the appellant or if it is inconsequential to the conviction and or sentence. The said discrepancy is curable under ***Section 382*** of the ***Criminal Procedure Code*** which provides:

> ***"Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant,***

charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

12. Further, in the case of ***Joseph Maina Mwangi -vs- Republic, Criminal Appeal No. 73 of 1993*** it was held:-

"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."

We find that the said discrepancy did not prejudice the appellant and was inconsequential to his conviction.

13. We find that there is no inconsistency in the prosecution's evidence as to when the incident was first reported to the police. It was PW3's (Cpl. Lucy) uncontroverted evidence that the complainant's grandfather first reported the incident on the material day at Nguruni and later reported it to Manyata Police Station on 23rd December, 2010.

14. ***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"

Both lower courts made concurrent findings that the complainant, M, had been defiled by the appellant. The only evidence in respect of what actually happened 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".

15. In this case, the complainant (M) was a minor and the trial court conducted a *voire dire* examination on her to establish her ability to tell the truth. The trial court in its judgment expressed itself as herein under:-

"In the proceedings before taking the evidence of the complainant child MW, the court tested the child, by asking her questions which were recorded. She gave answers that were also recorded. Arising from that examination, the court was satisfied that the child understood the importance of telling the truth even though she did not understand the nature and seriousness of an oath.

In my view the court tested the child PW1 and concluded that she is telling the truth. This court saw the child, observed the child and the manner the child answered questions and the court is satisfied that the child is of age of 10 years as stated by the doctor in the P3 form. Her evidence is admissible under Section 124 of the Evidence Act".

16. M gave a detail account of what transpired on the material day as follows: -

"I am 10 years old in standard 3 in [Particulars Withheld] Primary School. On

> ***21.12.2010, around 2:00 p.m. I went to call my grandfather from Mbuvori. I was accompanied by my sister N who is younger than me. I saw a man behind us and he came and held me and held my mouth. I know the person and knew him before that date. I know him by the name 'Ngai' the name popularly known. He covered my mouth, held my clothes dragged me to his house and locked me inside. He removed my clothes. I wore a dress and underpants. He placed me on his bed. He removed his penis and inserted it into my vagina and defiled me severally. After he defiled me, I put on my clothes and went to our home. My grandfather came and I informed him I was defiled…..".***

The trial court as indicated herein above found that M was a truthful witness. 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 complainant.

17. PW4, Dr. Stephen testified that upon examining M on 23rd December, 2010, two days after the incident, he noticed that her hymen was missing and that she had bruises on her genitalia. He also referred to treatment notes from Karau Health Centre where the complainant was treated on the material day. He indicated that according to the treatment notes the complainant's hymen had been broken and she had a smelly discharge. This evidence proved that M had been defiled. As to the identity of the perpetrator, we concur with the two lower courts that this was not a case of mistaken identity but 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".***

The complainant was able to identify the appellant as the perpetrator because he was known to her prior to the incident.

18. We are of the considered view that the complainant's age at the material time was proved to the required standard. It was the complainant's uncontroverted evidence that she was 10 years old at the material time. Further, the P3 form and the evidence of Dr. Stephen confirmed that M was 10 years old at the material time. We also find that the two lower courts considered the appellant's defence and properly dismissed the same.
19. The upshot of the foregoing is that we see no reason to interfere with the concurrent findings of the two lower courts. We find that the appeal lacks merit and is hereby dismissed.

Dated and delivered at Nyeri this 3rd day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

……

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR