IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MWILU, MUSINGA & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 635 OF 2010

BETWEEN

FRANCIS MWANGI NJOKI …….…….. 1ST APPELLANT

JOHN INGARA KIMONDO ……...……. 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An a*ppeal from a Judgment of the High Court of Kenya at Nakuru (Emukule, J.) dated 28th May, 2010*

in

H. C. Cr. A. No. 338 of 2008)

****

JUDGMENT OF THE COURT

1. ***Francis Mwangi Njoki*** (first appellant) and ***John Ingara Kimondo*** (second appellant) are the appellants herein. They were both convicted of the offence of defilement of a minor girl under the provisions of ***sections 8 (1)*** and ***(2)*** of the **Sexual Offences Act No. 3 of 2006** and sentenced to life imprisonment as by law required. Their appeal to the High Court met no success hence this their second appeal to this Court.

2. Briefly, the particulars of offence against both appellants before the trial magistrate were that the first appellant did, on the 5th day of May, 2007 at Nyahururu township, commit an act which caused penetration to the minor girl aged six years; whilst the particulars of offence against the 2nd appellant were that on the 6th day of May, 2007 at Nyahururu township he committed an act which caused penetration to the said minor girl. Both appellants denied the charges.

3. The prosecution case consisted of the evidence of five prosecution witnesses. PW 2 was the grandmother of the minor girl with whom the girl lived. PW 2 sent the minor girl home from the market on the 5th May, 2007 at 10.00 am to take her breakfast but she took too long to return and so PW 2 decided to follow the girl (PW 3) home. PW 2 did not find PW 3 at home. PW 2 sent a lady called Njoki to check for PW 3 at the market place but PW 3 was not found. PW 3 finally got home at 3.00 pm and told her grandmother (PW 2) that she had been at a Christian crusade that was ongoing at the market

place.

On 8th May, 2007 PW 1, who is PW 3's aunt, arrived in Nyahururu and PW 2 asked PW 1 to question PW 3 on her whereabouts on 6th May, 2007. PW 1 was told by PW 3 that the first and second appellants had defiled her on 5th and 6th May, 2007 respectively. PW 1 thereupon took PW 3 to the police station where a report of the defilement was made and the minor (PW 3) and PW 2 were sent to the doctor for examination. Dr. Kihurua Wanderi (PW 4) examined PW 3 and found that her hymen was perforated. An examination of the high vaginal swab exhibited pus cells and bacteria and the doctor formed the opinion that PW 3 had been sexually assaulted. He produced in evidence the P3 form he had filled.

4. PW 3 gave descriptive evidence of how the first appellant, whom she knew as a neighbour and as a shoe seller, took her to his house on 5th May, 2007 and removed her pant and defiled her and how she felt pain. She explained to court how, the second appellant similarly on the 6th May, 2007, took her to his house, removed her pant and defiled her. She testified that it was "so painful". PW 3 later identified the two appellants to PW 5, police officer Joy Gitonga, who arrested the duo and had them charged before the Resident Magistrate, Nyahururu.

5. The appellants denied the offence of defilement and later that of indecent assault that was introduced by way of a substituted charge. In their respective sworn statements of defence, both appellants denied committing the offences, called no witnesses and prayed that they be acquitted. The trial court however found proved to the required standard the offence of defilement, convicted and sentenced each of the appellants to life imprisonment.

6. The first appellant in his homegrown supplementary memorandum of appeal styled "Amended Grounds of Appeal", filed herein on 14th May, 2012, takes out five grounds as hereinunder reproduced verbatim:

"(i) THAT I am not guilty of the charges.

ii. ***THAT the learned high court judge erred in law when he convict me without consider the date PW 3 was examined by doctors.*** *(sic)*

iii. ***THAT the learned high court judge erred in law when he/she rely on a corroboration evidence adduced in lower court by prosecution side which was not corrobating any more.*** *(sic)*

iv. ***THAT the learned high court erred in law when he/she convicting dispite my constitution right as envisaged under section 49 (i) f (i) (ii) constitution being violated.*** *(sic)*

v. ***THAT, he/she erred in law when shifting the burden of proof upon the defence side.*** *(sic)* ***REASON'S WHEREFECORE I pray for the total success of This appeal conviction quested sentence set aside and set me at liberty."*** *(sic)*

7. On his part, the second appellant set out grounds of appeal similar in all material factors to those of the first appellant. Giving allowance for the evident failures in language used in the grounds of appeal as set out in paragraph 6 above, it is not lost that the appellants' complaints are that conviction was against the weight of evidence, was based on uncorroborated evidence, there was violation of the appellants' constitutional rights and that the burden of proof was shifted to the appellants. The appellants' written submissions merely went to enhance the above grounds, only emphasizing that the adduced evidence could not sustain any convictions. At the hearing of their appeal the appellants urged us to rely on their written submissions, stating that they did not wish to add anything further to those written submissions.

8. The Senior Principal Prosecution Counsel, **Mr. J. K. Chirchir**, who represented the Director of Public Prosecutions, opposing both appeals, submitted that there was overwhelming evidence against both appellants. He told us that the medical evidence availed clearly proved that defilement had been committed. Counsel added that the complainant's evidence that she knew the appellants and the work

they did and her description of how she was separately defiled by the two appellants proved the appellants as the perpetrators of the crime for which they were convicted. Learned counsel concluded his submissions by stating that any breaches of the appellants' constitutional rights as alleged in the amended supplementary grounds of appeal had been considered by the High Court and dismissed for lacking in merit. He urged us to dismiss the appeal.

9. This is a second appeal. This court is in the circumstances enjoined by law to only consider issues of law, see ***section 361 (1)*** **Criminal Procedure Code** which provides:

> ***"A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –***
>
> a. ***on a matter of fact, and severity of sentence is a matter of fact;"***

There is abundance of case law on the point and for the purposes of this appeal suffice only to cite that of ***M'Riungu vs Republic [1983] KLR, 455***, where it was held,

> ***"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 the findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the decision of the trial court or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."***

10. The allegation by the appellants that their conviction was against the weight of the adduced evidence is not borne out by the record. On the contrary, the evidence of both PW 3 and PW 4 that remained safely untested by cross-examination proved defilement to the required standard of proof, that of beyond reasonable doubt. PW 3 knew both appellants by name, the work they did and clearly detailed to court how she was defiled by each of them.

There was no issue of mistaken identity of the appellants to PW 5, the arresting officer. And the examination results of PW 3 by PW 4 showed a perforated hymen which sealed the fate of the appellants. It is for those reasons that we agree with the State that there was overwhelming evidence against the appellants and therefore we reject the ground on insufficiency of convicting evidence more particularly because the first appellate court carefully analysed that evidence and came to a very sound conclusion, in our view, when the court found:

> ***"In cross-examination PW 2 testified that the victim knew the 2nd appellant –*** *"that Mwangi does the work of shoes"* ***and that the victim informed her that Mwangi defiled her on different dates*** *"likewise John".*
>
> ***PW 1 also described in a matter of fact how both appellants were pointed out by the victim to*** *(sic)* ***and were arrested by the Police. The first appellant was arrested at his house while the second appellant was arrested at his place of work. It is PW 1 who just took the victim to the hospital and then reported to the Police. PW 5 PC Gitonga reiterated the testimony on identification and the arrest of the appellants. He also reiterated the evidence of PW 4 of the results of the medical examination, that the hymen was perforated and there was some infection.***
>
> ***Taken together the evidence of PW 1 and PW 2, that of PW 3, the victim and confirmed by PW 4, the doctor, there is no question that the prosecution proved its case beyond reasonable doubt. Ground 3 of the appeal fails."***

We endorse that finding.

11. As concerns the allegation of violation of the appellants' constitutional rights and that the same were

not considered by the first appellate court, we can do no better than quote the relevant part of the High Court judgment on the same, where, after analyzing the evidence on the appellants' pre-trial and fair-hearing rights, and noting that the allegation of violation was raised for the first time before the Judge, he wrote;

> ***"I have held and still hold the view that the true meaning of the decision of the Court of Appeal in Albanus Muasya Mutua vs Republic is that rights of an accused person (such as the appellants) are violated if the provisions of section 72 (3) (b) are not complied with. It is a breach. The remedy for the breach is not that the trial is a nullity or that the accused person be acquitted or that an appellant's appeal be allowed, on the ground of violation of his rights under the said section, but rather an action in damages under section 72 (6) of the Constitution*** *(sic)****. For those reasons, this ground of the appellants' appeal fails."***

The first appellate court was right on the law and we hereby uphold him, with the necessary consequence that the appellants' ground of appeal on account of violation of their constitutional rights is similarly dismissed.

12. Was there corroboration of the availed evidence and was any required in the first place? Firstly, under the proviso to the provisions of ***section 124*** of the Evidence Act, which are:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of 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."*** (emphasis provided)

No such corroboration as alleged by the appellants was required. Moreover even if any corroboration had been required, there was plenty of it in the evidence of PW 1, PW 2 and more particularly in the evidence of PW 4 in the form of the medical report.

13. Ground 5 of the appellants' appeal is that the courts shifted the burden of proof to the appellants. Quite apart from the fact that the appellants did not show us in what manner the burden of proof was shifted to them, a careful perusal of the record did not evidence proof of any such allegation and this ground similarly fails.

14. In the result, we find not an iota of merit in any of the grounds raised and consequently we order that this appeal fails in totality. The same is dismissed.

Orders accordingly.

Dated and delivered at Nakuru this 26th day of March, 2015.

P. M. MWILU

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR