IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MWERA, G.B.M. KARIUKI & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 160 OF 2014

BETWEEN

MUTUA MULI KILONZI ..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Machakos (Thuranira, J) dated 19th February, 2014

in

HCCR.A NO. 110 OF 2010)

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JUDGMENT OF THE COURT

MUTUA MULI KILONZO, the appellant, was charged with the offence of defilement contrary to ***Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006*** and an alternative count of indecent act to a child contrary to ***Section 11(1) of the Sexual Offences Act*** in the Senior Resident Magistrate's Court at Kithimani. The particulars of the offence of defilement were that on the 18th June, 2009, at [Particular withheld] Sub-Location, Kithimani Location in Yatta District within Eastern Province, intentionally and unlawfully did an act which caused penetration with his genitals namely penis into the genitals namely vagina of ***MM,*** a girl aged 4 years. The particulars of the alternative charge were that on the above mentioned place and date, the appellant committed an act of indecency to MM, a child aged 4 years, by touching her private parts namely vagina.

The appellant pleaded not guilty to both the main and the alternative counts. After considering the prosecution evidence and that of the defence, the learned senior resident magistrate (Hon. A.W. Mwangi) in her judgment dated 13th May, 2010, found that the prosecution had proved its case against the appellant to the required standard. Consequently, the appellant was convicted of the offence of defilement and sentenced to life imprisonment. Aggrieved by the said decision, the appellant appealed against both the conviction and sentence to the High Court but the High Court (Thuranira, J) vide a judgment dated

19th February, 2014, dismissed the appeal, confirmed the conviction and sentence imposed upon him by the subordinate court.

Being further aggrieved by that decision, the appellant filed this second appeal raising the following grounds of appeal that: the High Court Judge made an error in law and misdirected herself by failing to observe that medical evidence was unsatisfactory in that: *a)* PW4 claimed in court that he examined the victim on 20/6/09 while P3 form indicates 22/6/09 and *b)* given that the offence charged was committed on 18/6/09 it could not have been possible for the victim to have still been bleeding by the time of examination on 22/6/09 (4 days thereafter) as indicated at section "c" 2(a) and (b) of the P3 form (MF1-2); that the offence charged ought to have been under the provisions of ***Section 20(1) of the Sexual Offences Act No. 3 of 2006*** as evidence on record reveals that the appellant was an uncle to the complainant; that the case for the prosecution was not proved beyond reasonable doubt as required by the law; that his fundamental rights to a fair trial as enshrined by ***Article 25(c) of the Constitution*** were violated as the court allowed PW4 and PW5 to testify in a language not understood by the appellant and the services of an interpreter were not accorded hence this violated ***section 50(2) of the Constitution***; and that the appellant was prejudiced and unable to defend himself properly because of being charged with an inappropriate provision of the law while the offence was incest contrary to ***section 20(1) of the Sexual Offences Act No. 3 of 2006***.

At the hearing, the appellant was unrepresented. He informed us that he would use the Kiswahili language and would rely on his written submissions and had nothing to add.

Mr B.L Kivihya, learned Assistant Deputy Public Prosecutor (ADPP), in opposing the appeal, maintained that the appeal has no merit; that the High Court re-evaluated the evidence and arrived at the right conclusion; that there was evidence that the appellant defiled the complainant who was aged 4 years; and that PW2 corroborated the evidence.

The ADPP submitted that both the lower and High Court considered the appellant's defence and came to the right conclusion. He urged us to dismiss this appeal.

This being a second appeal, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two 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. See ***CHEMANGONG V R, [1984] KLR 611***. In ***KARINGO V R, (1982) KLR 213*** at p. 219 this Court said:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact 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 v R, (1950) 17 EACA 146)."*

We have considered the grounds of appeal, the record of appeal, the submissions and the law. It is the appellant's contention that his fundamental rights to a fair hearing as enshrined under ***Article 25(c) of the Constitution*** were violated as the court allowed PW4 and PW5 to testify in a language that he did not understand. Having perused the record, we note that both PW4 and PW5 testified in English. We also note that the accused did not cross-examine the two witnesses but the same is on record that the appellant did not have questions for the two witnesses. The record also shows that on the 18th February, 2010, interpretation was in English/Kiswahili. The charge against the appellant before the amended charge sheet was read out in Kiswahili during plea taking and the appellant pleaded not guilty. Further, during the trial the appellant cross-examined the prosecution's witnesses. This clearly indicates that he understood the proceedings in the trial court. We find the ground that the trial was conducted in a language that the appellant did not understand is without merit.

The appellant also contended that the offence charged should have been under the provisions of ***Section***

20(1) of the Sexual Offences Act No. 3 of ***2006*** as he was the complainant's uncle. The appellant was charged under ***Section 8(1) (2) of the Sexual Offences Act*** for defiling a child. It is also clear from the evidence tendered that the appellant is the complainant's uncle. ***Section 20 of the Sexual Offences Act***. ***Section 20(1)*** provides:

> ***"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:***
>
> > ***Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."***

Section 8 of the Sexual Offences Act partly provides as follows:

> ***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."***

Therefore, does the appellant being charged under ***Section 8(1)(2)*** and not under ***Section 20(1) of the Sexual Offences Act*** warrant his acquittal? The evidence adduced indicates that the appellant was aware of the nature of the offence he was charged with, that is, defilement of his niece. The age (4 years) of the complainant, MM, was included in the particulars of the offence and the

same was proved during trial. Further, the sentence issued under ***Section 20 of the Sexual Offence Act*** for incest of a girl below 11 years is life imprisonment and is similar to the sentence issued for an offence of defilement of a girl below 11 years. We, therefore, hold that no prejudice was occasioned to the appellant.

This ground, too, fails.

The appellant further contended that the prosecution's case was not proved beyond reasonable doubt as required by the law. MM testified that on the material day the appellant (pointing at him) *"did bad things to her"*. That she and the appellant were at home alone in their house when the appellant touched her vagina. MM testified that she informed her father about the incident. PW2 testified that when she went back home she noted that MM was limping; that they examined MM and saw mucus like substance on her and that she was also bleeding. PW4, a clinical officer who examined MM, testified that MM's *labia monora* and *majora* were inflamed and swollen; and that MM had blood on her trouser. It was PW4's uncontroverted evidence that MM was walking with difficulty. He stated that he concluded that MM had been defiled.

From the evidence adduced, it is not in dispute that MM was defiled. It is also not in dispute that she was 4 years old. The issue in contention is whether the prosecution proved that it was the appellant who defiled MM. ***Section 124 of the Evidence Act***, Chapter 80, 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 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."***

Indeed the appellant was not medically examined to prove his guilt for having sexual assaulted MM but

the evidence on record irresistibly and satisfactorily pointed to his guilt. This is because MM was defiled and she was able to point out the appellant as the culprit. MM knew the appellant as her uncle and she knew his name. Further, the trial court examined MM's demeanour and found her to be a truthful witness. Accordingly, we are of the view that the fact that there was no medical report linking the appellant for having defiled MM, did not in any way diminish MM's evidence that it was the appellant who had defiled her. See ***DAVID NDUMBA V R, CR.A NO. 272 OF 2012.*** In addition the evidence of the clinical officer and PW2 corroborated MM's evidence. We find that the prosecution proved the case to the required legal standard.

We find that this appeal has no merit and accordingly, dismiss it.

Dated and delivered at Nairobi this 20th day of March, 2015.

J. W. MWERA

JUDGE OF APPEAL

G. B. M. KARIUKI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR