IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: NAMBUYE, KIAGE & SICHALE, JJA)

CRIMINAL APPEAL NO. 136 OF 2014

BETWEEN

PNG…….....APPELLANT

AND

REPUBLIC …….....…….RESPONDENT

(*Appeal from the Judgment of the High Court of Kenya at Meru (Musyoka, J) Dated 6th February, 2014*

in

H.C. CR.A No. 141 of 2011)

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JUDGMENT OF THE COURT

The appellant herein ***PNG*** was charged in the Principal Magistrates court at Chuka with the offence of incest contrary to **section 20 (1)** of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence are that on the 26th day of March, 2010 in Meru South District within Eastern Province, he had penetration into the genital organs of ***JG*** a female person aged eight years and who by relation was his daughter. In the alternative the appellant faced the charge of indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act No.3 of 2006. The particulars are that on the 26th March, 2010 in Meru South District within Eastern Province committed an act of indecency with ***JG*** a child of eight years by touching her breasts and vagina. The appellant denied both counts prompting a trial in which the prosecution tendered four (4) witnesses to prove its case against the appellant. The appellant who was the sole witness for the defence gave unsworn evidence. At the end of the trial ***P. Ngare*** principal magistrate found the appellant guilty of the main charge, convicted him and sentenced him to life imprisonment. The appellant was aggrieved by that decision and appealed to the High Court against it. In judgment of ***W. Musyoka J***, delivered on his behalf by ***J.A. Makau , J*** on the 6th day of February, 2014 the appellant's appeal was dismissed.

The appellant is now before us on a second appeal. He has raised five (5) grounds of appeal. These are basically that the first appellate court failed to discharge its mandate properly in failing to find that there was a possibility of a fabrication of the allegation against him. In view of the serious prevailing

differences between him and the complainant; in failing to analyze the facts and evidence adduced by witnesses and arrive at its own independent conclusion; in failing to take note of a serious defect in the trial which rendered the appellant's conviction both unsafe and unsustainable under **section 198 CPC** and **section 77 (2)** of the Constitution; in failing to make a finding that the appellant's fundamental rights to fair trial were breached and violated; in rendering an unfair judgment and in failing to note that of the prosecution evidence fell short of the required standard.

The appellant who appeared before us in person adopted his written submissions. In summary these simply raised two basic complaints; that the entire prosecutions' case was a fabrication; and that medical evidence did not prove the offence charged.

Mr. A.M. Musyoka learned prosecution counsel for the respondent urged us to dismiss the appellant's appeal on the grounds that it lacked merit. In his view the prosecutions' evidence met the required threshold because; PW2 found the appellant in bed with the minor child and upon examining the child PW2 noticed a white discharge from her vagina; PW2's testimony corroborated the testimony of the minor child that she had been defiled by the appellant who was her own father. Even if PW2's evidence were to be discounted the trial magistrate could convict on the evidence of the minor PW1 alone if satisfied that the minor was speaking the truth. There was the testimony of the medical evidence through PW4 to the effect that there was the reddening of both the labia majora and minora which was proof of defilement. On that account ***Mr. Musyoka*** invited us not to disturb the concurrent findings of the two courts below and instead affirm these and dismiss the appellant's appeal in its entirety.

This is a second appeal and by dint of **section 361** of the Criminal Procedure Code this Court is restricted to addressing itself to matters of law only. The Court has stated in numerous decisions that it will not interfere with the 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 ***Chemagong versus Republic [1984] KLR 611***. Also ***Karinga versus Republic [1982] KLR 213*** at page 219 where this Court had this to say:-

> ***"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 Kareri S/O Karanja verus Republic [1956] 17EACA 146]"***

The appellant has basically invited us to fault the findings of the first appellate court for failing to discharge its own mandate properly. It is an invitation for us to depart from the concurrent findings of the two courts below. As was stated by this Court in ***Mwita versus Republic [2004] 2KLR 60*** we can only accept such an invitation if persuaded that no reasonable court could on the evidence adduced have arrived at such findings or, in other words, the findings were perverse and therefore bad in law.

The finding of the learned trial magistrate were that the complainant was aged eight (8) years. She was a daughter to the appellant as the appellant had conceded. Medical evidence through the P3 filled by PW4 indicated that there were bruises and reddening of the child's labia majora and minora. There was also a discharge from her vagina which was evidence of a sexual assault.

Turning to the identity of the sexual assailant, the trial magistrate made findings that the offence took place in broad day light; PW2 found the appellant in the act and gave a graphic account of what transpired; the child also gave a graphic account of what transpired. The trial court believed PW2's accounts of the timings when she PW2 met with the appellant. The trial court rejected the appellant's allegations of his absence from the home as at the time the alleged offence was committed as the appellant's failed to give any particulars of where he was and with whom he was. The learned trial magistrate rejected the appellant's defence of a frame up because the appellant had failed to give the specific instances to support his claim.

The role of a 1st appellate was as set out by the predecessor of this Court in the case of ***Okeno versus Republic [1972] EA 32*** Thus:-

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Penalty versus Republic [1957] EA 336) and for the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and drew its own conclusion (Shantilal M. Ruwela versus Republic [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must made its own findings and draw its own concussion only when can it decide whether the magistrates findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters versus Sunday Post [1958] EA.424"

We have revisited the judgment of the learned first appellate judge. We find that he took into account of the entire record as had been placed before him. The Judge then reminded himself of his role as the first appellate court judge, as stated in ***Odhiambo versus Republic [2005] 1 KLR, 176***. He summarized the evidence and submissions of both sides and summarized the evidence tendered by either side, made findings that there was no renunciation by the appellant that a relationship existed between him and the minor who was his biological daughter; medical evidence through PW4 had demonstrated that the child had been penetrated corroborating the testimony of the child that she had been defiled. On alleged contradiction between the testimony of PW1 and PW2 with regard to the exact time when the offence allegedly took place, with PW1 saying it was at 2.00pm while PW2 said it was 4.00pm, the learned Judge relied on the case of ***Twehangane Alfred versus Uganda Criminal Appeal No. 139 of 2001*** Contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of the witness being rejected, contradictions will be ignored by the court where these are minor and do not point to the untruthfulness of the evidence tendered; or alternatively where they do not affect the main substance of the prosecution's case. Those that touch on material points in the testimony of witnesses should not be over looked as they seriously affect the value of the prosecution's evidence.

Applying these principles the learned Judge found that the contradictions did not affect the main substance of the prosecutions' case. Neither did it affect the value of the prosecutions evidence.

The learned Judge rejected the appellant's allegation of the learned trial magistrate having taken into consideration extraneous matters as he had failed to elaborate what he meant by extraneous matters. He found that; since the trial court was satisfied that the minor child was speaking the truth there was no requirement for it to call for corroboration for the child's evidence. There is no requirement for the prosecution to call any number of witnesses to prove its case. Those called were sufficient as the appellant's cross-examination of them and his defence did not shake their testimonies.

With regard to the alleged flouting of the provisions of **sections 169 (1)** of the Criminal Procedure Code, the learned Judge rejected it because the appellant had failed to demonstrate it. In the result the learned judge found that the trial magistrate had carefully considered the evidence on record and was himself satisfied that the charge had been proved beyond reasonable doubt.

We find that the learned Judge took the right approach to the discharge of his mandate as a first appellate judge and had in mind the correct principles of law. He addressed every complaint raised by the appellant and made findings on each supported by evidence on the record. We find those findings sound have no justification to interfere with them.

Did the two courts below by stating that the appellant had failed to account for where he was and with whom he was as at the time the offence was allegedly committed by him shift the burden to him? We do not think so.It was in line with the provisions of **section 111(1)** of the Evidence Act, Cap 80, vide which an accused person can be called upon to give an account of matters within his knowledge. It provides:-

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exception from or qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such persons is upon him....."

See ***Douglas Thiong'o Kibocha versus Republic [2009 Eklr.***

Where the appellant may have been and with whom at the mentioned times of 2.00pm and 4.00pm were matters within his knowledge. The two courts below made no error in calling upon him to give an account of them.

Lastly there is the issue of *voir dire* administration. The learned trial magistrate only noted on the record the responses the minor child gave in response to questions put to her in his administration of the *voir dire*. We have recently said in ***Patrick Kathurima versus Republic [2015] eKLR*** that though it is not mandatory it is desirable that such questions be noted on the record as these enable both the trial court and appellate courts to gauge the level of intelligence of the minor and his/her ability to speak the truth. In the instant appeal, however, we find the failure to observe the correct procedure outlined in the ***Patrick Kathurima case*** (supra) did not vitiate the prosecution case because there was substantial compliance and the child's intelligence and the ability to speak the truth was tested on cross-examination. Her responses were tested by the two courts below and found truthful and intelligent in line with the principles set in ***Nicholas Mutua & another versus Republic MSA Criminal Appeal No. 373 of 2006.*** The minor's evidence was therefore properly received and believed by the two courts below as being sound. It was also well corroborated by both PW2's testimony and PW4s' medical evidence. It formed bais for the appellant's conviction. The sentence was within the law. We find no justification to interfere.

In the result, we find no merit in the appellant's appeal. The same is dismissed in its entirety.

Dated and Delivered at Meru this 17th day of December, 2015.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O.KIAGE

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JUDGE OFAPPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR