IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CRIMINAL APPEAL NO. 10 OF 2014

BETWEEN

JAMES MWANGI MURIITHI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kerogoya (Githua,dated 28th January, 2014)

in

(H. C. CR.A. No.144 of 2012)

JUDGMENT OF THE COURT

1. The appellant herein ***James Mwangi Muriithi*** was arraigned before the Senior Principal Magistrate's Court at Kerugoya for the offence of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual offences Act No.3 of 2006. It was alleged that on the 15th May, 2011 in Kirinyaga County he intentionally caused his penis to penetrate the genital organ, namely, vagina of ***FWG*** a child aged 10 years. In the alternative the appellant faced a charge of indecent Act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006; in that on the 15th May, 2011 in Kirinyaga County, he intentionally rubbed the genital organ namely (sic) ***FWG*** a child aged 10 years with his penis. The appellant denied both offences prompting a trial in which the prosecution called a total of four (4) witnesses; while the appellant gave unsworn evidence and called two witnesses;

2. The brief facts of the case are that on the material date M, PW2 left ***FWG*** at home. She came back home later and bathed ***FWG*** but noticed that she was limping and complained of pain in her private parts. It was upon inquiry by M that FWG narrated what the appellant had done to her after luring her to his house with a promise that he would give her a cake. ***M*** examined ***FWG***'s private parts and confirmed that she had been defiled. She reported the incident to police where she was issued with a **P3** and referred to hospital for treatment. The P3 was filled later by ***Hezron*** **PW3** who confirmed that ***FWG*** had been defiled. The appellant was arrested by the area chief and handed over **PW4** who arraigned him in court. The appellant was supported in his unsworn evidence by both his wife ***Caroline*** DW3, and his mother **Jane, DW2**, that he had spent that Sunday at his home in the company of his wife ***Caroline.*** He only left his home that same evening when he paid a brief visit to his mother **Jane** DW2. He came back to his home and found ***Caroline*** his wife still at the home and they spent the rest of the day together.

3. The learned trial magistrate ***S.N. Ndegwa*** after analyzing and assessing the evidence before him arrived at the conclusion that the prosecution case had met the threshold of proof beyond reasonable doubt. On that account he found the appellant guilty of the offence charged on the main count, convicted him and sentenced him to life imprisonment. The appellant was aggrieved by that decision and he appealed to the High Court. The first appellate court (***C.W. Githua, J)*** after re-evaluating, re-assessing and re-analyzing the evidence before her dismissed the appellant's appeal in its entirety and affirmed both the conviction and sentence imposed on him.

4. The appellant is now before us on a second appeal having raised four (4) grounds of appeal which can be summed up in two broad grounds: Firstly; that the evidence of **FWG** was not properly admitted in evidence as *the voir dire,* procedure was not properly administered. Secondly; that the 1st appellate Court did not discharge its mandate properly and thereby arrived at a wrong conclusion on the matter especially on the appellants *alibi* defence

5. In his submissions before us, ***Mr. Maina Kagio,*** learned counsel for the appellant, urged three major grounds. On *voir dire* Mr. **Kagio** submitted all that the trial magistrate did was to give a casual approach to that exercise which could not enable the trial magistrate to make an informed decision on the minors' intelligence, ability to understand the nature of the oath and the obligation to speak the truth. Secondly,

there was nothing in the medical evidence to suggest that the minor's hymen could not have been broken by something else other than the alleged penetration by the appellant. Thirdly, the evidence of ***Caroline*** DW3 that she was at home throughout with the appellant on the day the offence was alleged to have been committed and that of **Jane** DW2, that the appellant paid her a visit the evening he was alleged to have committed the offence was plausible and went to prove appellants *alibi* defence and ought to have been believed as it displaced the prosecution case.

6. ***Mr. J. Kaigai,*** learned ***ADPP*** on the other hand urged that the appellant's commission of the offence was proved to the required standard as the evidence of ***FWG*** was clear that she was lured to the appellant's home with a promise of being given a cake. She reported the defilement to her mother PW2 as soon as PW2 arrived home and noticed her limping and complaining of pain on her private parts which is evidence of consistency. The totality of the prosecution's evidence displaced the appellants defence; *voir dire* was properly conducted on ***FWG*** before reception of her evidence and no prejudice was suffered by the appellant by the failure to record the questions put to ***FWG*** before recording the answers given by her which were reflected on the record. On that account he urged us dismiss the appellant's appeal.

7. This is 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 there is demonstration that such findings are based on no evidence or are shown demonstrably that the court acted on wrong principles in making the findings. See the case of ***Kaingo versus Republic [1982] KLR 213*** at page 219 wherein this Court stated thus:-

> ***"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 rest to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karoti S/O Karanja versus Republic [1956 17 EACA 146]."***

8. We have on our own revisited the entire record before us and considered it in the light of the rival arguments herein and in our opinion the following issues arise for our consideration:

> ***Whether the evidence of FWG was properly admitted in evidence.***
>
> ***Whether the first appellate court discharged its mandate properly.***

9. On the administration of the *voir dire*, the record is clear that all that the learned trial magistrate did was to put questions to the minor which he did not reflect on the record but went ahead to reflect on the record the responses that the minor gave to those questions. This is how it went:-

> ***"PW1 A minor examined by court. I am FWG I go to [Particulars Withheld] Primary School. I am in class 1. I go to church ACK . We go to Sunday school. I knew that it is wrong to tell lies to court.***
>
> ***Court:***
>
> ***The minor to give unsworn witness statement."***

10. The need for the administration of *voir dire* on minor witnesses before reception of their testimonies especially in criminal trials is entrenched in **section 19** of the Oaths and Statutory Declarations Act cap 15 Laws of Kenya. This provision does not of itself provide for the format to be applied in the course of such administration. The format used has basically evolved through case law. In ***Sula versus Uganda [2001] 2EA 556*** the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter:-

11. In ***Patrick Kathurima versus Republic Nyeri CRA 137 of 2014*** this Court after reviewing case law on the subject observed thus:-

> ***"It is best though not mandatory in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in Regina versus Compell (Times) December 20, 1982 and Republic versus Lalkhan [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."***

On account of the above observations the court in the ***Kathurima case*** arrived at the conclusion that the minor's evidence in that appeal had wrongly been received and therefore vitiated the prosecution case which stood or faltered on the said minor's evidence. Further that the minors evidence which had formed the back bone of the prosecution case was riddled with contradictions and on that account allowed the appellant's appeal in its entirety.

12. There was however no hard rule laid down in the ***Kathurima case*** (supra) that in all cases where *voir dire* procedure had not been properly administered before reception of a minor's evidence, the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:-

> ***"It is best though not mandatory in our context that the questions put and the answers given by the child during the voir dire examination be recorded..."***

Although **FWG** gave unsworn evidence she was subjected to cross-examination by the appellant on her unsworn testimony. In ***Sula versus Uganda (supra***) the supreme court of Uganda ruled that:

> ***"A child who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence."***

13. In ***Nicholas Mutula Wambua & another versus Republic Mombasa Criminal Appeal No.373 of 2006 (UR)*** this Court when confronted with a similar issue construed **sections 208** and **302** of the Criminal Procedure Code governing trials in the subordinate courts and the High Court respectively and arrived at the conclusion that cross-examination of a witness who had given evidence not on oath is permitted by law. The court approved the view taken by the Supreme Court of Uganda in the ***Sula case (*supra)** that cross-examination of a child who gives evidence not on oath is meant to test the veracity of such a childs' evidence. In the ***Nicholas Mutula case (supra)*** the court went over the responses given by the child witnesses both during the *voir dire* examination and in cross-examination of his/her unsworn testimony and then observed thus:-

> ***"But in our evaluation, the answers the child gave during the voir dire were intelligent. He understood that it was wrong to lie. His evidence was coherent"***

On that account, the court allowed the child's testimony to stand.

14. In this appeal, in response to a questions put to her during the *voir dire* examination, **FWG** responded that she knew that it was wrong to tell lies to court. She was ten (10) years old. Her testimony was coherent. The appellant only put one question to her in cross-examination which she answered correctly. It is our finding that the responses **FWG** gave during the *voir dire* examination, the coherent flow of her testimony in chief and the single response to the single question put to her in cross-examination by the appellant all demonstrated that **FWG** was intelligent enough to understand the nature of the proceedings and the obligation to speak the truth. She therefore gave reliable evidence. Both courts below believed she was truthful. We find no justification to interfere with that finding. The appellant's trial was therefore not vitiated by the learned trial magistrate's failure to conduct the *voir dire* examination of **FWG** properly, as asserted by the appellant.

15. Having found that the appellant's prosecution was not vitiated, we come to determine the second issue that is whether the first appellate court discharged its mandate properly. On the authority of ***Okeno versus Republic [1972] EA 32*** the first appellate court was duty bound to re-analize and re-evaluate the evidence and come to its own conclusion without, of course, overlooking the conclusions reached by the trial court and at the same time bearing in mind that it neither heard nor saw witnesses testify.

16. We have on our own revisited the 1st appellate courts' judgment on the record and perused it. We find in it, that the learned Judge took note of the offence the appellant had been convicted of, summarized both the evidence and rival submissions of either side, drew inspiration from principles on the mandate of a first appellate court as set out in ***Okeno versus Republic (supra)*** and ***Kiilu and another versus Republic [2005] 1KLR 174.*** She then addressed her mind to each ground of appeal raised by the appellant, re-assessed and re-analized the evidence for and against each of the said grounds and then drew out conclusions on the same. In a summary these were that the learned trial magistrates' failure to comply with the first step of the *voir dire* examination of the (minor reflecting on the record the questions put by magistrate) was an irregularity which did not occasion any prejudice to the appellant. Second the medical evidence produced during the trial showed not only that the minor's hymen had been broken but that she had also been infected with gonorrhea, a sexually transmitted disease. On that account she found that PW3's evidence proved that PW1had indeed been defiled. The appellant took issue with that finding because it had not been demonstrated that penetration could not have been occasioned by something else other than the alleged penetration by the appellant. We find this was neither put to PW3 in cross-examination nor raised as a ground of appeal before the 1st appellate Court. It is an after thought and must be rejected. Third, that proof that the appellant was the complainant's assailant had been established because the complaint knew the appellant, as her uncle, she had graphically explained how he had taken her from her home to his home and defiled her, she knew him very well before the incident, the incident also took place at about 6.00 pm which to the learned judge was in broad day light.

17.Turning to the appellant's defence, she concurred with the findings of the learned trial magistrate that the appellant's allegations that the charge was a fabrication because of an alleged grudge between him and PW2 had rightly been rejected as an afterthought; the appellant's witnesses did not specifically state that they were with him at the time the offence was committed; approved the learned trial magistrate rejection of DW3's evidence (***Caroline)*** because being the wife of the appellant she had every reason to tell a lie to protect her husband's interests. Lastly that there was no inordinate delay in the reporting of the incident because PW2 only got to learn about the incident on 16th May, 2011 at around 7.00 pm and she reported the matter to PW4 on the following day at around 12.30 pm. On that account the learned judge affirmed both the appellant's conviction and sentence and dismissed his appeal in its entirety.

18. On our own, we find all the above findings were supported by the evidence on the record, reasons advanced were sound and within the law. We find no reason to fault them.

19. The upshot of the above analysis is that we find no reason to disturb the concurrent findings of the two courts below on the culpability of the appellant in the commission of the offence he was charged with. The sentence was also lawful and within the law. The appeal is accordingly dismissed in its entirety.

Dated and delivered at Nyeri this 16th day of December, 2015.

P.N. WAKI

JUDGE OF APPEAL

R.N. NAMBUYE

JUDGE OF APPEAL

P.O. KIAGE

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR