IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIHARA KARIUKI, PCA, MWERA & MURGOR, JJ.A.

CRIMINAL APPEAL NO. 367 OF 2011

BETWEEN

LAWRENCE MUCHINA NGUGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Ochieng J.) dated 27th September, 2011)

in

H.C.CR.A. NO. 457 OF 2009)

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JUDGMENT OF THE COURT

1. This is an appeal by **Lawrence Muchina Ngigi** from the judgment of the High Court upholding and affirming the conviction and sentence by the trial Resident Magistrates' court in respect of a charge of defilement contrary to section 8(1) & (3) Act No. 3 of the Sexual Offences Act, 2006.
2. In the first count, the appellant, together with another (who was, however acquitted by the trial Court) were charged with the offence of defilement of a minor contrary to section 8(1) & (3) Act No. 3 of the Sexual Offences Act, 2006. The particulars of the offence were that on the **16th day of June, 2007** at ***[particulars withheld]*** village in Kiambu District within the Central Province, jointly with another not before the court, intentionally and unlawfully defiled **E.W. (the complainant)** a girl aged 14 years.
3. In the alternative charge of indecent assault contrary to **section 144(1) of the Penal Code,** the particulars of the offence stated that on the **16th day of June, 2007** at ***[particulars withheld]*** village in Kiambu District within Central Province, the appellant indecently assaulted the complainant by removing her inner pants and touching her private parts.
4. In the second count, the appellant was charged with stealing contrary to **section 275 of the Penal Code.** In the particulars of the charge, on the **16th day of June, 2007** at ***[particulars withheld]*** village in Kiambu District of the Central Province, the appellant jointly with another not before the Court stole one mobile phone make Motorolla C117 and cash Kshs 500 all valued at Kshs 4,500 the property of the complainant.
5. The appellant pleaded not guilty to all the charges on the **4th day of July, 2007.** His trial

subsequently commenced on the **16th day of August, 2007** before the Resident Magistrate at Kikuyu, **Mrs. Wachira.**

6. In the prosecution's case, the complainant together with seven other witnesses namely; **M W W (PW2)**, **D K M (PW3)**, **M M M (PW4)**, **J O O (PW5)**, **APC Willy Cheruiyot (PW6), SGT Tonui (PW7)** and **Dr. Githuka George (PW8),** testified. The evidence adduced by these witnesses are summarized as follows.
7. The complainant then aged fourteen (14) years old was an 8th grade pupil at ***[particulars withheld]*** Primary School. In her testimony in the trial court, she recalled that on the **16thJune, 2007**, she had travelled to Muguga to pick up their house help, **M W.** She had in her possession a phone make Motorolla C117, which belonged to her mother, and Kshs 500. She told the court that before she reached Muguga, she received a phone call from a man who identified himself as an uncle to **M W**. He said that he was coming to pick her up from Mugugato and direct her to **W**.
8. At 1.00 pm, having arrived at Muguga, the complainant met the appellant, who was accompanied by another man, whom he identified as **C**. The appellant identified himself to the complainant by the name of **Muchina.** The appellant then informed the complainant that they would proceed to pick **W**, but before doing so, he told her that he needed to purchase a paper bag in which they could carry the blouse the complainant had brought for **W**. The appellant took Kshs 200 from the complainant and told her to wait for him. It was not until 4.00 pm that the appellant and his accomplice returned.
9. It was the complainant's evidence that the appellant and the man who had accompanied him then led her through a plantation, between 4.00pm and 5.30pm, where they suddenly turned on her and ordered her to lie down. Upon her refusal, the appellant and his accomplice forced the complainant down onto the ground, removed her shoes and clothes, and defiled her. Before leaving the scene, the appellant took away the complainant's phone, a Motorolla C117, and cash, Kshs 500. The complainant later found her way out of the plantation and sought help at a nearby housing estate, where she was sheltered for the night by an elderly man identified as **J O O (PW5)**. **Ongira** told the court that on the **16thJune, 2007** at about 6.00 pm, his neighbor asked him to attend to the complainant, who was still bleeding. This made him believe that the complainant had been defiled.
10. Following the arrival of the complainant's parents the following morning, the matter was reported at Ndehia Police Station. They were then referred to Mugetho Police Station. The complainant also identified the stolen phone at the Police Station as the one which the appellant had stolen from her. The complainant was taken for treatment at Tigoni Hospital and the Police later issued her with P3 form, duly filled by the doctor. Following investigations, the appellant was arrested.
11. **M W W (PW2)** told the Court that the complainant had been sent by her mother to Muguga to deliver bus fare to her so that she could travel to her workplace and resume work. The complainant was to call her as soon as she arrived at Muguga. However, when the complainant called, **W** did not have the phone, which was owned by ***D K M (PW3)***, as it was in the hands of the appellant**.** According to **W,** it was then that he left with one **Njoroge,** claiming that they were going to the shopping centre. Later when the appellant returned, he told **W** that the complainant had called earlier and informed him that she was going back to their home at Rongai. The following day, the complainant arrived at her home in the company of police officers and complained that she had been defiled.
12. **D K M** (PW3) told the trial court that **W** had on the **16th June, 2007** borrowed his phone to make a call , in the presence of the appellant and Njoroge. As soon as PW2 had finished making the call, the appellant borrowed the phone which he did not return to PW3 until about 8.00 pm. Thereafter, the appellant and Njoroge took **Mungai on** a drinking spree at Thigu. The following day, the complainant went to the home of PW3 in the company of two police officers attached to Thigu Administration Police Post. When questioned on the whereabouts of his phone, Mungai testified that it had been in the possession of the appellant. The appellant was apprehended by neighbours and handed over to the Police.
13. **M M M (PW4),** the complainant's mother, told the trial court that she had received a phone call from **Ochieng (PW5)** and who informed her of the incident that had befallen her daughter. The following day, she and her husband had travelled to Muguga. M M testified that her daughter had told her that she had been defiled by the appellant and his accomplice.
14. **APC Willy Cheruiyot (PW6),** a police officer attached to the Thigu AP Post told the trial court that the complainant reported the incident to him and informed him that she could identify the

assailants. He thereafter arrested the appellant who admitted having taken away the complainant's phone. **SGT Tonui (PW7)**, attached to the Kikuyu Police Station, told the trial court that he re-arrested the appellant from Thigu AP Post.

15. **Dr. Githuka George (PW8),** a medical doctor attached to Tigoni Hospital, told the trial court that he assessed the age of the complainant; about 14 years. **Dr. Githuka** noted in his report that the complainant's as genitalia were inflamed and her hymen was torn, evidencing sexual activity and which led him to conclude that the complainant had been defiled.

16. In an unsworn statement, in his defence the appellant denied the offence, asserting that he had been framed following a land related dispute between himself and **M W W (PW2)**, and **D K M (PW3)**, his cousins. The appellant stated that his grandmother had bequeathed to him, **W (PW2)**, and **M** (PW3) an acre of the land, but when he became of age, he unsuccessfully filed a succession case in respect of the said land; that sometime later the appellant learnt that **W (PW2)** and **M (PW3)** had sold the said parcel of land to two other people without consulting him, which gave rise to a disagreement between the appellant and **W (PW2)** and **M (PW3)**, who have subsequently framed this case against him for refusing to endorse the sale of the land.

17. The trial magistrate, having considered the evidence, found the appellant guilty of defilement of a minor contrary to section 8(1) & (3) Act No. 3 of the Sexual Offences Act, 2006 as charged under the first count**.** The appellant was convicted and sentenced to life imprisonment. On the second count of stealing, the appellant was acquitted for lack of evidence.

18. In rejecting the appellant's defence, the trial magistrate stated:

> ***"The accused person raises a defence where he alleges that the charges are fabricated because he had refused to consent to the sale of their family land by PW2 and PW3 to PW4 and PW5. This kind of defence is not only out of context but also an afterthought purely meant to sway the court's mind.***
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> ***I say this because PW2, PW3, PW4 and PW5 all testified in court and the accused person was given an ample opportunity to fully cross-examine them. At no point did the accused person raise the issue of land… The court finds that the charges in court cannot be framed up charges…"***

19. The appellant, being aggrieved with the decision of the trial court, filed an appeal in the High Court against both the conviction and the sentence. The appeal came up for hearing in the High Court and was heard by (**Ochieng, J**). The learned judge, who being equally satisfied that the prosecution had proved the case against the appellant, dismissed his appeal and upheld the conviction and sentence. He said in part:

> ***"Having re-evaluated the evidence on record, I must say that I share the view expressed by the trial court. Nothing could have been easier than for the appellant to have put questions to the witnesses whom he later alleged had conspired to fabricate the case against him.***
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> ***In any event, PW1 did not know the appellant prior to the material day. She therefore had no reason at all, to be involved in some fabrication.***
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> ***Furthermore, the evidence of defilement was real. It was definitely not fabricated.***

20. Having been dissatisfied with the affirmation of the conviction and sentence by the High Court, the appellant lodged this appeal which is before us. The appeal is premised on five grounds, as follows:

> ***"1. That, the Appellate Judge of the High court erred in law when he uphold [sic] conviction and sentence by failing to find that the charges preferred are fatally defective.***
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> ***2. That, the Appellate Judge of the High court judge erred in law when he upheld***

conviction of the trial court by failing to find that the provisions of sec. 2 (1) paragraph (a) of the Sexual Offences Act No. 3 of 2006 was not discharged.

3. That, the Appellate Judge of the High court judge erred in law when he upheld conviction and sentence by failing to find that the appellant's fundamental rights under sec. 72(3)(b) of the defunct constitution infringed.

4. That, [the] Appellate Judge of the High court erred in law when he upheld conviction and sentence on credible evidence that is impeachable under sec. 163 (1)(c) Evidence Act Cap 80 laws of Kenya.

5. That, Appellate Judge of the High court judge erred in law when he dismissed my plausible defence contrary to sec. 169 (1) CPC.

21. The appeal was heard on the **19th September, 2013** and the appellant appeared in person whereas the State was represented by **Ms Jacinta Nyamosi,** a Senior Principal Prosecution Counsel.
22. In arguing his appeal, the appellant submitted that during the trial, there was inadequate evidence of the complainant's age, independent of the complainant's testimony; that he was not subjected to a medical examination following his arrest; and that contrary to the law, he was held in custody for a period of 16 days before being arraigned in court. The appellant urged the court to allow his appeal.
23. The learned Senior Principal State Counsel **Ms. Nyamosi** opposed the appeal on both the conviction and sentence. She submitted that the appellant was convicted of defilement on sound evidence; that the doctor had examined the complainant and confirmed that she was 14 years; that the complainant also testified that she was 14 years old. **Ms. Nyamosi** admitted that the appellant had not been medically examined but that this did not dilute the evidence; that the complainant positively identified the appellant; and the corroborative evidence from **W (PW2)** and **Dr. Githuka (PW8),** confirmed the defilement.
24. It was **Ms. Nyamosi's** submission on the constitutionality of the appellant's detention, that the issue had been dealt with by the High Court and that the appellant's detention for 16 days did not compromise the conviction. She urged us to dismiss the appeal.
25. This Court has considered the record, the grounds of appeal, the able submissions by the appellant and counsel and the law. As a second appellate court, we will address in the main points of law as required by ***section 361(1) of the Criminal Procedure Code*** and our own decisions as in ***Karingo v Republic [1982] KLR 213***:

"A second appeal must be confined to points of law and the Court of Appeal will not interfere with concurrent findings of fact of the two lower courts unless they are shown to have not been based on evidence."

26. We are further cognisant of this Court's decision in ***M'Riungu v Republic [1983] KLR 455***, in which we stated as follows:

"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 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."

27. In our view, the appellant's submissions before us turned largely on evidentiary, factual issues. This being the second appeal, we have no jurisdiction to consider matters of fact, but only matters of law. See section 361(1) (a) of the Criminal Procedure Code and **M'Riungu v Republic** (supra). Based on the record before us, we find that both the subordinate court and the High Court properly evaluated and re-evaluated the evidence from the prosecution witnesses ***E W (PW1)***, **M W W (PW2)**, **D K M (PW3)**, **M M M (PW4)**, **J O O (PW5)**, **APC Willy Cheruiyot (PW6),**

SGT Tonui (PW7) and **Dr. Githuka George (PW8).**

28. This Court's satisfaction with the evaluated and re-evaluated evidence is dispositive of any invitation to determine the legal question whether failure to examine the appellant following his arrest on charges of defilement, was fatal. In such cases, the examination of the accused serves to corroborate, not found the prosecution's case; where the evidence is such as to adequately support a conviction, failure to examine the accused cannot serve to undermine the prosecution's case.

On the issue of the complaint's age, there is no evidence to show that the appellant, questioned on disputed the complainant's age. From the evidence, the complainant herself, PW4 and PW8, testified that the complainant was age 14 years which was believed by the trial court and the High Court. It follows therefore that, we have no jurisdiction to interfere with the concurrent findings of the courts below and consider this ground to be without merit.

29. Finally, regarding custody of the appellant for a period over 16 days before being arraigned in court, the position in law is now well settled. In the case of ***Julius Kamau Mbugua vs Republic Criminal Appeal No. 50 of 2010*** the Court addressed ***sections 72(3)(b)*** and ***77(1)*** of the repealed Constitution thus:

> ***"The underlying question arising in this appeal is whether an unconstitutional extra judicial incarceration by police before the suspect is charged in court either entitles the suspect not to be tried for the offence for which he was arrested, or, if tried, whether he is entitled to a discharge or acquittal. Simply put in another way, whether a breach of Section 72(3)(b) by depriving a suspect of his personal liberty by police before being charged in court entitles the suspect to go scot-free for the offence allegedly committed or about to be committed. This is a fundamental question of great public importance […]***
>
> ***In our view, the right of a suspect to personal liberty before he is taken to court under Section 72(3) (b) are clearly distinct from the rights of an accused person awaiting trial under Section 77(1).***
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> ***The main difference is that the breach of right to personal liberty is not trial-related. It is a right to which every citizen is entitled. It is the function of the Government to ensure that citizens enjoy the right. The duty is specifically on the police where the suspect is in police custody. If, by illustration, police breach the right to personal liberty of a suspect by unreasonable detention in police custody there is a right to apply to the High Court for a writ of Habeas Corpus to secure release (see Section 389(1)(a) of Criminal Procedure Code and Section 84(1) of the Constitution).***
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> ***In addition, Section 72(6) provided a remedy by way of damages to a person who is unlawfully arrested or detained."***

30. We also agree with the conviction and findings of both the subordinate and the High Court on the sentence, and have no reason to review the same.
31. For the reasons stated above, the appellant's appeal is dismissed. We reaffirm the conviction and sentence.

Dated and delivered at Nairobi this 17th day of January, 2014.

P. KIHARA KARIUKI

PRESIDENT, COURT OF APPEAL

J. W. MWERA

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR