



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A)

CRIMINAL APPEAL NO. 70 OF 2013

BETWEEN

ELIAS MURIERA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J.)

dated 6th June, 2013

in

H.C.CR.A NO. 231 OF 2009)

JUDGMENT OF THE COURT

1. **Elias Muriera**, the appellant, was charged with the offence of defilement contrary to **Section 8(1)** as read together with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006** and an alternative count of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** in the Chief Magistrate's Court at Meru. The particulars of the offence of defilement were that on 22nd May, 2009 in Meru Central District within the then Eastern Province, the appellant committed defilement with CN, a child aged 13 years, which caused penetration to her genitals. The particulars of the alternative charge were that on the above mentioned place and date, the appellant committed an act of indecency with CN, a child aged 13 years, by touching her genitals.
2. The appellant pleaded not guilty to both the main and the alternative counts. The prosecution called a total of four witnesses. It was the prosecution's case that on 22nd May, 2009 at around 8:00 p.m. while PW1, CN (C), was in the kitchen she heard a knock on the door. Upon opening the door, the appellant came in and tried to seduce C to have sexual intercourse with him. C refused and the appellant dragged her into the main house. At that time C was alone in the house. The appellant undressed C, removed his trousers and underwear and proceeded to defile C. It was C's evidence that when she tried to scream for help the appellant tied her mouth with his trousers. After the appellant was done he dressed up. Before the appellant left, he threatened C with death if she ever told anyone what had happened.
3. PW2, LK (L), testified that on 22nd May, 2009 at around 9:00 p.m she arrived home from the

market and found her daughter, C, in bed. On 23rd May, 2009 C went to school and came back home at around 2:00 p.m for lunch. It was then that L noticed C was walking with difficulty. She inquired from C what was wrong and C told her what had transpired on 22nd May, 2009. C maintained that she did not inform her mother what had happened on the material day because the appellant had threatened her with death if she did.

4. L and C reported the incident at Meru Police Station on 24th May, 2009. PW4, PC Janet Aiyabei (PC Janet), testified that C indicated in her initial report that she was able to recognize the appellant using the electricity lights that were on during the incident and that the appellant was her neighbour. PW3, Dr. Isaac Macharia (Dr. Macharia), examined C on 29th May, 2009 and found that her hymen was torn. He concluded that C had been defiled. It was the prosecution's case that at the time of the incident C was 13 years old. Subsequently, the appellant was arrested and charged.
5. In his defence, the appellant gave a sworn statement and called one witness. The appellant denied committing the offences he was charged with and maintained that the charges were framed against him by C's mother. He stated that L owed him Kshs. 1,000/= which she had refused to pay back. He did admit that C and L were his neighbours. DW2, Daniel Kimathi (Daniel), gave evidence that on 15th May, 2009 he accompanied the appellant to L's house where the appellant demanded payment of Kshs. 1,000/= from L. According to David, L refused to pay the amount and chased them away. He further testified that he knew nothing about what had transpired on 22nd May, 2009.
6. The trial court was convinced 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 21 years imprisonment. Aggrieved with the said decision, the appellant appealed against both the conviction and sentence in the High Court. The High Court (Lesiit, J.) vide a judgment dated 6th June, 2013 dismissed the appeal. The appellant has filed this second appeal based on the following grounds:-
 - ***The learned Judge erred in law in finding that the learned magistrate properly conducted the voire dire examination when the same was not properly done hence leading to a miscarriage of justice.***
 - ***The proceedings were a nullity as the magistrate failed to satisfactorily carry out voire dire examination on the complainant in accordance with Section 125(2) of the Evidence Act and Section 19 of the Oaths and Declaration Act. (sic)***
 - ***The learned Judge erred in failing to subject the whole evidence to a fresh and exhaustive examination.***
 - ***The learned Judge misdirected herself in finding that there was enough medical evidence to connect the appellant to the offence when in fact the same was inconclusive and therefore could not be relied on to convict the appellant.***
 - ***The learned Judge misdirected herself in arriving at a conclusion that Dr. Macharia relied on the treatment notes of the complainant when there was no such evidence from the lower court's proceedings.***
 - ***The conviction was against the weight of the evidence.***
7. Miss Nelima, learned counsel for the appellant, submitted that the proceedings in the trial court were a nullity. According to her, the trial court ought to have investigated if the complainant being a child understood the nature of an oath; the court also failed to investigate if the child was intelligent enough to give evidence. She argued that the examination of the complainant was important since she was the only witness. Miss Nelima submitted that the medical evidence that was adduced in the trial court was not subjected to fresh evaluation by the learned Judge; if the learned Judge did so, she would have found that the Doctor's conclusion that the hymen was

- perforated was not substantiated. She urged us to allow the appeal.
8. Mr. J. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal, maintained that the evidence was overwhelming. He stated that the main evidence was from the complainant and *voire dire* examination was conducted. He argued that there was no hard and fast rule on how *voire dire* examination ought to be done; but that a child must make an impression on the court that she has the capacity to understand the truth. Mr. Kaigai submitted that the trial court was satisfied that the complainant understood the importance of telling the truth and was intelligent to give evidence. He argued that it was trite law that a court can convict an accused based on the evidence of a single witness. He maintained that in this case the complainant's evidence was corroborated by her mother's and doctor's evidence. According to Mr. Kaigai, there was no possibility of mistaken identity since Caroline knew the appellant who was her neighbour and she recognized him with the aid of electricity lights that were on during the incident. He urged us to dismiss the appeal.
 9. This being a 2nd 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 -vs- R [1984] KLR 611*. In *Kaingo -vs- 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 C/O Karanja -vs- R (1956) 17 EACA 146)”

10. We have considered the grounds of appeal, record of appeal, submissions and the law. It is the appellant's contention that the trial court did not properly conduct *voire dire* to establish whether C being a child understood the importance of telling the truth and could give evidence. During the trial C was 13 years old. **Section 125 (1)** of the *Evidence Act* provides:-

“125(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether body or mind) or any similar cause.”

In *Cleophas Ochieng Otieno -vs- Republic- Criminal Appeal No. 328 of 2009*, this Court expressed itself as follows:-

“The authorities show that if the trial court after voire dire examinations is satisfied that the child witness understands the nature of the oath, the court without much ado proceeds to swear the child and receive the evidence on oath. But if the court is not so satisfied, the unsworn evidence of the child may be received if, in the opinion of the court, he is possessed of sufficient intelligence and understands the duty of speaking the truth.”

See also **Section 19** of the *Oaths and Statutory Declarations Act*, Chapter 15 Laws of Kenya.

11. Based on the foregoing we concur with the following findings by the learned Judge:-

“The court in the cited case underscored the need for the trial court to conduct a voire dire examination before determining whether and in what matter (sic) to take the evidence of a child. There are three tests or principles the trial court should apply,

1. Whether the child is possessed of sufficient intelligence to testify.

2. Whether the child understands the duty to tell the truth.

3. Whether the child understands the meaning of an oath.

The learned trial magistrate conducted voire dire examination and came to the conclusion that the complainant was possessed of sufficient knowledge to testify. He however ruled that she should not testify on oath. Even though no reason is given for this decision, it is clear from the last few sentences in the voire dire examination that the complainant had said that she did not know the meaning of an oath. The learned trial magistrate was right to rule that he would take the complainant's evidence not on oath

We, therefore, find no reason to interfere with the concurrent finding of facts by the two lower courts on the competency of C.

12. The appellant also contended that the lower courts erred in relying on the evidence of Caroline to convict him of the offence of defilement; the medical evidence adduced did not implicate him as the person who had defiled Caroline. The proviso to **Section 124** of the **Evidence Act**, 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.”

In this case C testified that it was the appellant who had defiled her on the material day; she knew the appellant prior to the incident as he was a neighbour and that she used the electricity lights that were on in the house to recognize the appellant. She further testified that she did not inform her mother on the same day about the defilement because the appellant had threatened her. Having perused the record, we concur with the two lower court's findings that C was a truthful witness who gave a detailed account of what transpired on the material day. Further, L testified that she noticed that C was walking with difficulty and Dr. Macharia testified that after examining C he found that her hymen had been torn and there was presence of spermatozoa. We are of the view that the evidence tendered by L and Dr. Macharia corroborated C's evidence that she was defiled. The fact that there was no medical evidence linking the spermatozoa found on C to the appellant did not in any way diminish C's evidence that it was the appellant who had defiled her. See this Court's decision in ***Simon Ngiri Thiogo -vs- Republic – Criminal Appeal No. 20 of 2012 & David Ndumba -vs- Republic- Criminal Appeal No. 272 of 2012.***

13. Having perused the record we find that the two lower courts did consider the appellant's defence and therefore this ground has no merit.

14. The upshot of the foregoing is that we find that this appeal has no merit and is dismissed.

Dated and delivered at Nyeri this 5th day of February, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR