IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 62 OF 2014

BETWEEN

ETM .... APPELLANT

AND

REPUBLIC.. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri

(Wakiaga, J.) delivered on 14th February, 2013

in

H.C.CR.A No. 33 of 2010)

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JUDGMENT OF THE COURT

1. ETM was charged with the offence of defilement contrary to ***Section 8 (1)*** and ***(2)*** of the ***Sexual Offences Act No. 3 of 2006***. The information is that on 10th February, 2008, in Murang’a District within the then Central Province, the appellant intentionally and unlawfully had carnal knowledge of PM a girl 5 years old. He faced an alternative count of indecent act with a child contrary to ***Section 11(1)*** of the ***Sexual Offences Act***. He pleaded not guilty and was tried, convicted and sentenced to life imprisonment for defilement. His appeal to the High Court against conviction for the offence of defilement was dismissed prompting a second appeal to this Court.
2. In his home-made memorandum, the appellant cites three grounds of appeal as follows:

i. ***That the High Court erred in law while upholding conviction and relying on the evidence of PW 2 and PW 3 whose credibility remained doubtful and in contravention of Section 163 (1) of the Evidence Act.***

ii. ***That the learned Judge erred in law in failing to re-evaluate and analyze the entire evidence on record.***

iii. ***That the High Court erred in law in upholding conviction as no birth certificate was produced to prove the age of the complainant.***

iv. ***That the honourable Judge erred in failing to consider the defence testimony.***

v. ***The learned judge erred in law in convicting the appellant based on the testimony of a single witness and failing to note that vital exhibits like documents were not produced by the prosecution.***

3. At the hearing of this appeal, the appellant was in person while the Assistant Director of Public Prosecution Mr Kaigai appeared for the State. The appellant elaborated on the grounds of appeal and submitted that the evidence of PW 1 PM, (the complainant), a child of 5 years was inconsistent and not credible; that the complainant's evidence was contradictory when in one instance she testified that the appellant removed her clothes and at another that he never removed her clothes; that the testimony of PW 2 and PW 3 is concocted testimony and no defilement ever took place; that PW2 never stated in her statement to the police that the complainant had been defiled; that the High Court did not properly re-evaluate and analyze the evidence on record and there was no prompt investigation by the police; that the appellant was arrested by members of the public who took him to hospital to be tested and he had injuries due to beatings by members of the public and not as a result of the alleged crime; that no evidence was led to prove the age of the complainant either through production of a birth certificate or medical evidence; that the detailed sworn testimony by the appellant was ignored and not considered by the two courts below; that the medical report prepared upon examination of the complainant did not implicate or connect the appellant with the offence as charged. The appellant submitted that there was a grudge between him and the complainant's mother PW 2 involving a land dispute which led to the charge against him. The appellant urged us to re-evaluate the evidence and allow the appeal.
4. The State opposed the appeal and submitted that the complainant gave a detailed testimony of how she was defiled by the appellant; that the trial court conducted a *voire dire* examination of the complainant and was satisfied as to her competence to give evidence; that the appellant was a person well known to the complainant; the complainant gave evidence which was consistent and gave details to her mother showing in which house the appellant defiled her; that some *"mandazi"* was used to lure the complainant into the appellant's house; that no grudge was proved to exist between the appellant and the complainant's mother and even the appellant in his defence stated there was no grudge. The State submitted that the prosecution had proved its case beyond reasonable doubt and the life sentence meted out on the appellant was the only sentence provided for in law.
5. The evidence on record shows that the complainant PW 2 PMK testified as follows:

> ***"My name is PMK. I do not know my age. I am the last born. My mother is WG. My father is K. I live with my parents. I am in nursery school I attend church and in church I am taught about God. A person who tells lies is a bad person. I do not know what happens to them. I know the accused person. His name is T. He is a neighbour. I even know their home. Accused is bad because he lied to me that he would buy me "Ngumu" (a type of mandazi). He bought it for me and lay on me. I was from school. He told me not to tell my mother. I felt pain. He never removed my clothes, he never removed mine. I do not know what to call what the accused did to me. I felt pain the whole body. We were walking down to our place. He then told me to leave. We were in the bushes. I was with M M, W and J. They had left by then. I went home. I told my mother about it. I told her that the accused pulled up my clothes and lay on me. Accused in the dock did that to me. I know their home and used to see him. My mother took me to hospital and I was given medicines".***

6. PW3 GWK testified as follows:

> ***"I am 23 years old. I am a farmer. I know the complainant. She is my child. I recall on 10th February 2009 at 4.30 pm I went home from Githambo shopping centre. I met with the complainant at the accused gate. She was crying. She then continued crying and said it was uncle the accused. Accused is her uncle. The accused was in a house. She pointed at the gate. I took my child and we went to the house. She confirmed the accused***

was in that house. She told me and showed me the door she had just used. The door was closed. I cleaned her private parts and saw some blood stains. I saw the window of the house was slightly open. The accused came to the window and said he would slap me. I took my child to Muriranjas hospital. I reported the matter at Kahuro Police Station on the same day. I know the accused person. I have no grudge with him.... I put my child on the ground. She lay down. She had her pant. The pant had no blood stains. She had blood in her vagina. She had just been released by the suspect".

7. PW 1 Martin Kariuki Mwangi, a clinical officer at Muriranjas hospital testified that he completed a P3 Form in relation to the complainant PW2 Peninah Muthoni on 11th February, 2009. That the complainant is a girl 5 years old. That upon examination, he established there was bruises/inflammation on both labia and her hymen was freshly broken. That the appellant was also examined on the same date and his penile tissue was bruised; in his assessment, the girl was penetrated on her vagina.
8. We have taken into account the submissions made by the appellant and the State; we have also considered the record of appeal and the judgement by the two courts below. This is a second appeal which must be confined to points of law. As was stated in ***Kavingo – v – R, (1982) KLR 214***, a second appellate court will not interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. (See ***Chemagong vs. Republic (1984) KLR 213***)
9. During the hearing of the instant appeal, the appellant gave a written submission challenging his conviction. He submitted that he had not committed the offence and that the complainant and PW 3 had told untruths; that there was a grudge between himself and PW 3 over a land dispute that led to fabrication of the charge against him.
10. In this appeal, the first issue for determination is whether the judge re-evaluated the evidence and properly arrived at the conclusion that the prosecution had proved the charge of defilement against the appellant beyond reasonable doubt. The second issue is whether the two courts below considered the defence raised by the appellant which he contends should have exonerated him from the charge facing him.
11. The complainant PW2, (PMK), a child aged 5 years testified that she knew the appellant who was the one who lay on her. She testified that the appellant is a neighbour known to her. The complainant's mother PW 3 testified that the appellant is uncle to the complainant. On our part, we observe that there is no issue of mistaken identification, this is a case of recognition and we are satisfied the appellant is a person well known to the complainant. PW 1, a clinical officer, testified that he examined the complainant who had a freshly broken hymen. We find that the two courts below did not err in finding that there is no doubt that the complainant was defiled.
12. As regards the identity of the person who defiled the complainant, we have re-counted the evidence of PW1, PW 2 and PW 3 to enable us evaluate and appraise to find out if any error or misdirection of law took place. Although the appellant denies he defiled the complainant, the issue for determination by this court is whether the evidence adduced by the prosecution proves beyond reasonable doubt that it is the appellant and no one else who defiled the complainant. The fact that the complainant was defiled is not in dispute. This was proved by the evidence of PW1 the clinical officer who examined her and testified in this case. The identity of the defiler was established by the evidence of the complainant. From the testimony, it is not in dispute that the complainant knew the appellant. The consistency of the complainant is revealed when she told PW 3 what the appellant had done to her.
13. As per the proviso in ***Section 124*** of the ***Evidence Act*** stipulates, although no corroboration is required in sexual offences. In the instant case, the circumstantial evidence adduced by the prosecution through PW1 corroborates the complainant's evidence. When the complainant was medically examined, the report confirms she had been sexually assaulted. When the appellant was put on his defence, he denied that he had defiled the complainant. The only evidence that the appellant adduced in detail related to the circumstances of his arrest and an allegation that he had a grudge with PW3. We are satisfied that the two courts below did not err in finding that it was the appellant who defiled the complainant.
14. On the contention that the age of the complainant was not established, it is our considered view that age is not proved solely through production of a birth certificate. In the instant case, the age of

the complainant was proved through the Medical Examination Report (P3 Form) tendered in evidence by PW1 and the evidence of her mother.

15. After careful appraisal of the evidence on record and considering the defence offered by the appellant, we are of the view that the prosecution proved its case against the appellant beyond reasonable doubt. The trial court upon conducting a *voire dire* examination of PW1 recorded that the child was intelligent and understood the meaning of bad and good. We see no reason to fault the conclusion of the two courts below on this issue. We have also considered the submission and other grounds of appeal raised by the appellant. We find that the said submissions do not raise any issues that would dent the otherwise strong case by the prosecution. The allegation that there existed a grudge between the appellant and the prosecution witnesses was not proved. In the circumstances, we find that this appeal has no merit and is hereby dismissed.

Dated and delivered at Nyeri this 30th day of July, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…………………………………….

JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR