IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 16 OF 2013

BETWEEN

STANLEY WARUI GACHERU ……...…… APPELLANT

AND

REPUBLIC ……...… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Wakiaga, J.)

dated 19th December, 2012

in

H.C.CR.A No. 247 of 2009)

****

JUDGMENT OF THE COURT

1. This is a second appeal from the Judgment of the High Court (Wakiaga, J.) dated 19th December, 2012 wherein the appellant's conviction was upheld and sentence confirmed.
2. ***Stanley Warui Gacheru,*** the appellant was charged with the offence of defilement contrary to ***Section 8(1) & (2)*** of the ***Sexual Offence Act*** and an alternative charge of indecent act with a child contrary to ***Section 11(1)*** of the ***Sexual Offences Act*** in the Senior Resident Magistrate's Court at Karatina. The particulars of the offence of defilement were that, on 12th May, 2007 in Nyeri District within the then Central Province, the appellant did an act of penetration to DN, a girl aged 11 years. The particulars of the alternative charge were that on the above mentioned date and place, the appellant unlawfully and intentionally indecently assaulted DN, a child under the age of 18 years by touching her private parts.
3. The appellant pleaded not guilty to both charges. The prosecution called a total of four witnesses in support of its case. It was the prosecution's case that on 12th May, 2005 at around 6:00 p.m while PW1, DN (D), was fetching firewood the appellant covered her mouth with his hand and dragged her into a nearby bush. The appellant ordered D to remove her panties. D refused to do so and the appellant pushed her to the ground. He removed her panties, lowered his trousers halfway to his thighs and proceeded to defile and sodomize D. When he was through he ordered D to get up and go home. He told her not to tell anyone what had happened. D went home crying and told her mother, PW2, JNK (J), that she had been assaulted. J testified that D told her that she had

known her attacker prior to the incident and would be able to identify him.

4. PW3, PC Mungia Nonari (PC Mungia), gave evidence that D and J reported the incident on the same day at Karatina Police Station. D informed her that she could identify her attacker by appearance. PC Mungia accompanied D and her mother to Karatina District Hospital where she was treated. Subsequently, D led the police to where the appellant was hired as a herdsman and pointed him out as the attacker. It was D's evidence that though she did not know the appellant's name she knew him by his appearance. The appellant was arrested, arraigned in court and charged.
5. In his defence, the appellant gave an unsorwn statement. He testified that he was arrested on 15th May, 2007 while he was at home. He denied committing the offence.
6. After considering the case on merits and taking into account that no medical report had been produced to prove penetration, the trial court convicted the appellant on the alternative charge of indecent act with a child. The appellant was sentenced to 20 years imprisonment. Aggrieved with the decision, the appellant filed an appeal in the High Court against both the conviction and sentence. By a judgment dated 19th December, 2012, the High Court (Wakiaga, J,) dismissed the appeal. The appellant has now filed this second appeal based on the following grounds:-

- ***The learned Judge erred in law by failing to note that the mandatory medical report was not submitted as concerns the complainant's allegations and in support of both charges.***

- ***The learned Judge erred in law by confirming a harsh sentence as imposed by the trial court contrary to Section 11(1) of the Sexual Offences Act.***

- ***The learned Judge erred in failing to note that the age of the complainant was not ascertained to secure the conviction and sentence as required by law.***

7. The appellant filed written submissions in support of the appeal. He submitted that the prosecution had failed to prove its case beyond reasonable doubt. According to the appellant, his conviction on the alternative charge could not stand because firstly, the medical practitioner who examined the complainant did not adduce evidence to confirm that the complainant was indeed assaulted by him. Secondly, the evidence of the complainant was that of a single identifying witness and could only be corroborated by the evidence of the medical practitioner.
8. The appellant argued that the sentence meted out to him was harsh bearing in mind that he was a first offender. He submitted that the age of the complainant was not ascertained during the trial. He urged the Court to allow the appeal.
9. Mr. Isaboke, Senior Prosecuting Counsel, supported the appellant's conviction and the sentence. He submitted that the medical report was not necessary to prove the alternative charge which the appellant was convicted of. He argued that the complainant was categorical on who assaulted her; she identified the appellant to the police; she knew the appellant well prior to the incident. Mr. Isaboke submitted that PW2, JN, corroborated the complainant's evidence. He urged the Court to dismiss the appeal.
10. We have considered the record, submissions by counsel and the law. By dint of Section 361 of the Criminal Procedure Code we are restricted to only consider matters of law in this second appeal. In ***Chemagong -vs- Republic (1984) KLR 213*** at page 219 this Court held,

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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 s/o Karanja- vs-Republic 17 EACA146)."***

The following issues arise for determination:-

- ***Was the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act proved against the appellant?***

- ***Was the age of the complainant established?***

- ***Can the issue of severity of sentence be entertained by this Court?***

11. ***Section 11 (1)*** of the ***Sexual Offences Act*** provides:-

> ***"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than 10 years."***

Section 2 of the ***Sexual Offences Act*** defines indecent act as:-

> ***"Any unlawful intentional act which causes:-***

a. ***any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;***

b. ***exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration."***

12. Both lower courts made concurrent findings that the prosecution had proved its case beyond reasonable doubt. There was no eye witness to the incident and the only evidence as to what transpired was given by D. The appellant argued that D's evidence required corroboration. ***Section 143*** of the ***Evidence Act*** provides:-

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

Further, 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 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."***

13. From the evidence on record, the complainant, DN, gave a detailed account of what transpired on the material day. She testified that the appellant pushed her to the ground, removed her panties, lowered his trousers halfway to his thighs and slept on her. This evidence clearly established that there was contact between the appellant's genital organs with that of the complainant. We are of the considered view that medical evidence was not necessary to establish the contact and prove commission of the offence. The complainant who suffered the sexual assault gave evidence of what happened to her. The case would have been different if penetration was required to be proved which was not the case herein.
14. We concur with the two lower courts that this was not a case of mistaken identity but of recognition. In ***Anjononi & others -vs- Republic*** ***(1976-80) 1 KLR 1566,*** this Court held at page 1568,

> ***"This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."***

The complainant was able to identify the appellant as attacker because he was known to her prior to the incident. PC Mungia Nonari and JN testified that the complainant had indicated in her initial report that she could identify the appellant. Further, it was the complainant who led the police to arrest the appellant.

15. On the issue of the age of the complainant, we concur with the two lower courts that the prosecution had proved beyond reasonable doubt that D was 11 years at the material time. We also find that the appellant has only raised this issue on the second appeal as an afterthought. Therefore, the appellant's conviction was proper and safe.
16. ***Section 11 (1)*** of the ***Sexual Offences Act*** prescribes a minimum penalty of 10 years imprisonment for the offence of indecent act with the child. The appellant contended that the sentence of 20 years imprisonment meted out to him was harsh and excessive. ***Section 361(1)(a)*** of the ***Criminal Procedure Code*** provides:-

> ***"(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –***
>
> ***(a) On a matter of fact, and severity of sentence is a matter of fact; .."***

Based on the foregoing provision this Court has no jurisdiction to consider any issue on severity of sentence on a second appeal. See ***Solomon Kiptoo Sawe -vs- Republic- Criminal Appeal No. 66 of 2006 & James Oromo -vs- Republic- Criminal Appeal No. 68 of 2006.***

17. The upshot of the foregoing is that this appeal lacks merit and is hereby dismissed.

Dated and delivered at Nyeri this 9th day of July, 2014.

ALNASHIR VISRAM

……

JUDGE OF APPEAL

MARTHA KOOME

……

JUDGE OF APPEAL

J. OTIENO-ODEK

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR