IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 17 OF 2013

BETWEEN

JOHN NJARA MAINA .....APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Wakiaga, J.) delivered on 24th January, 2013

in

H.C.CR.A No. 18 of 2010)

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JUDGMENT OF THE COURT

1. ***John Njara Maina*** was charged with defilement contrary to ***Section 8 (1*) & (2)** of the ***Sexual Offences Act No. 3 of 2006***. The particulars were that on 6th February, 2009 at [Particulars Withheld] village in Nyeri District within the then Central Province, the appellant did an act of penetration of G W G a child under the age of 16 years. He pleaded not guilty and was tried, convicted and sentenced to 20 years imprisonment. His appeal to the High Court against conviction and sentence was dismissed prompting a second appeal to this Court.
2. In his home-made memorandum, the appellant cites various grounds of appeal as follows:

i. ***That the High Court erred in law with regard to identification of the assailant by the minor;***

ii. ***That the appellant's medical results on the material date were omitted and never attended or visited by the trial magistrate nor the prosecution during trial to ascertain that the appellant was the culprit and no one else.***

iii. ***That PW1 claimed the appellant was the culprit but did not describe the clothing worn by the appellant.***

iv. ***That the prosecution failed to establish beyond reasonable doubt that the appellant did penetrate into the complainant's organ yet the appellant accompanied the minor to hospital.***

v. ***The defence by the appellant was ignored.***

vi. ***The High Court erred in not holding that even the alternative charge of holding the minor's buttocks was not proved.***

vii. ***That High Court erred in law in not considering that the P3 Form was not produced in evidence by the maker and it was inadmissible.***

3. At the hearing of this appeal, the appellant acted in person while the Assistant Director of Public Prosecution, Mr. J. Kaigai, appeared for the State. The appellant tendered written submissions in the appeal. He submitted that the learned Judge erred in relying on the prosecution evidence by PW1, PW2 and PW3 which was riddled with doubt and inconsistencies thus contravening ***Sections 163 (1) & 165*** of the ***Evidence Act*** (Cap 80, Laws of Kenya); that there was no tangible evidence adduced by the persons who arrested the appellant; that the High Court erred in not finding that ***Section 169 (1)*** of the ***Criminal Procedure Code*** was not followed.
4. The gist of the appellant's case is that there was no evidence on record to prove that the person who defiled the complainant had finished the job through ejaculation; that PW1 never revealed to the trial court if at all that the person had finished his act of defiling her; that the alleged person never ejaculated as the medical report did not detect any spermatozoa in PW1. The appellant cited the case of ***Mohammed Swaleh – v- R (2005) eKLR*** where it was stated that a witness in a criminal case should not create an impression in the mind of the court that he/she is not a straight forward person or raise suspicion about his/her trustworthiness or do (or say) something that indicates he is a person of doubtful integrity.
5. The appellant submitted that the learned Judge erred in not re-evaluating the entire evidence on record as he was duty bound to do so; that essential witnesses were never produced in court particularly the people who PW1 claimed had arrested the appellant; the appellant was arrested at his place of work and not by passersby as alleged; that there was no admissible medical report to prove the issue of defilement of PW1; that the appellant ought to have been medically examined to prove if he had defiled the complainant; that the two courts below erred in not finding the defence evidence worthy of belief; that the appellant was under no obligation to prove his innocence. The appellant cited the cases of ***Simon Muchiri & Gidrah Thuo Ndola – v- R Nyeri Crim. Appeal No. 12/13 of 2000 and Jon Gardon Wagner – v- R (2010) eKLR*** in support of his submission.
6. The State in opposing the appeal submitted that the complainant gave a detailed testimony of how she was defiled by the appellant; that the evidence against the appellant was overwhelming; that there has been concurrent findings of fact by the two courts below that PW1 was a minor vested with sufficient intelligence, and when she raised the alarm and told people on the road what had happened the appellant was arrested at the scene; that the testimony of PW2 is a recollection of what had happened and PW4 produced a P3 form confirming that PW1 was defiled; that the appellant's defence was considered and rejected and there was no case of mistaken identity; that the 20 year term of imprisonment was not excessive.
7. The evidence on record shows that a *voire dire* examination was conducted on PW1, G W G, who testified as follows:

> ***"On 6th February, 2009 at 1.00 pm I was at [Particulars Withheld] where my father works as a farmer. I was then leaving [Particulars Withheld] to go home where I reside. I met accused who told me to show him the home of the mother of Penina. It is this accused (points at accused) who accosted me. I had not known or seen him before. I started walking along with him. Suddenly, he seized me by the shoulder and dragged me into a bush where he defiled me. He had taken me to a bush. He had removed by underpants and then removed his trouser and he then removed his underwear. He then put (sic) his penis and put it in my private parts. He only stopped when I cried so much. He then dressed and left. I went home after wearing my underwear. I am the one who first left and left him in the bush. I***

had cried out but not loudly. There was no one in the vicinity. I met someone on the road. I met some people near home who asked me what was wrong and I told them what had happened. They are people whom I didn't know and they went to look for the accused. It appears they knew him, I went home and informed mother as to what happened. Mother took me to Kiamariga Police and by then the accused had been arrested. I was then taken to hospital at Karatina by mother. I was treated and discharged."

8. In cross-examination, PW 1 testified that she had not known the appellant before but he is the one who asked her if she knew Mama Penina's home; that they were taken to the police and hospital together.
9. PW2, M W testified that she is the mother to the complainant; that on 6th February, 2009 PW1 came home from [Particulars Withheld] crying; she asked her what was wrong and she stated she had met someone who took her to the forest and defiled her; that PW1 had informed passersby what had happened and the passersby pursued the culprit and arrested the appellant; that just as she was preparing to take PW1 to the police, she found someone being beaten and it was the appellant; that the appellant is a person known to her; that PW1 identified the appellant as the person who defiled her.
10. PW4, Dr. Mwangi Patrick, tendered in evidence a medical report prepared by Dr. Ngethe who had examined the complainant. The medical report indicated that the complainant was 13 years old, her hymen was broken but there was no semen; that it was likely that sexual intercourse had taken place due to redness of the private parts and her hymen was broken.
11. In his defence, the appellant testified that he was arrested because of grudges he had with some people he was working with; he was in charge of diesel that was being put in vehicles and the said people wanted him to exaggerate the amount of fuel put in the vehicles but he refused. As to the events of 6th February 2009, the appellant testified as follows:

"On 6th February 2009, I went to work and found the watchman who asked me why I was working and people were on strike. I said I had many problems. The watchman told me to go on strike and I refused. The watchman came back at 12.45 pm. I cooked ugali and ate my portion. At around 1.15 pm I saw 3 men and a woman. I told them not to enter the site but they came where I was. I asked then what was wrong. They just assaulted me. I fell down unconscious. They government people came and rescued me. I was taken to Kiamariga police and was told I had defiled a girl. I inquired where the girl was. Police told the people they would be jailed if they spoke lies. I explained that the assailants were thieves who had intended to rob me and they were the people who had been engaged by the workers who had gone on strike. None of the people who arrested me testified so that I could cross-examine them."

12. The trial magistrate in convicting the appellant expressed as follows:

"I find that PW1 has given a firm and consistent account of her encounter with the accused. The incident occurred during day time and apparently the accused was arrested soon after the incident. Accused has not stated why PW1 would have wanted to implicate him since he says that some people had grudges with him. The medical evidence does confirm that PW1 was defiled. I find that the prosecution has proved its case beyond reasonable doubt."

13. The High Court in dismissing the appellant's appeal held that the prosecution case had been proved beyond reasonable doubt and the appellant's conviction was safe. On our part, 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***

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14. It is the appellant's submission that since no semen or spermatozoa was found in the vagina of the complainant, there was no proof that defilement had taken place. It is also the appellant's contention that whoever defiled the complainant did not finish the job as no ejaculation took place.
15. The medical report tendered in evidence by PW4 confirms the testimony of PW1 that defilement had taken place and the complainant's hymen was broken. The key issue is the identity of the person who defiled the complainant. From her evidence, PW1 testified that it was the appellant who defiled her. We note that PW1 was a minor at the time of the offence and a *voire dire* examination was conducted and the trial court was satisfied that PW1 was telling the truth. There is no evidence on record to shake the credibility of the testimony given by PW1.
16. We have summarized the evidence of PW1, PW 2 and PW 4 to enable us appraise 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 defiled the complainant.
17. ***Section 124*** of the ***Evidence Act*** states as follows:

> ***"124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***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 if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

18. The proviso in ***Section 124*** of the ***Evidence Act*** stipulates that no corroborative evidence is required in sexual offences when the trial court is satisfied that the victim is telling the truth. In the instant case, the two courts below did not doubt the consistency and veracity of the testimony of PW1. It is our understanding that the appellant's case is that there was no semen or spermatozoa to corroborate the testimony of PW1. We are satisfied that when the complainant was medically examined, the report confirms she had been sexually assaulted. In a charge relating to defilement, proof of ejaculation is not an essential ingredient of the offence; the offence is not committed by proof of ejaculation.
19. 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 PW2. The medical report produced in court by PW4 was admissible. We are satisfied that the two courts below did not err in finding that it was the appellant who defiled the complainant.
20. The appellant contend that the passersby were not called to give evidence; we are of the considered view that the appellant was not prejudiced by the failure of the alleged passersby to give evidence. In ***Julius Kalewa Mutunga -vs- Republic, Criminal Appeal No. 31 of 2005 (Unreported),*** this Court held that:

> ***"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."***

21. 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. We see no reason to fault the conclusions and concurrent findings of the two courts below on this issue. 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. The appellant has not demonstrated to our satisfaction that the findings by the two courts below were not based on evidence. 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.

22. In the circumstances, we find that this appeal has no merit and is hereby dismissed.

Dated and delivered at Nyeri this 17th day of December, 2014.

ALNASHIR VISRAM

…….

JUDGE OF APPEAL

MARTHA KOOME

……

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