IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 390 OF 2012

BETWEEN

DANIEL BUNDI NJUKI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Ongudi, J.)

dated 1st November, 2012

in

H.C.CR. A No. 176 of 2009)

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JUDGMENT OF THE COURT

1. Daniel Bundi Njuki, the appellant, was charged with the offence of defilement contrary to ***Section 8 (1) & (2)*** of the ***Sexual Offences Act No. 3 of 2006***. The particulars are that on 16th September, 2008 in Kirinyaga District within the then Central Province, the appellant had carnal connexion(sic) of AMM a girl under the age of 14 years. He faced an alternative count of indecent act contrary to ***Section 11(6)*** of the ***Sexual Offences Act***. He was tried, convicted and sentenced to 20 years imprisonment by the trial court. His first appeal to the High Court ***(Ogundi, J.)*** was dismissed. Aggrieved by the dismissal, the appellant has lodged a second appeal before this Court.

2. PW1, AMM, gave sworn evidence as follows:

> ***"I am 13 years old. On 16th September, 2008 I woke up to prepare myself to go to school. We used to go to school early so we used to wake up each other. So I went to wake up the accused person's sister. She is called CN. I found when she was not ready, so I decided to go home and collect my cousin A. On my way home, I met Kinyua, the accused person. I had known Kinyua who is in the dock, I knew him well. So on my way back to collect A my younger brother who is in nursery, I met Kinyua the accused person. He held my shoulder by force, lay me down. I shouted for help. The accused then took his coat and gagged my mouth to stop me from shouting, he then held my mouth and removed my underpants and laid on me. He also removed***

his clothes, his trousers and lay on me. He removed his penis and inserted it in my vagina. He fucked me several times about four times. I had never had sex before. So he held, my hands fucked me and I bled from vagina immediately he sopped fucking me. The dogs began backing, I heard screamed so Mama Denis came. She collected me from the scene. Kinyua who is also called Daniel Bundi Njuki had left. Mama Denis took me to her home. She called my cousin K who called my uncle DK.... I was taken to Kianyaga Police Station and issued with a P3 Form. The accused in the dock is the one called Kinyua; he is also Daniel, he is the one who defiled me."

3. PW2, Juliana Mutithia Mbilo, testified as follows:

"I recall on 16th September, 2009 at 6.00 am. I was in my kitchen preparing tea for my children when I heard A pass by my place as usual. She passes there when she goes to school. She passes there to call her classmates to go to school. She does this daily. So after she had passed shortly I heard someone screaming. Then I also heard dogs barking. So I went to the scene to check. When I reached there I saw someone running away from Alice. Alice was lying down. Her clothes were soiled. I saw this person running away. He had black clothes, I picked up Alice. I inquired from her; she told me it was Kinyua who was running away. Her clothes were dirty. On the way we met K, A was still crying. We took A to her grandparents place and informed them and her uncle. I heard known Kinyua before; his real name is Daniel Njuki."

4. PW6, John Mwangi, a clinical officer, attached to Kerugoya District Hospital testified that on 16th September 2008, he conducted an examination on PW1, MM, a girl 13 years old; that on examination, her clothes were torn and her underpants was stained with blood; she had a broken hymen and there was blood; there was presence of spermatozoa; she was put on antibiotic and a P3 Form issued.

5. In his defence, the appellant testified that on 16th September, 2008 he woke up in the morning at 4.30 a.m. and went to check on his charcoal; that he returned home and he heard dogs barking as he was entering; that he saw a shadow silhouette going towards his macadamia tree; he flashed a torch and the person ran away; that he took his bicycle and went to Mwea; that when he returned to his home after three days in Mwea he was arrested and arraigned in court; he denied committing the offence as charged and stated he had a grudge with the complainant.

6. The trial magistrate in convicting the appellant stated that the testimony of PW1 was well corroborated by the testimony of PW2; that PW6 who examined the complainant confirmed she had been defiled; that the testimony of PW1 was well corroborated by the testimony of PW2 and PW6 and it was clear that it was the appellant who defiled the complainant. The learned Judge in upholding the trial court's conviction was satisfied that the evidence against the appellant was overwhelming and the evidence pointed squarely to the appellant as the person who committed the offence.

7. At the hearing of this appeal, the appellant acted in person and handed written submissions while the State was represented by the Assistant Director of Public Prosecution, Mr. J. Kaigai.

8. In his supplementary grounds of appeal, the appellant contends that PW6's evidence was inconsistent, unprudent and contradictory; that no DNA test was conducted on either party; that the trial magistrate erred in failing to address and caution himself that key and vital witnesses were not called to testify. In elaborating the grounds of appeal, the appellant in the written submissions reiterated that the medical report contained in the P3 Form was inconsistent and contradictory; that though PW6 alleges to have seen spermatozoa on the girl, no DNA test was conducted; that although PW6 stated there was blood in the vagina of the complainant he did not differentiate between menses and the alleged finger examination that showed blood; that if the school calendar is examined, it would be clear that on the material day all schools were closed and all pupils were on holiday; that he was framed for his activities in burning charcoal within the same shamba; that PW6 did not conduct any test to determine if there was any penetration and how the prosecution was able to point at him as the culprit; that the vital witnesses who were not called are the classmates of the complainant; that the parents of the complainant never appeared to testify. Finally the appellant posed that how come nobody in the vicinity responded to PW1's alleged

screams?

9. The State in opposing the appeal, submitted that there was clear evidence that the appellant committed the offence as charged; that the appellant was recognized by the complainant and there was no issue of mistaken identity; that the P3 Form tendered in evidence proved the complainant was defiled; that the appellant went underground after committing the offence; that the prosecution had proved its case to the required standard and there were concurrent findings of fact by the two lower courts that the appellant committed the offence.

10. This is a second appeal which must be confined to points of law. In ***David Njoroge Macharia – v- R [2011] eKLR*** it was stated that under ***Section 361*** **of the** ***Criminal Procedure Code*****:**

> ***"Only matters of law fall for consideration and the court 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."***

11. The appellant in his submission contends that he did not commit the offence. The critical evidence relating to the identity of the person who defiled the complainant is the testimony of PW1 and PW2. In a case involving a sexual offence, ***Section 124 of the Evidence Act*** is relevant. The Section provides 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."***

12. The appellant was a person well known to PW1 and PW2. In ***Anjononi & Others –v- Republic, (1976-80) 1 KLR 1566*** at page 1568 this Court held,

> ***"…recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

13. We have gone through the evidence on record and the judgment by the trial magistrate and the High Court. It is our considered opinion that there is no possibility of mistaken identity; the magistrate who heard and saw the complainant testify believed that it was the appellant who committed the offence as charged. As per the proviso in ***Section 124*** of the ***Evidence Act*** no corroboration is required in sexual offences, nonetheless, as was stated in the case *of* ***Maina Mwenja – v- R {2006} eKLR***, this Court is aware that the evidence of a child in most cases has to be corroborated. In the instant case, the medical report and testimony of PW6 confirms that PW1 was indeed defiled. The evidence of PW1 is one of recognition and PW2 saw the appellant running away from the scene of crime. We are of the considered view that the absence of a DNA test did not prejudice the appellant and is of less weight in the face of testimony of recognition by PW1. 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 was an allegation that he had a grudge with the complainant.

14. Whether primary schools were in session or the pupils were on holiday are facts irrelevant to the charge that faced the appellant. The appellant contended that vital witnesses were not called to testify; he singled out classmates of the complainant as persons who were never called to testify. The evidence on

record reveals that the said classmates never witnessed the commission of the offence and it would serve no purposes to call them to testify. ***Section 143*** of the ***Evidence Act***, provides that no particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact. In ***Julius Kalewa Mutunga -v- 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."***

15. With confirmation from the medical report that the complainant was defiled and on the strength of evidence of recognition as adduced by PW1, we are satisfied that the two courts below did not err in finding that it was the appellant who defiled the complainant. The record shows that that the credibility of PW1, PW2 and PW6 was neither impugned nor shaken by the defence testimony. In totality, this appeal has no merit and is hereby dismissed.

Dated and delivered at Nyeri this 16th day of December, 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