IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 51 OF 2013

GEORGE MURIUKI MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising from the judgment of the High Court of Kenya at Meru (Makau, J.) delivered on 8th December, 2011

in

H.C. CR. A. No. 206 of 2009)

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JUDGMENT OF THE COURT

[1] On 15th November, 2005 at about 7 p.m., the complainant (**P.M.)**, a young girl aged 9 years (*when the incident occurre*d) was all by herself in the kitchen of her mother's house. Her mother had not returned from the shamba, so she had closed the door. George Muriuki Muriithi (*appellant)* knocked the door and tricked **P.M.** to open the door so that he could pass to her a message which he had from her mother. Not suspecting anything sinister, **P.M.** opened the door, the appellant entered and quickly grabbed her by the waist and knocked her down. He removed her clothes and defiled her. **P.M.** testified that she could not scream because the appellant covered her mouth with his hand, she tried to resist but he overpowered her. After he finished defiling her, the appellant left **P.M.** crying. P.M. told the trial court that she was able to identify the appellant through recognition as he was a neighbor and used to do casual work for her mother.

[2] CM (PW 3), the mother of the complainant arrived home at about 7.30 p.m. and found **P.M**. crying . **P.M.** told her mother what had happened that she was defiled by the appellant. C reported the matter to the police and took **P.M.** to Kinoro Health Centre where she was treated and referred to Meru General Hospital. Dr. Isaac Mwangi Macharia, PW 1, completed the P3 Form on the injuries suffered by the complainant on 24th November, 2005. After examining **P.M.,** he concluded that she was a victim of defilement and she had contracted a urinary infection. During cross-examination, the doctor confirmed that **P.M**. was aged 9 years.

[3] George Muriungi, (PW4) the Assistant Chief of the area received a report that the appellant had defiled the complainant. The same report had been made at Kinoro Police Post. The appellant was apparently arrested at the Kinoro Market and PW 4 found members of the public trying to lynch the appellant. PW 4 arrested the appellant and took him to Kinoro Police Post where a report had already been made. However, the Investigating Officer did not testify but we shall comment on this point later in the judgment while analyzing the evidence.

[4] Based on this evidence, the appellant was charged with the offence of defilement of a girl contrary to ***Section 145(1)*** of the ***Penal Code***. The particulars of the offence stated that on the 15th of November 2005, in Meru Central District, the appellant had canal knowledge of a girl (P.M.), under the age of 16 years.

[5] The prosecution called a total of four witnesses in support of the charge, the trial magistrate was satisfied that the appellant had a case to answer, put on his defence, he denied having committed the offence; he claimed that C, the mother of the complainant maliciously implicated him with the offence. He alleged that C was his neighbour and her husband had bought land from the appellant's brother, however, C was chased away from the subject land by her husband who kept another woman in her place. C threatened that she would fix all those who caused her eviction from the land. The appellant said he was arrested on 18th November, 2005, at **Kare** area after meeting C while he was withdrawing money but she said nothing to him.

[6] The appellant's trial was done before two different magistrates, Mr. Kaniaru, (*Principal Magistrate*), heard the Prosecution's case; he was transferred from that station. Mr Githinji (*Principal Magistrate*) took over the conduct of the trial. The record of the proceedings show that counsel for the appellant, Mr B. G. Kariuki, consented to the matter proceeding for defence hearing from where Mr. Kaniaru left it. Thus Mr. Githinji completed the defence hearing and rendered the judgment in which he convicted the appellant of the offence of defilement of a girl and sentenced him to 10 years imprisonment.

[7] The appellant appealed before the High Court at Meru, **(J.A. Makau, J.).** The appellant essentially challenged the decision of the trial magistrate on the grounds that there was insufficient evidence to warrant conviction and the appellant was not properly identified.

In rejecting the appeal, the learned Judge made the following conclusions:-

> ***"The appellant was known to the complainant, talked to the complainant, had been to the complainant's home assisting in some work and there is no evidence of any grudge as analyzed by the court herein above.***
>
> ***The sentence of 10 years is not manifestly excessive in the circumstances and the appellant should count himself lucky that he was charged under the old law and not under the law of the Sexual Offences Act No. 3 of 2006. In the result, the appeal against the conviction is dismissed. The sentence was lawful, and so the appeal against sentence fails and is dismissed as well."***

[8] The appellant was again not satisfied with judgment of the High Court and he preferred this second appeal citing what he called "10 *Reasons wherefore*". During the hearing of the appeal, the appellant opted to rely on the said reasons. The issues raised in this appeal basically challenge the quality and quantity of the evidence before the trial court, the appellant contends that the evidence did not meet the standard of proof required by the law.

[9] On the part of the State, **Mr. Motende**, **Senior Principal Prosecution Counsel**, opposed the appeal, he submitted that the trial magistrate was satisfied that although the direct eye witness was only by the complainant, the circumstances prevailing during the incident were conducive for positive identification. The complainant knew the appellant as a neighbour, a fact that was also acknowledged by the appellant in his defence. According to Mr. Motende, this was a case based on the evidence of

recognition. He urged us not to interfere with the concurrent findings of the two courts below that were based on cogent evidence.

[10] This being a second appeal, only matters of law fall for our consideration. See **Section 361** of the **Criminal Procedure Code**. 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***.

Also 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)"***

[11] The issues of fact were considered by the two courts below and we are of the view that they thrashed them to a pulp and arrived at the correct conclusion. The trial magistrate was entitled to rely on the evidence of the complainant even though she was child, if he was satisfied that the child was telling the truth. Although the child was a sole witness, her evidence was corroborated by that of her mother and the medical report that was produced in evidence. Moreover, under the **Evidence Act**, especially the proviso to **Section 124** of the **Evidence Act**, the law as it was then provided:

> ***"Provided that where in Criminal Case involving a sexual offence, the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused if, for reasons to be recorded in the proceedings the court is satisfied the child is telling the truth."***

While still on this issue of the evidence of the complainant being the only direct evidence, we wish also to point out that, also under the provisions of Section 143 of the Evidence Act; no particular numbers of witnesses are required for a proof of a fact unless the law provides so.

[12] In line with the above proviso to the Evidence Act, the learned magistrate while analyzing the evidence by the complainant observed in the judgment as follows:-

> ***"She gave sworn testimony which (sic) consistent and firm. She revealed that she recognized the accused by his voice as he was a neighbour and that is why she opened the kitchen door for him".***

Similarly the High Court reviewed the evidence and was satisfied the appellant's conviction was safe from error, the learned Judge made the following observations:-

> *"**The evidence of PW2 was buttressed by evidence of PW1, the doctor who examined the complainant and Appellant. PW1 testified the complainant's clothes were soiled and torn and that on the examination of her urine it had numerous pus cells. That her hymen had been broken. That she had foul smell discharge from vagina and his conclusion was that she had been defiled and produced P3 form to that effect.***
>
> ***He also testified on examination of the Appellant he was found to have numerous pus cells in the urine suggesting urinal tract infection. The trial court found that the evidence narrowed down to the accused person…"***

Like the two courts below, we are satisfied that the appellant's conviction was based on sound evidence of identification through recognition by the complainant. The complainant was sexually assaulted, and the injuries sustained were verified by the P3 form and by her mother.

[13] On the issue that the complainant's mother implicated the appellant with the offence in revenge for having been kicked out of the matrimonial home. We also find this issue was adequately addressed by the Judge when he made the following observations;-

> ***"The trial court considered the Appellant's defence and found it to be farfetched. The trial court found and quite correctly that if Catherine Mugai had any problem about her marriage with anyone it was her husband, and if she wanted to fix anyone other than her husband, most likely she would have gone for the woman, allegedly married by her husband or even the Appellant's elder brother who had sold the alleged land to Catherine Mugai's husband"***

[14] We entirely agree with the learned Judge and further observe that it defeats common sense and indeed implausible that a mother can set up her own child in order to implicate the appellant with a shameful offence of defilement that carries with it trauma and stigma and go to the extent of piecing together evidence of defilement from the police records, to the hospital and giving evidence in court. To us the allegation of a grudge was a mere defence and was rightly dismissed by the two courts below.

In the upshot we find no merit in this appeal and proceed to dismiss it.

Dated and delivered at Meru this 5th day of December, 2013.

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

M. K. KOOME

….....

JUDGE OF APPEAL

J. OTIENO – ODEK

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR