IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 62 OF 2013

BETWEEN

PATRICK WACHIRA KARIMI..... APPELLANT

AND

REPUBLIC..... RESPONDENT

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

(Wakiaga, J.) dated 4th May, 2012

in

H.C.CR.A NO. 268 OF 2008)

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JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court dated 4th May, 2012 wherein the appellant's first appeal was dismissed. ***Patrick Wachira Karimi,*** the appellant, was initially charged with the offence of subjecting a child to sexual activity contrary to ***Section 15*** of the ***Children's Act.*** However, the charge was amended and the appellant was charged with the offence of defilement contrary to ***Section 8(1) & (3)*** of the ***Sexual Offences Act.*** The Information being that on 11th February, 2005 at ***[particulars withheld]*** Village in Nyeri District within the then Central Province committed an act of penetration to J M a child under the age of 15 years.

[2] The appellant pleaded not guilty to the charge and the prosecution called a total of 6 witnesses. It was the prosecution's case that on 8th February, 2005 PW3, J M W (J), was sent home from school due to

non payment of school fees. She went home where she lived with her mother, PW4, N W M (N). Her mother had rented a single room in the appellant's compound. She found her mother very ill.

[3] On 11th February, 2005 N in the company of the appellant's wife went to Tumutumu hospital to seek treatment leaving J alone in the house. At around 2:00 p.m on the same day, while J was resting on the bed, the appellant came into the room and started touching her inappropriately and insisting that he wanted to have sex. J resisted but the appellant overpowered her and proceeded to defile her. It was J's evidence that the appellant threatened to throw both J and her mother out of the rented room if she ever disclosed to anyone what had happened. Thus J decided to keep quiet while realizing that indeed her mother was in rent arrears.

[4] J went back to school but she later discovered that she was pregnant. When she went back home during the April holidays she told the appellant she was pregnant. The appellant told her to give birth to the baby and he would look after the child. She then went back to school for the new term. When she was at school, she was informed by her sister that the appellant had kicked her mother out of the house. She later told her mother that she was pregnant and that it was the appellant who was responsible. On 5th October 2005 N went to the police station at Nyeri and reported the incident, she was advised by the police to wait until the child was born so that they could begin investigations. J testified that the baby was born on 22nd October, 2005 and the appellant was arrested.

[5] PW1, Rose Nabwana Shikuku (Rose), a government analyst, testified that she received three samples of blood belonging to J, the appellant and F G (child) from PW5, PC Benjamin Kiswirie (PC Benjamin), with instructions to carry out a DNA test to determine the child's paternity. She testified that by examining the DNA profile from a person and their parents, it is possible to determine the elements of DNA gained from their biological mother and those gained from their biological father. She testified that based on the DNA findings; there were 99% plus chances that the appellant was the J's child's father. The appellant was charged and arraigned in court.

[6] The appellant in his evidence gave an unsworn statement. He testified that the charge against him was fabricated. He stated that N rented a room from him and after about a year she started having problems paying the rent. Consequently, he asked N to vacate and she left leaving rent arrears of Kshs. 1,600/=. The appellant maintained that N fabricated the case against him on account of the foregoing. He denied committing the offence he was charged with.

[7] Based on the aforementioned evidence, the trial court convicted the appellant of the offence and sentenced him to 20 years imprisonment. Aggrieved with that decision the appellant filed an appeal in the High Court. The High Court (Wakiaga, J.) vide a judgment dated 4th May, 2012 dismissed the appellant's appeal. The appellant has now filed this second appeal. In his address to us, the appellant who appeared in person submitted that the age of the complainant was not established by evidence; the complainant's evidence on her age was not credible; there was conflicting evidence as to the age of the complainant at the time of the alleged incident. He argued that the age of the complainant could only have been determined through a birth certificate which was not produced. He maintained that he had a consensual relationship with the complainant who was of age and they were blessed with a child. He urged us to allow the appeal so that he may get an opportunity to give support to his child who may be suffering.

[8] Mr. Kaigai, Assistant Deputy Public Prosecutor, in opposing appeal supported the appellant's conviction and sentence. He argued that it was clear that the appellant forced himself on the complainant who was a minor and subsequently she gave birth to a child whose DNA profile matched that of the appellant. Mr. Kaigai stated that the appellant's defence was considered and rejected; the sentence handed to the appellant was a lawful one, he therefore urged us to dismiss the appeal.

[9] This being a 2nd appeal, this Court is restricted to address itself on matters of law only. As 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***. 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)."***

[10] Based on the foregoing and the submissions of the appellant it is not at all disputed that the appellant had sexual relations with Julia consequent to which Julia conceived and gave birth to a baby. The appellant in his submissions before this Court contended that Julia had attained the age of majority when he had sexual relations with her. Therefore, these two issues fall for our determination:-

- ***Was the age of the complainant (J) established?***
- ***Was the offence of defilement established against the appellant?***

It was Julia's evidence that when the appellant forcefully had sex with her she was 15 years old. PW6, Dr. Moses Ngugi (Dr. Ngugi), who examined the appellant on 27th February, 2006 confirmed that at the time of the incident J was 15 years old. The two courts below arrived at concurrent findings that J was 15 years at the time of the incident. We have also addressed our minds as to whether there was need of further evidence to establish the age of J. The same question was paused to the appellant during the hearing of this appeal while considering that it was common knowledge that J was a secondary school student. The appellant however stated that that it was also common knowledge that elderly people go to school therefore there was no need for him to ascertain her age. He knew she was of age. In our respectful view, the evidence by Julia and the medical report regarding her age were not displaced by the appellant's defence.The prosecution proved beyond reasonable doubt that J was 15 years and there was no need of further evidence. See this Court's decision in ***Sebastian Ngunjiri Muhukumi -vs- Republic – Criminal Appeal No. 654 of 2010.***

[11] *The second issue was whether the appellant committed the offence of defilement. Under* ***Section 8*** of the ***Sexual Offences Act*** partly provides as follows:-

> ***"8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2).....***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

In this case there was penetration as J a minor conceived on the material day and subsequently gave birth to a baby whose paternity the appellant readily acknowledged in his submissions before us. Therefore, the offence of defilement was proved by the prosecution.

[12] The upshot of the above is we find no merit in this appeal and we have no hesitation to order it dismissed.

Dated and delivered at Nyeri this 10th day of December, 2013.

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