IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 163 OF 2013

(From original Conviction and Sentence in Kandara SRM Criminal Case No 506 of 2010 – C. Kabucho, SRM)

DICKSON MUTWIRI NYAGA……..APPELLANT

VERSUS

REPUBLIC……..…....….RESPONDENT

J U D G M E N T

1. The Appellant **Dickson Mutwiri Nyaga,** was convicted after trial of two counts of ***defilement of a child*** contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act, No 3 of 2006*****.** It was alleged that on 4th and 5th respectively of September 2010 at [particulars withheld] Village in Kandara District within Murang'a County, he intentionally caused his penis to penetrate the anus of, respectively, **JKW** and **KMN,** both children aged 15 years. He was sentenced to serve 20 years imprisonment on each count, concurrent. He has appealed against both conviction and sentence.

2. In his petition of appeal the Appellant has complained that the trial court erred in law and fact –

(i) by founding the convictions upon inconclusive medical evidence;

(ii) by founding the convictions upon the uncorroborated testimonies of PW1 and PW2;

(iii) by founding the convictions upon defective charges;

(iv) by failing to find that the Appellant was held in police custody for a period that contravened the Constitution; and

(v) by failing to give cogent reasons for rejecting the Appellant's defence.

3. In "amended supplementary grounds of appeal" and written submissions tendered at the hearing of the appeal, the following further grounds emerge –

(vi) that the burden of proof was not discharged;

(vii) that the ages of the complainants were not ascertained; and

(viii) that the trial court did not properly scrutinize the medical evidence tendered.

4. Learned prosecution counsel did not support the conviction in count one but supported that in count two. She submitted that regarding count one there was only the evidence of the complainant (PW1) upon which the trial court solely convicted, without considering the provisions of section 124 of the Evidence Act, in that it did not give reasons for believing the complainant. As for the conviction in count two, learned counsel submitted that all ingredients of the offence charged were proved beyond reasonable doubt.

5. I have read the record of the trial court in order to evaluate the evidence placed there and arrive at my own decision regarding the same. This is my duty as the first appellate court. I have borne in mind however that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

6. The two complainants, **JKW** and **KMN** testified under oath (as PW1 and PW2 respectively) after *voire dire* examination by the court. They stated that they were aged 15 and 12 years respectively. PW1 was in standard 7 primary while PW2 was in standard 6. They were both cross-examined by the Appellant.

7. PW1 narrated how he shared his bed with the Appellant at his (PW1's) grandmother's instruction after supper. It was the night of 04/09/2010. As they prepared the bed the Appellant held him by the shoulder and said that he loved him. He then put his finger under PW1's nose and he became unconscious. The finger smelt like some nasal decongestant in the market called "Rob". He came to at about 5.00 a.m. and felt something penetrating his anus. It was the Appellant's penis. Apparently he had applied on himself and on the anus of PW1 some milking salve.

8. The Appellant then asked PW1 how he was feeling and tried to kiss him. PW1 then told the Appellant to stop, and he did. He then told PW1 that he would give him a radio.

9. Later at about 1.00 p.m. PW1 told his grandmother what had happened but she did not believe him and said she would investigate the matter herself.

10. On 16/09/2010 an occasion arose for PW1 to be punished by his teacher for some transgression. He pleaded not to be caned on his backside because he had been defiled in his anus. He then told the teacher what had happened to him. He also told him that the same thing had happened to his cousin, the second complainant (PW2).

11. Subsequently the teacher and others arranged for the two boys to be taken to the police station where they recorded their statements. They were then escorted to Thika District Hospital where they were treated and their medical reports filled.

12. PW1 finished his testimony-in-chief by stating that the Appellant had defiled him on and off since the year 2007. Each time he would apply something to his nose and he would become unconscious.

13. The story of PW2 was more or less the same as that of PW1, except that he was defiled on the following day, 05/09/2010. He and the Appellant similarly shared a bed. The Appellant applied something to his nose and he became unconscious. He came to at about 5.30 a.m. naked to find pain in his anus and some oil applied to it. Upon PW2 asking him what he had applied to him the Appellant replied that it was some medicine for chest congestion.

14. He reported the matter to his grandmother (same as PW1's grandmother) but she did not believe him either. On 16/09/2010 PW1 reported the defilement of both of them to a teacher. Just like in the case of PW1, the Appellant had defiled him several times before.

15. In cross-examination PW2 stated that the Appellant paid his motor bike fare and a phone. He did not report the defilements before because he feared the Appellant.

16. PW7 (**LMG**) was the school teacher to whom PW1 reported his own and PW2's defilement by the Appellant. He took the matter to the school committee chairman, PW3 (**JMK**). PW3 interrogated both

boys and then took them to their grandmother. He instructed her to call the mothers of the boys. The mother of PW2 came. She was CNN. She found the two boys and PW3 at the hospital being examined and treated. She produced in evidence PW2's birth certificate. She did not know the Appellant before.

17. PW4 (**Dr. Muiruri Isabwell**) produced in evidence the medical reports of PW1 and PW2 prepared by his colleague Dr. Sanchia. The medical reports were signed on 21/09/2010. In respect of PW1 there was evidence of penetration though the anal canal was intact as there were no blisters or lacerations seen. His age was given in the medical report as 15 years.

18. Similarly for PW2 there were no lacerations and the anal canal was intact; but there were signs of penetration.

19. For both boys penetration had occurred about (5) months prior to examination according to the medical report.

20. PW6 (**PC Doreen Mutua**) was one of the police officers who arrested the Appellant. PW8 (**PC Eric Omondi**) took over the case as investigating officer from another officer; but he does not appear to have done anything in the case.

21. The Appellant gave an unsworn statement and called one witness. He denied that on 04/09/2010 he had shared a bed with PW1. He stated that he had shared a bed with his friend called Kimani. The following morning as he went to milk he argued with the father of PW1 who had wanted to be the treasurer of their church. He did not get the post and blamed the Appellant for it. He threated the Appellant. The Appellant stated that the charges were trumped up so that he goes to jail and PW1's father would then take over as treasurer. He stated further that after he had been arrested and charged the father of PW1 came and told him to pay KShs 10,000/00 so that he finishes the case. The Appellant refused and PW1's father then threatened him that he would see.

22. DW2 (**PKN**) was the witness called by the Appellant. His testimony was that his home was neighbouring the home where the Appellant was employed. On 04/09/2010 at about 4.00 p.m., he found the Appellant at his place of work. He waited for him to finish milking and at about 7.00 p.m. both went to Gacharage market. Eventually they went to his (DW2's) home where they spent the night together. On 16/09/2010 he learnt that the Appellant had been arrested upon allegation of defiling some children on 04/09/2010. He reiterated that on that day the Appellant had spent the night with him at his (DW2's) home. In cross-examination he stated that he was 17 years old.

23. That was the totality of the evidence placed before the trial court. There was no dispute regarding the identity of the Appellant. He was well-known to PW1 and PW2.

24. PW1 and PW2 were not children of tender years, though the trial court found it necessary to conduct *voire dire* examinations in respect of them. They testified under oath and were cross-examined. Their testimonies were clear and straight-forward. They had each spent a night with the Appellant, PW1 on 04/09/2010 and PW2 on the following night, apparently at the instruction of their grandmother. It was not the first time that the Appellant had spent a night with them. According to their testimonies it was not the first time that he had defiled each of them, on each occasion after rendering them unconscious by use of some drug.

25. It will be noted that the Appellant did not once deny that he had spent nights with the two boys. He only denied that on 04/09/2010 he had spent the night with PW1. He did not even deny that on the following day he had spent the night with PW2.

26. The medical evidence was rather poor in that it seemed to suggest that the boys were examined some five months after the defilements the basis of the two charges. However, it will be noted that the medical reports were signed on 21/09/2010, about 17 or 18 days after the defilements. Again there appeared to be no physical indications of the defilements, probably because any bruises or lacerations had already healed in those 17 or 18 days. However, PW2 was treated for a sexually transmitted disease; it was not stated if

the disease was in the urinary tract or in the anus. He had complained to the doctor of pain on and off when passing stools.

27. But even without useful medical evidence, the testimonies of PW1 and PW2 were clear, forthright and unshaken in cross-examination. The trial court believed them, as I do, and the Appellant's conviction in both counts can be properly founded on the testimonies of PW1 and PW2. The *proviso* to **section 124** of the **Evidence Act, Cap 80** refers. That notwithstanding, there was plenty of corroboration in the testimonies of PW3, PW5 and PW7. The Appellant's defence was properly rejected. It is to be noted that his witness was another child of 17 years with whom he said he spent the night of 04/09/2010, no doubt a disturbing prospect as noted by the trial court.

28. The age of PW2 was properly proved by his birth certificate. As for PW1, he was of a discerning age, and he stated that he was 15 years old. His medical report also stated so, though it was not specific to age assessment. I am satisfied that the respective ages of the complainants were proved to the required standard.

29. It would have been useful for the boys' grandmother to testify. She did not. We do not know why she did not. But the absence of her testimony does not in any way alter the candid and clear testimonies of PW1 and PW2.

30. Upon my own evaluation of the evidence placed before the trial court, I am satisfied that the Appellant was convicted on the two counts of defilement upon good and sound evidence. The charges were proved beyond reasonable doubt, as there is no proper basis for disturbing the convictions.

31. As for the sentences, once the trial court decided that the Appellant deserved a custodial sentence (and there cannot be any doubt that he richly deserved it) the minimum term of imprisonment it could impose was twenty (20) years in each count. That is what he got.

32 I find no merit in the Appellant's appeal in its entirety. It is hereby dismissed. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 28TH DAY OF SEPTEMBER 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 29TH DAY OF SEPTEMBER 2017