



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 237 OF 2012

JOHN MUGO..... APPELLANT

VERSUS

REPUBLICRESPONDENT

**(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT
AT BARICHO (E.H. KEAGO- P.M) IN CRIMINAL CASE NO. 7 OF 2012 DELIVERED ON
17TH SEPTEMBER 2012)**

JUDGMENT

The appellant herein was convicted on two counts of defiling BWB (Count 1) and JN (Count 2) both aged six (6) years on 3rd December 2011 in Kirinyaga West District by penetrating his penis through their vagina. He was sentenced to serve two concurrent life sentences.

He has preferred this appeal against both conviction and sentence and puts forward the following grounds of appeal:-

1. *That he pleaded not guilty*
2. *That the learned trial magistrate erred in law and facts by failing to consider that I did not understand Kikuyu English or either Kiswahili when reading the charges and during trial*
3. *That the learned trial magistrate erred in law by failing to consider that I am mentally retarded and needed medical attention before the commencement of trial*
4. *That learned trial magistrate erred in law and in fact by failing to consider my state and provide me with legal representative for fair hearing as stipulated in the new Constitution Section 50 (h) i.e. to have an advocate assigned to the accused person by the state and at the state's expense if substantial injustice would otherwise result and to be informed of his rights promptly.*

The state through Ms Kambanga State Counsel supports both the conviction and sentence.

The prosecution case against the appellant was that on 31st December 2011, PW1 (BW) was playing with JW (PW2) when the appellant told them to un-dress and proceeded to defile both of them. They were aged six (6) years at time of the offence. Both of them knew the appellant as MUGO.

The two complainants were taken to Kerugoya District Hospital and examined by Hezron Macharia Maina (PW3) who produced their treatment notes and P3 Form – Exhibits 2 and 5. He examined them barely hours after the incident. In the case of B, he noticed laceration on the labia

majora and minora and the hymen was perforated. The cervix and vagina were swollen and there was a whitish smelly discharge. He confirmed she was defiled. And with respect to JW, the labia minora was swollen and hymen broken. The cervix and vagina were essentially normal though a dried up whitish discharge was seen. He concluded that she too was defiled.

PW4 (AN) the mother to B told the Court that upon her return home the same evening, the complainant told her that MUGO had defiled her. She examined her genitalia and noticed she was walking with difficulties. She took her to hospital and reported to police at Kagio Police Station. On her part, AWK (PW5) the mother to JW told the Court that when she heard of the incident, she spoke to her but her daughter said she was not defiled. This witness was stepped down during her evidence in chief on 30th April 2012 and from the record, she was never called again to finish her evidence. It is not clear why she was stepped down and never re-called. Had she turned hostile? We will never know.

The incident was reported to P.C. GLADYS GESUKA (PW6) of Kagio Police Station who interrogated both complainants who told her they had been defiled by JOHN MUGO. She referred them to hospital and the appellant was later arrested and charged. She produced the birth certificates of both complainants.

The appellant's defence was very brief and I will reproduce it. Having been sworn, he said:-

“I am called JOHN MUGO. I stay in Thumaita. I am a shamba boy. I wish to say I am sorry. That's all”.

This being the first appellate Court, I must, as was held in **OKENO VS REPUBLIC 1972 E.A. 32**, submit the evidence to a fresh and exhaustive examination and weigh the conflicting evidence to draw my own conclusions but also bearing in mind that unlike myself, the trial magistrate had the advantage of hearing and seeing the witnesses.

The two complainants were both aged six (6) years at the time of the incident. Their birth certificates showed that B was born on 20th December 2005 and JANE on 16th February 2005. They were both therefore children of tender years as defined under the Children's Act. The Court can still convict on the evidence of such a child if it is ***“.....satisfied that the alleged victim is telling the truth”*** - see **Section 124 Evidence Act**.

In this case, the trial magistrate conducted a voire dire examination on both complainants before finding that B (PW1) was ***“not possessed of enough knowledge”*** and so she gave un-sworn evidence while J (PW2) was possessed of ***“sufficient knowledge”*** and therefore she gave sworn testimony. Looking at the similarities in the questions that the magistrate put to the complainants and their responses, it is difficult to understand why they were treated differently. Nonetheless, what is crucial is that the trial Court believed their testimony hence the conviction of appellant. For my part, looking at the narration by the two complainants who knew the appellant well and further taking note of the fact that they were examined the same day and medical evidence confirmed they had been defiled, I am satisfied that the complainant's evidence was weighty enough to sustain a conviction and the finding of the trial magistrate cannot be faulted.

In his grounds of appeal, the appellant stated that he is a mental patient but there is nothing on the record to show that any evidence was placed before the trial Court either by himself or any other person to suggest that he had a mental problem. And on the allegation that he could neither speak Kikuyu, English or Swahili, although the record does not show what language the trial Court was using, the record shows that he cross-examined witnesses and therefore he must have understood whatever language was being used. Indeed when he appeared before me for his appeal, I asked him if he did not understand Kikuyu language and he said he did. I am satisfied therefore that he understood the language of the Court.

On the ground that he was entitled to an advocate assigned to him by the State at the State's

expense, it is true that **Article 50 (h) of the Constitution** provides that an accused would be entitled to an advocate at the State's expense where substantial injustice may result. Indeed in **DAVID NJOROGE MACHARIA VS REPUBLIC CRIMINAL APPEAL NO. 497 of 2007** the Court of Appeal ruled that in addition to situations where substantial injustice may result, persons accused of capital offences where the penalty is death have the right to legal representation at State expense. In that case, the Court directed the Attorney General and other relevant bodies to take the necessary action to ensure that this provision is actualized. It is not clear if that has been done to-date. What is clear however is that appellant was not charged with a capital offence although the charge facing him is nonetheless a serious one. The appellant ought to have placed before the Court any material to show that substantial injustice would occur if he was not accorded legal representation in his case. Further, and as was stated in **MACHARIA's** case (supra) there would be a need for the Government to make major policy and legislative changes and avail finances in order to put into effect the Constitutional requirements that accused persons be availed legal representation in situations where substantial injustice would result. However, that does not mean that pending the setting up of that scheme, all such cases that would otherwise qualify for such representation should be put on halt or that such trials would be rendered a nullity. For the reasons stated above, that ground of appeal fails.

Finally, reproduced above what the appellant said in his sworn statement in defence. He said he was "**sorry**". I have agonized over whether that amounts to a confession. A confession is defined in **Section 25 of the Evidence Act** as follows:-

"A confession comprises words or conduct or a combination of words and conduct from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence"

And in **BLACK's LAW DICTIONARY 9th Edition**, a confession is defined to include " ***an oral or written acknowledgement of guilt....***"

When the appellant uttered the words "**sorry**", he had heard all the evidence that was adduced in his trial, he was aware of the charge facing him, he was before a magistrate and, most importantly, he had just been sworn. Taking all that into account, it is my view that though coming late in the trial, the appellant was confessing to the crime whose facts he had just heard. Certainly he was not denying the offence.

Having considered the evidence in this case, and also having considered the grounds of appeal, I have reached the conclusion that the appellant's conviction was on sound evidence. Nothing was placed before the trial Court to indicate that appellant was mentally retarded and certainly he did not strike me as one needing medical attention or who was not able to follow the proceedings both here and in the Court below. He told this Court that he understood Kikuyu language and indeed he spoke it. In the circumstances of this case, there is really no basis for reaching a conclusion that the trial magistrate failed to provide him with legal representation when there is nothing on the record to reflect that there was such a need. The up-shot of all the above is that the appellant's appeal against conviction is dismissed.

With regard to sentence, the law provides for a mandatory life sentence for defilement and there can be no reason to interfere with the sentence.

This appeal is accordingly dismissed.

B.N. OLAO

JUDGE

18TH OCTOBER, 2013

B.N. Olao – Judge

CC – Muriithi

Appellant present

Mr. Omayo State Counsel present

COURT: Judgment delivered this 18th day of October 2013.

Mr. Omayo State Counsel present

Mr. Muriithi Court clerk present

Appellant in person

Right of appeal explained.

B.N. OLAO

JUDGE

18TH OCTOBER, 2013