IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, NAMBUYE & OKWENGU, JJA)

CRIMINAL APPEAL NO. 3 OF 2015

BETWEEN

JOHN MUGO..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Keroguya (Olao, J.) dated 18th October, 2014).

in

(H. C. CR. A. No. 237 of 2012)

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JUDGMENT OF THE COURT

JOHN MUGO, the appellant before us, was charged, tried and convicted by Baricho Principal Magistrate, **(Hon. E. K. Keago)** of two counts of defilement contrary to **Section 8(1)(2)** of the **Sexual Offences Act.** It was alleged that on the 31st December 2011, at about 6.00 pm, he had intentionally caused his penis to penetrate the vaginas of two female children ***B.W*** and ***J.W*** aged six years. Upon his conviction, he was sentenced on each count to serve life imprisonment, which is the minimum sentence for such an offence. His first appeal to the High Court **(Olao J.)** was dismissed, hence this second and last appeal.

The appellant has not had any legal representation before any of the courts, and has obviously been handicapped in putting across his case in a manner that strictly complies with the Rules of the Court. Nevertheless, there is no compulsion in employing legal counsel and the court has a duty to treat all parties who come before court equally. In this appeal, he submitted some 4 *"Grounds of appeal"* which we shall treat as his original *'Memorandum of Appeal"*, but on the hearing date, he filed what he called *"Supplementary Grounds of Appeal"* without seeking leave to do so. He also filed written submissions which he requested us to peruse and decide the appeal in his favour. **Assistant Director of Public Prosecutions, Mr. Kaigai,** who opposed the appeal, represented the state.

The damning evidence that led to the appellant's conviction came from the two minors, ***B.W*** and ***J.W***. The two courts below found as facts that they were playing in some grazing field in Thumaita village in

Kirinyaga where they found the appellant, known to them as a worker for ***B.W's*** Auntie. The appellant then asked them to strip naked and he made ***B.W*** lie down on her back facing upwards and he then penetrated her vagina with his penis. He then turned on ***J.W*** on his knees and defiled her as she stood naked. When ***B.W*** went home at 7.00 pm, her mother, ***A.N.W*** (PW4) noticed that she was walking with difficulty. On being questioned by her mother, ***B.W*** confessed that she had been defiled by the appellant. PW4 took her to Kagio Police Station where a report was made and they were referred to Kerugoya Hospital for medical examination and treatment. ***B.W*** was examined by a Clinical Officer, **Hezron Macharia Maina** (PW3) at 11.30 pm the same evening. PW3 found that her genitalia had laceration on the labia majora and labia minora, her hymen was perforated and her cervix and vagina were swollen. There was also presence of a whitish foul smell discharge. The laboratory investigation revealed numerous pus cells, but no sexually transmitted disease or HIV. No obvious bleeding or spermatozoa were seen. ***B.W*** was admitted in the hospital for three days for treatment.

PW3 also examined ***J.W*** the following morning. He found the labia majora of her genitalia was swollen, the labia minora was normal but there was dried up whitish discharge on it, the hymen was broken at 3-5 o'clock sections, and the cervix and vagina were normal. The laboratory investigation revealed no spermatozoa, sexually transmitted disease or HIV, but there were numerous pus cells. She was also placed under treatment. PW3 concluded that the two minors had been defiled and completed P3 forms, which were exhibited in court.

The investigating officer, **PC (W) Gladys Gesuka** (PW6) of Kagio Police Station arranged for the arrest of the appellant on 3rd January 2012 and arraigned him in court the following day.

The major complaints laid out by the appellant in his grounds of appeal and written submissions are that the High Court did not re-evaluate the evidence otherwise it would have found that the evidence was uncorroborated and inconsistent; that the charges were not adequately proved; and that his defence was ignored. Elaborating on those grounds, the appellant submitted that the only evidence of defilement came from the two minors and that no one was called from the members of the public who reportedly had witnessed the defilement either to confirm it or testify that they caused his arrest, since he was not pointed out by the minors for arrest. In his submission, the evidence of the minors was not consistent because one said they were defiled as they lay on the ground while the other said she was standing. The uncorroborated evidence of the minors should not therefore have been accepted since it required corroboration in law and the two could not corroborate each other. In his view, the medical evidence did not provide corroboration because there was no evidence of bleeding and the clothes worn by the minors were not produced in evidence to show whether they were torn. As regards his arrest, he submitted that there was no evidence to show how he was arrested and the court did not, in compliance with **Section 150** of the **Criminal Procedure Code** summon the arresting officer to show where and how he was arrested. Finally, the appellant submitted that the High Court appears to have shifted the burden of proving his innocence when he had no duty in law to prove anything.

In response, Mr. Kaigai submitted that the trial court believed the two minors' evidence and there was no requirement in law for corroboration of their evidence. In any event, their evidence was corroborated by medical evidence and that it was clear from that evidence that the appellant was known to the minors and there was therefore no difficulty in arresting him. As for appellant's defence, it was no more than a mere admission since he apologized for the offence.

We have considered the appeal within the permissible parameters of examining matters of law only, under **Section 361** of the **Criminal Procedure Code.**. This is because concurrent findings on matters of fact carry considerable weight and respect unless they are not based on any evidence on record or on a perverted appreciation of the facts. The trial court will also have seen and heard the witnesses testify before it and gauged their credibility first hand, which advantage appellate courts do not have.

On the issue of corroboration of the minor's evidence, which is an issue of law, the answer lies in **Section 124** of the **Evidence Act** which provides for corroboration of the evidence of children, but the proviso thereto, which is a recent amendment states:-

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

In assessing the credibility of the two minors, the trial court stated as follows:

> ***"The two complainants stated that indeed the accused defiled them in turns on 31.12.2011. They did report the facts to their parents, police and before court. The girls to me appear innocent as to the clarity of the act, and therefore were free when they testified. The accused did not cross examine PW2 who collaborated the unsworn testimony of PW1 as to how the accused had defiled them."***

We have no reason to interfere with such assessment or the finding by the two courts that the appellant penetrated the respective vaginas of the minor complainants with his penis. There was medical evidence, also believed by the two courts below, that indeed the two minors were defiled which strengthened their account of the ordeal. The crucial element of the offence that was required to establish was penetration and therefore the complaint by the appellant that there was no bleeding seen or spermatozoa found or torn clothes exhibited does not detract from the findings that the vaginas of the minors were penetrated.

As for the appellant's arrest, the minors testified that they knew the appellant as he was working for the aunt of ***B.W***. That fact was not denied or challenged in cross-examination and it was not difficult therefore to make the arrest of the appellant which the investigating officer confirmed was done on 3rd January 2012. It is true that there was no evidence from the officer who arrested the appellant, which evidence would have been prudent to advance the prosecution case, but the appellant does not contest that he was lawfully arrested and taken to court within the time limits provided under the law. His trial was also lawfully conducted and we do not find any serious issue of law on arrest.

Finally as regards the defence, we find, as the High Court did, that it was a virtual confession at the tail end of the trial. The High court stated as follows:-

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

The upshot is that this appeal lacks merit and we order that it be and is hereby dismissed.

Dated and delivered at Nyeri this 3rd day of February, 2016

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR