IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OMOLO, WAKI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 257 OF 2009

BETWEEN
BENJAMIN MBUGUA GITAU .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Eldoret (Mwilu, J.) dated 29th October, 2009

in

H.C.CR.A. NO. 94 OF 2007)

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JUDGMENT OF THE COURT

This is the second and last appeal by ***Benjamin Mbugua Gitau*** who was convicted by Eldoret Resident Magistrate (J. Owiti) for the offence of defilement under ***section 8(1)*** as read with ***section 8 (3)*** of the Sexual Offences Act. Upon his conviction he was sentenced to serve 20 years imprisonment. His first appeal to the superior court, Mwilu J, was dismissed, hence the appeal now before us which can only be premised on issues of law. Only two grounds were raised by the appellant who drew the *"grounds of appeal"* in person but at the hearing he was represented by learned counsel Mr. L.K. Sirtuy. They may be paraphrased before we examine the submissions of counsel thereon:

1) The conviction of the appellant was based on misapprehension of the evidence on record and therefore the offence was not proved as charged.

2) The superior court did not properly re-evaluate the evidence on record as was its duty to do.

What were the concurrent findings of fact made by the two courts below?

T.W.K (PW1) was a 13 year-old minor in standard 6 at a Primary School in Eldoret. She lived with her parents at M[....], within the same town. Late in the afternoon of 26th November, 2006, T, accompanied by two of her friends, ***M. W. K*** (PW5) and one ***F***, attended a funeral in the neighbourhood. At about 7.30 p.m., T and M escorted F back to her home to collect a cardigan. On reaching F's home, the two girls

waited outside the gate. Shortly thereafter some two men came along and found them. It was the appellant and one ***Mugo***, both of whom were well known to the girls as they were from the same neighbourhood. Both men grabbed T and started dragging her towards a forest nearby. M tried to protest and pull T back but Mugo became furious and M fled. She went to call for help. In the meantime, the appellant stuck some socks in T's mouth to silence her and the two men managed to drag her into the bush where she was forced to lie on her back. They tore up her skirt and panties and Mugo lay on top of her as the appellant held her down by the hands. Mugo unzipped his trousers and placed his penis into her vagina. When he finished, the appellant took his turn and defiled her too as Mugo held her down. Fortunately some two boys one ***Waria*** and one ***Njuguna***, came along and managed to apprehend Mugo and the appellant. A Community police agent, ***Ali Odhiambo*** (PW3) was summoned and headed to the scene. T's mother ***A. N. M*** (PW2) also arrived at the scene after receiving a distress call regarding her daughter. Both Odhiambo and N found the two men, T with her torn and soiled clothing, and M who had returned to the scene with other members of the public. T said she had been raped by the two men. Odhiambo called Eldoret Police Station and started to escort the two men towards the station but along the way, Mugo bolted out and escaped. He remained at large throughout the trial of the appellant. But the appellant was re-arrested and ***Pc. Beatrice Lagat*** (PW6) commenced investigations. T was taken to Moi Teaching and Referral Hospital where she was examined and treated. Her P3 form was completed by ***Dr. Paul Rono*** (PW4) who confirmed that T had a tear on the *labia majora* and was bleeding on her private parts. She also had spermatozoa. In his opinion T had been defiled.

In his sworn defence, the appellant said he worked as a Disc Jockey in K. T within M[...] but on the day in question he attended a funeral in the neighbourhood with his friend Mugo. The two then met three ladies on the way and he left Mugo with them as he proceeded to the funeral venue. Soon after, Mugo was arrested on allegation that he had raped one of the ladies and was brought to the funeral venue where the appellant was. Mugo had said he was with the appellant and for that reason the appellant was also arrested. He was taken to the police station but denied the allegations of defilement. He further contended that he was not examined by a doctor to ascertain whether he committed the offence.

After considering the evidence of all six prosecution witnesses and that of the appellant, the trial magistrate was in no doubt that T and M were credible and truthful witnesses. So was T's mother, Odhiambo and Dr. Rono whose cumulative evidence was supportive of the charge laid. The court dismissed the defence put forward by the appellant as an afterthought. The superior court, apart from dispensing with various legal issues raised by the appellant in his first appeal, also re-evaluated the evidence and came to the same conclusion as the trial court. The court stated in part: -

"The offence of defilement was proved and the evidence adduced at the trial is clear on that. The complainant's evidence was steadfast on that. Contrary to what the appellant says that PW2 exonerated him the said PW2 said that she was told by PW1 that she was raped by Mugo and another person and that other person was the appellant herein. The complainant's evidence that she was raped by Mugo and the appellant was not shaken. Her account of how the two dragged her away from PW5 was not disapproved (sic)**. PW5 said that she did not witness the incident. That is not the same thing as saying that it did not happen. She clearly said that she ran away to call for help and when she came back PW1 told her that she had been raped. The P3 form was explicit that rape was committed and the complainant's labia majora had tears, the hymen was broken and there was fresh blood, spermatozoa and red blood cells in the complainant's genitalia. The complainant said she was raped by two people and the appellant was one of the two the other one Mugo having escaped. Because of the age of the complainant what she calls rape is indeed defilement. Her evidence on that point was not contradicted. The appellant's so called alibi cannot stand. He was arrested with his accomplice soon after the commission of the offence by the two boys who answered the distress call of the complainant and while Mugo managed to escape the appellant was not as lucky. There is no missing link from the time of the commission of the offence and the arrest of the accused."**

The learned Judge also dismissed the appellant's contention that there was no corroboration of the complainant's evidence stating that corroboration was not a requirement of the law as it was removed by

the proviso to ***section 124*** of the Evidence Act, and even if there was such requirement, it was declared unconstitutional in the case of **Mukungu v R Cr. App. No. 277/02**, as it would be discriminatory of women and girls. At all events the court found, there was corroboration from T's mother (PW2), M (PW5) and Dr. Rono (PW6).

Those are the findings which aggrieved the appellant and it was argued by Mr. Sirtuy on the first ground, that they were based on no evidence or on a misapprehension of it. If such was the case, of course, an issue of law would arise since the judgment would in effect be bad in law. Was that the case? Mr. Sirtuy contends that the evidence established that two people committed the offence but only one of them was charged while nothing is said in the charge sheet about the second one. If, as is apparent, the complainant was gang raped, then, he submitted, the proper charge ought to have been "*gang rape under* ***section 10*** *of the Act*." As it is, he submitted, the offence under ***section 8 (1)*** requires proof that there was penetration but that would be impossible to prove against the appellant alone unless a DNA (deoxyribonucleic acid) test was conducted on the spermatozoa found in the complainant's private parts, which was never done. Furthermore, the offence was committed at night and there was contradictory evidence from Tabitha and Mary, as to the identity of the two assailants. In his view, such contradiction could only have been cleared by the evidence of the two boys who apprehended the assailants, one Waria and one Njuguna, but the two were not called to testify and therefore there was no basis for making any definite finding on the appellant's identity.

In responding to that ground of appeal learned Senior Deputy Prosecution counsel, Mr. Oluoch, submitted that although the offence was committed by two persons, they could not be charged jointly therewith as there cannot be a joint charge of rape or defilement. As for the use of DNA to identify whether the spermatozoa came from the appellant, Mr. Oluoch submitted that it was unnecessary since the essence of the offence was penetration of the female organ and not ejaculation. On the issue of identification Mr. Oluoch submitted that the appellant was known to T and M and it was recognition rather than identification of a stranger which strengthened the prosecution case. The appellant was also found at the scene by Njeri and Odhiambo who also saw the distressed state of the complainant. There was no need therefore to call further evidence from the two boys who apprehended the appellant and his accomplice before handing them over to Odhiambo.

We have considered the issue and have come to the conclusion that there is no basis for the assertion that the evidence on record was misapprehended by the two courts below or that the concurrent findings of fact were based on no evidence at all. The central and crucial part of the prosecution case was the complainant's evidence that she knew the appellant who was from the same village and that he did penetrate her genital organ with his. There is no denial by the appellant that he came from the same village with the complainant and indeed there is an admission that he had also attended the same funeral as the complainant. There is also no denial that the assailant who is at large, Mugo, was his friend and they were together at some point when he left him with some women. His only defence was that he was not present when Mugo committed the offence and was wrongly implicated by the said Mugo. The two courts below were at liberty to believe T on her version of events and for the reasons they gave, it would have required no other evidence in corroboration as it is not a legal requirement. See proviso to ***section 124***, Evidence Act. But there was more. M was also believed. It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see ***section 143*** Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys.

We also agree with Mr. Oluoch that there was no necessity of DNA tests as penetration, which is the main element of the offence, was proved. There was also no prejudice caused to the appellant by failing to charge him with *"gang rape"* under ***section 10*** as opposed to defilement under ***section 8 (1)*** as both are equally grave and carry heavy penalties. That ground appeal is lacking in merit and we reject it.

The second ground of appeal is also baseless. It cannot be said, as contended by the appellant, that there

was no re-evaluation of the evidence by the superior court. We have reproduced above a portion of such re-evaluation and the conclusions made on the basis of the evaluation. It must be stated that there is no set format to a re-evaluation of evidence by the first appellate court should conform. We adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation**, thus:

"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In *Sembuya v Alports Services Uganda Limited [1999] LLR 109* (SCU), Tsekooko JSC said at 11:

'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scruitinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'

In Odongo and another v Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), ODOKI JSC (as he then was) said: "While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

It is clear to us that there was sufficient re-evaluation of the evidence by the first appellate court and we reject the second ground of appeal.

The upshot is that this appeal has no merit and we order that it be and is hereby dismissed.

Dated and delivered at Eldoret this 25th day of March, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR