



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 2 OF 2010

MARK WANGOLIKU MULATI:..... APPELLANT

VERSUS

REPUBLIC:..... RESPONDENT

JUDGEMENT

The appellant, **MARK WANGOLIKO MULATI**, was convicted for the offence of Defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. He was then sentenced to 15 years imprisonment.

In his appeal, the appellant has asserted that his rights under Article 50 (2) (b) of the Constitution were violated, as he was not given sufficient details of the charge preferred against him.

Mr. Mukabane, learned advocate for the appellant, argued that the plea was not taken in accordance with the law. He submitted that section 207(1) of the Criminal Procedure Code was violated. The said violation is attributed to the failure by the trial court to specify the language in which the plea was taken.

That failure is said to have rendered the trial a nullity.

Mr. Mukabane also submitted that there were material contradictions in the evidence tendered by the prosecution. The said contradictions were in relation to the date when the offence was committed.

As far as the appellant was concerned, the complainant cited a date that was not consistent with either the charge sheet or with the other prosecution witnesses. It was thus not clear when the offence was committed, submitted the appellant.

Finally, the P3 form which was exhibited in court was said to constitute insufficient evidence. The reason for that contention was that a P3 form should, in the opinion of the appellant, be filled in within 72 hours of the incident. In this instance, it was filled in, about 96 hours after the alleged incident.

Ms. Ruto, learned state counsel opposed the appeal. In her view, the appellant had fully participated in the proceedings, which had been conducted in Kiswahili. The fact that the appellant cross-examined the witnesses, was said to show that he understood the proceedings.

The Respondent also submitted that there was no contradictions or inconsistencies about the date when the offence was committed.

As regards the P3 form, the Respondent submitted that it clearly proved that the complainant had been defiled.

The evidence was thus said to have been sufficient to lead to the appellant's conviction.

In reply to the submissions of the Respondent, the appellant said that the plea was taken in th English language, as the answer given by the accused was in English.

The appellant also reiterated that the witnesses who testified for the prosecution, had given evidence that was both contradictory and inconsistent.

As the first appellate court, I have re-evaluated all the evidence on record, and drawn my own conclusions.

The plea was taken on 13th July, 2009. The record shows that there was interpretation from English to Kiswahili. Therefore, I find no merit in the appellant's contention that the plea was taken in English.

The record also shows that every element of the charge was provided by the court, to the appellant.

As the appellant did not specify any particular detail that was allegedly not provided to him, at that stage, there is no basis for the contention he put forward, in that respect.

PW1 is the complainant. She said that the appellant first defiled her on 6th July, 2009. He then locked her up, inside his house until 9th July, 2009, when the appellant's father opened the door and released PW1.

PW2 is the complainant's father. He confirmed that PW1 did not return home on 6th July, 2009.

PW2 later traced his daughter to the appellant's house.

PW3 is a clinical officer. He produced the P3 Form for the complainant. The said P3 form showed that the complainant's hymen was torn. However, PW3 said that the tear was not fresh.

PW3 also testified that there was evidence of penetration of the complainant's private parts.

During cross-examination, PW3 said that PW1 was examined after 4 days. He explained that a victim of a sexual offence ought to be examined within 72 hours.

PW4 is a police officer. She was at the Lumakanda Police Station when PW1 was escorted to the station by her father.

PW1 reported to PW4 that the appellant had defiled her on 8th July, 2009.

After the trial court put the appellant to his defence, the appellant said that when he was arrested, he was not with the complainant. He denied committing the offence.

Having re-evaluated the evidence on record, I note that the complainant's hymen was found to be torn when the clinical officer examined her on 12th July, 2009. As the clinical officer said that the examination was conducted 4 days after the incident, that tallies with the complainant's complaint, which she made at the Lumakanda Police Station.

Accordingly, the evidence of PW3 and of PW4 support the particulars of the charge sheet, regarding the date when the offence was committed.

I also find that the evidence of the complainant is not at variance with that of those other witnesses. I say so because the complainant made it clear that after she was first defiled on 6th July, 2009, the appellant locked her up, inside his house. She remained locked up until the morning of 9th July, when the appellant's father opened the door.

That evidence is neither contradictory to nor inconsistent with the medical evidence.

Although the clinical officer testified that a victim of a sexual offence ought to be examined within 72 hours, there is no legal edict that renders inadmissible, evidence which was obtained through an examination conducted after the 72 hours.

In my understanding, the period of 72 hours provides medical personnel with the best opportunity of obtaining maximum results from the examination of the victim. In effect, after 72 hours, some evidence may have been lost.

But evidence such as a tear of the hymen or of bruises or abrasions to the sexual organ would still be available on the victim, as the results herein demonstrated.

I find that the evidence adduced by the prosecution clearly proved that the appellant defiled the complainant. Therefore, the conviction was founded on solid and sufficient evidence.

There is no merit in the appeal. It is therefore dismissed. I uphold both conviction and the sentence.

DATED, SIGNED AND DELIVERED AT ELDORET

THIS 23RD DAY OF OCTOBER, 2013

FRED A. OCHIENG

JUDGE