



REPUBLIC OF KENYA

High Court at Nyeri

Criminal Appeal 197 of 2009

STEPHEN MBUGUA THUKU.....APPELLANT

versus

REPUBLICRESPONDENT

(arising from the judgment of Hon. M.W. Mutuku Senior Resident

Magistrate Kigumo in Criminal Case No. 214 of 2008)

JUDGMENT

The appellant herein who was charged with the offence of defilement contrary to section 8(1)(3) of Sexual Offences Act No. 3 of 2006.

The Particulars of the offence was that on 9th day of February 2008 at [particulars withheld] within Central province did intentionally and unlawfully caused his penis to penetrate the vagina of J G K aged 13 years.

He faced an alternative charge of indecent assault contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on 9th February 2008 at [particulars withheld] within Central Province he unlawfully touched the private parts of J G K aged 13 years.

He pleaded not guilty and was tried convicted and sentenced to serve 15 years imprisonment on the count of defilement.

Being aggrieved by the said conviction and sentence the appellant filed the present appeal and in his home made grounds of appeal stated that:

- a. His rights under then section 72/3 of the Constitution were violated.
- b. The complainant's evidence was not corroborated
- c. His defence was not considered.

When this appeal came up for hearing the appelalnt who was unrepresented filed written submissions which he relied upon.

This appeal was opposed by Miss Ngalyuka learned State Counsel who submitted that the complainant who was blind recognised the appelalnt through his voice.

The ability of the complainant to recognise the voice was tested by the court and she was able to recognize the voice of the appellant as Mbugua and the court ruled that she was credible witness even though she was blind.

The complainant gave evidence that the appellant took her to the maize plantation where he defiled her. P.W.2 and P.W.3 confirmed that they were in the maize plantation and when they did not find P.W.1 they testified that they saw the appellant run from the maize plantation and that the complainant emerged and confirmed that she had been defiled by the appellant.

She submitted that there was sufficient evidence that P.W.1 had been defiled and that the appellant was in the contrary.

She submitted that the delay was not inordinate.

The appellant in his written submission has raised the issue of violation of his constitutional right under the then section 72(3(b) of the Constitution. He has submitted that he was held for 3 days.

I have taken into account the submission by Miss Ngalyuka that the delay was inordinate and further the fact that the appellant has credibility to claim for damages should I be wrong on holding that the same was not prejudiced by the said delay.

In respect of the medical report there is no requirement for the appellant to be taken for examination. I have looked at the evidence of P.W.6 Dr. David Kamau Maina where the same stated:

“There were lacerations and hymen was not intact, on 19th February 2008 she had whitish discharge from the vulva. There were signs of forced entry because of laceration. The absence of hymen indicated that there could have been penetration. Absence of spermatozoa could be due to absence of ejaculation.”

I am therefore satisfied that the complainant was defiled.

The only issue for me to decide is whether the same was defiled by the appellant.

P.W.1 testified that the appellant found her outside alone and talked to her. He told her to accompany him to the maize plantation where he told her to remove her pants which she did he then had sex with her.

P.W.2 E.W testified that she was home cleaning clothes and thereafter left P.W.1 at home. She confirmed that P.W.1 has a very good mastery of people's voices. Since they did not find P.W.1 at home they decided to go look for her and after a short while they saw the appellant emerged from the maize plantation jumped and crossed into the banana plantation running away. From the same point they saw P.W.1 emerging. She had mud/soiled on the hair and back of the clothes. When asked she said that Mbugua had raped her and that she had whitish discharge all over her thighs and the pant was torn.

P.W.3 J.K testified that when he reached home he did not find P.W.1 while the door was closed so he decided to check on P.W.2 his wife at the shamba they saw P.W.1 from the shamba and she had soil on her clothes and hair on the back. The appellant jumped off the maize plantation into the banana plantation and that P.W.1 told them that she had been defiled by the appellant.

In his unsworn evidence the appellant stated that on 9th February 2008 he was at his place of work and that he was framed because of a land dispute.

I have looked at the evidence placed before the trial court and is convinced that the appellant committed the offence appealed against. I have noted that both P.W.2 and P.W.3 saw the same emerge from where P.W.1 came from and that P.W.1 told them that she had been defiled by the appellant. There is no evidence of the existence of a grudge between the appellant and P.W.3. P.W.3 stated that there was

no grudge between him and the appellant and under cross examination confirmed that he had not sought to buy the appellant's fathers farm and even if it is true that the appellant stopped his father from selling his land to P.W.3 I can not see what the same would have achieved by framing the appellant with the charges appealed against.

The appellant has raised the issue of defect of the charge sheet based on the fact that the same state that he was taken to court on 12th November 2008. I have looked at the records of proceedings before the lower court and it is clear that the appellant was taken to court on 20th February 2008 and therefore the same did not suffer any prejudice due to the wrong date on the charge sheet.

Finally on the issue of delay I agree with the submissions by Miss Ngalyuka fro the state that the a delay of two days was not inordinate taking into account the nature of the offence and the fact that the complainant is blind.

I therefore find no merit on the appellant's appeal herein noting that the prosecution case against the same was proved beyond reasonable doubt.

I therefore dismiss the appeal herein.

Dated and delivered at Nyeri this 22nd day of November 2012.

**J. WAKIAGA
JUDGE**

Miss Ngalyuka for the State.
Stephen Mbugua Thuku

**J. WAKIAGA
JUDGE**