



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 241 of 2008

**(From original conviction and sentence in Criminal Case No.350 of
2007 of the Principal Magistrate's court at Molo – S. SOITA, PM)**

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPHAT CHERUIYOT MUTAI.....ACCUSED

JUDGMENT

JOSPHAT CHERUIYOT MUTAI, the Appellant was charged before the Principal Magistrates Court at Molo with the offence of defilement contrary to Section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge against him were that on the 26th day of February 2007 in the Rift Valley Province, he unlawfully had carnal knowledge of DCL, a girl under the age of 18 years against her consent. He pleaded not guilty but after trial before the Principal Magistrate at Molo, he was convicted and sentenced to 15 years imprisonment. He has appealed against both that conviction and sentence.

In his written submissions, the Appellant has raised three main points. They are violation of his constitutional right to a fair trial; identification; and lack of evidence to support his conviction.

On the first point the Appellant contended that contrary to Section 72(3) of the Constitution, he was detained by police for 7 days before being taken to court. Citing the case of Ndede Vs Republic, [1991] KLR 567, he argued that the learned trial magistrate erred in not inquiring into the period of his detention before being taken to court. On identification, he wondered how the complainant, having said she did not know him, managed to identify him to PW2 and PW3 who arrested him.

The last point the Appellant raised was lack of evidence to support his conviction. He argued that besides contradicting herself when she said that the house she was taken to was near the road and later saying it was about 1 KM away, it was impossible for nobody to have seen him with her. He also argued that having not been examined although he was available in the police cells, there is no proof that he is the one who defiled the complainant and infected her with an STD. according to him the charge was fabricated against him for reasons he does not know. In the circumstances he urged me to allow this appeal.

Mr. Gumo for the Republic urged to dismiss this appeal as the Appellant's conviction was based on sound evidence. He said the complainant was 17 years old and there was therefore no failure of justice in the Appellant's conviction.

I have considered these rival submissions and carefully read the record of appeal. The charge sheet shows that the Appellant was arrested on 26th February, 2007 and taken to court on 2nd March, 2007. That is after a period of three and not seven days as the Appellant alleged. (state what days of the week these were).

Even if there was a violation of the Appellant's constitutional right to a fair trial, that violation was occasioned by the police against whom the Appellant had recourse for a remedy. It had nothing to do with the complainant whose defilement required to be punished. In the circumstances, I dismiss the Appellant's first point that his rights under Section 72(3) of the Constitution were violated.

I will deal with the points of identification and lack of evidence together. On examining the complainant, the Clinical Officer, PW5, found her hymen broken and spermatozoa in her vagina. Even without taking the complainant's evidence into account that is enough evidence to prove that she had been defiled.

It is true the complainant said she had not known the Appellant before. However, in the course of the defilement, the Appellant himself, perhaps because he wanted to start a relationship with the complainant, gave her his name and asked her where she came from. After retaining her clothes in an effort to stop her from running away, she nonetheless ran to her uncle's home and informed her aunt that she had been raped by one Josephat, being the name Appellant had given her. The complainant's uncle knew who that Josephat was. When he went to Appellant's house with complainant's father, Appellant threw out to them the complainant's clothes remarking that he did not need them. That gave him away. If he was not the one who had defiled the complainant, how did he come to be in possession of her clothes? Clearly that evidence corroborated the complainant's and the clinical officer's evidence. I therefore agree with Mr. Gumo for the state that the Appellant's conviction was based on sound evidence and I accordingly dismiss his appeal against conviction.

The offence for which the Appellant was convicted carries a minimum sentence of 15 years and that the sentence imposed upon the Appellant. In the circumstances I have no leeway in the matter. The appeal against sentence is also hereby dismissed.

In the upshot, I dismiss this appeal in its entirety.

DATED and delivered this 2nd day of February, 2010.

D.K. MARAGA

JUDGE.