



IN THE COURT OF APPEAL

AT ELDORET

CORAM: MARAGA, OUKO & MOHAMMED, J.J.A)

CRIMINAL APPEAL NO. 66 OF 2011

BETWEEN

ALEX KIBET MURGOR.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kitale

(Ombija, J) dated 11th April 2011 in H.C.CRA NO. 43 OF 2008)

JUDGMENT OF THE COURT

1. **ALEX KIBET MURGOR**, the appellant herein was charged with the offence of defilement contrary to **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence alleged that on 8th July 2006 at *[particulars withheld]* village in West Pokot District within Rift Valley Province, the appellant had carnal knowledge of GCK, a girl aged below 15 years. He pleaded not guilty but after trial before the Senior Resident Magistrate at Kapenguria, he was convicted and sentenced to twenty years imprisonment. His appeal to the High Court having been dismissed, he has now preferred a second appeal to this court.

2. In his seven grounds of appeal the appellant has raised three points: that his constitutional rights were violated in that he was detained by police for 11 days before he was arraigned in court; that his identification by recognition was flawed as the complainant did not give his name to the police at the time of reporting the offence and that both the trial and the first appellate courts erred in relying on insufficient and contradicted evidence.

3. In his submissions before us, the appellant denied having committed the offence he was convicted of. He argued that being one-handed he could not have managed to pin down the complainant and defile her. He contended that this was a trumped up charge to camouflage the complainant's father's refusal to pay him the balance of the purchase price of the land he had sold to him. On identification and contradictory evidence the courts below relied on, he submitted that the complainant gave the name of her assailant as "Osama" which is not his name and that he was not medically examined to prove that he was indeed the one who defiled the complainant. On those submissions he urged us to allow this appeal.

4. In response, Mr. Omwega, learned Senior Principal Prosecution Counsel, dismissed this appeal as unmeritorious. He submitted that contrary to the appellant's contention, the complainant gave his name to her mother immediately on arrival at home. She told her mother that it was Alex Kibet *alias* Osama who defiled her. Counsel submitted that in his defence the appellant never raised any grudge with the complainant's father. In conclusion he said the appellant's conviction was based on overwhelming evidence as the complainant's testimony was corroborated by that of the clinical officer who examined her and confirmed that she has indeed been defiled.

5. We have considered these submissions and carefully read the record of appeal. This being a second appeal, by dint of **Section 361** of the **Criminal Procedure Code**, this Court is supposed to deal with only points of law. Where the two lower courts have made concurrent findings on points of fact, to overrule them, the appellant needs to demonstrate to this Court that those findings were based on no evidence at all or on a misapprehension of the evidence on record which no reasonable tribunal properly directing its mind to it would reach such conclusion. See the cases of **Sammy KanyiMwangi v. Republic, Criminal Appeal No. 60 of 2006 (CA)** and **Njoroge v. Republic, [1982] KLR 388**.

6. In this case, the appellant's first ground of appeal was that he was held by police for over 11 days before he was taken to court. If that is true then his constitutional rights to a fair trial were indeed violated. That will, however, not avail him in this appeal. As this court has repeatedly stated detentions of suspects for periods longer than those authorized by law only gives rise to causes of action against the government for general damages. The appellant's recourse in respect of unlawful detention is therefore in an action against the government for damages. In the circumstances the first ground of appeal fails.

7. The appellant's second ground of appeal is that the complainant's father tramped up the charge against him to cover the debt he owes him. Having perused the record we agree with Mr. Omwega that no grudge was raised in the trial court or even in the first appeal. The appellant did not, in cross-examination of the prosecution witnesses or in his defence, raise any grudge. Even if he had raised it, that is a matter of fact which cannot entertained in a second appeal. In the circumstances, we dismiss this ground of appeal also.

8. The third and last ground of appeal is on the appellant's identification/recognition. The record shows that as soon as the complainant reached her home after the ordeal she was subjected to, she told her mother that Kibet *alias* Osama had defiled her. There was evidence that the appellant is also known as Osama. The mother of the complainant in turn gave the appellant's name to the Assistant Chief who arrested him from a funeral and handed him to Kapenguria Police Station. Considering the evidence of all those people we find that the appellant was indeed recognized by the complainant. After all he is the complainant's neighbour who knew him very well. This ground of appeal also fails.

9. In the upshot we find no merit in this appeal and we accordingly hereby dismiss it.

DATED and delivered at Eldoret this 16th day of October, 2013.

D.K. MARAGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

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DEPUTY REGISTRAR