REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 129 of 2010

EVANS WAMALWA SIMIYU ……....……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The victim involved in the alleged offence was a girl aged 12 years old. The appellant denied the offence but after a full trial he was convicted and sentenced to 20 years imprisonment. This appeal arises from the said conviction and sentence.

It is his case that, he ought to have been examined by a doctor, and the learned trial magistrate erred both in law and fact to accept the evidence of the doctor who gave evidence and, in any case, the acceptance of that evidence contravened Section 77 (1) of the Evidence Act. It is also his case that, there were no independent witnesses and the court was wrong to rely on circumstantial evidence of P.W. 1. Finally, it is his case that the court erred in law and fact by failing to consider his alibi defence.

The evidence on record was that P.W. 1 who is the mother of the complainant noticed her daughter was not sitting properly and was crying. On asking her what happened, she said she had been defiled by the appellant. She examined the daughter and found some evidence leading to the alleged offence. On the same date, she took her daughter to the hospital and later to the Police station. She knew the appellant who used to buy milk from her home. Subsequently the appellant was arrested.

The learned trial magistrate conducted a preliminary examination of the complainant to access her capacity to give evidence. He held that the child was intelligent and understood the meaning of oath and therefore allowed her to be sworn. The complainant gave an account of what transpired on the date of the alleged offence, and how she revealed the encounter with appellant to her mother. The evidence of the doctor P.W. 4 confirmed that there was evidence of defilement. In his defence by way of unsworn statement the appellant denied the offence and said he knew nothing about it.

In convicting the appellant, the learned trial magistrate said as follows,

"**In her evidence P.W. 2 the complainant testified that when she went to the toilet, accused followed her and defiled her. He threatened he would strangle her and throw her in the toilet if she screamed. Accused was well known to her as he used to buy milk from them. P.W. 1 on receiving report from her daughter P.W. 2 checked her and saw she had sperms. P.W. 4 Doctor Mayende**

testified that he examined P.W. 2 and found spermatozoa when he did a swap……. Accused has not accounted for himself on the day the offence was committed. He did not challenge P.W. 2's evidence. His defence is merely an account of how he was arrested. I find that P.W. 2 is corroborated by her mother P.W. 1 and P.W. 4 the Doctor that she was defiled. P.W. 2 positively identified the person who defiled her as the accused. The prosecution has proved case against the accused, his defence does not challenge prosecution evidence. I find him guilty as charged".

As the first appellate court I have considered the evidence on record and come to independent conclusions. The appellant had a close association with both P.W. 1 and P.W. 2. He was well known to both witnesses. He used to buy milk from their home. The mother of the complainant specifically said,

"I knew the accused before that day. He gets milk from me and pays the end of the month. I had not quarreled with him"

Under cross examination she said as follows,

"I had known you for three months. You used to collect milk."

On the other hand the complainant P.W. 2 said as follows,

"On 11 /8/2009 I was home alone. I was cooking. Accused came and knocked the door. He is Evans……..Evans is the one in the dock. He used to buy milk from us. I had not quarreled with him"

That is sufficient evidence in my view to place the appellant at the scene of the crime. The complainant gave a graphic account of what took place between her and the appellant. In his defence however, the appellant did not at all dispute what transpired on the date of the alleged offence except to say that he was at his home when some members of public came and asked his wife to call him. He was a tea picker and that he was told something had happened in the factory. He was taken to the factory and then to the police station where he met the complainant and her mother. He knew nothing about that offence.

There is nothing on record by way of conduct or evidence to suggest that this offence was planted on the appellant. The evidence of the complainant and the doctor together with the evidence of identification of the appellant by P.W 1 and P.W 2 was sufficient to prove the offence beyond any reasonable doubt. I therefore agree with the learned trial magistrate that the prosecution proved the case beyond any reasonable doubt. The sentence imposed was lawful under the Act and I have no reasons to interfere with the same. The end result is that this appeal is hereby dismissed.

Orders accordingly.

Dated, signed and delivered at Nairobi this 13th day of November, 2012.

A. MBOGHOLI MSAGHA

JUDGE