IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 22 OF 2010

[From original conviction and sentence in Criminal Case No. 902 of 2009 of the Principal Magistrate's Court at Nyahururu – T. Matheka, PM]

EVANS MOKUA NDEGA…….....……..APPELLANT

VERSUS

REPUBLIC…….....……....RESPONDENT

JUDGMENT

Evans Mokua Ndega, the Appellant herein, was charged with the offence of defilement contrary to **Section 8(1)(4) of the Sexual Offences Act**, **Act No.3 of 2006**. It was alleged that on 9th April, 2009 at G[...] Farm, Subukia in Nakuru North District, he intentionally caused the penetration of his penis into the vagina of M.N., a girl aged 17 years old. In the alternative, he faced a charge of indecent act on a child contrary to **Section 11(1) of the Sexual Offences Act**.

After a full trial, the court convicted and sentenced the appellant to 20 years imprisonment. The court noted that the complainant was mentally retarded *(imbecile)*. Being dissatisfied with both the conviction and sentence, the appellant filed this appeal. The grounds upon which the appeal is brought are that as follows;

(1) The Magistrate erred by relying on the uncorroborated evidence of one witness (PW1).

(2) That the Magistrate failed to evaluate the evidence.

(3) That the Magistrate failed to carefully consider the evidence of the complainant who was an imbecile.

(4) That the Magistrate failed to consider the appellant's defence.

Briefly stated, the prosecution case was that PW1, **M.W.**, who is 12 years old, was at their kiosk at G[...] in Subukia at about 2.00 p.m. she was with her sister E.W. **(PW2)**. She saw Mokua, a brother to their neighbour come and leave a jug with his nephew at the shop. The appellant's sister is known as Mama Flora is their neighbour. PW2 sent PW1 to go and get an onion from their house so that they could cook at the kiosk. On reaching their home, PW1 heard her sister M.N coughing, as if being strangled. When she reached the kitchen, she found the appellant lying on her sister, M.N. PW1 started to scream and went to tell E.W (PW2) whom she asked to go home. She reported to their father who in turn called their mother who was away from home. PW2 also knew the appellant. She was informed by PW1 of what had happened and went home but did not get the appellant. The complainant was examined by **Isaac Gitonga (PW4)**, a Clinical Officer at Kabazi Health Centre who filled the P3 form. PW4 found that M.N's hymen

was broken, and injuries to her private parts with a blood stained discharge.

The complainant was seen by the court before the case commenced and the Magistrate noted that she appeared disoriented and did not seem to know where she was. Her mother PW3 M.W.G. said that N. suffers from epilepsy and she is dumb. PW4 also noted that though N. was in good health, she suffered from mental retardation.

In his defence, the appellant alleged that he was framed by the mother of the complainant because he had tomatoes for sale and she wanted to be a broker but he gave to someone else.

In his submissions, the Appellant contended as follows; that the evidence of the single witness, PW1 was uncorroborated; the trial court failed to evaluate the evidence; though the that maker of the report said that the complainant was an imbecile, he was not called as a witness; that the evidence of PW1 that she found the appellant lying on the complainant contradicts PW2's evidence who was told that the appellant was holding the complainant; that PW3 and 4 colluded to frame him because instead of the complainant being taken to a public hospital she was examined in a private hospital; that there was no medical evidence linking him with the offence.

Mr. Omwega, counsel for the State, opposed the appeal. He urged that the Appellant was caught on top of the complainant; the complainant was examined by a clinical officer soon thereafter and was found to be bleeding from her private parts, the hymen was broken with evidence of forced penetration; the incident it was in broad daylight and the appellant was known to the witnesses; that the alleged grudge between the appellant and the complainant's mother was baseless and that the case was proved beyond a reasonable doubt; that the sentence meted was on the lower side, the maximum sentence for the offence being life imprisonment.

Being the first appellate court, I am bound to re-evaluate the evidence on record in order to arrive at my own independent conclusion, always bearing in mind that I did not have the opportunity to see or hear the witnesses. In this case, PW1 said that she found the Appellant red handed while lying on her sister, N. who is dumb. This was in broad daylight. The appellant had just been with PW1 at their kiosk. He is a brother to PW1's neighbour. PW1 went and informed PW2, her father, and the mother soon thereafter, about what she had found. No doubt there was only one witness to the incident. **Section 143 of the Evidence Act** does not require any particular number of witnesses to prove a fact. However, the court must ensure that the prevailing circumstances at the time of the act as well as the scene of the incident are favourable for positive identification. In the case of **Tipapek Kimiti alias Ole Lemurinka Vs Republic, Nairobi Criminal Appeal No. 2 of 2006**, the court said;

"It is now trite law that when the evidence before a court of law is mainly that of a single witness on identification, the court has to be extra careful before entering a conviction."

The trial Magistrate properly observed that PW1 found the accused on top of the complainant. The matter was reported to police the same day. The complainant was examined the next day and there was evidence of forced penetration, broken hymen, bloody discharge and bruised genitalia. In my view, the circumstances were favourable for identification. PW1 knew the appellant. After a report was made to the police station and upon examination of the complainant by PW4, he confirmed that there was evidence of forced penetration. The police also recovered the clothes which the complainant wore at the time of the incident and which was found to have been muddy and blood stained. It was confirmed that the complainant was not in her monthly period. PW4 and 5 also noted that the complainant had bruises on the neck and back which is evidence of force or violence used on the complainant who could not speak for herself. I find that there was overwhelming evidence adduced in support of the testimony of PW1.

The Appellant alleged to have been framed because he refused to let PW3 to be his broker in the sale of tomatoes. That defence came as an afterthought. At no stage, during the trial and cross examination of witnesses, did the appellant ever raise that allegation. In his grounds of appeal, he is raising fresh issues that PW3 and 4 colluded to frame him but that did not arise during the trial. The trial court made a finding

that there was nothing before the court to support the Appellant's claim that the mother of the complainant had a grudge against him. I totally agree with the trial court that the line of defence was an afterthought and therefore untrue.

The appellant dwelt at length as to why the doctor who examined the complainant did not attend. I have seen on the file a report for **Dr. Njau**, the Provincial Psychiatrist who found the complainant to be 17 years of age, of unsound mind due to mental retardation and was not capable of giving evidence. I find there to be no miscarriage of justice because the court had a chance to see the complainant and formed its opinion as required by **Section 125(2) of the Evidence Act**. PW4 and 5 also saw her. She could not speak or understand what was going on.

Having considered the evidence on record and the defence, I find that the trial court arrived at the correct decision in convicting the appellant. The Appellant was sentenced to 20 years imprisonment. The minimum sentence for the under Section 8(1)(4) offence is a term not less than 15 years. Taking into account the fact that the victim was a child, mentally retarded and yet the appellant took advantage of this helpless girl, I find the sentence to be lenient and this court declines to interfere. The appeal fails and is hereby dismissed.

DATED and DELIVERED this 10th day of June, 2011.

R. P. V. WENDOH
JUDGE

PRESENT:
In person - Appellant
Mr. Omutelema for Respondent
Kennedy – Court Clerk