



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 49 OF 2009

LEONARD KIPRONO BYEGONAPPELLANT

VERSUS

REPUBLICRESPONDENT

*(Appeal from the judgment of the Principal Magistrate at Bomet, Hon. T. Okelo given
in Bomet PM CR. Case. NO. 26 of 2008)*

JUDGMENT

Leonard Kiprono Byegon, the appellant, was found guilty and convicted on 10.9.2009 by Hon. T. Okelo, Principal Magistrate, in Bomet Cr.C.No.26 of 2008 of attempted defilement of a girl aged 5 years contrary to section 9(1) of the Sexual Offences Act, No.3 of 2006. He lodged the appeal herein against his conviction and sentence. The main thrust of his appeal was that there was insufficient evidence against him to support the conviction.

Mr. E.M Orina, was the Learned Counsel who appeared for the appellant during the hearing and Miss.M.N Idagwa, Learned State Counsel, appeared for the Respondent. Miss. Idagwa conceded the appeal on the ground that there was no evidence of identification of the appellant. She also contended that the charge was defective. Mr. Orina concurred with her.

I have duly perused the record. The only evidence connecting the appellant to the crime is that given by the minor, S.C, PW1. She was a girl of tender age in Kindergarten. She made an unsworn statement to the effect that she did not know the appellant prior to her attempted defilement. She, however, said that he was her neighbour and that his home was not far from where she lived. She did not give his name. No identification parade was mounted.

Her father, B.T, was told that his daughter, PW1, had been defiled by the accused. He did not tell the court who gave him the information. The mother of PW1 reported the matter to PC Elias Wambugu, PW5.

The Clinical Officer, Christine Rono who was (PW2), examined PW1 on 29/1/2008 at Longisa Hospital and found that her hymen was intact but there was whitish discharge on her thighs and on her school uniform. Her vagina had white discharge. She concluded that there was harm. She opined that there was no penetration but there was ejaculation. Her HIV status was negative. She concluded that there was an attempt to defile.

No investigation appears to have been conducted to establish if the sperms found on PW1's thighs came from the appellant. The evidence of PW1 was not corroborated. She did not describe the attacker whom she said she had not known prior to the date of the attempted defilement. She said in her evidence that she got to know him in court as she testified as the person who was her neighbour. But it is not clear whether the person who was her neighbour whom she saw in the dock in court was one and the same person who had attempted to defile her. When she started making her unsworn statement she said: ***"I do not know the accused. I have never seen him."*** Then she went on to state that she ***"did not know the accused prior to that day but now I know him."***

On the basis of this evidence, it is not possible to make a finding of guilty. The evidence is simply not sufficient.

I notice that the charge also omitted reference to section 9(2). It should have been under section 9(1) as read with section 9(2) of the Sexual Offences Act.

In the light of the above, I have no option but to allow the appeal, which I hereby do.

The conviction is hereby quashed and sentence set aside. Unless otherwise lawfully held, the appellant shall be released forthwith and set free.

DATED at KERICHO this 28th day of October, 2010

G B M KARIUKI, SC

RESIDENCE JUDGE

COUNSEL APPEARING

Mr.Orina Advocate for the Appellant

Miss. N.M Idagwa State Counsel for the Respondent