REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLANT SIDE
CRIMINAL APPEAL NO. 434 OF 2002
(From Original Conviction and Sentence in Criminal case No. 1099 of 2002 of the Chief Magistrate's Court at Mombasa – L.N. MBATIA – SRM)

SALIM ALI DADA…….APPELLANT

-VERSUS

REPUBLIC ……RESPONDENT

J U D G M E N T

The appellant was charged with the offence of defilement of a girl under the age of 14 years contrary to Section 145(1) of the Penal Code in that on 28/5/02 at [particulars withheld] he had carnal knowledge of M.A, a girl under the age of 14 years. He was convicted and sentenced to serve 10 years imprisonment with 4 strokes of the cane. He has appealed on the grounds that the burden of proof always rests on the prosecution. The case was not proved beyond reasonable doubt, his defence was not considered and the trial magistrate relied on insufficient investigations evidence. He added further grounds in the supplemental petition all regarding to the complaint that the evidence was hearsay and not corroborated. Looking at the evidence on record it is clear the complainant a young girl of 8 years was defiled. She was examined by the doctor a few hours after the incident and it was confirmed that she had had sexual contact. She even had STD in her blood.

Her mother P.W.2 who was the first to see her after the incident confirmed that she was crying and upon examination of her vagina she was bleeding. That evidence was corroborated by the two witnesses P.W.2 and P.W.5. The story as told by the P.W.1, the unsworn statement of the complaint is coherent, consistent and clear. She was not shake in cross-examination. She was able to tell all the details involved. I believe her unsworn statement. She reported immediately to her mother who took up the matter to the chief.

As to whether it was the appellant who committed the crime against her is the important issue now. P.W.2 said that the home of the appellant is in the neighbourhood and that it could be seen from their compound. She said she knew the appellant as Mpokomo the same name complainant had mentioned. The Chief (P.W.3) also confirmed that the appellant was known by people as Mpokomo because he belonged to that tribal group. It is therefore shown he was clearly known to the witnesses. The complainant said she knew appellant before this incident. She said he normally passes their home when he is going to the river She knew his home. On the material day she met him on the way, as she was going to her aunt's home. It is the appellant who asked her to go his home. The appellant gave money which was 10/= which she gave to police officers – such a coin 10/= was produced in court. This incident occurred in daylight and therefore there is no way the complainant would have made a mistake as to the identity of the appellant.

In his defence the appellant confirms that he was arrested on the same day 28/5/02. He denies having defiled her and stated that he was not taken to hospital for examination. He also said that no one saw him defile her. Considering this defence it relates to matters after the incident. He did not deny giving the complainant the money. Although he had cross-examined the witnesses he did not bring out any evidence in his favour and he did not answer to the charge when giving evidence. While it is true that the burden of proof always rests on the prosecution, in a case where the prosecution have proved their case the appellant may bring a doubt by explaining his position. As it is I find the prosecution had laid before the Court sufficient evidence to support a conviction even without taking the appellant for medical examination. I find the evidence as to the fact of defilement was proved. I also find that the evidence of complainant was corroborated. I also find that there was no one else who can be implicated with this offence except the appellant. He was well identified by complainant whose evidence is true. In the circumstances I do not find any reason to interfere with the conviction. Regarding sentence the trial Magistrate is best placed to assess punishment. I find sentence of imprisonment not excessive. However as punishment by strokes of the cane are now outlawed the same is set aside.

The upshot is that the appeal is hereby dismissed.

Dated this 23rd day of December, 2003.

JOYCE KHAMINWA

J U D G E

23/12/03

Mrs. Khaminwa – J.

Clerk: Abuya

Ms. Mwaniki – State Counsel

Appellant present

Judgment read in open court.

JOYCE KHAMINWA

J U D G E