



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 220 OF 2009
EVANS MOGIRE KEBWARO

.....
APPELLANT
-VERSUS-

REPPUBLIC

.....**RESPONDENT**

JUDGMENT

(Being an appeal from the Judgment of the Chief Magistrate's court at Kisii in Criminal Case No. 24 of 2007 delivered by P.L Shinyada, R.M on 16th October, 2009)

The appellant, **Evans Mogire Kebwaro** was charged before the chief magistrate's court at Kisii with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the **Sexual Offences Act**. The particulars of the offence were that the appellant on 16th December, 2006 in Kisii District within Nyanza Province, defiled **W.G** a child aged 6 years. The appellant denied the offence and his trial ensued. The prosecution called 4 witnesses in a bid to prove their case. By way of summary of their evidence, the prosecution case was as follows:

PW1, **W.M.M** alias **W.G**, a minor aged 7 years, on 16th December, 2006 had been left at home with her two brothers, **T** and **D** when it started raining. Her brothers went to sleep as she went about fetching rain water. The appellant whom she knew as her cousin came, forcefully held her hand and pulled her into the house in a room where she used to sleep. He removed her pants after forcing her on to the floor, removed his penis and inserted it into her vagina. She felt pain and once the appellant was done he put on his clothes and ran away. She immediately reported the incident to her grandmother and she was taken to the hospital where she was treated and a issued with a P3 form that was later filled. She positively identified the appellant as the person who defiled her. PW2 **Ann Nyamotare**, a police constable on the material day was at the crime office, Kisii Police station at around 7.00 p.m. when she received the complainant accompanied by one M, her father. The father alleged that the complainant had been defiled by a person known to her.

She then accompanied the complainant to hospital where she was treated and her P3 form filled. The complainant mentioned the person who had defiled her and he was later arrested by Administration Police from Kiogoro camp and brought to Kisii Police Station. The said administration police officers were led by PW3, **Moses Karoli** .On 18th December, 2006 at around 6.00 a.m. as he and his colleagues were coming from patrol duties in Kiogoro location they met one, **R.A** who pleaded with them to assist her arrest the appellant who had allegedly defiled her daughter. They obliged, went to the appellant's home and arrested him. PW4, **Jackson Murauni**, a Registered clinical officer from Kisii Level 4 hospital on 19th December, 2006, whilst at the hospital received the complainant then aged 6 years who had been issued with a P3 form from Kisii Police Station. She was accompanied by a police officer, PW2. She alleged that she had been defiled on 16th December, 2006, by a person known to her. He examined the complainant and filled her a P3 form. His findings were that her hymen was torn. There was blood in her

vagina. A high vaginal swab taken revealed blood cells in the specimen though without any spermatozoa. It was this conclusion that the complainant had been defiled as there was evidence of penetration.

The appellant was then placed on his defence and opted to give a sworn statement. He stated that the complainant was his niece and that he did not know why he was being prosecuted for. He went on to state that the charges against him were fabricated by his brother because of the land dispute that they have.

The learned magistrate having carefully analyzed and evaluated the evidence tendered as aforesaid found for the prosecution, convicted the appellant and thereafter sentenced him to life imprisonment.

The appellant was aggrieved by the conviction and sentence aforesaid. Through **Messrs Reuben Maseses & Co.** he lodged the instant appeal setting out 6 grounds to with:-

“1. THAT the learned trial magistrate erred in law and in fact in failing to inquire into the constitutional rights of the appellant before proceeding on(sic) trial as the appellant had been confined in Kisii Police Cells for about one week before being arraigned in court notwithstanding the weight of evidence against the appellant.

2. THAT the learned trial magistrate erred in law and in fact in convicting the appellant when the evidence in (sic) record of PW1 required corroboration.

3. THAT the learned trial magistrate erred in law and in fact in convicting the appellant by relying on conjectures, suppositions and on extraneous matters as the charge sheet on the(sic) court below had not entry on the occurrence book to warrant the institution of the offence of defilement in the said court.

4. THAT the learned trial magistrate erred in law and in fact in relying on evidence that was incredible and unworthy of belief without addressing the discrepancies involved in (sic)the evidence of PW3 who was the arresting officer who arrested the appellant on 18th December, 2006 and took him to court on 4th January 2007 without explaining the anomaly or reasons for the delay.

5. THAT the learned trial magistrate erred in law and in fact in convicting the appellant by relying on hearsay evidence which is in admissible in law.

6. THAT the learned trial magistrate erred in law and in fact in not giving her reasons for convicting the appellant.”

When the appeal came up for hearing before me on 22nd July, 2010, the state through **Mr. Mutai**, learned Senior State Counsel conceded to the appeal on the ground that the charge sheet was fatally defective as the particulars thereof did not bring out the ingredients of the offence as required. He further submitted that should the court agree with him and allow the appeal he was not going to seek for an order for retrial since the offence was committed in 2006 and the prosecution may not be able to trace witnesses and avail them for the retrial.

Though the appellant's counsel was duly served with the hearing notice, he failed to attend court. However the appellant was not averse to prosecuting the appeal in person the absence of his counsel notwithstanding. He had nothing however, to say with regard to the state conceding the appeal.

I have carefully perused the charge sheet as well as the particulars thereof. I have also considered the evidence tendered in support thereof. I am satisfied and entirely agree with the learned state counsel that the charge sheet as drawn was fatally defective. The charge sheet was brought under Sexual Offences Act. That Act gives the sort of particulars which must be incorporated in the charge sheet to make it valid. The particulars given in the charge sheet in the circumstances of this case did not bring out the

ingredients of the offence as required. They were framed as though the appellant had been charged under the repealed sections of the penal code that dealt with the offence of defilement.

The learned state counsel did not seek a retrial and rightly so in my view. The record of the trial court reveals that the prosecution had to undergo trials and tribulations over a long period of time in order to avail any of the witnesses to testify. It is as though the said witnesses were reluctant to testify. At some point, the trial court was even compelled to issue warrants of arrest to secure the attendance of some of the witnesses. Indeed some crucial witnesses such as the mother of the complainant flatly and completely refused to testify forcing the prosecution to close its case without her evidence. This being the case and as correctly pointed out by the learned senior state counsel, it is highly possible that even if I was to order a retrial, the prosecution may find it extremely difficult to trace and avail witnesses for the retrial.

Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless he is otherwise lawfully held.

Judgment dated, signed and delivered at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA

JUDGE