



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 167 OF 2008

PATRICK MUTISO KIMUYU APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. A.W. Mwangi Resident Magistrate delivered on 8/8/2008 in Yatta Resident Magistrate Criminal Case No. 910 of 2007)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Patrick Mutiso Kimuyu** was charged with the offence of **defilement contrary to section 9 (1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 5th August 2007 at *[particulars withheld]* **Market, Ndalani Location** in **Machakos District** within the **Eastern Province** had carnal knowledge of **K M** a girl under the age of sixteen years.

2. In the alternative, the Appellant was charged with the offence of **indecent act with a child** contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 5th day of August 2007 at *[particulars withheld]* **Market, Ndalani Location** in **Yatta District** within the **Eastern Province** committed an indecent acts with **K M** by touching her private parts namely vagina and breasts.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. After a full trial, the Appellant was convicted for the offence of defilement and sentenced to life imprisonment.
4. The prosecution case was that on the material day at about 2.00 p.m, PW1 **R N M** went for a Women's Group meeting. She left her children **M** aged nine (9) years, **K** aged four years and baby **K** aged about 1½ years at home. When PW1 returned home at about 5.00 p.m, she found baby **K** had breathing problems and could not stand and was just crying. PW1 took the baby to hospital and the baby was put on medication for one week.
5. The baby's health did not improve and the mother sought further medical treatment. PW1 was only sponge bathing the baby due to the illness. However, on the fifth day, PW1 decided to give the baby a full bath and placed her in basin of warm water. The baby screamed very loudly. Upon checking the baby PW1 noticed that the baby was bleeding from the private parts and the

- entire area was swollen.
6. PW1 took the baby to the hospital again. After the baby was examined, it was confirmed that the baby had been defiled. The matter was reported to the police and investigations commenced. A P3 form was issued and the baby taken to **Matuu Sub-District Hospital** for examination and treatment.
 7. Upon returning home, PW1 inquired from her son **M M** (PW2) what had happened to the baby. It was then that **M** revealed that the Appellant had visited them on the material day at about 3.00 p.m. while the mother was away. That the Appellant sent the other children to the market to watch a video and that the Appellant remained behind with the baby. That later the Appellant called **M** (PW2) and handed over the crying baby to him, then left. That the trouser the baby was wearing had been changed with another trouser from the clothes line. The baby could not stand and cried until the mother returned at about 5.30 p.m. A further report was made to the police, connecting the Appellant to the offence. The Appellant was arrested and subsequently charged.
 8. In his defence, the Appellant gave sworn evidence. The Appellant who described himself as a mason stated that on the day he was arrested, he had gone to work as usual. When he returned home, about ten people who were armed with stones and rungu went to his home. That PW1 (the baby's mother) was among those people. The Appellant was arrested and his hands tied up with a rope. Allegations of defilement were made. The Appellant was escorted to the chief's office. That PW1 (the baby's mother) was told to part with Kshs.2,000/=. The following day the Appellant was handcuffed and escorted to the police station. The Appellant was placed in police custody and arraigned in court on the third day.
 9. The Appellant was aggrieved by the conviction and sentence and appealed to this court on the following grounds:-
 - v. **That the prosecution case was not proved yet the Appellant was not given the benefit of doubt.**
 - v. **That the conviction was based on weak circumstantial evidence.**
 - v. **The child (baby) did not testify and therefore there was need for the evidence to be corroborated as provided for under section 124 of the Evidence Act.**
 - v. **That this case is a frame up due to a grudge due to a land dispute.**
 10. During the hearing of the appeal, the Appellant put in supplementary grounds of appeal and opted to rely on written submissions. The submissions essentially expounded the grounds of appeal.
 11. The appeal was opposed by the State. In a nutshell, the learned counsel for the State submitted that the prosecution case was proved and that the sentence was within the law.
 12. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – **See Okeno –vs- Republic (1972) EA 32.**
 13. It is evident from the record that the conviction was based on circumstantial evidence. Nine (9) year old **M** (PW2) was the key prosecution witness. PW2 gave sworn evidence after the trial court carried out a *voire dire* and was satisfied that the child understood the meaning of oath and the duty to tell the truth. PW2 narrated to the court how he was left at home with his younger siblings when the mother went for a meeting. According to PW2's evidence it was the Appellant only who visited them. PW2 described the Appellant as his uncle who he knew by the name "**M**". PW2's evidence is therefore that of recognition. As stated in the case of **Anjononi & Ano –vs- Republic 1980 KLR :-**

“A case of recognition, not identification is more satisfactory, more assuring and more reliable than that of identification of a stranger because it depends on the personal knowledge of the assailant in one form or the other.”

The offence took place during the day between 3.00 p.m. and 5.30 p.m. The evidence of PW2 pointed out that the baby was okay when they left the baby with the Appellant who sent them to go and watch a video at the market but PW2 found the baby crying and breathing with difficulty and unable to stand when the Appellant handed the baby back to him. According to PW2, he found the baby's trouser had also been changed. PW2 maintained his evidence during the cross-examination by the Appellant. The trial magistrate who had the advantage of observing the demeanour of the witnesses believed PW2's

evidence. In the lower court judgment, the trial magistrate observed as follows:-

“PW2 struck the court as a truthful, honest witness”.

After evaluating PW2’s evidence, I have no reason to doubt his credibility. Although the evidence of PW2 was circumstantial evidence, no other inference can be drawn from the same except the guilty of the only person who PW2 left with the baby. As stated in the case of **Daniel Muthomi M’arimi –vs- Republic 2013 e KLR** while referring to the case of **Republic –vs- Kipkering Arap Koske & Another (1949) 16 EACA 135** *“in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”*

14. The mother (PW2) was not at home at the material time. It is clear from the mother’s evidence that she had left the children home alone and that the son (PW2 M) told her that it was only the Appellant who had visited them in the mother’s absence. The mother denied framing up the Appellant due to a grudge over family differences and further stated that the differences developed after the baby was defiled. The mother also denied any suggestions that the nine year old brother (PW2) could have defiled the child, stating that the brother (PW2) had been taking care of the baby without harming her.
15. The evidence of the Clinical Officer, PW3 **Benjamin Maingi** confirmed that the baby had been defiled. The Clinical Officer testified that the hymen was torn and had raw edges, which was indicative of sexual activity. The Clinical Officer reflected the baby’s age in the P3 form as 1 year and 3 months. The baby was shown to the trial court when the mother testified. The evidence of PW4 **PC James Ndegwa** confirmed that a report was made to the police and investigations carried out and the Appellant charged.
16. On the other hand, the Appellant blames this case on a family grudge. However, during cross-examination, the Appellant stated that there were no personal differences between him and the child’s mother. If the differences were between the child’s mother (PW1) and the Appellant’s parents as stated by the Appellant, then it is difficult to see why PW1 picked on the Appellant in what the Appellant called a revenge mission. It is noted that PW1 denied all allegations of a frame up. In any event, PW2 the child’s brother stated that he was friends with the Appellant. There is no reason why PW2 (brother) would frame up the Appellant. The medical evidence confirmed that the baby had been defiled. The defilement cannot be a frame up.
17. After sifting through the entire evidence on record, I am satisfied that the prosecution case was proved beyond reasonable doubt. The facts of the case are incompatible with the innocence of the Appellant.
18. The Appellant raised the issue of **Section 124** of the **Evidence Act** which provides as follows:-

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

19. The evidence that specifically links the Appellant to the perpetration of the offence herein is that of PW2 who is a minor. However, this is a sexual offence and the victim of the offence was about 1 ½ years old and could not testify. PW2 the brother testified on her behalf. I do not think that the intention of the law was to lock out victims who are of very tender age and incapable of giving evidence.

20. **Section 9 (1) and (2) of the Sexual Offences Act** under which the Appellant is charged respectively creates the offence of attempted defilement and provides the penalty for the same. The Appellant ought to have been charged under **section 8 (1)** as read with **section 8 (2)** of the **Sexual Offences Act**. However, no prejudice was occasioned to the Appellant (*See section 382 of the Criminal Procedure Code.*)
21. I have pondered over whether the charge in the main count is defective. However, the term “**carnal knowledge**” which is used in the particulars of the offence means sexual intercourse especially with an underage female (*See Black’s Law Dictionary, 7th Edition*). The mention of the victim’s age as under sixteen years does not make the charge defective as the question of age comes in on the issue of the sentences provided for under the **Sexual Offences Act**.
22. After evaluating the evidence on record, I am satisfied the offence of defilement contrary to **section 8 (1)** as read with **section 8 (2)** of the **Sexual Offences Act** was proved beyond reasonable doubts. The sentence meted out by the trial court is within the law. The appeal has no merits and is dismissed.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 26th day of March 2014.

.....

B. THURANIRA JADEN

JUDGE