



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT BUNGOMA**

**Criminal Appeal 68 of 2009  
JOSEPH IKAUNYI**

**EMASE.....APPELLANT**

**~VRS~**

**REPUBLIC.....RESPOND  
ENT**

**JUDGMENT**

The Appellant Joseph Ikaunyi Emase was convicted by Bungoma Resident Magistrate of the offence of defilement of a child contrary to section 8 (4) of the Sexual Offences Act No.3 of 2006. He was sentenced to twenty (20) years imprisonment with hard labour. He was condemned to be under police supervision for a period of three (3) years on completion of sentence.

In his petition of appeal, the Appellant appeals against the conviction and sentence. One of the grounds is that the magistrate failed to consider that he was of unsound mind. It is his contention that the evidence on record was not

sufficient to convict him for the offence charged. The last ground is that his alibi defence was not considered.

The State opposed the appeal partly. Mrs. Leting agreed that the evidence on record can not sustain a conviction on the offence of defilement but is proved that the Appellant is guilty of the offence of an indecent act with a child. She urged the court to convict the accused of the lesser offence.

PW1, the complainant was aged seventeen (17) years according to her testimony. She testified that the Appellant found her, in her parents one-roomed house with her younger baby brother. He closed the door, knocked her down after attempting to strangle her. He tore up her pants and had carnal knowledge of her three times. The baby was present and it cried a lot but Appellant went on. After he was through, he took a panga and threatened the complainant that he would kill her if she told anyone what had happened. PW1 reported to the Assistant Chief. She was taken for treatment.

PW2 was a neighbour to the complainant aged 18 years. He passed near the complainant's house and heard her screaming from inside the house at the material time (3.00 p.m). Then he saw a man leaving the house after a short while. PW1 told PW2 that the Appellant had raped her. PW3 is the Assistant Chief of Apatitit sub-location. He was called on phone by the Assistant Chief of O[...]sub-location and informed of the incident. He was given the name of the Appellant and complainant both of whom are his

subjects. He arrested the accused after he was identified by the complainant later and took him to the police station.

PW4 was the Assistant Chief of O[...]sub-location who received the report from the complainant and alerted PW3. He says he met with the Appellant about 200 metres from the complainant's home but did not suspect anything until he met the complainant crying. She told him that she had been raped by the Appellant. He asked his colleague PW3 to arrest the Appellant.

PW5 received the report at Kotur Police Patrol Base and on 28/8/2008 and later received the Appellant there from PW3. He booked the report in the O.B. and later charged the Appellant with the offence.

PW6, the Clinical Officer who examined the complainant found no evidence of penetration or bruises on the genitalia except whitish mucus on top of her genitalia spread all over. The torn pants were sent for DNA but it appears the results were not received.

It is not disputed that there was no evidence of penetration found by PW6. No laboratory test was conducted to establish what the whitish mucus was. At least the age of the complainant was proved by producing her Child Health Care Card and Baptismal Card.

In the absence of medical evidence, the offence of defilement cannot be proved. The magistrate erred in both law and fact in finding that the offence had been proved against the accused. The magistrate ought to have invoked

the provisions of section 179 of the Criminal Procedure Code and convicted the accused of a lesser offence. I therefore quash the conviction on the offence of defilement and set aside the sentence.

I am satisfied that the evidence on record proves the offence of indecent act on a child contrary to section 8 (4) of the Sexual Offences Act. The Appellant is therefore convicted of the offence of indecent act with a child. He has now served one (1) year since he was convicted and had spent six (6) months in remand awaiting trial. The period of one and half (1 ½ ) years is hereby taken into consideration. I sentence the Appellant to serve ten (10) years imprisonment to run from the date of his arraignment in court on 11/9/2008.

**F. N. MUCHEMI**  
**JUDGE**

Dated, Delivered and Signed at Bungoma this 23rd day of March 2010.  
In the presence of the Appellant and the state counsel Mr. Onderi.