



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 35 OF 2009

(From original conviction and sentence in Criminal Case No. 3 of 2008 of the Chief Magistrate's Court at Machakos, E. Nderitu, Ag. SRM)

PATRICK DAVID KIMEU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, Patrick David Kimeu was charged with the offence of defilement contrary to Section 8(2) of the Sexual Offences Act No. 3 of 2006.

The particulars of offence being that on the 27th June 2008 in Machakos District within Eastern Province intentionally and unlawfully committed an act which causes penetration with E M a girl aged 7 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 offence being that on the 27th day of June 2008 in Machakos District within Eastern Province indecently assaulted E M by touching her private parts.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.
4. The prosecution case was that on the material day at about 3.00 p.m., the complainant, PW1 E M M a seven (7) year old Std One girl was playing with other children outside their house. The Appellant then called the complainant to his house. The Appellant removed the complainant's trouser, covered her mouth with his hand then sodomized her. After he was done the Appellant gave the complainant some *ugali* and *sukuma wiki* then told her to go and play.
5. That night the complainant's mother, PW2 A M M noticed that the complainant had problems sleeping. The mother checked the complainant who was complaining of pain in the anus. The mother noticed some stains in the complainant's underpants but the complainant did not tell her what had transpired.
6. Two weeks later the complainant told the mother that the Appellant had sodomized her. By that time the Appellant who was a neighbour was away. The matter was reported to the police station and the complainant taken to hospital. The doctor confirmed that the complainant had been defiled. The Appellant was arrested and charged.
7. In his defence the Appellant gave unsworn evidence. No witness was called. The Appellant

stated that on 8th July, 2008 at about 10.00 a.m. he was in his house when the complainant's mother called him and accused him of having done something to her daughter.

The Appellant had just come from upcountry the previous day. The neighbours and the complainant's aunts came in screaming. The Appellant ran away to the Police Station to escape the mob. The complainant's mother followed him to the police station. The Appellant was placed in the cells. Investigations commenced. The Appellant was then charged.

8. The Appellant was convicted in the main count of defilement and sentenced to serve life imprisonment. The Appellant was aggrieved by the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

- a. That the prosecution case was not proved beyond any reasonable doubt.
- b. That no DNA test was carried out.
- c. That the prosecution failed to call crucial witnesses.
- d. That the burden of proof was shifted to the defence.
- e. That the defence case was not considered.
- f. That the sentence was harsh and excessive.

9. This being the 1st appellate court, 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.**

10. The complainant (PW1) gave sworn evidence. The trial court carried out a *voir dire* and was satisfied that the complainant was intelligent enough to warrant the reception of evidence and understood the meaning of oath. The complainant's evidence was that the Appellant defiled her by doing bad manners to her. The complainant described the bad manners as the putting of his “*urinating thing*” inside her anus.

11. The complainant's evidence on the defilement is corroborated by that of her mother (PW1) and the doctor, PW3 Dr. Musau Virginia. The mother's evidence was that the complainant was complaining of a painful anus and had stained underpants. The doctor testified that the complainant had a fissure on the upper part of the anal region. The doctor produced a P3 form which gave the complainant's age as seven (7) years.

12. On the identification of the culprit, the complainant's evidence was that she was called by David to his house. She identified the said David in court as the Appellant. Although the complainant's evidence was that she knew the Appellant before the material date, her evidence fails to reflect how she knew him. The complainant's evidence is rather sketchy and it seems not to have been treated with caution to elicit more details to avoid any issues of mistaken identity especially taking into account that the complainant identified the Appellant two weeks after the event.

13. The complainant's evidence was that she was playing with other children when the Appellant called her. Investigations ought to have been carried out as to who these other children were and if they were capable of giving evidence and possibly shed more light on who the culprit was.

14. Although the defence case is essentially on the question of arrest, it was not the duty of the defence to fill in the gaps in the prosecution case.

15. After re-evaluating the evidence on record, I hold that the Appellant ought to have been given the benefit of doubt. The appeal has merits and is allowed. The conviction is hereby quashed and the sentence set aside. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 8th day of October, 2015

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B. THURANIRA JADEN

JUDGE