



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 138 OF 2012**

PATRICK KAPWETE ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 3594 of 2010 of the Chief Magistrate's Court at Mombasa – **Hon. Michieka - SRM**)

**JUDGMENT**

**PATRICK KAPWETE** hereinafter referred to as the Appellant was Convicted and Sentenced to Twenty (20) years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual offences Act No. 3 of 2006.

The particulars of the charge were that on diverse dates between the 17th day of November and 20th November, 2010 at [Particulars Withheld] village Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of **J M** a girl aged fourteen (14) years.

The brief facts of the case are that the Complainant and the Appellant were friends. On the 17th day of November, 2010 she went to his house and they started cohabiting as man and wife till the 20th day of November, 2010 when police went and arrested the Accused/Appellant.

In his defence the Appellant testified to the effect that the Complainant had informed him that she had been sacked from her work place and had nowhere to go to. He put up with her till the time he was arrested. He also did tell the Court that to his mind she was an adult as she was formerly employed.

On the issue of age of the Complainant. There is evidence from herself, her mother (PW 2) and her father (PW 3) that she was born on 2nd February, 1996. At the time of the commission of this offence she was aged fourteen (14) years old. As to the issue of whether sexual intercourse did take place (penetration). There is evidence from the Complainant herself, the Doctor and the Appellant himself who conceded that he was staying with her in his house and had thought that she was an adult. He did not specifically deny having had sexual intercourse with the Complainant his defence being that she presented herself to him as an adult by stating that she was employed before.

During cross-examination by the Accused she stated,

**“I do not know why I lied to you. You did not call me. I just came. I wanted to live with you”.**

What is that she lied to the Appellant? Was it as alleged by the Appellant that she had told him that she had been sacked from her place of work and needed a place to stay while searching for another job? Could the information that she was of working age and not a school girl have encouraged him to think that she was an adult?

These are issues that ought to have occupied the mind of the trial Court.

In his defence the Appellant did state that he allowed her to stay with him as she had told him that she was an adult.

The learned trial magistrate while grappling with the issue as to whether the Complainant had told the Appellant that she was an adult noted that it was the Accused word against that of the appellant. He did not bear in mind that during cross-examination by the Appellant she did concede to lying to him and that she was not called by him but she voluntarily took herself to the appellant as she wanted to live with him as husband and wife.

Section 8(5) of the Sexual offences Act provides,

**“ It is a defence to a charge under this section if;**

**(a) it is proved that such child, deceived the Accused person into believing that he or she was of over the age of Eighteen (18) years at the time of the alleged commission of the offence and**

**(b) the Accused reasonably believed that the child was over the age of Eighteen (18) years**

**(6) The belief referred to in sub section (5) (b) is to be determined having regard to all circumstances, including any steps the Accused person took to ascertain the age of the Complainant”.**

In the present case the Complainant did concede to have lied to the Appellant as her intention was to live with him as husband and wife. Its clear that he got caught in her web of deceit. He did not initiate the act of **“staying together”** she did. This must have influenced his mind as to her age. His defence was therefore valid and meritorious.

The Conviction was not safe. It is hereby quashed and the Sentence set aside. The Appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed in open Court this **13th** day of **February, 2014**.

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**M. MUYA**

**JUDGE**

**13TH FEBRUARY, 2014**

**In the presence of:-**

Miss Mwaura learned State Counsel

The Appellant present

Court clerk Musundi