

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.1330 OF 1994

(From Original Conviction and Sentence in Criminal Case
No.2489 of 1994 of the Principal Magistrate's Court at Thika
S.N. Mutuku Esq.,)

ANDREW ESHIKIMO APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

Andrew Eshikimo Aura has appealed against his conviction and Sentence in Criminal case No.2489 of 1993 in the Senior Resident Magistrate at Thika where he was convicted of the offence of defilement of a girl contrary to section 145(1) of the Penal Code by the Resident Magistrate Mrs. S.N. Mutuku. It was alleged that on 16th August, 1993 at [particulars withheld] Estate in Thika in Kiambu District the Appellant had carnal knowledge of L.N.M a girl under the age of 14 years.

Evidence was adduced by the complainant, whose age her mother gave as 12 years and the doctor gave as 10 years, unsworn as she was taken to be a child of tender years. She claimed she had been lerned by the Appellant to his house and the Appellant had gone with her to bed. From the evidence she did not scream and she tried to hide the incident from her mother and had to be caned and forced to reveal it. She was the most important witness trying to connect the Appellant with the alleged offence.

Others who tried to connect the Appellant with the offence were her mother J.M (P.W.2) and J.M (P.W.5) as well as the medical evidence. P.W.3 Monica Muthike Mironga said what the complainant told her.

P.W.2 and P.W.5 claimed that the Appellant's trousers belt was open and he buttoned it outside where he had gone to meet them to inquire what was happening. It is difficult to see how the Appellant could have done that when nobody was chasing him from his house towards P.W.2 and P.W.5. This piece of evidence should be rejected.

Then the medical evidence talked of bruises without giving the age of the bruises. Some with whitish discharge and spermatozoa and pus cells. This was a girl whom the doctor found to have gonorrhoea. That decease could definitely have come from the Appellant on that day it suggests the complainant had not remained pure. See the way she tried to evade P.W.2 and P.W.5. She had not screamed. She could cheat P.W.2 and P.W.5 that she had been in the toilet.

Moreover her evidence was unsworn. A child of tender age This needed corroboration by evidence which consistently pointed at the Appellant but no other.

In my view there was no such evidence. Even medical evidence failed to do that since the doctor did not say when the injuries and the other deposits he talked about were effected.

If the complainant had been in the house of the Appellant her sweater could not have been dusty at the elbows. P.W.2 talked of that dust.

Furthermore, from what the complainant said, it would appear that her sexual intercourse with the Appellant was interrupted before ejaculation. A question may arise therefore as to where the spermatozoa had come from.

On my own review if the evidence before the court, I am not satisfied the prosecution succeeded in proving this case against the Appellant beyond reasonable doubt.

Accordingly I allow the Appeal. Quash the conviction and set aside the sentence.

The Appellant be released forthwith unless lawfully detained in some other cause.

Dated this 30th day of August, 1996.

J.M. KHAMONI

JUDGE

Present.

Mr. Jilo for the State.