CRIMINAL APPEAL NO. 434 OF 2010

ERICK ONYANGO ONDENG .....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 645 of 2009 in the Chief Magistrate's Court at Makadara – Mrs. T. Murigi (PM) on 16th July 2010)

JUDGMENT

1. The appellant **Erick Onyango Ondeng**, was charged with defilement of a child contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3** of **2006**. The brief particulars were that on the 22nd day of January 2009 at D[....] in Nairobi East District within Nairobi Province, wilfully and unlawfully committed an act which caused penetration with his male genital organ into a female genital organ of J.A.O, a child aged 10 years.

2. At the close of the case the appellant was convicted and sentenced to serve life imprisonment. The appellant filed an appeal relying on six amended grounds.

3. Being the first appellate court I have analysed and re-evaluated all the evidence on record, to come to my own conclusion in line with **AJODE VS. REPUBLIC 1972 EA 32,** in which the Court of Appeal held that:

"In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that."

4. On ground No. I, the appellant urged that the charge sheet was incurably defective and therefore rendered the entire trial a nullity. His reasons were that, twice the prosecutor applied and was allowed, to amend the date of the offence in the charge sheet to read 18th January 2009 instead of 22nd January 2009, but that an amended charge sheet was never filed in the court file, and he was never allowed to further cross-examine the witnesses who had already testified.

5. I have analysed the proceedings and find that indeed, the application pertained to the amendment of the date only. The first application was made on 8th June 2009 before any of the witnesses testified. The court allowed it upon the applicant stating that he had no objection. The court record shows that the charge was read to the appellant indicating the changes in the date, and his plea of not guilty was entered afresh. There were no witnesses to be recalled for cross examination as none had testified at this point.

6. When the prosecution repeated the application at the close of their case, it made no difference because no new particulars were being added to the charge sheet. The date of the offence had already been

recorded in the proceedings as 18th January 2009, and there was no need to recall any of the witnesses for further cross-examination. Indeed this application by the prosecution was superfluous as it had already been made at the beginning of the trial and been allowed. I therefore find that there was no contravention of **Section 214** of the **Criminal Procedure Code**, and that the appellant suffered no prejudice.

7.The second ground is that the coram was not indicated at the time of reading the ruling. I find that no prejudice was occasioned to the appellant. Throughout the proceedings the coram was recorded properly indicating the trial magistrate, the prosecutor and even the court clerk. Indeed during the reading of the ruling too, the coram should have been specifically recorded. I however noted that the case did not proceed to defence hearing that day. The learned trial magistrate informed the appellant that he had a case to answer and reserved the defence hearing for 27th May 2010 on which date the coram is shown

8. The 3rd and 4th grounds were that the prosecution evidence was inconsistent and contradictory and that the prosecution case was not proved beyond reasonable doubt against the appellant. The appellant urged that **PWI** the minor's guardian talked of hearing the minor's voice coming from the sink area, when she was inside a vacant room retrieving greasing oil for her husband, on the 18th January 2009 at about 9.30 p.m. J.A.O however testified that the appellant defiled her inside his house sometime after 7 p.m. when she brought him the cooking oil that he had sent her to buy. The appellant also urged that an independent witness should have been called to testify to the fact of the minor having been observed walking with difficulty.

9. From the record the minor was defiled more than once, and on all those occasions she was alone with her assailant. The evidence of identification therefore came from the minor alone. The evidence however indicates that the appellant was not a stranger to the minor. They both lived in one plot with a common gate and the appellant's room was next door to those of the J. A. O's uncle with whom she lived. They all shared common bathroom, toilet and sink facilities.

10. The record shows that she referred to the appellant by name during her testimony **"Onyango used to buy me mangoes".** And..... **"This is Onyango"**.... as she positively identified the appellant.

11. The minor did not tell her guardians immediately what had happened until she developed difficulties walking. **PWI** the aunt did not testify that she knew the actual date on which the minor was defiled. In fact it is not clear what the connection is, between her hearing the voice of the J.A.O. coming from the common sink area at 9.30 p.m. on 18th January 2009, and the actual defilement.

12. J. A. O. Was a ten year old minor who was subjected to <u>voire dire</u> examination and found to be **"capable of understanding the oath"**, according to the learned trial magistrate. Her evidence was taken on oath and the appellant did not rebut any of it by way of cross examination.

13. J.A.O's evidence was corroborated by that of **PW5** Dr. Rilwan who produced a medical report compiled by his colleague Dr. Muhombe. The medical report confirmed that there had been penetration upto the hymen. That the hymen had old tears on the lateral and anterior side. The external genitalia was normal and no STD or spermatozoa were found. The report did not state that the hymen was breached. The evidence does not therefore contradict that of **PW3** Dr. Kamau who said that upon examination of the minor he found the external genitalia to be normal and the hymen intact.

14. The fact of the hymen not being breached does not negate the complainant's assertion that the appellant inserted his penis into her vagina. **Section 2** of the **Sexual Offences Act No. 3** of **2006** interprets the act of penetration as follows:

"Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person".

15. On ground No. 5 the appellant urged that his defence was dismissed without cogent reasons. I have

analysed and reassessed his defence in light of the rest of the evidence on record. According to the appellant this charges were fabricated against him because of a pre-existing grudge between him and the minor's aunt. That the minor's aunt had approached him with a proposal that they should be lovers but he turned her down because he had dependants and he did not want to mess up his life. That she became bitter and that bitterness spawned the allegations of defilement.

16. The appellant in his own defence stated that when he was called into J. A. O's home her uncle asked her to say what she had told him. According to the appellant:

"The child said that I had raped her at the sink."

The appellant's mother was called into the house and she too asked J. A. O to state who had sexually assaulted her. Again in the appellant's testimony J. A. O. maintained her stance: "**The child said that I was the one**."

17. This being a criminal case the appellant was under no obligation whatsoever to explain his innocence. I however note that the appellant never raised the idea of their still born love affair with **PWI** during his cross examination of **PWI**. To raise it in his defence for the first time therefore amounts to an afterthought meant only to extricate him from culpability, in my humble opinion

18. The learned trial magistrate did evaluate the defence evidence and state as follows:

"I discredit his defence that the complainant's guardian had a grudge with him and implicated him with this offence has no basis at all (sic). He did not raise the issue that she wanted to be his lover during cross-examination and only raised it during his unsworn defence. He merely denied the offence."

19. On the final ground that the appellants mitigation was not considered and that the sentence imposed against him was harsh and excessive, the record reflects that the learned trial magistrate did consider the appellant's mitigation. The sentencing is in accordance with **Section 8(1)(2)** of the **Sexual Offences Act** under which he was charged and convicted. **Section 8(1)(2) Sexual Offences Act** which is coached in mandatory terms provides that:

"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to life."

Therefore harsh as the sentence may be, it is what is provided for by law.

20. The learned counsel Mr. Muriithi in opposing the appeal on behalf of the state, urged that the appellant was not a stranger to the minor and that the minor called him by name during the investigations and during the trial. He further urged that the minor positively identified the appellant and was categorical even on cross-examination that the appellant was her defiler.

21. In his opinion all the ingredients of defilement were proved by the prosecution and there was no reason for the complainant a minor to fabricate evidence against the appellant. The learned state counsel urged the court to find, as the trial court did, that the complainant was truthful and reliable and dismiss the appeal.

22. After a careful reassessment of the evidence on record, the petition of appeal and the submissions advanced, I respectfully agree with the conclusions drawn by the learned trial magistrate. I therefore uphold the conviction and affirm the sentence imposed by the learned magistrate. I dismiss the appeal.

SIGNED DATED and **DELIVERED** in open court this **20th** day of **June 2012.**

L. A. ACHODE
JUDGE