



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL CASE NO.7 OF 2011

JAMMIN NDEGE OGONDAAPPELLANT
VERSUS

REPUBLICRESPONDENT

**[Appeal From Original Conviction and Sentence of Maseno SRMS Court: S. ONGERI – R.M
in Criminal Case No.542 OF 2009:**

J U D G E M E N T

The appellant **JAMMIN NDEGE OGONDA** was charged with the offence of defilement contrary to Section 8(1) as read with section 8(2) of the Sexual Offences Act No.3 of 2006 of the Laws of Kenya. The appellant pleaded not guilty, was tried, convicted and sentenced to life imprisonment. The particulars of the offence were that on the 8th of April, 2009 at 9.00 in Kisumu West District within Nyanza Province penetrated in the genital organ of **M.N.A** child aged 9 years.

Being aggrieved by the judgment the appellant preferred this appeal based on the petition of Appeal and amended Petition of Appeal. The grounds may be summarised thus:

- **The complainant (PW1) did not testify;**
- **Essential witnesses were not called;**
- **Trial court did not consider the defence evidence;**
- **The trial court convicted the appellant without considering his age;**
- **There was no evidence corroborating that of the complainant;**
- **The appellant's rights under Section 50(1) & 4 of the Constitution were not considered;**
- **The appellant's alibi was not considered.**

At the hearing of the appeal the learned State Counsel **Mr. Meroka** submitted that at the time of the commission of the offence the appellant was 17 years. A fact that the trial court omitted while passing sentence in disregard of Section 191 of the Children's Act in which case he did not support the sentence. However the appellant is now of age and the court cannot treat him as a minor. He has served 3 years already. The learned State Counsel however supported the conviction and sought to have the court met out an appropriate sentence.

The appellant relied on written submissions that may be summarized as follows:

- **The medical report did not link him to the offence, he was neither examined;**

- **No age assessment done, or birth certificate produced to show the age of the complainant;**
- **The evidence of PW1 was not corroborated;**
- **Section 50(1) was violated as he was not given the right to cross examine.**
- **Essential evidence not adduced.**

Being the first appellate court it must reconsider, evaluate and examine the evidence on record so as to arrive at an independent opinion. **OKENO VRS REPUBLIC**. The evidence on record may be summarised as follows:

PW1 M.N.A gave an unsworn statement. She is aged 9 years. She recalled the 8th of April, 2009 at 9 a.m. She came across the appellant who defiled her. He lay her on his bed and inserted his penis in her anus. She felt pain. He had removed her underpants. She was later taken to Chulaimbo hospital and a P3 form filed. The matter was reported at Maseno Police Station.

PW2 MOSE JONES a clinical officer at Chulaimbo District Hospital. He recalled examining **PW1** on 9/4/2009. He found that she had a tear on the vaginal walls and was swollen with harmatoma. The nature of the offence was defilement. He classified it as penetrative intercourse. He filled a P3 form.

PW3 J.A.O, the mother of **PW1**. She recalled that on 8th April, 2009 she was called by a child of a neighbour and informed her that the appellant had defiled **PW1**. **PW1** then informed her of the incident she took her to hospital and later reported the matter to the police station.

PW4 ELIZABETH YATICH from Maseno Police Station. On 9/4/2009 she received **PW1 & PW3**. **PW3** told her of **PW1**'s defilement. She was given the name of the suspect. She recorded the witness statement and issued a P3 form. The appellant was arrested.

The appellant gave his statement as follows: there is no indication whether it was sworn or not. He stated that he is 15 years old and a student at C[...] Primary School in standard eight. He denied the charge. He denied meeting the complainant.

Having considered the evidence, on record the issue for determination is whether or not the complainant was defiled and if so whether there is evidence linking the offence to the appellant.

From the evidence of **PW1, PW2 & PW3** there is no doubt that the complainant (**PW1**) was defiled on the material night. The evidence of **PW1** is corroborated by the examination of **PW3**. The issue now is whether there is evidence linking the defilement to the appellant. **PW1** though a minor was consistent in her evidence, she reported the incident to her mother immediately it happened, she informed **PW3 & PW4** and indicated that she was defiled by a person she knew. She gave the name to her mother. Indeed this corroborated the information her mother had received. The appellant confirmed that he knew the complainant although he denied the offence.

This now leaves the court to weigh the evidence of **PW1** against that of the appellant as the only key witness the other child did not testify. The complainant stated that there were other people working in the home. She picked on the appellant as the assailant. She knew him before, she knew his name, and they were neighbours. Like the trial court I am inclined to believe the complainant although the trial court did not warn itself of the danger of relying on the evidence of a single witness, I will do so as I find the evidence cogent and truthful. In the circumstances I find that the conviction by the lower court was safe.

I do agree also that the sentence passed by the trial court was illegal as the appellant was a minor at the time of the commission of the offence and he could not have been given a life imprisonment. The sentence was illegal and it must be quashed which I hereby do.

The offence was no doubt serious and thoughtless of the appellant to have committed the same. He deserves to be punished. I will consider the 3 years he spent in prison the same may not necessary be adequate. However before I pass sentence I will ask for a pre-judgment report that will have the victim and her mother also interviewed together with all other relevant persons before I rule on the sentence.

Dated and delivered this 16th day of Feb2011

ALI-ARONI
J U D G E

In the presence of:

.....state counsel
.....appellant in person