



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 223 of 2008

*(From original conviction and sentence in Criminal Case No. 943 of 2007
of the Principal Magistrate's court at Molo – S.MT. S. SOITA, PM)*

FREDRICK OGOLA NDEDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

FRED OGOLA NDEDA, the Appellant was charged with defilement contrary to **Section 8(2)** of the **Sexual Offences Act 2006**. He was in the alternative charged with indecent assault contrary to **Section 11** of the same Act. He pleaded not guilty to both the charges but after trial before the SPM at Molo, he was convicted and sentenced to life imprisonment. He has appealed against both that conviction and sentence.

In his submissions, the Appellant contended that the learned trial magistrate erred in convicting him on the evidence of only members of one family without corroboration. He argued that as PW3 was told that F, the other child the Appellant allegedly defiled along with the complainant in this case, had not been sent for money from the Appellant, the learned trial magistrate should have realized that the complainant lied and her evidence should not have been relied upon. He said the medical evidence having shown that the complainant was HIV positive, he should have been examined to prove that he was the one who infected her that virus. He said his wife on hearing that took the test and she was found to be negative.

Opposing the appeal, Mr. Gumo for the state urged me to dismiss it as the Appellant's conviction was based on overwhelming evidence. He submitted that the Appellant took advantage of the tender age of the child victim and sexually abused her.

There is no doubt that the offence the Appellant was convicted of is indeed very serious. That seriousness is demonstrated by the life imprisonment provided for it which is the one the trial court imposed on him. Even without being under any legal obligation, that alone would force me to carefully consider the evidence on record to satisfy myself that the Appellant's conviction was indeed proper. Having carefully read the record of appeal and considered the above submissions, I find myself uncomfortable with the Appellant's conviction for two reasons. One, the learned trial magistrate erred in failing to record the questions she put to the complainant and the answers she got during the vive dore examination. That failure leaves me in doubt as to whether or not the complainant was indeed intelligent as the learned trial magistrate found and understood the importance of telling the truth. Secondly, despite the learned trial magistrate's statement that there is nothing on the P3 form to show that the complainant was HIV positive, in her evidence the clinical officer, PW1, said she was. If the police had had the Appellant tested and found to be also HIV positive, that would have sealed his file. If on the other hand he tested negative, that would have left doubt in the trial magistrate's mind of the Appellant's guilt and led to his acquittal.

For these reasons I give the Appellant the benefit of doubt. I therefore allow this appeal, quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered this 27th day of April, 2010.

**D. K. MARAGA
JUDGE.**