



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Criminal Appeal 262 of 2008**

**JONATHAN NJERU NGURU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of D. A. Orimba, Senior Resident Magistrate in the Senior Resident Magistrate's Criminal Case No.278 'B' of 2007 dated 18<sup>th</sup> September 2008 at Kangema)*

**JUDGMENT**

**JONATHAN NJERU NGURU**, the appellant herein was convicted for the offence of attempted defilement of a child contrary to Section 9 (1) of the Sexual Offences Act No. 3 of 2006. He was sentenced to ten (10) years imprisonment. Being aggrieved he preferred this appeal. On appeal he raised the following grounds of appeal:

1. *That the learned trial magistrate erred in both points of law and facts in finding a conviction upon the prosecution case that lacked adequate corroboration.*
2. *That the learned trial magistrate erred in both points of law and facts in finding a conviction where else the prosecution case was surrounded by doubts and inconsistencies.*
3. *That the learned trial magistrate erred in shifting the burden of proof and thus became obliged to reject my defence that remains true.*
4. *That the learned trial magistrate erred in both points of law and fact in accepting the prosecution charge as provided where as the same lacked compatible facts to find a conviction.*
5. *That the learned trial magistrate erred in both points of law and facts in finding a conviction and sentence on mere presumption of facts.*
6. *That the learned trial magistrate erred in points of law/fact in not considering the provision of section 56 Evidence Act Cap 80 whilst the evidence of good character is admissible.*

The Appellant was initially tried on a charge of defilement of a child contrary to Section 8 (1) of the Sexual Offences Act No. 3 of 2006 but the evidence tendered proved the offence he was convicted for.

When the appeal came up for hearing the Appellant raised one major issue that is to say that his Constitutional rights under Section 72 (3) (b) of the Constitution were breached. He claimed he was detained in Police custody for more than five (5) days before he was taken to court. On 10<sup>th</sup> February 2010, Miss Ngalyuka, learned Senior State Counsel, successfully sought for leave to file a replying affidavit of the investigating officer to explain the delay. She was given ten (10) days to do so. On 6<sup>th</sup> May 2010 Mr. Makura, learned Senior State Counsel, stated that the investigating officer had not availed himself to give evidence to explain the delay. The record is very clear that the

Appellant was arrested on 11<sup>th</sup> November 2007 and kept in Police custody until 16<sup>th</sup> November 2007 when he was taken to court. The prosecution were duty bound to explain the reason for the delay but they opted to keep mum. I am convinced in the circumstances that the Appellant's constitutional rights under *Section 72 (3) (b)* of the Constitution were breached. He was held for four (4) days over and above the 24 hours set by the Constitution. Consequently such an aggrieved party is entitled to an acquittal irrespective of the strength of the case presented against him. For the above reason, I am obliged not to look at the merits of the appeal. I hereby allow the appeal by quashing the conviction and set aside the sentence. The Appellant is hereby set free forthwith unless lawfully held.

*Dated and delivered at Nyeri this 9<sup>th</sup> day of July 2010.*

**J. K. SERGON**

**JUDGE**

In open court in the presence of the Appellant and Mr. Makura Litigant State Counsel.