



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 56 OF 2008**

*(From Original Conviction and Sentence in Criminal Case No. 291 of 2006 of the Senior Resident Magistrate's Court at Kwale:  
D.O. Ogembo – S.R.M.)*

SAID ISMAIL ..... APPELLANT  
VERSUS  
REPUBLIC ..... RESPONDENT

**JUDGEMENT**

The Appellant **SAID ISMAIL** has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Kwale Law Courts. The Appellant was arraigned before the lower court on 6<sup>th</sup> February 2006 faced with a charge of **ATTEMPTED DEFILEMENT OF A GIRL CONTRARY TO SECTION 145(2) OF THE PENAL CODE**. The particulars of the charge were that

***“On the 2<sup>nd</sup> day of January, 2006 at lunga lunga location in Kwale District within the Coast Province, attempted to have carnal knowledge of A.O a girl under 14 years.”***

In addition the Appellant also faced an alternative charge of **INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 144(1) OF THE PENAL CODE**. The Appellant entered a plea of ‘not guilty’ to both charges and his trial commenced before the lower court on 14<sup>th</sup> November 2006. The prosecution led by **INSPECTOR CHARO**, called a total of six (6) witnesses in support of their case. The complainant **A.O** was a minor aged 8 years and after a **‘voire dire’** examination conducted by the learned trial magistrate, she gave her evidence on oath. She told the court that on the material date of 2<sup>nd</sup> February 2006 she and two other girls had gone to the river to shower. They met the Appellant there and he called the complainant to collect money from him. As she approached he returned the money into his pocket. He then held the child’s hand and pulled her into the bushes. He forced her to lie down, placed his knee on her chest and removed her underwear. The complainant screamed and her grandfather came to her rescue. He caught Appellant with complainant. The Appellant ran away but was chased and caught by members of public. He was later taken to the police station and charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave a sworn defence by which he denied the charges. On 29<sup>th</sup> September 2007, the learned trial magistrate delivered his judgement in which he convicted the Appellant of the charge of Attempted Defilement, and thereafter sentenced him to serve five (5) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

The Appellant who was not represented by counsel at the hearing of his appeal chose to rely entirely upon his written submissions which had, with the leave of the court been duly filed. **MR. ONDARI**, learned State Counsel opposed the appeal and urged the court to confirm both the conviction and sentence of the lower court.

As a court of first appeal I am guided by the decision of the Court of Appeal in the case of **OKENO -**

VS- REPUBLIC [1972] E.A.L.R., 32 where it was held

***“it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld.”***

**PW1** told the court that on the material day the Appellant lured her to come to him pretending that he would give her money. She went to him when in her own words at page 8 line 3

***“He then returned the money in his pocket and took me to the bush as he held my hand. He then held my neck. He placed his knee on my chest. He at the time forced me to lay down. He removed my panties and I screamed and my grandfather came.”***

The complainant here has given a graphic and clear recollection of what transpired that day. I do not think that a child so young would be able to tell such a story in such detail unless it was a true account of what actually happened to her. The complainant's evidence is corroborated by **PW2 A.K.**, who was with her on the material date. The incident occurred at about 12.00 noon. It was broad daylight and visibility was good. Both **PW1** and **PW2** identify the Appellant as the man who took the complainant into the bushes. **PW2** ran home to inform her father after complainant went with the Appellant. Both witnesses though young corroborated each other and gave clear evidence. They both remained unshaken under cross-examination by the Appellant.

Further corroboration is provided by the evidence of **PW6 R.H.** He told the court that on the material day at 1.00 p.m. he received a report from two young girls that the complainant had been abducted at the river. He went to the bushes and found the Appellant holding the complainant by the neck. He noted that the complainant's underwear had been removed. When Appellant saw **PW6** he ran away. **PW6** gave chase and with the help of members of public caught him. **PW6** caught the Appellant in the very act of trying to defile the complainant. Why would an adult man lay a child down on the ground and remove her underwear? He clearly had only one intention, to defile the child and I do believe that had **PW6** not emerged the Appellant would have proceeded to do just that. **PW6** chased the Appellant from the scene. At no time did he lose sight of him.

Likewise **PW4 M.S.**, went out to the forest to search for the complainant. He heard the child scream. Appellant took to his heels. **PW4** and others chased the Appellant. He too positively identifies the Appellant as the culprit. **PW3** the complainant's father told the court that when he got to the scene the Appellant had already been apprehended. He confirms the identity of the Appellant.

Further evidence is provided by **PW5 PC DAN MUSUKU**, who went to the scene the following day 3<sup>rd</sup> January 2006. He found the ground had been disturbed indicating signs of a struggle. He also recovered the complainant's underpants and Kshs.30 there. As stated earlier this incident occurred in broad daylight. The Appellant was caught red-handed molesting the child. His attempts to escape were thwarted by the members of public who chased and caught the Appellant. The Appellant was chased from the scene and at no time did they lose sight of him.

The trial court did give due consideration to the Appellant's defence but dismissed the same at page 4 line 10 thus

***“I have otherwise considered the defence raised. With respect I do not believe the same. It is clear that accused's defence was an afterthought ...”***

I do agree with this dismissal of this defence.

The Appellant did also raise the ground that his constitutional rights as guaranteed under S. 72(3) of the (old) Constitution. The Appellant was arrested on 2<sup>nd</sup> February 2006 and was brought to court on 6<sup>th</sup> February 2006. This means that he was brought to court four (4) days after his arrest as opposed to the 24 hours provided for by the Constitution. This delay does not in my view entitle the Appellant to an automatic acquittal. The 4 day delay is not in my view inordinate given the circumstances. The Appellant retains the right to file a claim for legal damages should he so wish.

On the whole I am satisfied that the evidence against the Appellant was watertight. The prosecution properly discharged their burden of proof. The conviction of the Appellant was sound both in law and based on the facts. I do hereby confirm that conviction.

The Appellant was allowed an opportunity to mitigate after which the learned trial magistrate

sentenced him to serve five (5) years imprisonment. The offence was serious and it involved a minor victim. This sentence was appropriate and was neither harsh nor excessive. I do uphold the same. Finally this appeal fails in its entirety. The conviction and sentence of the lower court are confirmed and upheld.

**Dated and Delivered in Mombasa this 28<sup>th</sup> day of October 2010.**

**M. ODERO**  
**JUDGE**

Read in open court in the presence of:-

Appellant in person

Mr. Muteti for State

**M. ODERO**  
**JUDGE**  
**28/10/2010**