



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

**CRIMINAL APPEAL NO. 145 OF 2013**

**ROBERT OTIMA OMBEGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 390 of 2011 in the Senior Principal Magistrate's at Nyando)*

**J U D G M E N T**

**1).** The appellant was charged with the Offence of Attempted Defilement contrary to section 9 (1) as read with section 9 (2) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on the 4th day of March 2012 at [particulars withheld] Sub location in Nyakach District within Kisumu County intentionally and unlawfully attempted to commit an act which causes penetration with his genital organ to C A O.

**2).** After a full trial the appellant was sentenced to 10 years imprisonment hence this appeal.

3). The brief facts of this matter are that **PW1 C A O** on the material day at around 7 pm was walking home from his uncle's place where she had gone to collect some milk. At a place near the ACK church, the appellant suddenly emerged and grabbed her on the neck. In the ensuing struggle the complainant screamed and it attracted the attention of one Rose and some boys. The accused attempted to run away but they apprehended him. He was assaulted but luckily enough police officers came to his rescue. He was then taken to Pap Onditi police station.

4). **PW2 PC Charles Muyeko**, was the investigating officer. Upon receiving a telephone call from Adan Abdula OCS Pap Onditi they went to Regen ACK where they rescued a person who was being assaulted by a mob. They proceeded to arrest him and was accompanied by one M A who was the grandmother to the complainant. He further testified that the appellant had been charged with the offence of defilement at Nyando vide case No. 513 of 2011 but had been finalised.

5). **PW3 M A O**, told the court that she heard screams near her home. She went to the scene and found many people including a priest from the ACK church. She found the appellant being assaulted by members of public for grabbing the neck of the complainant.

6). The appellant gave sworn defence. He said that he came from the farm that evening and he met a man whom he called a witness to the complainant whom he alleged that he had been having a grudge against him because of a land issue. According to his testimony the whole thing is a frame up.

7). Having perused the proceedings herein and the submissions by both parties

the duty of this court is to evaluate the matter afresh and arrive at an independent finding. The substance of the appellant's petition is that the evidence on record was so insufficient that the court ought not to have convicted him. The state on the other hand submitted that there were sufficient evidence to support the conviction and thus this appeal ought to fail.

8). The court has perused the proceedings and it appears that there are salient features which failed to connect the offence to the complainant. First of all, there is no sufficient evidence on record to show the age of the complainant. The charge sheet does not indicate how old the complainant was. It is only PW2, the investigating officer that estimates her age to be between 16 -17 years. Ordinarily, there ought to be proof of the age in particular documentary proof.

9). Equally, there is nothing to show that she was in Form 4 at [particulars withheld] Secondary School. Perhaps such documentary evidence would have been safer for the court to determine the age of the complainant. This question of the age is so critical because it informs the court the extent of the sentence it metes against the offender. Although at times the apparent age of the child can be deduced from the definition found in section 2 of the Children's Act Cap 141 Laws of Kenya, the prosecution must always strive to convince the court of the victim's age. In this matter the complainant herself did not even attempt to state her age. This question was articulated in **Paul Odhiambo Mbola -VS- Republic, Criminal Appeal No. 16 of 2012 (UR)** Kisumu.

10). Secondly, there was no sufficient medical evidence to show that the complainant was assaulted. She only claimed that she was grabbed on the neck

and that the same was paining. Nothing would have been easier for PW2 to refer her for medical assessment and the P3 form to be filled. In the absence of such crucial document there is no sufficient evidence of the alleged grabbing and struggle.

**11).** Even more intriguing is the absence of key witnesses especially the boys and one Rose who rescued the complainant. PW3 arrived late in the scene when the appellant had been arrested and was being beaten by the mob. Although legally there is no specific number of witnesses who must prove a charge, in this instance I find that the absence of the key eye witnesses very intriguing. They ought to have shed light on what they saw taking place between the appellant and the complainant.

**12).** More importantly, the incident took place at around 7 pm. Presumably, there was some light depending on the time. There was also an indication by PW1 that the boys who rescued her were using torches. Infact she said that she did not know the appellant and that this was the first time she met him. How then did she recognise the appellant? Was there some form of light? To my mind this was very critical in answering the question of identification of the stranger.

**13).** Without going into other details therefore I do not think that the prosecution established their case beyond any shadow of doubt. The glaring omissions stated above should have gone in favour of the appellant. The appeal is allowed. The appellant is set free unless lawfully held.

**Dated, signed and delivered at Kisumu this 25th day of May, 2015.**

**H.K. CHEMITEI**

**JUDGE**