



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL APPEAL NO. 15 OF 2015**

**BETWEEN**

**RIAKO PHILENT OUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 49 of 2015 at Senior Resident Magistrates Court at Mbita, Hon. S. O. Ongeri, RM dated on 24<sup>th</sup> March 2015)*

**JUDGMENT**

1. The appellant **RIAKO PHILENT OUMA** was charged with the offence of gang defilement contrary to **section 10** of the *Sexual Offences Act, 2006*. The particulars were that on 2<sup>nd</sup> October 2010 at Gongo East Location, Homa Bay County, in association with another not before the court, he did an act which caused penetration of his male genital organ into the genital of organ of a child, HAO aged 15 years. He also faced a charge of committing an indecent act with a child contrary to **section 11(1)** of the *Sexual Offences Act* based on the same facts by touching her breast and rubbing his penis against her vagina.
2. The appellant was tried, convicted and sentenced to 15 years imprisonment. He now appeals against conviction and sentence on the grounds set out in the petition of appeal dated 7<sup>th</sup> April. Mr Nyauke, counsel for the appellant, who urged the appeal, attacked the conviction and sentence on three broad grounds. First, he contended that the evidence upon which the appellant was convicted was insufficient and unreliable. Second, that the age of the complainant was not proved as required by statute and third, there was no proof of penetration or an indecent act.
3. Mr Oluoch, learned counsel for the respondent submitted that there was sufficient evidence to show that the complainant was defiled by the appellant and that even though she fell unconscious, she identified the appellant and he was also seen by PW 3 leaving the house. He submitted that the offence was proved and as such the appeal ought to be dismissed.
4. As this is a first appeal, I am obliged to review and evaluate the evidence afresh and reach an independent conclusion as whether to uphold the conviction. In so doing allowance should be made for the fact that I neither heard nor saw the witnesses testify (see *Pandya v Republic* [1957] EA 336 and *Kariuki Karanja v Republic* [1986] KLR 190).
5. The prosecution case was the appellant was among others who defiled the complainant, PW 1. She testified that she was 15 years old attending primary school. She recalled that on 2<sup>nd</sup> October 2010 at about 2 pm she passed by the appellant's house as she was going to the river to fetch water. The

appellant, who was standing outside, called her. She then narrated what happened to her as follows;

*He called me by name ..... He went inside the house. I went and met him in the house. Immediately I entered he locked the door from inside. Inside there was another boy called Ouma. Ouma came with a liquid like spirit with [a] handkerchief and placed it in my nose and I was unable to breathe. I fell unconscious and I found myself at Homa Bay Hospital ..... I was feeling pain in my genitalia ..... It was the Philent and Ouma who were in the house. I saw them before I fell.*

6. PW 3, the brother to PW 1, testified that on the material day he was with his sister when she went to fetch water. She did not return so he decided to find out where she went. Upon reaching the appellant's house, he heard PW 1 scream. He proceeded to the house and knocked and after a while the appellant opened the door but he left through the window of the bedroom. He found PW 1 lying on the bed foaming in her mouth with saliva. Her skirt was folded without her underpant. He tried looking for the appellant but without avail so he called his father and they took PW 1 first to Ndiru Dispensary then to Homa Bay District Hospital where she admitted for a week.

7. PW 4, the father of PW 1 and PW 2, recalled that on the material day he had been working on his land. In the evening PW 3 came home crying and informed him what had happened to PW 1. He went to the house and found PW 1 seated on the floor near the bed with her skirt cut. She had injuries on her elbows and knees. He took her to Ndiru Health Centre and thence to Homa Bay Hospital where she stayed for a week. He stated that she was only able to talk after 5 days. She identified the appellant as the person who blindfolded her.

8. The investigating officer, PW 5, testified that she was instructed to investigate a case of defilement. On 3<sup>rd</sup> October 2010, she met PW 4 and PW 1's brothers who made the report. She visited PW 1 in hospital and found her unconscious. She recorded her statement once she regained consciousness. She completed her investigations and caused the appellant to be charged.

9. Dr Ayoma Ojwang (PW 2) who testified and produced the medical report prepared by Dr Watongo who worked under him. He was familiar with her handwriting and signature as required by **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. Dr Watonga examined her on 4<sup>th</sup> October 2010 and observed that her skirt had tears but no stains. PW 1 had bruises on the left knee and her vagina had lacerations and a whitish discharge. No specimens were taken.

10. The appellant elected to give sworn testimony in his own defence. Although he stated that he knew PW 1 as they were cousins, he denied that he committed the offence. He stated that on 2<sup>nd</sup> October 2010, he was in school sitting for his chemistry examination and he went home at 6.00pm on that day. He stated that he had differed with PW 4 and on 19<sup>th</sup> October 2010 while he was in his shamba, PW 4 came and chased him with a panga whereupon he went to report to the chief. They were summoned by the chief and made peace. He further testified that he was arrested on 23<sup>rd</sup> October 2010 by Administration police officers and taken to Rangwe Police Station.

11. Under **section 10** of the ***Sexual Offences Act***,

*Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.*

12. The essential element of gang defilement is defilement committed in association of two or more persons. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. "Penetration" under **section 2** of the **Act** means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

13. I have evaluated the evidence presented before the subordinate court and I find that the prosecution proved the elements of defilement. PW 1 narrated how she was lured into a house by the appellant and was suffocated by another person and a few days later found herself in hospital. The testimony of PW 3 and PW 4, who saw her after the ordeal, testified of her distressed state which is consistent with her having been defiled. The fact of defilement was corroborated by the medical evidence of PW 2. The totality of the testimony of PW 1, PW 2, PW 3 and PW 4 is that there was penetration.

14. As to whether the appellant was the person who committed the offence, I find that the PW 1 knew the appellant and his home and she testified how she was lured to the house. In other words the appellant was not a stranger to her and the incident took place at midday which lessened the opportunity of mistaken identity. Furthermore, PW 3 stated that he saw the appellant running away from the house when he went there. This conduct is inconsistent with his innocence.

15. I further add the incident took place in the appellant's house where only he and the other assailant had access. Since the PW 1 was found in an unconscious state after having been sexually assaulted, what could have happened to PW 1 was a matter within the appellant's knowledge. Under the provisions of **section 111** of the *Evidence Act*, the appellant had to give a reasonable explanation how this incident took place in his house. The Court of Appeal in *Mkendeshwa v Republic [2002] 1 KLR 461* explained these provisions as follows;

*In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.*

16. The appellant raised an alibi defence in that on the material day he was doing school examination. When an alibi is proffered, the prosecution is obliged to investigate it but since the appellant had not given any notice that he would raise it and it was being set up after the close of the prosecution's case, it was open to the trial court to weigh it against the prosecution evidence already tendered (see *Wangombe v Republic [1976 – 80] KLR 1683*). As the alibi was not put to any of the prosecution witnesses, I find that in light of the clear and convincing testimonies of PW 1, PW 3 and PW 4 the appellant's alibi defence was an afterthought. As regards that appellant's suggestion that there was a grudge between him and the complainant's father, PW 3, I find that this issue was not put to him during cross-examination and that it is also an afterthought.

17. I now turn to the issue of age of the child. The age of a child is a question of fact and I would echo what the Court of Appeal stated about proof of age for purposes of the *Sexual Offences Act* in *Moses Nato Raphael v Republic NRB CA CRA No. 169 of 2014 [2015] eKLR*. It stated that;

*On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in *Tumaini Maasai Mwanja v. R, Mombasa CR.A. No. 364 of 2010*, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.*

18. The appellant did not contend that PW 1 was not below the age of 18 years. For purposes of the sentence, PW 1 was sufficiently intelligent and gave her age as 15 years. PW 4, her father also testified that PW 1 was aged 15 years. This was sufficient proof of age. Under **section 2** of the *Children Act*, age means the apparent age where the exact age is not known. In this case there was sufficient proof that PW 1 was aged 15 years.

19. Mr Oluoch argued that had the appellant been convicted under **section 8(3)** of the *Sexual Offences*

**Act**, he would have been sentenced to not less than 20 years imprisonment. He therefore requested the court to enhance the sentence. Although the submission is attractive, I am constrained to hold, as guided by the Court of Appeal in ***Charles Muriuki Mwangi v Republic CA Nyeri Criminal Appeal No. 24 of 2014 [2015]eKLR***, that since notice to enhance the sentence was not given prior to the hearing, to enhance the same would violate the appellant's right to a fair hearing. Furthermore, this is not a case where the sentence is clearly illegal as it is permitted by the relevant section of the law.

20. I hold that the prosecution proved the case against the appellant beyond reasonable doubt and I accordingly affirm the conviction and sentence.

21. The appeal is dismissed.

**DATED and DELIVERED at HOMA BAY this 26<sup>th</sup> day of August 2015**

**D.S. MAJANJA**

**JUDGE**

Mr Nyauke instructed by Nyauke and Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecution instructed by the Office of the Director of Public Prosecutions for the respondent.