



**GEORGE ODHIAMBO MWALO ..... APPELLANT**

**-VERSUS-**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

***(Being an appeal from the conviction and sentence of the Senior Resident Magistrate’s Court at HomaBay, Hon. S. M. Mwendwa in Criminal Case No. 920 of 2007 dated 23<sup>rd</sup> November, 2007)***

The appellant **George Odhiambo Mwalo** was charged with the offence of defilement contrary to section 8 (i) as read with section 8(4) of the **Sexual Offences Act** 2006. According to the stated particulars of the charge he unlawfully had carnal knowledge of one **B. A**, aged 16 years. Initially no alternative charge was preferred against him. Subsequently after plea had been taken he was required to plead to an alternative charge of indecent assault contrary to section 11 **Sexual Offences Act**. The appellant pleaded not guilty to both charges. He was tried and convicted by the SRM’s court at Homabay. He was dissatisfied with the judgment hence the present appeal.

Briefly the prosecution case before the trial court was that the appellant way laid the complainant on her way to school to attend preps at about 7.30pm on 3<sup>rd</sup> July, 2007. He threatened her with death and forced her to accompany him to his house nearby. Once in the house, he locked the door, forced her to undress and forced her to have sexual intercourse. He kept her locked in the house from 3<sup>rd</sup> July, 2007 to 15<sup>th</sup> July 2007. He provided her with a bucket into which to relieve herself. He repeatedly had sex with her every night during the whole period.

On 15<sup>th</sup> July 2007, the appellant released the complainant when he suspected that he was about to be discovered. She ran home half dressed and reported her ordeal to her uncle who later reported to the area village elder. Her mother also reported the incident to her school’s head teacher. The appellant was subsequently arrested and charged, tried and convicted.

In his present appeal he has set out five ground which taken together are: that the trial court convicted him on the prosecution’s evidence which was not credible that there was no evidence to link him to the offence; that the complainant’s school mates were not called to testify; and, that the trial court did not consider his defence.

The appellant has also presented written submissions in which he has stated that the investigation was not thoroughly done. He has taken issue with the complainant’s testimony that she was held hostage for two weeks stating that she would have been able to escape or alert the neighbours.

The appellant has further submitted that given the fact that the complainant had the opportunity to escape but did not escape implies that she was in his house willingly. Finally, the appellant has submitted that the age of the complainant was not ascertained and that the omission subjected him to prejudice in the sentence meted out by the trial court.

The respondent through its learned counsel **Mr. Mutai**, opposed the appeal. In his submissions he recalled that the appellant took the complainant to his house by force and forced her to stay there for above two weeks while repeatedly having forced sexual intercourse with her. Her testimony before court as Pw1 was corroborated by that of her father who testified as PW2. PW2 reported the incident to the clan elder one **Dickson Otieno Oyoka** who testified as PW3 and stated that upon receiving a report from the complainant's head teacher, he led a raid to the appellant's home where he arrested the appellant and recovered the complainant's school uniform.

The investigating officer, PW5 said that after his investigations he preferred charges against appellant. The complainant was examined by one A L of S District Hospital who testified as PW6. He testified that he found visible injuries to the labia majora and minora but no vaginal tears. The hymen was also broken and the cervix had visible injury. PW6 concluded that there was evidence of penetration.

I am under duty sitting as a first appellate court to evaluate the evidence afresh and to arrive at my independent determination, all the while being conscious that I do not have the benefit of hearing and seeing the witnesses. See **Okeno –vs- Republic (1972) E. A 32; Patrick & Another –vs- Republic (2005 2 KLR 162.**

From my analysis of the prosecution evidence on record, as already set out above, I find that the offence was proved. The testimony of PW1 was corroborated in material respects by PW2 who stated that her daughter (in actual fact niece) went missing for about 2 weeks. On her return home and upon giving her story, her uniform was recovered at the house of the appellant. The evidence of PW5 has already been set *extenso* in the preceding paragraphs. It was conclusive that penetration did take place. The identity of the appellant was also not in doubt at any time during the trial.

The appellant seems to say in his submissions that if the complainant was in his house for that long then she was there willingly as she had an opportunity to escape which she did not utilise. I seem to agree with the appellant for the reason that the complainant stated that an unnamed neighbour used to hear her scream at night and that the appellant used to leave her in the house alone during the day. Had she screamed the neighbours would have heard her and rescued her. However, such a defence is not available to the appellant. He was charged with defilement. The age of the complainant was established to be 16. She had no capacity to give consent. So once the trial court found that the appellant had had sexual intercourse with her, it became immaterial whether she was in his house willing or unwillingly. That is the law.

On sentence, the appellant was convicted under section 8 (4). The section provides that a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years. The appellant was sentenced to 20 years imprisonment. I find that the appellant was given a lawful sentence. However, I would in the circumstances of this case, allow the appellant benefit of the minimum sentence. I therefore allow the appeal against sentence only, quash the twenty year sentence imposed by the trial court and substitute therefor a sentence of 15 years imprisonment, being the minimum sentence provided by law.

Accordingly I uphold the conviction and reduce the sentence to 15 years imprisonment.

**Judgment dated, signed and delivered at Kisii this 27<sup>th</sup> day of September, 2012.**

**R. LAGAT-KORIR**  
**JUDGE**

**In the presence of:**

George Odhiambo Mwalo :appellant (present/absent)

..... :counsel for respondent (present/absent)

Edwin Mongare :court clerk

**R. LAGAT-KORIR**  
**JUDGE**