



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 53 OF 2013**

**BETWEEN**

**PHILIP OCHIENG OWINO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(From the original conviction and sentence in Criminal Case No. 112 of 2012**

**in the Senior Principal Magistrate's court at Siaya delivered by Hon. J.N.Sani (Ag. SRM on 17th April, 2013)**

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

**Background**

1. **PHILIP OCHIENG OWINO**, the Appellant and another whose appeal was determined in **Stephen Odhiambo Ododa v Republic [2015] eKLR** were convicted for the main count of Gang Defilement contrary to section 10 of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 20 years each.

**The Trial**

2. The prosecution called 5 witnesses in support of the charges. **PW1 CAO**, the complainant recalled that on her way to school on 1st February, 2012, she met the appellant and his co-accused one Stephen Odhiambo Ododa. It was her evidence that the two took her to the Appellant's house (simba) where they locked her in and left but not before Appellant who had a panga threatened to cut her if she attempted to leave.

3. Complainant told court that Appellant and his co-accused returned at night and they defied her in turns. It was her evidence that they would lock her in the house in the morning, return at night and defile her in turns for 6 days until 6th February, 2012 when they let her go.

4. Complainant stated that after she left Appellant's house on 6th February, 2012, she met one Kol a neighbour who took her home where she narrated the ordeal to her father and mother and was thereafter taken to Siaya hospital where she was examined as well as Siaya police station where the incident was reported.

5. **PW2 LAN**, the complainant's mother told the court that complainant who was 14 years did not return home from school on 1st February, 2012 and was not found until 6th February, 2012 when she returned home and reported that she had been detained and gang defiled whereupon the witness took her to hospital where a P3 form was filled.

6. **PW3 Bob Onyango Ahenda**, who was among the people who mounted a search for the complainant said that the minor was found in a bush on 6th February, 2012 and she told them that she had been gang defiled by the Appellant and another.

7. **PW4 Simon Nyamwembe**, a clinical officer examined complainant and produced her P3 form with results that the minor's external genitalia was normal with no tears but that the hymen was broken and there was presence of epithelial cells which was evidence of friction of the vaginal wall.

8. **PW5 CPL ANTONY MOGO** the investigating officer testified that upon receipt of complainant's report, the Appellant and another were arrested and charged.

9. The Appellant gave sworn defence and stated that he did not see complainant between 1st and 6th February 2012 and that he was arrested from his house on 8th February, 2012 and charged with offences that he did not commit.

10. In a judgment dated 17th April, 2013, appellant and his co-accused were convicted and each was sentenced to serve 20 years imprisonment.

### **The Appeal**

11. The conviction and sentence provoked this appeal. In his petitions of appeal, the Appellant raised 7 grounds but in his submissions filed on 7th March, 2019, he raised three grounds to wit:-

1. ***That the prosecution did not establish the hymen prior to the alleged offence by stating whether it was freshly broken***
2. ***That Section 33 of the Sexual Offences Act was not complied with***
3. ***That the age of the complainant was not proved***

12. When the appeal came up for hearing on 2nd April, 2019, the appellant stated that he was wholly relying on his grounds of appeal and written submissions.

13. Mr. Muia, learned State Counsel opposed the appeal and stated that the complainant was defiled by Appellant and another for 6 days. The state urged the court to be persuaded to dismiss the appeal since the appeal against the Appellant's co-accused had also been dismissed.

### **Analysis and Determination**

14. As the first appellate court in the instant appeal, I am required and indeed duty bound to subject the evidence tendered in the lower court to thorough re-evaluation and analysis so as to reach my own conclusion as to the guilt or otherwise of the appellant. In doing so I must give allowance to the fact that I neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour. (See **OKENO – VS – REPUBLIC (1972) E.A. 32.**)

15. I have considered the evidence on record *vis a vis* the grounds of appeal and submissions by the parties herein.

16. It is true that other than the evidence of PW1, no other eye witness testified on the whole incident. Complainant's evidence that she was detained by the Appellant and his co-accused for 6 days is corroborated by her mother who told court that the minor disappeared from 1st February to 6th February, 2012.

17. The evidence on record reveals that the Appellant and his co-accused were not strangers to the complainant and there could therefore not have been a possibility of mistaken identity. The incident took place for 6 days and the circumstances of the case suggest that the complainant could not have had any difficulty recognizing her captors.

18. Medical evidence confirmed that the hymen was not freshly broken but the presence of epithelial cells which the clinical officer stated was evidence of friction on the vaginal wall corroborated the complainant's evidence that she had been repeatedly defiled. And although the evidence of defilement is that of a single witness, complainant's disappearance for 6 days and medical evidence provided sufficient proof that the complainant was telling the truth.

19. Section 33 of the Sexual Offences Act that gives the trial court powers to obtain evidence of the surrounding circumstances and impact of any sexual offence upon a complainant uses the word "**may**". The power is discretionary and not a mandatory obligation on the trial court. Non-compliance with the same is therefore not fatal to the prosecution case.

20. The *penalty for various offences under the Sexual Offences Act, 2006, is determined by the age of the complainant*. An accurate assessment of the age of the child is a material factor in charging, convicting and sentencing. Complainant told court that she was 16 years whereas her mother said she was 14 years. In the case of **Richard Wahome Chege v Republic [2014] eKLR**, the Court of Appeal held as follows:

***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth" It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself"***

21. Although no documentary evidence was tendered to prove complainant's age, I am on the basis of the foregoing authority, that complainant was a minor and the charge of gang defilement preferred against the Appellant and his co-accused was proper.

### **Disposition**

22. Having considered the evidence in its totality, I am satisfied that the appellant was convicted on sound evidence. Accordingly and for the reasons set out hereinabove, this appeal is dismissed and the conviction and sentence imposed on the appellant upheld. It is so ordered.

**DELIVERED AND SIGNED AT KISUMU THIS 4<sup>th</sup> DAY OF April 2019**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant - Felix**

**Appellant - Present in person**

**For the State - Mr. Muia**