



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT SIAYA**

**CRIMINAL APPEAL NO. 103 OF 2016**

**BETWEEN**

**VICTOR OCHIENG ONYANGO.....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence dated 13<sup>th</sup> November 2015 in Criminal Case No. 226 of 2015 at Ukwala Law Court before Hon. C. N. Wanyama, RM)*

**JUDGMENT**

1. The appellant appeals against a conviction for the offence of gang defilement contrary to **section 10** of the ***Sexual Offences Act***. The particulars of the charge were that on 25<sup>th</sup> May 2015 at [particulars withheld] Sub-location, Ugenya District within Siaya County in association with one **AO**, he caused his penis to penetrate the vagina of **NBE** aged 13 years.

2. The prosecution case was that on 25<sup>th</sup> May 2015, the complainant, PW 1, went with her sister PW 3 to get the books from the appellant. When they reached his house, they found AO and the appellant. A O switched off the light and they told them not to get out but PW 3 ran away. PW 1 narrated how the appellant and AO forced her to remove her clothes, they beat her with a stick and proceeded to penetrate her. They then gave her some liquid which caused her to sleep.

3. In the meantime, PW 1 and PW 3's mother, PW 2 recalled that on the morning of 26<sup>th</sup> April 2015, she did not find the children in the kitchen where they normally slept. Their beds had not been slept in. She began looking for the girls whereupon she found PW 1 near the toilet. She was bleeding from her private parts and her left eye was bruised. She had to be assisted. She told her mother what happened and identified the appellant and A O. On her part, PW 3 testified that after she ran away she went to another homestead and slept till morning. PW 1 and PW 3's brother, PW 4, confirmed that the girls did not sleep home and she assisted PW 1 to walk when they found her at the gate that morning.

4. The incident was reported at the police station on 26<sup>th</sup> April 2015 at 9.30am by PW 2. The Investigating Officer, PW 5, recalled that PW 1 directed them to the scene of the incident but AO and the appellant were not there. He issued a P3 form to PW 1. PW 6 examined PW 1 on that morning and confirmed that she had a laceration on the left eye, and lacerations on her legs. Her hymen was torn and there was dry blood at the vaginal opening. In his defence, the accused only gave his account of the arrest and denied the charges.

5. The essence of gang defilement is the common intention of two or more people acting in consent to defile a child. In this case the testimony of PW 1 and PW 3 is clear that they went to the place where they found AO and the appellant who proceeded to lock PW 1 in a room whereupon they physically and sexually assaulted her. The intention of the appellant and AO was clear and it was to have sexual intercourse with PW 1 and PW 3. PW 1's testimony was clear and consistent with that of PW 3. She reported to PW 2 in the morning. PW 2 saw her in a distressed state. When she was examined by PW 6, the injuries were consistent with penetration and physical assault.

6. The appellant's defence was weak tea when considered alongside the prosecution case. The appellant

was known by PW 1 and PW 3 and nothing emerged in cross-examination or in the entire evidence to cast doubt of PW 1's testimony.

7. The conviction and sentence are affirmed.

8. The appeal is dismissed.

**SIGNED, DATED and DELIVERED at SIAYA this 2<sup>nd</sup> day of February 2018**

**D.S. MAJANJA**

**JUDGE**

Appellant in Person

Ms Odumba, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State

Court Assistants: Laban O. Odhiambo, Ishmael Orwa