



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMA BAY**  
**CRIMINAL APPEAL NO 56 OF 2015**

**BETWEEN**

**JAMES OJWANG EMOKOI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by S.M. Mokuu (SPM) in*

*Oyugis SPM Criminal Case No 7 of 2014)*

**JUDGMENT**

1. **JAMES OJWANG EMOKOI** (the appellant) was convicted on a charge of defilement contrary to section 8(3) of the Sexual Offences Act No 3 of 2006 and sentenced to 20 years imprisonment. The prosecution case was that on 4/04/2016 in **RACHUONYO SOUTH** district within Homa Bay County he intentionally and unlawfully caused his penis to penetrate the vagina of **MAO** a child aged 15 years old. The appellant denied the charge and prosecution called a total of 6 witnesses to prove its case.
2. **MAO** (PW1) told the trial court that she was born on 25/11/2001 and was a pupil at [**Particulars withheld**] **PRIMARY SCHOOL**. On 4/4/2016, she had gone to pick a book from her friend's place when she met the appellant (whom she did not know before) along the way at about 7.30pm. He greeted her and attempted to stop her but **MAO** decided to run away. He pursued her, got hold of her hand and warned her not to scream. He held her by the neck and pointed a knife at her then led her to his house where he prepared supper and thereafter told her to go to bed in a separated house. He undressed her then undressed himself and had sex with her the whole night-this was her first sexual encounter.
3. In the morning the appellant gave her water to clean herself then he took her back to the house-although he was not in the house during the day. On the second night they again had sex and thereafter **MAO** proceed home via one **JACKLINE**'s place. Naturally upon arrival at home her mother asked her to explain where she had been and she was taken to hospital for medical examination. **MAO** explained that she was able to identify the appellant well because she stayed with him for two days.
4. **N A O** (PW2) –the girl's mother confirmed that her daughter went to school on 4/4/2016 but did not return home. She got a message on her phone from one **JAMES EMOKOI** saying **MAO** would return the next day. She made a report to the area chief and also to the school and on 6<sup>th</sup> April 2016, while on her way to make a report at **OTHORO** police post she met **MAO** and upon inquiring the girl said a certain young man had taken her to his house and that he had sex with her.
5. **TOM ODHIAMBO OJWANDO** (PW3) the Assistant Chief of [**Particulars withheld**] sub-location

confirmed that PW2 reported to him that her daughter had been missing since 04/04/2016 and he advised her to inform the school authorities and the police. He arrested the appellant after visiting his place of work in the company of a village elder one **GEOFFREY OTIENO ODHIAMBO** (PW4) because:

**“it was suspected that the complainant would be putting up with the accused.”**

Both witnesses confirmed that MAO said she had been with the appellant.

6. **SAMUEL JUMA** (PW5) the clinical officer who examined **MAO** on 06/06/2016 found that her hymen was intact but there was sperm fluid inside her vagina and urinalysis revealed the presence of sperms in the urine and he formed the opinion that she had been defiled. However the appellant was not availed at the medical facility for examination

7. In his unsworn defence the appellant stated that he did not defile **MAO** and her family simply wanted money from him. He described the evidence presented by the prosecution as falsehoods

8. The trial magistrate noted that **MAO**'s age was not contested and the child dedication card confirmed that she was a minor at the time of the incident. Further that she had not been at home on 04/04/2016 and 05/04/2016. He rightly observed that in an offence of this nature it was important to establish whether there had been penetration and stated that although **MAO**'s hymen was found to be intact he did not get the impression that she was lying when she described how the appellant undressed her and inserted his male organ into hers. The trial magistrate described **MAO** as forthright as she described every aspect of what happened to her in a straightforward manner. It was on account of this that the court made a finding that there had been penetration.

9. The trial magistrate also pointed out that the pair had been together for long enough for **MAO** to get sufficient opportunity to identify the appellant and there was no doubt that the appellant had committed the offence

10. The appellant challenged the findings on grounds that when the first report was made to police. PW1 neither mentioned his name nor gave a description of his physical appearance. Further that no items of clothing were produced as exhibits and the court admitted the evidence of the clinical officer which lacked merit.

11. The appellant relied on written submissions and argued that there was no proof of the complainant's age as no age assessment was ever done and the baptismal card could have been obtained to serve the interest of the aggrieved party. He was also adamant that the fact that the hymen was intact was proof that no penetration had taken place and there was no proof that the sperms found in her urine belonged to him

12. In opposing the appeal Mr. Oluoch submitted on behalf of the State that **MAO** had testified how she stayed for two days with the appellant and there was no way she could have failed to identify him. Further the girl's mother received a message on her phone saying **MAO** would return the next day and the sender happened to bear the names of the appellant. Counsel argued that the medical examination clearly showed that **MAO** had been defiled and the issue about the girl's age was confirmed both by the baptismal card and her mother's evidence.

13. Indeed at the hearing there was no contest regarding **MAO**'s age, and the trial magistrate noted as much. There was nothing raised at the trial to suggest that **MAO** was over 18 years and indeed despite there being no contest on the matter, the trial magistrate analyzed that point and concluded that she was indeed a minor as confirmed by her mother who knew her date of birth. I find no reason to fault the trial magistrate on that point.

14. As to whether there was proof of defilement – the issues to be considered is proof of penetration as indeed contemplated by **section 8(1)** of the **Sexual Offences act** which provides that:-

**“A person who commits an act which causes penetration with a child is guilty of an offence**

**termed defilement.”**

**Section 2** of the Act defines penetration to mean:-

**“... the partial or complete insertion of genital organs of a person into the genital organs of another person.”**

15. Would the presence of spermatozoa in PW1’s genitalia and urine prove that she had been defiled? There is a list of authorities on this matter – that the mere presence of spermatozoa in a female’s genitalia does not prove defilement – there has to be evidence of penetration. How would one prove penetration? There would have to be signs of entering into the genitalia – whether forceful or otherwise.

16. In this instance the clinical officer did not observe any injuries, but if there was no resistance by MAO, would there be bruises on a first sexual encounter? How else would spermatozoa had found the way into her genitalia and urine if not through a sexual encounter? Does one look for spermatozoa or urine or is it by way of a high vaginal swab?

17. This latter finding of spermatozoa in her genitalia, coupled with her own evidence and absence of injuries and an intact hymen do not make medical sense to me. How does **MAO** engage in sex for 2 nights for the first time in her life yet no injury, no sign of penetration, no broken hymen?

18. Consequently my finding is that the conviction was not safe and is quashed.

19. The sentence meted is set aside. The appeal is allowed and appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Delivered and dated this 28<sup>th</sup> day of February, 2017 at Homa Bay**

**H.A. OMONDI**

**JUDGE**