



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUSIA**  
**CRIMINAL APPEAL NO. 44 OF 2015**  
**EDWIN OCHIENG OUMA.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in criminal case No. 870 of 2013  
of the Chief Magistrate's Court at Busia by D.O Ogola – Chief Magistrate)*

**JUDGMENT**

The appellant, **EDWIN OCHIENG OUMA**, was convicted for the offence of indecent act with a child contrary to section 11(A) of the Sexual Offences Act No. 3 2006.

The particulars of the offence were that on 11<sup>th</sup> June 2013 at [particulars withheld] village, Busia Township location of Busia County, he intentionally and unlawfully committed an indecent act with **R A O, a child aged 7 years**.

He pleaded not guilty and he was tried and convicted. He was sentenced to five years imprisonment.

He now appeals against the sentence.

The state conceded that the appeal was harsh through Mr. Owiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

When the complainant was going home from school, the appellant called her and took her to some maize plantation where he inserted his finger into her genitalia. She felt pain and cried. He carried her and left her at the gate of the school. The complainant is aged 7 years. B C met the appellant in her garden carrying the complainant who was crying. The complainant contended that the appellant inserted his fingers in her genitalia and she felt pain and started crying. The medical evidence confirmed the complaint.

The appellant was tried under section 11(A) of the Sexual Offences Act which caters for adult complainants. It provides:

***Any person who commits an indecent act with an adult is guilty of an offence and liable to***

***imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both.***

This was erroneous. He ought to have been charged under section 11(1) of the Sexual Offences Act which states:

***Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.***

The appellant having benefitted from an error by the prosecution and the trial court, he cannot be heard to say that the sentence was harsh. I will not therefore disturb the sentence. His appeal is therefore dismissed.

**DELIVERED and SIGNED at BUSIA this 22<sup>nd</sup> day of June, 2017**

**KIARIE WAWERU KIARIE**

**JUDGE**