



the appellant had attempted to defile the child. She knew the appellant as her neighbour of two years. The information about the alleged attempt was received from **FE(PW4)**, sister to Irene (PW3). She (PW4) said that she was at home when she heard the child crying while inside the appellant's house. She went there and found the child completely naked. She (child) was with another child inside the house. The appellant was also inside the house. F(PW4) removed the crying child from the house as the appellant left to go and hide. The child allegedly indicated that the appellant had attempted to defile her.

The child appeared in court as a witness (PW2) but the learned trial magistrate noted that she was of tender years and apprehensive of the environment such that she could not testify. In that regard, the learned trial magistrate was completely in order.

**Bernard Bundotich (PW1)**, a clinical officer at Lodwar district hospital examined the child and compiled the necessary P3 form which he produced.

**P.C. Peter Munene (PW5)**, based at Lodwar police station investigated the case after the necessary report was made. Thereafter, he preferred the present charge against the appellant.

The appellant's defence was a denial and a contention that he was framed up by the mother of the child for whom he had worked as a watchman.

The appellant's witness, **Walkman Isaiah (DW2)**, indicated that the appellant did nothing against the child on that material date.

The learned trial magistrate after considering the foregoing evidence arrived at the conclusion that the charge against the appellant had been proved beyond reasonable doubt.

It is apparent from the judgment of the learned trial magistrate that his main reason for convicting the appellant was that the appellant said nothing about his intention in removing the child's clothes and that being a male person and the child being a female, the only logical conclusion coming to mind was that the appellant intended to defile the child.

With respect, such reasoning could not hold water since there was no evidence or sufficient evidence to show that the child was made naked by the appellant and the fact that the child was found in the house of the appellant while naked only amounted to suspicion and nothing more. There was nothing else to suggest that an attempt was made by the appellant to defile the child. The medical evidence vindicated the appellant in that regard. It is obvious that having failed to find any substantial evidence linking the appellant to the alleged offence, the learned trial magistrate placed reliance on suspicion cast upon the appellant such that he (appellant) was required to prove his innocence.

In criminal cases, the burden is always on the prosecution to prove its case beyond reasonable doubt and not for the accused person to prove his innocence.

In this court's opinion, there was insufficient evidence to convict the appellant. The learned prosecution counsel was correct in conceding this appeal.

The appellant's conviction by the learned trial magistrate was not proper and sound and is hereby quashed with the resultant effect that the sentence imposed against the appellant is set aside.

The appellant shall be released forthwith unless otherwise lawfully held.

**[Delivered and signed this 14th day of May, 2013.]**

**J.R. KARANJA.**  
**JUDGE.**

