**REPUBLIC OF KENYA**

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

**H.C. CRIMINAL APPEAL NO.18 OF 2012**

(An Appeal arising out of the Conviction and Sentence of NJAGI M.W. - RM delivered on 14th July 2011 in Busia SPM.C.CR.C.No.102 of 2011)

**PETER OCHIENG OPONDO……..…….....**
**…….APPELLANT**

**VERSUS**

**REPUBLIC…….....…….……..…….....RESPONDENT**

**JUDGMENT**

The Appellant, Peter Ochieng Opondo was charged with defilement contrary to **Section 8(1) & (2**) of the **Sexual Offences Act**. The particulars of the offence were that on 26th January 2011 at Bumina Village in Bujumba Sub-location of Busia County, the Appellant intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of R E N, a child aged eight (8) years. He was alternatively charged with committing an indecent act contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars of the offence were that on the same day and in the same place, the Appellant intentionally and unlawfully committed an indecent act by rubbing his penis into the vagina of R E N, a child aged eight (8) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted of the cognate offence of attempted defilement contrary to **Section 9** of the **Sexual Offences Act**. He was sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised four (4) grounds of appeal challenging this conviction and sentence. He was aggrieved that he had been convicted on the basis of facts which did not establish his guilt to the required standard of proof beyond any reasonable doubt. The Appellant accused the trial court of failing to take into consideration his defence before arriving at the decision to convict him. He took issue with the fact that the trial court had convicted him on the basis of contradictory, inconsistent and uncorroborated evidence of the prosecution witnesses. He was of the view that his rights were violated during trial. In the premises therefore, the Appellant urge the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of his appeal, the Appellant, who was acting in person, presented to the court written submission in support of his appeal. He urged the court to allow the appeal. Mr. Kelwon for the State made oral submission urging the court to dismiss the appeal on the grounds that the prosecution had established its case on the charge that was brought against the Appellant to the required standard of proof beyond any reasonable doubt.

The complainant in this case was at the material time aged eight (8) years. She testified as PW1. In her testimony, she identified herself as M O. The charge sheet talks of the complainant being one R E N. When PW5 C B M testified before the trial court, he told the court that the complainant was his child. He produced a birth certificate which indicated the names of the child to be R E N. He told the court that at school the child was known by the name M O. PW2 a teacher at ***[particulars withheld]*** Primary School where the complainant is a pupil referred the complainant as M A. PW4 E W M, the Deputy Head teacher of ***[particulars withheld]*** Primary School did not refer to the complainant by name. The issue which the trial court tried to grapple with, and which this court is considering, is what the actual name of the complainant is. It is inconceivable that the complainant could have different names in her birth certificate and be referred by different name while in school. This court will return to this aspect of the case later in this judgment.

According to her testimony, the complainant testified that she was confronted by the Appellant at about 2 p.m. as she was walking back to school. She told the court that the Appellant enticed her and took her to a bush where he undressed her before he had sexual intercourse with her. Apart from having sexual intercourse with her, the complainant testified that the Appellant sodomized her. She stated that she could not raise alarm because the Appellant blocked her mouth with his hands. She recalled that she was rescued by a woman who found them in the act. She testified that upon being discovered the Appellant ran away. Crucially in this case, the woman who is alleged to have found the Appellant defiling the complainant was not called to testify. This was even after PW4 told the court that a report was made to the school by two women who claimed that the complainant had been defiled. The complainant testified that as a result of the sexual assault, she felt pain in her vagina and anus. The complainant was taken Khunyangu Sub-district Hospital where she was examined by PW3 Makokha Lazarus, a clinical officer based at the said hospital. He noted that the clothes of the complainant were not blood stained. The labia was inflamed, it was red and swollen. There was no visible discharge. The hymen was intact. There were no tears or bruises. Critically, the doctor did not examine the complainant's anus to establish her claim that she had been sodomized. Even with this finding, PW3 found that the complainant had been defiled. The trial court did not believe the clinical officer's finding to the effect that the complainant had been defiled. He reached the finding, which this court agrees with, that there was no evidence to support the claim by the complainant that she had been penetrated.

The Appellant was arrested within the vicinity by the members of the public. According to PW5, after his arrest, the complainant was taken to where the Appellant was. The complainant positively identified the Appellant. It is important at this juncture to point out that the complainant did not know the Appellant prior to the alleged incident. She was a stranger to the Appellant. Her testimony before the trial court did not identify the Appellant by his clothing or by his physical appearance. Other than the testimony of PW5 which was to the effect that the complainant had point out the Appellant as **"huyu",** there is no other independent evidence which connects the Appellant to the alleged commission of the offence.

The Appellant, in his defence denied committing the offence. He told the court that he worked as a boda boda operator in Bumala stage. He recalled that he was summoned to go to Bumala Police Patrol Base where he was arrested and remanded. He shocked when he was charged the present offence. He told the court that he did not even know who the complainant was.

As the first appellate court, this court is required to reconsider and to reevaluate the evidence adduced before the trial court and reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any finding regarding the demeanour of the witnesses (see **Njoroge –Vs- Republic [1987]KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge of attempted defilement to the required standard of proof beyond any reasonable doubt.

Upon reevaluating the facts of this case, there are certain disturbing issues that arise. First, is the issue of the name of the complainant. It was clear to this court that the birth certificate which was produced in court as that of the complainant could not possibly be true. It is inconceivable that a child of eight (8) years could have a completely different name in school to that which appears in her birth certificate.

There is no nexus between the names R E N and M A or O. The two sets of names are completely different. In the circumstance of this case, it can safely be concluded that the charge sheet bearing the name M A was defective because it did not refer to the actual complainant who is R E N. It can also be stated that R E N and M A or O are not one and the same person. This raises doubt as to the identity of the complainant.

Secondly, the testimony of the complainant was not sufficiently corroborated by medical evidence. The complainant testified that she was defiled and sodomized. Medical evidence did not establish this fact. This is despite the fact that the complainant was taken to hospital immediately after the alleged incident. Therefore, the complainant's story should have been taken with a pinch of salt. This was because she was not obviously telling the truth. Thirdly, the prosecution did not call crucial witnesses to prove its case. The women who are alleged to have found the Appellant defiling the complainant were not called to give evidence. What we have on record is hearsay evidence by the two teachers of the school where the complainant is a pupil which was to the effect that they had learnt that the complainant had been defiled from the said women. The complainant in her testimony referred to a woman who rescued her as she was being defiled. This woman was a critical witness who should have been called to testify.

Fourthly, the Appellant was not properly identified as the person who either defiled or attempted to defile the complainant. The Appellant was a total stranger to the complainant. He was not known to the complainant prior to the alleged defilement. In such circumstances, it was important that the complainant gives the physical description of the person who sexually assaulted her, including the clothes that the assailant is said to have worn. It is not enough for the prosecution to say that the Appellant had been identified by the complainant when she pointed him out after his apprehension by the members of the public.

All these contradictions and inconsistences taken into totality raised reasonable doubt that the Appellant actually committed the offence. The prosecution did not prove its case against the Appellant to the required standard of proof beyond any reasonable doubt. In the premises therefore, the alibi defence of the Appellant may well be true. The appeal is allowed. The conviction of the Appellant by the trial court is hereby quashed. The sentence of ten (10) years imprisonment imposed on him is hereby set aside. The Appellant is acquitted of the charge of attempted defilement. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**L. KIMARU**

**JUDGE**

**DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 20TH DAY OF JUNE 2013.**

**F. TUIYOT**

**JUDGE**