REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

H.C. CRIMINAL APPEAL NO.14 OF 2012

(An Appeal arising out of the Conviction and Sentence of M. Munyekenye RM delivered on 13th July 2011 in Busia SPM.C.CR.C.No.247 of 2010)

STEPHEN OTIENO……..…….....
…….APPELLANT

VERSUS

REPUBLIC…….....……..…….....RESPONDENT

JUDGMENT

The Appellant, Stephen Otieno was charged with defilement contrary to **Section 8(1) & (3)** of the **Sexual Offences Act**. The particulars of the offence were that on 29th February 2008 in ***[particulars withheld]*** Village in Busia District, the Appellant intentionally and unlawfully committed an act which caused his penis to penetrate into the vagina of J P W, a child aged nine (9) years. He was alternatively charged with the offence of committing an indecent act with a child 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 onto the vagina of J P W, a child aged nine (9) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted of the alternative charge of committing an indecent act with a child and sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of a charge sheet which did not reflect the true particulars of the case. He took issue with the fact that the trial court relied on contradictory and conflicting evidence of the prosecution witnesses to arrive at the decision to convict him. He was aggrieved that he had been convicted on the basis of insufficient evidence which had not established the offence of indecent assault. He faulted the trial magistrate for failing to consider his alibi defence before reaching the determination to convict him. In the premises therefore, the Appellant asked the court to allow the appeal, quash his conviction and set aside the custodial sentence that was imposed on him.

At the hearing of the appeal, the Appellant presented to the court his written submission in support of the appeal. He urged the court to allow the appeal. Mr. Kelwon for the State made oral submission urging the court to find that the prosecution had established its case to the required standard of proof beyond any reasonable doubt. He urged the court to uphold the conviction and the sentence of the trial magistrate.

The facts of this case are as follows:

The complainant in this case, J P W, was a child aged eight (8) years at the time the offence is said to have been committed. She testified as PW1. It was her testimony that on 29th February 2008, while she was seated outside their home with her older sister, the Appellant whom she referred to as Otis, requested her to run an errand on his behalf. At first the complainant was reluctant to accede to the request. The Appellant insisted. The complainant eventually acceded to the request. She went to where the Appellant was. She told the court that when she reached where the Appellant was, the Appellant held her by her hand and mouth and pulled her into a thicket. He undressed her. He then removed his trousers and blue inner wear. He then took his penis and put it into her vagina. She recalled that the Appellant forcefully had intercourse with her. She felt pain but could do nothing because the Appellant had used force. When the Appellant finished with her, he warned the complainant not to tell anyone what had transpired or else he was going to cut her with a panga. The complainant went home. She did not tell anyone on that day what had happened.

On the following day, PW3 M A L, the mother of the complainant realized that there was something wrong with the complainant. She had gone to the river with the complainant to do some washing. She asked the complainant to take a bath. She noticed that the pants of the complainant were blood stained. The complainant was reluctant to tell her why her pants were blood stained. Because she knew that the complainant was close to her father, PW2 L O O, she requested PW2 to inquire from the complainant what the problem was. Upon inquiry, PW2 established that the complainant had been defiled by the Appellant on the previous day. The Appellant was well known to the complainant and PW2. They were neighbours. In fact they were related.

PW2, on learning of the sexual assault made a report to PW4 A O A, the area Assistant Chief of Burinda Sub-Location. PW4 advised PW2 to take the child to hospital. The complainant was taken to Khunyangu Sub-district Hospital where it was established that indeed the complainant had been defiled. The P3 form indicating that indeed the complainant had been defiled was produced by PW6 Lazaros Makokha, a clinical officer based at the said sub-district hospital. According to the P3 form, the labia majora and the labia minora appeared red and inflamed. There was a yellowish discharge. The hymen was broken. It was his medical opinion that indeed the complainant had been defiled. A report was made to Bumala Police Station. PW5 PC Nicholas Osendo was assigned to investigate the case. After concluding this investigation, he reached the determination that a case had indeed been established to enable the Appellant to be charged with the sexual offence.

When the accused was put on his defence, he denied the charge. He admitted that he was related to the complainant. He gave an alibi defence. He told the court that on the material day that he is alleged to have defiled the complainant, he was working at Sega shopping centre which is about five (5) kilometres from his home. He told the court that he had not seen the complainant on the material day. He speculated that the complainant may have been sexually assaulted by one of the many people who went to their home to drink busaa and chang'aa. This was because the said alcoholic drinks were sold at their home. He conceded that the complainant knew him. He was emphatic that he could not defile a child of such a young and tender age.

This being a first appeal, it is the duty of this court to reconsider and to reevaluate the evidence adduced before the trial court so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (see **Okeno –Vs- Republic [1972] EA 32).** The issue for determination by this court is whether the prosecution established its case on the charge of defilement to the required standard of proof beyond any reasonable doubt.

This court has reevaluated the facts of this case. The Appellant was convicted on the basis of the evidence of complainant, a child then aged eight (8) years. According to her testimony, the Appellant lured her to a thicket, then forcefully removed her clothes before defiling her. The complainant was known to the Appellant at the time of the incident. The Appellant confirmed in his testimony that the complainant knew him. In fact, the complainant referred the Appellant by his nickname. The incident is said to have taken place on 29th February 2008. The complainant did not report the incident until the following day. She was

prompted to make the disclosure by her parents when they realized that the complainant had a blood stained pant. The reason for this apparent delay in reporting the incident can be explained by the fact that the complainant told the court that she was threatened with physical harm by the Appellant if she told anyone what had happened to her. The evidence of the complainant is essentially that of a child. **Section 124** of the **Evidence Act** requires such evidence to be corroborated by other material evidence except in cases of sexual offences. In the present case, the testimony of the complainant was corroborated by medical evidence which indeed established that the complainant had been defiled. Being a child of eight (8) years, it cannot be said that the child had a previous sexual experience. The sexual assault by the Appellant was the first and traumatic sexual experience for the complainant. Although the Appellant adduced evidence that he was not in the vicinity when the complainant was defiled, upon reevaluating the evidence adduced by the prosecution witnesses, and particularly the complainant, this court was convinced that the complainant was telling the truth.

In the circumstances therefore, this court holds that the prosecution proved its case on the alternative charge of committing an indecent act with a child to the required standard of proof beyond any reasonable doubt. The alibi defence of the Appellant did not displace the strong evidence that was adduced against him by the prosecution witnesses. The claim by the Appellant that he was convicted on the basis of a different charge sheet than the one he pleaded to was not supported by evidence. It was apparent that the Appellant is seeking to take advantage of the fact that this was the second time that he was being convicted after the first trial was vitiated by the fact that the age of the complainant was not established during the first trial. In the second trial, the prosecution produced the birth certificate of the complainant which established that she was eight (8) years old at the time of the incident.

This court therefore finds that no merit with the appeal. The appeal against conviction and sentence is hereby dismissed. The sentence imposed on the Appellant was lawful. The conviction and sentence of the trial court is hereby confirmed. It is so ordered.

L. KIMARU

JUDGE

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

F. TUIYOT

JUDGE