

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 77 OF 2012

(Being an appeal from the conviction and sentence in Criminal Case No. 462 of 2012 by the Resident Magistrate, Kilifi Hon. E.M. Kagoni on 9th August 2010)

HAMISI CHARO KARISA.....1ST APPELLANT

MATANO MASHA.....2ND APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGMENT

1. This Appeal was initially filed by the 1st Appellant. However, when the appeal came up for hearing, the counsel appearing for the 1st Appellant informed the court that he had instructions from the Appellant's co accused to be joined in the Appeal as the 2nd Appellant. That application was not opposed by the state counsel. The Appeal was consequently amended by the consent of the parties to include the 2nd Appellant.
2. The Appellants were charged with the offence of Gang defilement contrary to section 10 of the Sexual Offences Act. No. 3 of 2006. The trial Magistrate convicted the Appellants for the said offence and sentenced them to serve a jail term of 15 years.
3. The particulars of the offence were that on 6th May, 2012 at 19:00 hours, the Appellants intentionally caused their penis in turns to penetrate into the vagina of the complainant, a child of 14 years.
4. The Appellants counsel argued only one ground of appeal, that is, that the charge sheet was defective. According to counsel, an act of defilement cannot be committed jointly. It can only be committed separately. The Appellant's counsel further submitted that the particulars of the charge are tainted with duplicity.
5. On the other hand, the state counsel submitted that the Appellants have not denied that they committed the offence that they were charged with. According to the state counsel, the word "jointly" was not used in the particulars of the offence. The particulars stipulated that the act of defilement by the Appellants was done in "turns".
6. Alternatively, the state counsel argued that even if the charge sheet was defective, the court can and should order for a re-trial in view of the overwhelming evidence against the Appellants.
7. The brief facts of this case are that the complainant, then aged 14 years old, was dragged to a house by the Appellants while on her way home. She lost her consciousness as she was being caressed by the two. She gained her consciousness at around 9.45 pm and found herself naked and in a lot of pain. She dressed up and went to her aunt's place which was not very far from the house that she had been dragged into. She knew the 1st Appellant whom she positively identified as their former shamba boy.
8. It is not in dispute in this appeal, as I have stated above, that the Appellants defiled the complainant. The only issue that I am supposed to determine is whether the charge sheet as drawn is incurably

defective.

9. It is true, as argued by the Appellants' counsel that the act of defilement cannot be committed jointly. I have perused the charge sheet and I have not come across the assertion that the Appellants defiled the complainant jointly. The offence is that of Gang defilement contrary to section 10 of the Sexual Offences Act No. 3 of 2006.

10. Gang defilement is the causing of penetration with a child in the company of another or others. The particulars of the offence are clear that the appellants intentionally caused their penis in turns to penetrate the vagina of the complainant. The offence was committed by the two in "turns" and not jointly, because as has been held by the Court of Appeal, penetration cannot be done jointly. Consequently, I disallow the Appellants' argument that the charge sheet was incurably defective and dismiss their appeal.

Dated and delivered in Malindi this **28th** day of **March**, 2014.

O. A. Angote

Judge