REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 127 OF 2011

(From the original conviction and sentence in criminal case no. 11 of 2011 of the

Chief Magistrate's Court at Malindi before Hon. G. Sagero – RM)

PIUS KILUKA MAELE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with Attempted Defilement of a child contrary to Section 9(1) of the Sexual Offences Act. The particulars of the offence were that on the 13th February, 2011 at about 1.00a.m, at [Particulars withheld] Area in Malindi District within Kilifi County of the Coast Province attempted to cause penetration of his male genital organ namely (penis), into the genital organ namely (vagina) of R K a girl of 15 years.

2. He was also charged in the alternative with the offence of Indecent Act with a child contrary to section 11(A) of the Sexual Offences Act (sic), particulars of which were that on 13th February, 2011 at about 1.00a.m, at [Particulars withheld] Area in Malindi District within Kilifi County of the Coast Province, intentionally and unlawfully committed an indecent act by touching the thighs of R K A girl of 15 years.

3. The Appellant was found guilty of the main charge and sentenced to 10 years imprisonment at the close of the trial. The grounds of appeal as stated seem to attack the sentence but in light of the sections of law quoted therein are really a challenge of the evidence upon which the conviction and sentence were premised and a legal challenge of the charges as laid. That is also the gist of the submission by Mr. Kihanga for the appellant. In particular he challenged the proof of age tendered at the trial and argued that in the circumstances described by the witnesses the offence could not have been committed by the appellant. Through Mr. Musyoki the State opposed the appeal, asserting inter alia that the age of the appellant was proved.

4. The duty of the first appellate court is to evaluate a fresh the evidence of the trial and to draw its own conclusions. The court will not ordinarily interfere with the findings of fact by the Lower Court based on the credibility of witnesses unless the same are obviously wrong or that a reasonable tribunal could not have arrived at such findings (see **Okeno V R [1973] EA 322; Oyier v R [1958] KLR 353).**

5. The prosecution evidence was that the complainant (PW1) R K a girl aged 15 lived at Muyeye with her four siblings and parents in a rented single room. On 13th February, 2011 the family had visitors staying overnight who included PW1's cousins. Because they could not all fit in the one room PW1 and F K (PW2), F M (PW3) and PW1's siblings had to sleep in a veranda facing nine other rooms occupied by other tenants, including the appellant.

6. As the girls slept, they noted that the appellant's door was open but he turned down their request to close it. At 1.00am PW2 was woken up by the presence of the appellant among the girls. He knelt next to PW1, naked with towel in hand. The girls raised an alarm which roused PW1's mother S M J (PW5) from her sleep. She got out of her room and on hearing PW2's report knocked on the appellant's door, demanding an explanation. The appellant allegedly explained that he was on his way from the toilet when he decided to cover PW1 with the towel. The matter was reported to the police and the appellant was arrested.

7. The appellant in an unsworn defence statement claimed that he had been framed and that the girls screamed when they saw him returning to his room from the bathroom.

8. On the question of age, Dr. Ariba Olembo (PW6) produced the age assessment form showing the complainant to be approximately 15 years old. The appellant was convicted on the main charge which was Attempted Defilement but in my opinion the evidence led by the prosecution came short of proof. Secondly, the alternative charge to which resort could be had was defective. As laid in the charge sheet the statement of the said offence cited the wrong provision. Instead of Section 11(1) it cited Section 11A of the Sexual Offences Act. The two offences are in relation to indecent act with a child, and an adult respectively. The charge as laid in the alternative carries particulars appropriate to a charge under Section 11(1) and not 11(A) of the Sexual Offences Act. Clearly, this was a defective charge (see **Jason Akumu Yongo v R [1983] eKLR.** It does not fully meet the criteria of Section 134 of the Criminal Procedure Code. The learned magistrate did not deal with this aspect as he was satisfied that the main count had been proved.

9. Of more concern is the fact that beyond the appellant's alleged presence next to PW1, the said witness herself did not state what else the appellant did to her. Nor does PW2. All PW2 stated is that the appellant was trying to touch PW1 but instead touched her (PW2). The girls were all sleeping together with PW1 and PW2 next to each other. Section 9 of the Sexual Offences Act defines attempted rape as an attempt "to commit an act which would cause penetration with a child." The act committed should be cognate to the act which would cause penetration.

10. In this case the appellant had not even touched PW1 or done any specific act to her that can be construed as an attempted defilement, or even an indecent act. I agree with the submissions of the defence counsel that the circumstances in which the girls were sleeping tend to displace the possibility of the occurrence of the offence, save with collusion. It may or may not be true that the appellant stated to PW5 that he had wanted to cover the complainant, or as he told the court, he was from the bathroom and the girls screamed on seeing him.

11. Reviewing the charges preferred and the evidence, I think that the trial court did not properly evaluate the evidence of the eye witnesses PW1 and PW2. In particular there was no basis for the finding that the appellant while naked attempted "to lie on the complainant." The appellant's intentions may not have been as pure as he purported in his defence but the onus lay with the prosecution to prove acts tending to demonstrate the alleged attempt. In my view the learned magistrate would have reached a different conclusion if he had properly applied his mind to the actual evidence tendered rather than make surmises.

12. This appeal must be allowed for the foregoing reasons. The conviction is quashed and the sentence of ten (10) years imprisonment set aside. The appellant is set at liberty unless otherwise held.

DATED AND DELIVERED IN MALINDI THIS 4TH APRIL 2014

O.A. ANGOTE

JUDGE