



No.2975

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO.53 OF 2009

JAMES WAMBUA ISINYAMBU.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

JUDGMENT

Mr. Mukofu, learned State Counsel conceded to this appeal and rightly so in my view, on grounds that the offence charged was not proved to the standard required in criminal proceedings. That there was no evidence of the appellant touching the complainant's private parts.

The Appellant had been charged before the Chief Magistrate's court, Machakos with one main count and on alternative count. In the main count he was charged with attempted defilement contrary to section 9(1) of the Sexual Offences Act. The particulars were that on 6th March, 2007 in Machakos District, within Eastern Province, the appellant unlawfully and intentionally attempted to have carnal knowledge of **M.M**. In the alternative count, he was charged with indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, particulars being that on the same day and place, he intentionally and unlawfully indecently assaulted **M.M** by touching her private parts.

The appellant denied both counts and was subsequently tried. The prosecution called a total of 3 witnesses in a bid to prove its case against the appellant. At the end of the trial, the trial Magistrate acquitted the appellant on the main count holding that the charge could not be sustained as it did not contain a penalty section. Accordingly, it was in violation of Section 77(8) of the Constitution. However, he proceeded to convict the appellant on the alternative charge on the ground that the appellant exposed his penis to the complainant. That exposure according to the trial Magistrate was pornographic. It was therefore an indecent act with a child. Upon convicting the appellant as aforesaid, the trial Magistrate then sentenced him to 10 years imprisonment.

Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal on grounds that the evidence tendered was insufficient to find a conviction, the trial Magistrate failed to consider his defence and that the sentence imposed was harsh and excessive.

The summary of the case before the trial Magistrate was as follows:

PW.1 **M.M**. the complainant on 6th March, 2007 at about 2.00 p.m. was collecting firewood outside the house of the appellant when the appellant suddenly held her by her hand and led her into his house and forced her on his bed. She screamed but the appellant blocked her mouth with his hand. She fought him off whilst screaming. The appellant then pushed her under his bed and offered to give her KShs.20/- if she agreed to have sex with him but she refused. The appellant tried to remove her pants but she screamed even more attracting the attention of her mother, **A.M** (PW.2). Her mother came, pushed the door open and entered the house and found her under the bed while the appellant was standing beside her. Her mother screamed and attracted the attention of her husband who also came to the scene. The complainant told them what had transpired and they took her to a Health Centre. In the meantime, the appellant was arrested by villagers and escorted to the Police Station. While inside the appellant's house, the appellant had removed his long trousers and pants and exposed his penis to the complainant.

PW.3 **Caleb Lutome** stated that he received the appellant at the Police Station from members of public among them the complainant who reported to him that the appellant had on the previous day attempted to defile her. He arrested the appellant and charged him.

Put on his defence, the appellant in a sworn statement stated that on 6th March, 2007 he was at home helping his sister who had given birth when at about 1.00 p.m. the complainant's mother PW.2 came and asked the complainant if she had gone to fetch water from his house. PW.2 then beat her up telling her that she was not supposed to go to his house. She beat her even more when he intervened and asked her not to beat her again and it was then that the complainant told her that she had been to his house and that he had tried to defile her. People came, observed the complainant and escorted her to hospital. He was arrested the same day in the evening and escorted to M[...] and later charged. He denied committing the offence adding that he was framed with the case because the complainant's father had vowed to have him jailed after he caused him to be arrested by the police in the month of January.

As already stated, the appeal was conceded to by the State. As expected, the appellant warmly welcomed the states gesture. In the alternative count upon which the appellant was convicted, it was alleged that the appellant intentionally indecently assaulted the complainant by touching her private parts.

Indecent act is defined in Section 2(1) of the Sexual Offences Act, as:

“ any intentional act which causes any contact between the genital organs of a person, his or her breasts and buttocks with that of another person and/or exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration”.

So that, for a conviction to be sustained, the Prosecution must prove that the appellant's genital organs had any contact with genital organs of the complainant, her breasts and or buttocks and/or that he exposed or displayed any pornographic material to the complainant. On the evidence on record nothing of the foregoing happened, nor were they proved. All that the complainant told the court was that the appellant tried to remove her pant but she resisted and by then he had removed his long trouser and his pants and she saw his private parts. In fact under cross-examination by the appellant, the complainant said she saw the accused's penis. Seeing is not touching. To my mind **touching means, to be in contact with, to come into contact with or to put the hand to something**. Therefore, seeing perse the penis of the appellant does not amount to indecent act. There is no evidence that the appellant's penis came into contact with the complainant's genital organ, breasts and or buttocks nor was it a pornographic material.

However, the trial Magistrate was of the view that such exposure amounted to indecent act which was a gross misdirection in law. Much as the Sexual Offences Act does not define pornography material but the **Blacks Law Dictionary 7th Edition** defines the noun pornography as material (such as writings, photographs or movies) depicting sexual excitement. The appellant did not have writings, photographs or movies depicting sexual excitement. All that he did, if at all, was to expose his penis to the complainant. That cannot amount to pornography, going by the above definition. It appears that the learned Magistrate treated the appellant's penis as a material. A penis cannot be a material. Material connotes in this case the substance or matter from which anything is made. That cannot be a penis.

The upshot of all the foregoing is that the concession to the appeal by the State was well founded. Accordingly, the appeal is allowed, the conviction quashed and sentence imposed set aside. The appellant shall be set at liberty forthwith, unless otherwise lawfully held.

Dated, Signed and delivered at Machakos, this 15th day of November, 2011.

ASIKE-MAKHANDIA
JUDGE