REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 136 of 2008

(From original conviction and in Criminal Case No. 2694 of 2005 sentence of the Chief Magistrate's Court at Malindi before Hon. D. W. Nyambu - SRM)

ABDUL ALI alias **MAJID…..……..…….…APPELLANT**

VERSUS
REPUBLIC ……..……RESPONDENT

JUDGMENT

Abdul Ali alias Majid (the appellant) was convicted on a charge attempted defilement contrary to section 9(1) as read with section 2 of the Sexual Offences Act No. 3 of 2006. After due trial in which seven witnesses testified, he was sentenced to serve ten (10) years imprisonment.

The prosecution case was that on 7th day of October 2005 in Malindi, the appellant unlawfully attempted to cause penetration with a child namely M.M, F.O and H.T girls under the age of 16 years.

He faced an alternative charge of indecent assault with the same children. He was convicted on the main charge. The testimony of F.O (PW1) an eight year old girl, was that on 6-10-05 at 11.00am, she was at home playing, when the appellant (whom she knew) who was inside his house, summoned her to pick or collect a shilling. She got into the house accompanied by H and M. Appellant grabbed her, removed all the little girls' clothes and rubbed his penis against their private parts and chests. He then took them to the latrine and washed them – warning them not to tell anyone or he would cut them with a panga.

H (PW2) who is aged 7 years, gave similar evidence although according to her, appellant had said he was going to give them *mabuyu* and *mashata* (which are Swahili snacks). She further stated that after rubbing his penis on their private parts, he washed them and gave them *mabuyu* and a shilling with a warning not to tell their parents or he would cut them with a panga.

M (PW3) gave evidence similar to what PW2 stated.
PW4, S (H's mother) testified that she had noticed a bad smell emanating form her daughter and upon interrogation learned that she had been defiled by the appellant. She checked the child's genitalia and noticed that the vulva was red. She took the child to Malindi District Hospital for treatment.

T.A.M (PW5) also confirmed receiving a report about the incident involving his daughter who is (PW2) i.e one of the girls. It was his testimony that appellant disappeared after the incident.

Dr. Anisa Omar (PW7) who produced the P3 forms on behalf of Dr. Wabengo, in the findings of nature of injury or degree of injury regarding F, was not filled, and with regard to H examination found no physical injuries and her genital tract was normal with no injuries nor was the hymen broken. The same findings applied to M. M.

Upon being put to his defence, the appellant opted to make an unsworn statement in which he left the matter to the court to decide.

The trial magistrate in her judgment observed that appellant had not stated anything of substance in his defence.
She found that the three girls' evidence was corroborated by the evidence of PW2 and true record of the events. She held that appellant had committed indecent acts with the three children by unlawfully causing his genital organs to come into contact with the genital organs of the complainant.

The appellant has challenged both conviction and sentence on grounds that:

(a) His rights under section 72(3) (b) had been violated.

(b) The prosecution case was full of discrepancies.

(c) The case was not proved beyond reasonable doubt.

Appellant sought to rely on written submissions.

On violation of his rights, appellant submitted that he was arrested on 12-11-05 and taken to court on 18-1-05 – the State did not respond to this fact or give an explanation as regards the delay and I make a finding that appellant's rights were indeed violated and he is entitled to compensation under section 72(6) of the Constitution.

It was also submitted that the appellant had initially been charged with defilement contrary to section 145(1) of the Penal Code, which charge was later substituted on 7th August 2007 with an offence under the Sexual Offences Act. Miss Waigera for the State submitted that this was an error on the strength of provisions of section 27(4) of the Constitution which provides that no person shall be held guilty of a criminal offence on account of an act which at the time did not exist, and so the prosecution and trial magistrate made an error in law by substituting the charge with an offence under a law that had not come into existence at the time the offence was committed.
Indeed the offence is alleged to have occurred in October 2005, the Sexual Offences Act came into operation in the year 2006. Is there provision for the Act to operate retroactively? The first schedule of the Sexual Offences Act deals with the transitional phase and section 3 provides as follows;

> ***"Any proceedings commenced under any written law or part thereof repealed by this Act, shall continue to their logical conclusion"***

This was by legal notice No. 7 of 2007, and obviously there was an error in law for the procedure adopted by the Court. It follows as a matter of course that proceedings and conviction were prejudicial to appellant and must be quashed – which I hereby do.

So what is the option? Would a re-trial be the best way to go?

The State does not wish for a re-trial as there is no guarantee of getting witnesses under the circumstances the sentence is set aside and appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **12th** day of **May 2010** at Malindi.

H. A. Omondi
LADY JUSTICE