



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MALINDI**  
**CRIMINAL APPEAL 73 OF 2004**

**(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE 1260 OF 2004)**

**CERETTA MEDARDO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

This is an appeal by the state under section 348 A of the Criminal Procedure Code.

The appeal raises points of law and is, therefore, in my view competent. On 23rd August, 2004, the respondent Ceretta Medardo was brought before the Senior Resident Magistrate, Malindi, in Criminal Case No 1260 of 2004 charged with having carnal knowledge of a person against the order of nature contrary to section 162 (A) of the Penal Code. In the alternative he was charged with indecent assault. It was alleged that on 23rd day of July, 2004 at Kibokoni estate, Malindi the respondent had carnal knowledge of JO against the order of nature.

Through an interpreter the charges were read to the respondent who denied them, he was granted bond.

On the same day at 2.30 pm, the prosecution informed the court that both the complainant and his father did not wish to proceed with the case against the respondent. A lady by the name LA was introduced as the mother of the complainant. After taking the oath she stated that

“..We have talked and I have agreed to pardon accused in the dock. I want the case to be withdrawn. I know I shall not be able to return the case in Court because I have pardoned him. I have not been forced into withdrawing the charge. It is my own volition.”

The subordinate court then proceeded to acquit the respondent under section 204 (although not indicated I presume) of the Criminal Procedure Code.

The appellant now appeals to this Court against the order of the subordinate Court. The appellant relies upon a Memorandum of Appeal with 5 grounds of appeal, which were argued together during the hearing. The gist of the grounds is that the subordinate Court misdirected itself in acquitting the respondent on the basis of an application to withdraw by a person other than the complainant under section 204 of the Criminal Procedure Code.

The appellant further argued that since the matter involved a child of tender years, the case ought to have

been dealt with by the Children's Court as it fell within the provisions of the Children Act.

On the other hand Mr Ole Kina, for the respondent argued that the matter fell outside the jurisdiction of the Children Act as the charges the respondent faced related to offences under the Penal Code. He argued further that the lower court must have been satisfied that there were sufficient ground for it to have granted the application for withdrawal of charges.

According to him it is in the interest and for the benefit of the child that the charges were withdrawn.

It was further argued that it was the Republic, on the child's behalf that initiated the withdrawal.

Finally it was contended that the charges were defective. Mr Ole Kina urged that Court not remit the matter for retrial as the charges were not specific.

I have carefully considered the foregoing submissions.

The issue for determination is whether the subordinate court misdirected itself by allowing the criminal charges against the respondent to be withdrawn under section 204 of the Criminal Procedure Code.

Section 204 of the Criminal Procedure Code provides:

"If a complainant, at any time before the final order is passed in a case under this part, satisfies the Court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused."

This section contemplates two situations. First it is the complainant who can withdraw a case under the section.

Second – the court has to be satisfied that there are sufficient grounds for permitting such a withdrawal. The Court retains a discretion to allow the application. But once it has exercised that discretion and allowed the withdrawal it is bound to acquit the accused person. The application for withdrawal was made by the mother of the child whose rights are alleged to have been violated. Was LA, the mother qualified as a complainant to withdraw the charges?

A complainant, according to section 59 of the Criminal Law (Amendment) Act No 5 of 2003 is a person who lodges a complainant with the police or any other lawful authority. It has not been shown who lodged the complaint with the police. However, according to the charge sheet, JO c/o Rainbow Rescue Centre is shown as the complainant. It is him who was aggrieved and must have provided the details of the alleged offence on him to the police. There is no age limit prescribed for a person to qualify to be a complainant. However, there are legal provisions dealing with how to treat evidence of children of tender years. These are adequately provided for under section 124 of the Evidence Act and section 19 of the Oaths and Statutory Declaration Act. The procedure to be followed has been laid down by case law. For instance in the case of *Johnson Muiruri v R* (1983) KLR 445 to which Mr Ogoti for the applicant referred this Court, the Court is required, before receiving evidence of a child of tender years, to form an opinion, on a *voire dire* examination. This is to enable the Court to decide whether the evidence can be received on oath or unsworn. Again this is important as evidence of a child of tender years taken on oath requires no corroboration while on unsworn evidence of such a child must be corroborated. The present matter had not reached the point of receiving evidence. However, if the child was to withdraw, the Court would have been expected to test the intelligence of the child through a *voire dire* examination before deciding whether or not to subject him to the oath. I come to the conclusion that the child, JO, was the right complainant. Although the mother has parental responsibility to him under the Children Act, the responsibilities enumerated in the Act do not encompass the withdrawal of criminal charges against those alleged to have violated the child's rights.

It will also be remembered that although Mr Ogoti told the Court in his submissions that the child is ten (10) years old, there is nothing to this effect on record except in the alternative charge where the child is

described as a boy below the age of 18 years.

The second issue is whether the Court was satisfied that sufficient ground existed for the withdrawal. The only thing the Court was told by the mother of the child, who I have ruled was not the complainant, was that

“We have talked and have agreed to pardon accused in the dock. I want the case withdrawn ....”

The reasons for withdrawal were not set out to enable the trial Court to exercise its discretion under section 204 of the Criminal Procedure Code. There were talks but the nature of these talks which culminating in the decision to withdraw the charges were not disclosed.

Generally speaking under section 176 of the Criminal Procedure Code, the Courts are expected to encourage and facilitate amicable settlement by way of reconciliation of parties in certain criminal cases, such as in the case of common assault or in any case of a personal or private nature. However, Courts will not facilitate reconciliation where the offence, although of a personal or private nature, is aggravated in degree or where the offence amounts to a felony. The offence with which the respondent was charged in the lower Court is expressly declared under section 162 (a) of the Penal Code as a felony. In my view, therefore, this was not a case where the Court was required to promote reconciliation. Before I conclude, I wish to comment on two issues raised by both counsel.

Mr.Ogoti urged the Court to find that the case in question should have been adjudicated by the Children Court as it involved a child. This assertion is certainly not correct. Part VI of the Children Act creates Special Courts to deal with certain issues regarding children.

In particular, in criminal cases, the jurisdiction of the Children Court is limited to cases where either the child is charged with a criminal offence or where any person is accused of an offence under the Children Act. In the present case the child is the victim. He is not the one charged with the offence in question. Neither is the respondent charged with any offence created by the Children Act.

The second matter was raised by Mr Ole Kina that the charges were defective, for the main charge is not specific and both the main and alternative charges are duplex.

Mr Ole Kina represented the respondent before the subordinate court when plea was taken and later that afternoon when the withdrawal was sought & granted. He had the opportunity to raise an objection at that early stage.

Secondly, if the charge was defective, such irregularity can only be reversed or altered on appeal if the irregularity has occasioned a failure of justice. As matters stand, it has not been shown that a failure of justice was occasioned to the respondent. But if the charges are defective, the trial Court has powers, at any stage of a trial before the close of the prosecution case to order for amendment.

For all these reasons, I would allow this appeal by setting aside the order and consequential acquittal of the respondent under section 204 of the Criminal Procedure Code.

The effect of this is that the matter will be tried afresh before any Court of competent jurisdiction. Orders accordingly.

**Dated and delivered at Malindi this 13th day of October 2004.**

**W.OUKO**

**JUDGE**

Dated and delivered in Court.

Mr.Ole Kina for Respondent.

Mr.Ogoti for applicant

C.C: Randu – Interpreter English/Italian.

W.Ouko

Judge

13.10.2004

Mr.Ole Kina

The accused may be arrested and charged. The accused is on bond. I pray that the accused be admitted to bond. The court to provide a date for him to present himself before the lower Court. The accused is an old man. He has been appearing all the time he was required to do so.

**W.OUKO**

**JUDGE**

Mr.Ogoti

I oppose the application. At this stage the accused has no charges against him. The court can only exercise that discretion where there is a definite charge.

W.Ouko

Judge

In Reply

The acquittal by the subordinate Court has been set aside, meaning that the proceedings have not been terminated. There will be no necessity in presenting afresh charge. It is a continuation of the earlier case.

W.Ouko

Judge

Court

The order of this Court is that the matter be heard afresh. The respondent is already on bond, and his passport, I believe was deposited in Court. The respondent's bond is extended until he presents himself before the subordinate Court on 18<sup>th</sup> October 2004 for further orders.

W. OUKO

JUDGE