



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 37 OF 2013

(From original sentence and conviction of the Chief Magistrate's court at Malindi Criminal Case no. 816 of 2012 before Hon. L. Gicheha – SPM)

HASSAN KENNEDY DEMBEDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with two counts of Attempted Defilement contrary to Section 9(1) of the Sexual Offences Act No. 3 of 2006. He was also charged with an alternative count of Indecent Act contrary to Section 11(a) of the Sexual Offences Act. The Appellant was convicted of the alternative count of indecent act. The particulars were that the Appellant on the 14th day of July, 2012 at [particulars withheld] village of [particulars withheld] location within Kilifi County unlawfully and intentionally committed an indecent act by touching the anus of W M, a child aged fourteen years using his fingers.

The Appellant was convicted and sentenced to serve ten years imprisonment. The grounds of appeal are that the charge sheet was fatally and incurably defective, the prosecution evidence was contradicted and inconsistent, that the charge was conspiracy against the Appellant and that his defence was dismissed without being considered.

Mr. Gekanana, Counsel for the Appellant wanted to determine the appeal by way of written submissions. Counsel contends that the section used to charge the Appellant (11) (a) does not exist. Therefore, the charges were not supported by the charge sheet which was defective. The evidence of the Complainant does not show that there was any attempt to defile the Complainant and there was no indecent act. PW1 testified that the Appellant smeared oil on his body and the allegations that he smeared even the buttocks was an afterthought. The age of PW1 is not clear as he said he was born in 1996 yet he is claiming to be fourteen years old. The trial court did not conduct a *voire dire* examination on PW1 before he testified. Since the Appellant was a minor this ought to have been done.

Miss Mathangani agreed to file written submissions in reply to those filed by the counsel for the Appellant but failed to do so.

I have gone through the record of the trial court. The Complainant in the alternative count that led to the conviction was PW1 W M. His evidence was that he was 14 years old and a class 8 pupil at [particulars withheld] Primary School. On the 14th July, 2012, a Saturday, he was coming from school tuition at

about 1.00pm when he met the Appellant. The Appellant told him that he did not sleep at night as he had seen a picture of PW1 being invaded by demons and being buried in a casket. The Appellant told him that he wanted to remove the demons and they should go to the forest so that he could pray for him. PW1 was told to buy oil which could be used to remove the demons but he had no money. It is his evidence that the Appellant went with him to a shop and bought the oil. They went to a bush about a kilometer away and he was told to remove his clothes so that the oil could be smeared on his body. The Appellant smeared the oil on his body and arms and was told to lie down on his stomach but he refused. The Appellant smeared oil on his buttocks and he showed him his penis. He was given the Appellant's phone number which he was told he could call if he sensed anything sinister.

PW1 went home and informed his brother V. V called the Appellant who was referring himself as a pastor and asked to meet him. PW1's father went home and was informed about the incident. Later PW1 was with his father when they saw the Appellant and the Appellant told them to finalise the matter. As they were talking another lady appeared saying he wanted to talk to the pastor. They decided to go to the area chief with the Appellant but the Appellant ran away. PW1 was scared and he knew that the Appellant wanted to do bad manners on him. It is his evidence that the Appellant did not remove his penis but he only touched it and showed him.

PW2, K J N, was the Complainant in Count 2. He testified that he met the Appellant on 21st July, 2012 at about 9.30am when the Appellant told him that someone in his family wanted to kill PW2. PW2 was told to fast and pray and God will show him the person who wants to kill him. PW2 was told by the Appellant that if he did not listen he would die in fourteen days. He informed his mother and on the 29th July, 2012 he saw the Appellant walking with PW1 and his father. He informed his mother who joined them and PW2 went to notify his father who was sleeping. When they went out they heard people screaming "thief" and the Appellant ran away.

PW3, J K M, is the father of PW1. On 14th July, 2012 PW1 told him that a person by the name M who is a pastor had taken him to the forest and smeared oil on him. The pastor had given his son his mobile number. He called the number and asked the person to go to his house but he did not. On 29th December, 2012 he gave the phone number to one Mrs. Sande and asked her to call so that he could find out the church which the pastor would attend. According to PW3, it was Mrs. Sande who had sold the oil to the Appellant as she had confirmed that to him. While he was near [particulars withheld] health centre with PW1 they saw the Appellant and PW1 pointed at him. PW3 told the Appellant to go with him to the AP's office and the Appellant agreed. While walking they were joined by PW2 and his mother. Before they reached where they were going the Appellant ran away. They reported the matter at the Watamu Police Station. The Appellant was later arrested and charged with the offence.

PW4, JENNIFER SIDI, sells clothes at Matsangoni. On the 6th December, 2012, the Appellant went there and left his luggage saying he was going to church as it was a Sunday. This was the second time that the Appellant had left his luggage. PW3 went to her and asked her about the pastor. She called the Appellant to find out whether he would go to [particulars withheld]. Sometimes later she heard that the pastor wanted to pray for PW3's child. PW5, CONSTABLE NANCY AYUMA, was based at the Watamu Police sTation and she investigated the case. It is her evidence that the matter was reported at the police station on the 1st August, 2012. PW1 informed her that the Appellant had smeared oil over his body so that demons could go away. She recorded the witness statements and charged the Appellant with the offence.

The Appellant gave them the name of ISAIAH MOGAKO as his name but according to his identity card he is called HASSAN KENNEDY DAMBEBE. PW5 in her investigations found out that the Appellant had been suspended from the church. In the church, the Appellant was known as Isaiah Malala.

PW6, L K, is the mother of PW2. She narrated how PW2 met the Appellant and testified on how she met the Appellant walking with PW3. She followed them as she wanted to talk to the Appellant but the Appellant escaped and ran to the forest.

The Appellant gave unsworn evidence. He testified that he is a pastor and a businessman. He is forty years old, has a wife and a child. His wife is also a pastor in their church. They ran Milimani Deliverance Church. One church is at [particulars withheld] near the home of PW3. He testified that at one time they had a conference for a week at the [particulars withheld] church and PW3 complained that they were making noise. It was his evidence that PW3 told him that he had come from Nairobi to make life difficult for the people at [particulars withheld] and that he was preaching witchcraft. He reported the matter to an elder who promised to talk to PW3. He then went to Nairobi but one of his people by the name James Njoroge called him indicating that he was required at Watamu Police Station. He completed his work in Nairobi and when he came back he went to the police station and was arrested. He was later charged with the offence.

The main issue for determination is whether the prosecution proved the alternative count of indecent act to the child which led to the conviction. Counsel for the Appellant contends that there is no Section 11(a) under the Sexual Offences Act. It is true that the Appellant was charged under Section 11(a) of the Sexual Offences Act. The trial magistrate dealt with that problem and indicated that the correct section was 11(1) of the Sexual Offences Act. The trial court in its judgment amended the Section and indicated that the Appellant was not prejudiced with those amendments. The trial magistrate also indicated that she had the jurisdiction to amend the charge sheet. I do find that there was no prejudice on the Appellant as the main charging section for the offence of Indent act with a child Section 11. Since Section 11 was clearly stated on the charge sheet I do find that the reference to Section 11 (a) instead of 11(1) does not make the charge to be defective. The particulars of the offence have also to be considered. The particulars referred to a child aged fourteen years. There is Section 11(A) which deals with indecent act with an adult. The Appellant was not prejudiced and the trial magistrate correctly made an amendment to the charge sheet. The trial magistrate considered the fact that the Appellant had been charged with the main count of Attempted Defilement and the court could have convicted him of the lesser alternative of Indecent Act even if no alternative count had been preferred against the Appellant.

It is the evidence of PW1 that he met the Appellant at about 1.00pm. He did not know the Appellant. PW1 narrated how they went together to buy oil and went to the bush with the Appellant. PW1 managed to pinpoint the Appellant to his father (PW3) when he saw him again. It is not by coincidence that PW3 was also told by the Appellant that he would die in fourteen days. PW2 saw the Appellant walking with PW1 and PW3 and he pointed out the Appellant to his mother.

The prosecution evidence shows that the incident occurred during the day. PW1 was able to clearly see what happened and also see the Appellant. It is not a case of mistaken identity. The defence evidence is to the effect that PW3 had a problem with Appellant's church and he was against the church. The trial magistrate correctly evaluated the defence evidence and noted that according to PW3 he did not know the Appellant before he was pointed out by his son (PW1).

From the evidence on record, I am satisfied that it is the Appellant smeared oil on PW1's body. According to PW1 the Appellant smeared he oil up to his buttocks. The definition of indecent act under Section 2 of the Sexual Offences Act includes any contact between any parts of the body of a person with the genital organs, breasts, buttocks of another. There is evidence that the Appellant used his hand to smear oil on the buttocks of PW1. That act on its own constitutes an indecent act which falls within the provisions of the Sexual Offences Act. The defence evidence did not raise any doubt on the prosecution case. The prosecution evidence is also strengthened by the evidence of PW4 who was given the phone number that can be given to PW1 and it is clear that when PW4 called that number she managed to talk to the Appellant.

In the end, I do find that the prosecution proved its case beyond reasonable doubt. The fact that no *voire dire* was conducted on PW1 does not make his evidence to be unreliable. PW1 testified that he was 14 years old and a class 8 student. The trial court was able to see the witness and was convinced that he could testify on oath. The witness was cross-examined by the Appellant and he was able to answer the questions. There is no evidence that PW1 was lying under oath. I find that the appeal lacks merit and the same is hereby disallowed.

Delivered and dated this 3rd day of March, 2015.

Said J. Chitembwe

JUDGE