

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 97 OF 2012

(From original sentence and conviction of the Principal Magistrate's court at Lamu Criminal Case no. 6491 of 2011 before Hon. J. Munguti – PM)

SIKUBALI KAINGU KARISAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant was charged with two counts of Indecent Acts with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence for both counts are that the Appellant on the 4th November, 2011 at [particulars withheld] area in Lamu district within Lamu County unlawfully did an indecent act with E O O aged ten years and H A R aged nine years by exposing to them his penis and telling them to join them to enjoy leisure. The Appellant was convicted of both counts and sentenced to serve ten years imprisonment.

The grounds of appeal are that he pleaded not guilty to the charges and that the sentence is harsh and he would like it to be reviewed. The Appellant filed written submissions which simply expound on the two grounds.

Mr. Nyongesa, State Counsel, conceded to the appeal. Counsel submitted that the case was not proved as required. Only two minors testified and the Sexual Offences Act requires contact of the private part of the Complainant and that of the Accused. There was no evidence of contact. Counsel also submitted that indecent exposure requires pornographic material but there were no materials exposed to the Complainants.

Three witnesses testified before the trial court. PW1, E O O testified that on the 4th November, 2011 she was with PW2 heading to school when the Appellant called them and asked them to go and have pleasure with him. The Appellant removed his short and showed them his penis. They ran away and went to inform their parents. PW2, H A gave similar evidence. PW3, F R was stepped down and did not testify. PW4, A O is the mother of PW1. Her evidence was that on the 4th November, 2011 at about 8.00am PW1 left for school with PW2 but she shortly heard them screaming saying a certain boy had removed his short and asked them to join him and have pleasure. The Appellant was arrested on the road and taken to the police station.

In his defence, the Appellant stated that he was on the road when he was arrested by six people who claimed to be police officers. He was taken to Lamu Police Station where he stayed for four days before he was charged with the offence.

The State Counsel conceded to the appeal and it is clear that there was no contact between the Complainants and the Appellant. It is also not clear whether the Appellant removed his short fully and exposed himself to the children or he attempted to do so. The trial court in its judgement simply concluded that the prosecution had proved its case. There were no pornographic materials exposed to the children.

I do agree with the State Counsel that the case was not proved beyond reasonable doubt and the conviction is not safe. So the appeal is hereby allowed and the Appellant shall be at liberty unless otherwise lawfully held.

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

Said J. Chitembwe

JUDGE