



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 98 OF 2012

(From the original conviction and sentence in criminal case no. 730 of 2009 of the Principal Magistrate's Court at Kilifi before Hon. A. M. Obura – PM)

LAWRENCE NGUI MALUKU APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

1. Two counts are stated against the appellant in the judgment of the Lower Court namely, Defilement contrary to Section 8(4) of the Sexual Offences Act and in the alternative Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act; and secondly, Infringing the rights of a girl contrary to Section 119(6) of the Children's Act.
2. The judgment did not make any reference at all to the 2nd count and neither is the count on the copy of the charge sheet in the record of appeal. The original charge sheet cannot be traced on the original file. Be that as it may, the appellant was subsequent to a full trial convicted on the count alternative to the first one and sentenced to ten years imprisonment. He appeals to this count against both conviction and sentence. His four grounds of appeal were as follows;

“1. That the learned honourable magistrate erred both in law and fact in finding that the offence of indecent assault as charged in count II had been proved beyond reasonable doubt. (sic)

2. That the learned honourable magistrate erred both in law and fact in finding that the age of the complainant had been proved beyond reasonable doubt.

3. That the learned honourable magistrate erred both in law and fact in rejecting the defence of the appellant without giving any reasons.

4. That the learned honourable magistrate erred in fact in failing to find that crucial witnesses were not called to testify”

3. The State opposed the appeal relying on the evidence adduced at the trial. As required to do on a first appeal I have re-evaluated the trial evidence in order to draw my own conclusions. (See **Okeno vs R 1973 EA32**). Briefly, the evidence in the Lower Court was that the complainant (F L), (PW1) a girl aged 17 years, and her mother E K (PW2), were members of the [Particulars

withheld] Church Mtwapa, where the appellant presided as a pastor. The complainant would, with PW2's knowledge occasionally be called upon to perform some chores at the appellant's house where he resided with his wife.

4. On 5th March, 2009 a fellow church member called P N asked the complainant to go to the appellant's house. When she got there, the appellant's wife was not at home. The appellant was insistent on showing her some speakers he had allegedly purchased, which turned out to be a trick to get her into a room where he forced himself on her fondling her shoulders and breasts and eventually having sex with her. The complainant was thereafter ordered to bath and not report the incident to anyone. The appellant told her that she could have an abortion if she got pregnant so that she could complete her studies. She left the house after bathing. She did not report to anyone.
5. She realized in the next month that she was pregnant. In August, 2009 when she reported to the appellant, he took her for a pregnancy test and tried to persuade her to marry P N to avoid exposing him, eventually offering her shs. 4,000/- to procure an abortion after she rejected the marriage offer. She reported to her mother and eventually police were notified. She gave birth to a child.
6. The appellant testified that the complainant was a member of his church but he denied defiling her. He claimed that the case was fabricated by a wrangling faction in the church.
7. Having re-evaluated the evidence and rival submissions, I take the following view of the matter. Although the appellant's counsel placed great emphasis on the particulars of the indecent act stated in the alternative charge for which a conviction was recorded, this appeal in my view turns on one key question: the age of the complainant. Apart from bald statements by PW1 and her mother, no other evidence was tendered, such as P3 form, baptism card, school leaving certificate etc. In my considered view such evidence was critical in this case where the victim was said to be 17 years of age, in order to remove any doubt as to the actual age.
8. The trial court observed that no documentary evidence of age was tendered but went on to conclude that the stated age (by PW1's mother who was "best placed to know her age") was not disputed by the defence. First, the mother did not even state the year of the complainant's birth. Secondly, in my view, it was a misdirection for the court to intimate that the burden had somehow shifted from the prosecution to prove its entire case. Where a victim's or accused person's age is borderline it is important to establish the exact age as an estimate would not do. That is the principle to be drawn from the case of **Denis Abuya v R [2010] eKLR** cited by the appellant's counsel.
9. Section 11(1) of the Sexual Offences Act is in the following terms;

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

The court did not assert that it believed the complainant's evidence on age, in which case a liberal interpretation of Section 124 of the Evidence Act, could perhaps be applied. In the absence of credible proof that the complainant was a child within the meaning of the Sexual Offences Act, the alternative charge could not stand.

10. While I do not believe that the complainant made up all the events contained in her evidence, as suggested by the defence, I think the prosecution ought to have called P N as a witness, if only to counter the allegations that he, and not the appellant, was responsible for the alleged sexual abuse visited upon PW1.
11. That matter however, like the prosecution failure to call the persons who conducted the second pregnancy test, allegedly on the appellant's request or even the doctor is an indication of the

shoddy manner in which the investigations and prosecution were handled. The sum of Shs. 4,000/- allegedly handed over to police by PW2 was not tendered at the trial either.

12. For the foregoing reasons, this appeal must be allowed with regard to the conviction on the alternative count. Equally, the prosecution having failed to prove the main charge, count 2 could not have been sustained. I note however, that the judgment of the learned magistrate was silent on that score. The conviction on the alternative charge is unsafe and liable to be quashed which I hereby do. The sentence of ten years imprisonment is set aside. The appellant will be set at liberty unless otherwise lawfully held.

Delivered and signed at Malindi this **11th** day of **March, 2014** in the presence of Mr. Obaga holding brief for Mr. Odhiambo for the appellant, Mr. Nyongesa for the State.

Court clerk – Samwel

C. W. Meoli

JUDGE