



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 62 OF 2011**

**HARRISON MACHARIA KARANJA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 258 of 2010 in the Chief Magistrate's Court at Kibera – Nyakundi (PM) on 17<sup>th</sup> February 2011)*

**JUDGMENT**

1. The appellant, **Harrison Macharia** was charged with the offence of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 8<sup>th</sup> day of January 2010 at [particulars withheld] area in Kajiado North District within the Rift Valley Province unlawfully and intentionally exposed his penis to M. N. N. (initials used to protect the minor's identity) a child of 10 years.
2. The case for the prosecution was that **PW1**, who was a girl of ten years, was going to school on 8<sup>th</sup> January 2010 when she came upon the appellant. The appellant emerged from the bush and exposed his genitals to her. **PW1** ran to school and reported the incident to the school principal. The appellant was arrested a few days later when he was seen lurking at the school gate. He was later charged as read.
3. Testifying without oath in his defence, the appellant admitted that indeed he was arrested outside the school gate on 15<sup>th</sup> January 2010. He however explained that he had come to the school gate on the advice of a friend who told him he could secure himself some casual work at the school. He denied committing the offence.
4. Following his conviction after a full trial, the appellant filed an appeal claiming that the prosecution did not prove their case beyond reasonable doubt, that essential witnesses were not summoned, that the prosecution evidence was inconsistent, contradictory and insufficient and that his defence had been ignored.
5. The appellant was charged with the offence of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** which provides as follows:

**“A 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 descriptive part of what constitutes indecent act therefore, requires contact between the body parts of a person with the genital organs breasts or buttocks of the other. It also includes exposure to pornographic material against the other person's will.

6. I am alive to the fact that not every inconsistency between the charge and the evidence, or indeed, within the charge sheet itself is fatal to the prosecution case. In this case however, the charge

reads that the appellant exposed his penis to a child aged 10 years. The evidence shows that in essence the appellant did what is colloquially referred to as “flashing”. He did not come into physical contact with her at all. I find that the offence and the particulars described are inconsistent with **Section 11(1)** of the **Sexual Offences Act** referred to.

7. I agree with Learned state counsel Mr. Mutua who while conceding the appeal on behalf of the state, submitted that the prosecution’s evidence disclosed another offence and not that for which the appellant was charged.
8. I observe from the record that the appellant was sentenced to serve ten years imprisonment on 17<sup>th</sup> December 2011. He has already served three years thereof. The appellant also appears to have remained in remand custody throughout the trial. In view of the foregoing and the likely charge he would face, it is my considered opinion that it would not be in the interest of justice for this court to order a retrial.
9. For the reasons set out above I allow the appeal. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED and DELIVERED** in open court this **2<sup>nd</sup>** day of **July 2014**.

**L. A. ACHODE**

**JUDGE**