REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 19 OF

MOHAMED SHEHE MARO……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(BEING AN APPEAL FROM THE CONVICTION AND SENTENCE OF THE RESIDENT MAGISTRATE (M.O. OBIERO) IN HOLA CRIMINAL CASE NO. 136 OF 2010)

JUDGEMENT

The Appellant (Mohamed Shehe Maro) was charged with defilement contrary to Section 8(1)(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge alleged that on 5th July, 2010 at around 16.00 hours at [particulars withheld] in Tana River District within the Coast Province the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of M. O. a girl aged 12 years.

In the alternative the Appellant was charged with committing an indecent act contrary to Section 11(1) of the Sexual Offences Act. It was said that if the Appellant did not defile the said M. O. as alleged in the main count then he committed an indecent act by causing his penis to touch her private parts.

At the conclusion of the trial the Appellant was convicted and sentenced to 10 years imprisonment on the alternative charge. The Appellant being aggrieved by the conviction and sentence appeals to this Court.

After perusing the Appellant's Amended Petition of Appeal, I summarize his grounds of appeal as follows:-

1. The Appellant's conviction was based on an incurably defective charge sheet;
2. The prosecution evidence was contradictory; and

3. The Appellant's defence and alibi were not considered by the trial magistrate.

The appeal was opposed. Mr. Mulama for the state contended that the Appellant's argument that the medical evidence did not establish penetration was of no consequence since the alternative charge for which he was convicted did not require evidence of penetration.

On the claim that the evidence of the complainant could not be relied on since she was mentally retarded, it was submitted for the state that the evidence of the complainant was corroborated by that of other witnesses. Counsel also asserted that a thorough *voir dire* examination was conducted by the trial magistrate who was satisfied that the complainant was seized of sufficient intelligence to give evidence on oath.

On the argument that the exact age of the complainant was not proved, Mr. Mulama asserted that the offence for which the Appellant was convicted only required the prosecution to show that the complainant was under the age of eighteen years.

I will start by considering the question as to whether the Appellant was convicted on a defective charge. I need not consider the main count of defilement since the Appellant was not found guilty on the same. As for the alternative charge, I note that the same was properly drafted and I do not see the reason why the Appellant claims that the charge is defective.

There is also an argument by the Appellant that the age of the Appellant was not proved. Section 11(1) of the Sexual Offences Act creates an offence known as indecent assault with a child. One of the ingredients of this offence is that a complainant should be a child meaning a person under the age of eighteen years. The evidence on record in regard to the age of M. O. is in the first instance found in the charge sheet which indicates that the complainant is ten years. M.O. in her testimony told the Court that she was ten years old. The mother of the complainant did not state the age of the complainant but stated that she was in class two thereby putting her at the approximate age of ten years. The trial magistrate noted that the complainant was a minor before proceeding to conduct a *voir dire* examination of the witness. In the P3 form produced by the medical officer the age of the child is given as twelve years. The evidence on record therefore confirms that the complainant was below twelve years of age. She was obviously a child for the purposes of Section 11(1) of the Sexual Offences Act.

Another ground of appeal is that the Appellant was convicted on insufficient evidence. This being a first appeal, I will proceed to look at the evidence on record afresh, evaluate it and reach my own independent conclusion. In doing so, I will bear in mind the fact that I never saw nor heard the witnesses testify.

The complainant testified that on 5th July, 2010 at about 2.00p.m. she had gone to the mosque for the madrassa programme. She was with other children and their teacher was Ustadh Rocket whom she identified in Court as the Appellant. She testified that as she was leaving the mosque, with the other children, at about 4.00p.m. the Appellant called her back but she refused to go back. He nevertheless held her hand and led her to a room inside the mosque where he closed the door and in the words of the complainant proceeded as follows:-

> **"After closing the door, he pushed me onto the floor and he lay on me. After that, he undressed me and removed my inner pant. He also removed his trouser and the inner pant. He then inserted his penis into my vagina. After that he told me to go back the following day. He told me that I would recover from my sickness. I am suffering from epilepsy. When I wanted to go back home, the accused used a blue piece of cloth to clean my vagina. I saw a white substance."**

The complainant testified after the trial magistrate conducted a *voir dire* examination on her and concluded that she was intelligent and competent to testify.

When the complainant reached home she found her mother (PW2 F B) and PW3 Z M S and told them what had happened. They accompanied her to the mosque in a bid to confront the Appellant but they did

not find him. The complainant showed them the room in which she had been molested. PW3 told the Court that she saw whitish substance when they removed the complainant's inner clothing. These two witnesses also confirmed that the complainant told them that the Appellant had told her that he was giving her medicine for her epilepsy condition.

The evidence of the complainant is clear and consistent. She immediately reported the incident to her mother when she reached home. It is true that PW3 during cross-examination stated that complainant had a minor mental problem and that she had memory lapses. If this condition was prominent the trial magistrate would have noticed the same. The complainant testified a month after the incident and she could not have done so if she had serious memory lapses.

The complainant repeated the same story to PW5 Police Constable Mbone Ishindu at the police station. This witness told the Court that when she went to the mosque with a view to investigating the matter she was denied entry and told that non-Muslims were not allowed to enter a mosque.

In his defence the Appellant told the Court that at the time of the alleged defilement he was at a mosque called [particulars withheld] with two other men. He was later surprised when he was arrested and accused of defiling the complainant. He told the Court that he never saw the complainant in his madrassa on that day. He admitted that his other name was Ustadh Rocket.

I have looked at the evidence on record and agree with the finding of the trial Court that the Appellant was indeed at the scene of crime on the material day. The complainant knew the Appellant who was her madrassa teacher. She led PW2 and PW3 to the room where she had been sexually molested. The issue of alibi was introduced by the Appellant when he gave his testimony in Court and PW5 cannot be accused of failing to investigate the alibi. In any case the Appellant never called the people he claimed to have been with at the material time. There is no reason why the complainant could have concocted such a story against the Appellant. I find that his defence was correctly rejected by the trial magistrate.

PW5 Dr. John Mwangi told the Court that there was no evidence of penetration. From the evidence adduced the trial magistrate correctly concluded that an indecent act as defined by the Sexual Offences Act had been performed on the child. I agree that the evidence that was placed before the trial court indeed established that this offence had been committed. The sentence of ten years is the minimum sentence provided for such an offence by the law.

In conclusion, I find that the Appellant's appeal has no merit. The appeal is dismissed and the Appellant will continue serving the sentence imposed by the lower Court.

Orders will issue accordingly.

Dated and signed this day of 2013

W. KORIR,

JUDGE OF THE HIGH COURT

Dated and delivered this 3rd day of December, 2013

S.N.MUTUKU

JUDGE OF THE HIGH COURT