REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 151 OF 2011

D O A…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(*From original conviction and sentence in criminal case Number 40 of 2011 in the Principal's Magistrate's court at Mandera – R. Odenyo (PM) on 16th May, 2011)*

JUDGMENT

The appellant D O A was charged with the offence of defilement contrary to Section 8 (1) and (2) of the Sexual Offences Act No. 3 of 2006. It was alleged in the particulars of the charge that on 27th January, 2011 at [particulars withheld], Mandera East District within Mandera County he defiled the complainant named in the charge sheet. In the alternative he was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the same Act. He denied the offence but after a full trial he was convicted and sentenced to life imprisonment.

He was aggrieved by the said conviction and sentence and filed this appeal. He has raised five grounds of appeal the summary of which is that the learned trial magistrate failed to comply with Section 207 (1) of the Criminal Procedure Code; that the evidence was full of inconsistencies and contradictions making the conviction unsafe. It is also his position that the case was not proved beyond any reasonable doubt and that his defence was not given any consideration. Finally, that the learned trial magistrate did not consider his mitigation and that the sentence imposed is harsh and excessive. The appeal is opposed by the Republic.

The evidence adduced before the learned trial magistrate was that the complainant P.W. 1 and his brother P.W. 2 went to swim in a river. The appellant then came along and told them that their mother was looking for them. Both followed the appellant. When they reached a river bed the appellant produced a knife and told the complainant to lie down which he complied with. The appellant then removed is trouser and sodomised him.

On seeing this complainant's brother P.W. 2 ran and informed their mother P.W. 3 who immediately ran to the scene. At the scene the mother found her son P.W. 1 crying and lying on his stomach without his trouser. P.W. 1 told the mother that he had been defiled by someone he knew by appearance only. The mother checked her son and saw some blood and white fluid oozing from his anus. She took P.W 1 and washed him.

On the following day P.W. 3 the mother and her husband went to the home of the appellant because their son P.W. 2 had singled him out as the culprit. The matter was reported to the police and the appellant arrested. The complainant was examined by P.W. 4, a clinical officer, who produced the P3 form with respect to the incident. He noticed that the complainant's anus was tender and assessed the degree of injury as harm. Subsequently the appellant was charged with this offence.

Upon being put on his defence the appellant told the court that he was a student at [particulars withheld] Boys Town Primary School and that he was aged 17 years old. He was in school at the time of the

alleged offence and denied committing the offence.

As required of me I have made an independent evaluation of the evidence on record. The complainant was aged 8 years old while is brother was aged 6 years old. The time of the offence was 2 p.m. and the complainant said he knew the appellant by appearance. He used to see him at ***[particulars withheld]*** Secondary School where his father works.

The appellant did not conceal his face and I have no doubt whatsoever that he was properly identified by the complainant and his brother. The record shows that the charge was read over and explained to the appellant in Kiswahili language to which he pleaded by denying the offence. Thereafter during the trial he participated by cross-examining the witnesses who were called to testify. I have not seen any breach of Section 207 of the Criminal Procedure Code the marginal note of which reads, "**Accused to be called upon to plead".**

The evidence of the complainant was corroborated by that of the mother and further fortified by that of the clinical officer P.W. 4. There was no inconsistency or contradiction as alleged by the appellant. His defence was considered by the learned trial magistrate and found to contain nothing to shake "**the strong and well corroborated evidence by the prosecution".** The learned trial magistrate concluded the defence evidence was made up.

The appellant was given an opportunity to mitigate before sentence. He told the court that he was epileptic and asked for leniency. The court noted the mitigation. Further, the learned trial magistrate noted that the appellant said in his defence that he was 17 years old thereby compelling the court to give an order for age assessment upon him. The assessment report was prepared and filed. The appellant was said to be 22 years old.

I observe that the learned trial magistrate was meticulous in handling the entire case and cannot be faulted whatsoever. The evidence adduced was sufficient upon which to found a conviction. The sentence is mandatory and this court cannot interfere with it. This appeal is therefore dismissed.

SIGNED DATED and **DELIVERED** in court this **10th Day** of July **2014**.

A.MBOGHOLI MSAGHA

JUDGE