MARTIN WANJALA HOSEA ……APPELLANT

VERSUS

REPUBLIC …….....…….RESPONDENT

(From original conviction and sentence in Criminal Case number 883 of 2010 of the Principal Magistrate's Court at Maseno – Mr. S. Ongeri Esq.)

JUDGMENT

The appellant herein **Martin Wanjala Hosea** was on 22nd July 2010 charged with the following offences:-

1. Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act number 3 of 2006 Laws of Kenya.

The particulars are that on diverse dates between 27th February 2010 and 29 May 2010 at {*particulars withheld*} in Kisumu District in Nyanza Province by use of his genital organ namely penis caused a penetration into the genital organ namely vagina of M. A. O. a girl aged fifteen (15) years.

2. Alternative charge

Indecent Act with child contrary to Section 11(1) of the Sexual Offences Act number 3 of 2006.

The particulars of the offence are that on diverse dates between 27th February 2010 and 27th May 2010 at {*particulars withheld*} in Kisumu West District of Nyanza Province committed an indecent act with M. A. O. a child aged fifteen years by touching her vagina, breast and buttocks.

The appellant was convicted and sentence to serve twenty (20) years imprisonment. He has filed his appeal citing the following grounds:-

1. That the learned trial magistrate erred in law and fact in convicting the appellant of the offence, charged when the prosecutions had not provided its case beyond reasonable doubts as by the law.

2. That the learned trial magistrate erred in law and in fact disregarding the evidence of the appellant which evidence was cogent and credible.

3. That the learned trial magistrate erred in law and fact in shifting the burden of proof on the appellant.

4. That the learned trial magistrate erred in law and fact in convicting the appellant in the absence

of DNA and age assessment report on the complainant.

5. That the learned trial magistrate erred in law whereby he did not impartially analyse the evidence adduced by both parties and hence his judgment is insupportable in law.

At the hearing of this appeal the State supported the conviction. The appellant apart from his oral evidence chose to rely mainly on his written submissions.

I have perused the courts proceedings as well as the judgment. Even before analyzing and evaluating the same it is imperative that I determine one main point which I have observed in the entire proceedings.

There is no evidence that all the prosecution witnesses ever testified on Oath. On 24th February 2011 the proceedings shows that the same were done in camera. It further states **"PW minor girl SS in Kiswahili".** The same is repeated with PW2, PW3, PW4 and PW5.

The abbreviated word **"SS**" is strange to me. Ordinarily the proceedings ought to be written in full and not abbreviations. I am unable to know what **"SS'** meant.

Section 151 of the Criminal procedure Code States :-

"Every witnesses in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath" (*underlining mine)*

It is therefore clear that the taking of an oath is mandatory.

Black Law Dictionary 8th Edition defines Oath as:- **A solemn declaration accompanied by a swearing to court or a revered person or thing that ones statement is true or that one will be bound to a promise".**

The effect of an oath therefore is to ensure that all that the witnesses states is true and it invites penalties should it turn out to be false.

For the above observation therefore I need not go into the merits or demerits of this appeal. The options opened now is to order that the appeal be allowed or a retrial. I shall order a retrial pursuant to the nature and the circumstances in this case.

The period when the offence was committed is not inordinately long. The witnesses including the complainant are still available. Most of the witnesses in any event are professionals.

I do therefore order that this matter be retried before another court of competent jurisdiction and not before the same trial magistrate. Without prejudice to the findings of that court, in the event that the appellant is found guilty, the court should take consideration for the period served by the appellant in jail from the date he was arrested and the period he was sentence. That period for avoidance of doubt should be computed and added to whatever sentence the court shall give.

Orders accordingly.

Dated, signed and delivered at Kisumu this 9th day of July 2012

H. K. CHEMITEI
JUDGE

In the presence of:

……State Counsel

…… Appellant

HKC/aao