REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 83 of 2007

BAISHE ALI MOHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, **Baishe Ali Mohammed**, was charged with the offence of committing Indecent Act with a child contrary to provisions of section 11(1) of the Sexual Offences Act.

The particulars are that on the 2nd day of January 2007 at about 6.30pm in Lamu District within the Coast Province, unlawfully and indecently touched the private parts, namely, buttocks of **H I,** a child under the age of 18.

He was convicted after trial and sentenced to serve 7 years imprisonment.

He appealed against conviction and sentence and at the hearing was represented by Mr. Abdallah Khatib advocate, who drew up 4 grounds of appeal which is convenient to use as an index. At the hearing the said counsel applied for leave to argue all the four (4) grounds together. There being no objection from the learned state counsel, Mr Ogoti, I allowed Mr Abdallah's application.

Mr Abdallah argued that the learned trial magistrate erred in law in his evaluation of the evidence on record and thereby came to a wrong conclusion. The complainant's evidence is that the appellant removed his clothes and did bad things to him.

Dr. Gilbert Mawabi who examined the complainant found as a fact that there was no laceration, no spermatozoa, no bruise or cut in the vulva. The canal ring was normal. There was no evidence of trauma or forced entry. The expert evidence of the doctor was thus at variance with the evidence of the complainant.

In sexual offences, it is trite law that there ought to be corroboration. Yet the learned trial magistrate convicted the appellant without the requisite corroboration.

The foregoing apart the learned trial magistrate also relied on the evidence of PW 2 and PW 4 which were merely hearsay.

Last but not least, that the sentence was harsh and excessive. The maximum sentence under section 11(1) of the Sexual Offences Act is 10 years. Yet the learned trial magistrate gave the appellant 7 years despite the mitigating circumstances.

Mr Ogoti, learned state counsel, supported the conviction and sentence. He urged me to find that the appellant was charged with indecent assault as opposed to sodomy.

That under section 2(1) A of the Sexual Offences Act, indecent assault means an intentional act which causes:-

(a) Any contact between the genital organs of a person, his or her breasts or buttocks with that of another person. It does not include penetration.

That the complainant (PW 1) was known to the appellant. He used to give him a bicycle to ride. On the fateful day the appellant asked the complainant to go to his house. Having presented himself, the complainant was taken to the roof top. He was instructed to remove his clothes and sleep on the bed. He resisted. At this point in time the appellant took upon himself to remove his clothes. The appellant also removed his clothes. He then did bad things to him, which meant he removed his clothes and touched his buttocks with his penis.

I was urged to find that since they were only two at that time, it was incumbent upon the magistrate to choose whose evidence to believe. He believed the complainant.

PW 2 merely confirmed that the appellant was always in the habit of giving small children bicycles to ride. This was a means of luring them.

Given the nature of the charge, the doctor's evidence was not material. It could have been material if the charge was that, of sodomy.

Last but not least I was urged to find that the trial magistrate was under section 124 of the Evidence Act entitled to rely on the evidence of a minor even without corroboration having warned himself of the danger of doing so.

This being a first appeal I have carefully re-evaluated the evidence on record. Having done so I make the following findings:-

One, that the appellant and the complainant knew one another well.

Two, that appellant was in the habit of luring small children by giving those bicycles to ride (see evidence of PW 1 and PW 2).

Three, on the fateful day the appellant asked the complainant to come to his house.

The learned trial magistrate believed that once in the house the complainant was undressed by the appellant who touched his buttocks with his penis.

Four, under section 124 of the Evidence Act the magistrate was entitled to rely on uncorroborated evidence of a minor if satisfied that the child was truthful **(See MUHAMED Vs- REPUBLIC (2005) 2 KLR)**.

Five, the charge of committing indecent act with a child under section 11(1) of the Sexual Offences Act was thus proved on the evidence even without the evidence of the doctor.

On sentence, I take cognizance of the fact that the maximum sentence for an offence under section 11(1) of the Sexual Offences Act is 10 years. Given the mitigating circumstances of the case, I am of the view that the sentence was harsh and excessive in the circumstance.

For those reasons the appeal against conviction is dismissed. The appeal against the sentence is allowed. The sentence is reduced to the period already served. The appellant is, accordingly, set free unless lawfully held for some other lawful reasons.

Dated and delivered at Malindi this 4th day of May 2009.

N.R.O. OMBIJA

JUDGE

Mr Ogoti for Republic

Mr for Abdallah for Appellant.