REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 86 OF 2017

WALTER CHESORI TOWETT.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the conviction and sentence delivered on by Hon. F.Kyambia (PM) in Sirisia Cr. Case No. 900 of 2015)

J U D G M E N T

1. **Walter Chesori Towett (the appellant),** was charged with the offence of defilement contrary to ***section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006***.

2. The particulars of the offence were that on 29/8/2015 at about 9.00 a.m in Chetais Sub-County within Bungoma County he intentionally caused his penis to penetrate the anus of EK, a male child aged 9 years old.

3. The appellant also faced an alternative charge of committing an indecent act with a child contrary to ***section 11 (1) of the Sexual Offences Act No. 3 of 2006*****.** It was alleged that on the same day, place and time, he intentionally touched the anus of EK a child aged 9 years.

4. The appellant denied the charges but after trial, he was found guilty, was convicted and sentenced to twenty years imprisonment. Aggrieved by that decision, the appellant filed this appeal raising seven grounds that can be summarised into four, *viz*, ***that; the charge sheet was defective as it did not disclose the section of the law under the Sexual Offences Act, the conviction was founded on fabricated, insufficient, inconsistent and uncorroborated evidence, there was no medical evidence to link the appellant to the offence and that the trial erred in rejecting the appellants defence.***

5. In his submissions, the appellant did not address the grounds of his appeal. He only submitted that the sentence was excessive and gave mitigation for a lenient sentence. He submitted that he was not afforded an advocate during the trial thereby violating his rights under ***Article 50 of the Constitution***. On its part, the prosecution submitted that it had satisfied all the ingredients of the offence and the sentence was proper in the circumstances.

6. This court being the first appellate court, it is alive to the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** wherein it was held: -

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."***

7. The prosecution case was that, on 29/8/2015, the complainant was in the farm planting onions together with his brother **Ezra Ruto (Pw6)** and the children of the appellant. The appellant asked the other children to continue planting onions whilst he asked the complainant to go to his house.

8. On reaching his house, the appellant closed the door and threatened to cut the complainant's throat if he did not yield to his demands. The appellant then removed the complainant's clothes and had penetration on him twice. He then asked him to go and join the others in planting the onions.

9. The following day, the complainant reported the incident to the village elder, **Maurice Esok Ekidap (Pw3)** who arrested the appellant and

took him together with the complainant to Cherevek Ap Camp. At the camp, they were received by **Pw4 PC Ambrose Mariti** who escorted them to Chepkube Police Station where **PC Elijah Nakaya (Pw5)** received them**. Pw5** issued the complainant with a P3 form and directed his father, **TC (Pw2)** to take the complainant to hospital.

10. **Pw2** took the complainant to Cheptais Sub County Hospital where he was examined by **David Kimengich (Pw7).** On examination, **Pw7** confirmed that the complainant had painful bruises and injuries on the anal cavity. He opined that the complainant had been defiled as there were injuries suggesting penetration.

11. In his defence, the appellant told the court that he had on 20/6/2015 entered into an agreement with **Pw2** and his wife for the supply of onion seeds. That the same were to be collected on 20/8/2015 but **Pw2** requested for more time to prepare the land. That on 27/8/2015, he went to plant in the farm but there was no one in the farm. On 30/8/2015, **Pw3** informed him that he was required at the AP camp. He went to the camp but was detained there and later charged.

12. The first ground of appeal relates to the defectiveness of the charge sheet. According to the charge sheet, the appellant was charged with *"Defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006"*. What was missing were the words, *as read with,* immediately after the word ***section 8(1).***

13. In this court's view, that error was minor as the appellant was aware of the charge he was facing. In any event, that is an error which is curable under ***section 382 of the Criminal Procedure Code*** as harmless error which did not occasion any miscarriage of justice. See **B N D v Republic [2017] Eklr.**

14. The second and third ground were the insufficiency, and inconsistencies in the prosecution case, the lack of corroboration as well as medical evidence. The appellant did not point out the inconsistencies complained of.

15. **Pw1** recalled succinctly how the appellant separated him from the rest of the children and took him to his house and defiled him. He testified in detail as to what happened. His brother, **Pw6** confirmed the appellant separating the complainant from the rest of the children and how the complainant returned an hour later and told him that the appellant had defiled him.

16. It is clear that when **Pw1** got the first opportunity, he reported to **Pw6** what had happened to him. The appellant prevented the complainant from going home on the day of the incident. It is the following day when the complainant and **Pw6** found the village elder, **Pw3** that they reported the incident to him. **Pw7** confirmed that there were injuries of a recent nature on the complainant's anus when he examined him.

17. This Court finds no merit in the appellant's complaint that there was delay in making the first report and in seeking medical attention by the complainant. This is because, the complainant first informed **Pw6** of the incident almost immediately. The next person in authority was **Pw3** who was only available the next day. The appellant's action of preventing the complainant and **Pw6** from going home, delayed the making of the report to the authorities and for any immediate medical examination.

18. In this Court's view, the prosecution case was consistent and firm. **Pw6 and Pw7** were independent witnesses who corroborated the complainant's testimony in material particular.

19. The trial court which saw the witnesses found that the complainant was telling the truth. Under ***section 124 of the Evidence Act, Cap 80,*** the evidence of the complainant was sufficient to return a conviction.

20. The evidence on record proved the age of the complainant as being 9 years. There was the P3 form, age assessment form and the testimony of the father **Pw2.** On penetration, the testimony of the complainant and **Pw7** together with the P3form proved that there had been penetration. As regards the identity, the appellant was well known to the complainant. The appellant was positively identified by both the complainant and **Pw6.**

21. In view of the foregoing, the prosecution case was proved to the required standard.

22. The appellant complained that there was no medical evidence to connect him to the offence. In **Robert Mutungi Muumbi v Republic [2015] Eklr**, the court held: -

> ***"Section 36(1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved…."***

See also **KOO v Republic [2019] Eklr.**

23. On the evidence on record, this Court is satisfied that there was no reason to order for a DNA test in order to prove the case against the appellant.

24. The last ground was that the trial Court did not consider and analyse the appellant's defence. The appellant did not directly deny that on the material day and time he was with the complainant. Further, he did not deny the specifics that were alleged by the complainant. The only issue he raised was that he owed money to the complainant's father. This however, he did not raise with **Pw2** when he testified. In this regard, the defence was properly rejected as an afterthought.

25. The appellant beseeched the Court to reduce the sentence for being unconstitutional and excessive. ***Section 8(2) of the Sexual Offences Act*** provides for a life sentence for defilement of a child of less than 11 years. The age of the complainant in this case was proved to be 9 years. There is nothing unconstitutional about the sentence. The trial Court had the discretion to mete out any sentence whether twenty years or any other sentence it felt to be adequate.

26. The appellant had a wife and children. There is no doubt that there were or could be many people of the opposite gender at his disposal with whom he could engage in sexual intercourse. There is no probable reason why he had to sexually assault a young boy of 9 years. By so doing, he ruined the life of the poor boy. It must have psychologically devastated the victim. It calls for a deterrent sentence. That is why life sentence would have been the most appropriate sentence in this case. The appellant must be very lucky that he escaped with a lenient sentence of 20 years imprisonment. He is also lucky that the prosecution did not cross-appeal in this Court.

27. In this regard, I find the appeal on both conviction and sentence to be without merit. I dismiss the appeal and uphold both the conviction and sentence.

Signed at Meru: -

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 17th day of September, 2020.

F. GIKONYO

JUDGE