REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 226 OF 2017

WK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 520 of 2016 delivered on the 4th day of December, 2017 by Hon. R. Yator, SRM]

JUDGMENT

Introduction

1. The appellant was on 04/12/2017 convicted and sentenced to serve imprisonment for 20 years for the offence of defilement c/s 8(1) (3) of the Sexual Offences Act, the particulars of which were that he had *"on 2nd May 2016 at 1900hrs in Koibatek sub-County within Baringo County, intentionally and unlawfully caused his penis to penetrate the anus of KK, a child aged 12 years."*

2. The appellant also faced an alternative charge of indecent act with a child c/s 11(1) of the Sexual Offences Act on the same facts, short of penetration. The Prosecution called 6 witnesses and the appellant when put on his defence gave an unsworn statement without calling any witnesses.

Judgment of the trial Court

3. In her judgment, the trial court considered the evidence before her and convicted the appellant on the main count as follows:

> *"I have considered both the prosecution and defence as well as the exhibits herein produced. Firstly, and in establishing the complainant's age pexb 5 shows date of birth as 23rd January 2004 and as such at time of offence the victim was 12 years old.*
>
> *On whether the complainant was defiled he confidently said the accused after laying him down as he faced down he inserted his penis into his anus and he felt pain. He as well managed to identify the accused saying he had lit a torch from the phone which he switched off when they met, that he knew him well as he was a worker to their neighbour and used to know him as Wesley.*
>
> *He further said that he had met the accused who had been going to the shops immediately after informing his mother, Pw2 was telephoned at the Centre where the accused was and was arrested. As such his identity by the complainant is indisputable. In fact the accused confirmed that shortly after his arrest, PW1's parents arrived as well as PW3 and PW4.*
>
> *The doctor testified and P3 form which he produced said probable weapon was sodomy and that he relied on the treatment chit and PRC form which confirmed the victim had soiled anus and perineum soiled with spermatozoa/semen and along the scrotal region. As such the said observations by the doctor are related to the offence herein.*
>
> *The accused in his evidence said the evidence was contradictory as the doctor said the child's clothing was soiled while the child did not state the same and that the investigating officer said the child was dragged into the forest while the child said he was taken into the forest.*
>
> *The child's short which was soiled was produced as exhibit and indeed the Court is convinced that the soil on the short was due to lying down and further his anal area was found to be soiled with mud hence forms a nexus. I hence find the prosecution evidence to be quite overwhelming and the charges herein against the accused have been proved against the required standard of proof and as such he is hereby convicted under section 215 of Criminal Procure Code."*

4. In sentencing the accused, the trial count considered a deterrent sentence appropriate in the circumstances of the case as follows:

> *"Considering nature of offence which is rampant and has to be deterred, the accused is hereby sentenced to 20 years imprisonment with a Right of Appeal."*

Appeal

5. The appellant filed a Petition of Appeal dated 14/12 2017 setting out grounds of appeal as follows:

> *a) That the learned trial Magistrate erred in law and in fact by failing to appreciate that I was not given a fair hearing since I was not accorded enough time and resources to prepare my defence as Article 50 of the Constitution of Kenya.*
>
> *b) That the learned trial Magistrate erred in law and in fact by failing to appreciate that the appellant's identity was not proved to the required standards.*
>
> *c) That the learned trial Magistrate erred in law and in fact by failing to find that the exhibits were produced in evidence contrary to laid down Law Procedures.*
>
> *d) That the learned trial Magistrate erred in law and in fact by dismissing the appellants defence yet the same was cogent and raised credible doubt against the Prosecution's case.*
>
> *e) That I pray to be supplied with committal proceedings and its judgment.*
>
> *f) That further grounds shall be adduced at the hearing."*

6. The appellant subsequently filed supplementary grounds of appeal raising three principal objections on lack of positive identification of appellant as the perpetrator, lack of corroboration of the complainant's evidence and non-consideration of the defence evidence set out as follows:

> *"**Supplementary Grounds of Appeal***
>
> *Viz*
>
> ***Ground One:***
>
> *That my lord the trial learned Magistrate faulted both in law and face when seemingly based the conviction on mistaken identity at night where the condition of positive identification was not free form the possibility of error given to the fact that Pw1 was suddenly grabbed and allege to have been sexually sodomised in a state of apprehensive.*
>
> ***Ground Two:***
>
> *That my lord the trial learned Magistrate once more faulted both in law and fact when miserably based the conviction on misapprehension and assumption without due circumspect that the Prosecution evidence were below the standard not worth to be relied upon to prove the crime described by Pw1 and the Prosecution as a whole.*
>
> ***Ground Three:***
>
> *That my lord the trial learned Magistrate faulted both in law and fact when maliciously based the conviction on flimsy and doubtful account attributed in Court by the Prosecution side given to the fact that there was no age assessment of Pw1 and birth certificate were tendered in Court addition to that the appellant was not examined to establish beyond all reasonable doubts whether he involved to commit the crime in question.*
>
> ***Ground Four:***
>
> *That my lord the trial learned Magistrate finally faulted both in law and fact when erroneously overlooked and objected the appellant's defence without cogent reason is yet the same was remarkably comprehensive in casting considerable doubts to the strength of the Prosecution case."*

Submissions

7. The appellant and Counsel for the DPP made oral submissions at the hearing with the DPP not opposing the appeal but urging conviction for the alternative charge of indecent act as follows:

> *"Appellant*
>
> *I have written submissions. I shall reply to submissions by the DPP.*

DPP

Appeal is not opposed.

Appellant convicted of defilement contrary to section 8 (1) and (3) of the Sexual Offences Act and sentenced to serve 20 years. Complainant was 12 years as per Clinic Card, which indicated that he was born on 23/1/2004.

It is the evidence of the complainant that he was sent to the shop by his mother and the appellant raped her. He also identified the appellant as he used to see him every day at the family of Toloso who was their neighbor. He also knew the appellant by his names.

The appellant pulled the complainant at the push and laid him on the ground and remover his shirts and inner wear till the knees. The appellant had removed his trouser and removed his penis and did bad manners to his anus.

He did not scream although she felt pain. He reported the matter to his mother who took him to hospital. The medical evidence and the P3 form given by Pw5 contradict the evidence in the medical notes and the PRC form.

Pw5 at page 26 lines 12 – 13 states that sodomy was thioght to have taken place in day before examination and had been treated.

At line 14 – 15 of page 26, he stated that the injuries to the anal area were soiled with wound but there were no liners and there no discharge apart from the soiling. This was inconsistent with the finding on the PRC form which indicated that there was presence of semen.

All the document indicated that there were no liners at the anal region and in any view it has an attempt to defile which was not completed.

Appellant was charged with alternative count of indecent act which was the right charge for the appellant to be convicted as the one for defilement was not supported by evidence.

I urge Court to review the evidence on record and use its discretion to convict and sentence on alternative count.

Appellant

I am a young person. The 20 year sentence is excessive. The trial court should have been guided by my defence. I came from Kericho. It was a trumped up charge. I was taken to Mathare Hospital. I request to be taken to my Psychiatrist to establish whether I am in need of medication. I last took medication before was convicted and sentenced and transferred to Nakuru G.K. Prison.

DPP

The appellant should be referred for mental assessment before sentence is passed. "

8. On the DPP's suggestion, the court called for a mental assessment report before judgment on the appeal from conviction and sentence. The psychiatrist's report by Dr. Njau, J. W. of Provincial General Hospital, Nakuru dated 18th October 2018 and filed on 08/11/2018 confirmed the appellant as fit to follow the court proceedings and noted that *"Wesley Koros is an adult male who suffered from psychotic disorder which was successfully treated and he is currently stable mentally."*

Issues for determination

9. The court frames the following issues for determination:

a. Whether defilement proved;

b. Whether alternative charge proved; and

c. Whether appellant shown as perpetrator.

10. A question of the appellant's mental state and its impact on the trial is also considered below.

Determination

Whether defilement proved

11. According to the complainant minor (PW1), the appellant had upon meeting the complainant at about 7.00pm in the evening of 22nd May 2016 defiled him by inserting his penis into his anus and then left after completing the act as follows"

"PW1

I come from Langas in [particulars withheld] where I live with my parents with my 10 siblings.

I school at [Particulars Withheld] in class 4.

I know why I am in Court on 22nd May, 2016 around 7.00 pm I was going home while from Bagdad while from shops where I had gone to buy tea leaves after being sent by my mother IL. The accused Wesley Koros whom ***I met on the way was going to Bagdad in Metipso to the shops while with a phone which he was using its torch to reflect and when I met him he switched off torch on the phone and I did not talk with him when we met. I could identify the accused when I met him as I used to see him every day where he used to work at family of Toloso who are our neighbours (nearby) and I used to know his names****.*

He then followed me as I headed home where I pass through the forest and I did not ask him anything and he did not tell me anything while running after me but I was walking he then pulled me into the forest and I was wearing a blue short and inner wear black in colour and he did not tell me anything and first laid me down on the ground after which he removed my short and inner wear till the knees and he was bending then he removed his trouser totally and he remove his penis and I was lying facing down and he did bad manners to me after inserting to my backside on the anus. ***After that he went away towards the road. I did not scream. I did not scream as it was dark and I felt pain on my anus. He then entered towards the forest and he lighted the torch on the phone and I went home where I told my mother and she took me to Eldama Ravine District Hospital that same night and also to the police****. The accused is the one in Court (points out)."*

12. PW2, a neighbour who shortly after the alleged incident had at 7.45pm answered a call for help from the complainant's mother to who the complainant had made a first report that the accused had defiled him, described how shortly after the alleged incident he called a shopkeeper and village elder and directed them to the shopping centre towards which the complainant said the accused had gone after defiling him as follows:

"PW2

I come from Lanagas village in Metipso and I work as a casual labourer at a sawmill. On 22nd May, 2016 at 7.45 pm I was at home when I received a phone from a neighbor IL that I rush to her home and I went there and she told me there was an employee of a neighbor (whom I knew) who had defiled her child and it was one KK and PW1 told us after defiling him accused went towards shops. I called Hezekiah Cheruiyot a shopkeeper at Bagdad Centre and informed him to check if accused was there and he confirmed he was at the Centre. I then called Laban Kibet of Nyumba kumi and we all went to the Centre with the complainant and his mother and found accused had already been tied with a rope inside a hotel and Chief called police who said we take him to Police Station, where we took him and we were asked to take the boy to hospital and I accompanied the mother to Eldama Ravine District Hospital same night. The accused is the one before Court and I never used to know his name but knew him physically as a worker for my neighbor Tungo Tuluso."

13. PW3, the shop keeper who PW2 had called seeking help in arresting the appellant confirmed receiving the call at 8.00pm requesting his help in arresting the appellant, which he did shortly thereafter, as follows:

"PW3

I come from Chemasusu in Eldama Ravine and I am a maize dealer at Bagdad Centre where I have a store there. On 22nd May, 2016 at 8.00 pm, Chemirmir (PW2) called me asking if I knew the worker for Gogo Tuluso and that he had a mark/scar on the face and I told him I knew him as he used to bring milk daily at hotel and he told me he had done something and that I arrest him and I found him seated outside with another young man and I tied him with a rope and took him to the hotel inside and mother to complainant, one I, and PW2 arrived and brother to Thomas, one Moses, arrived and said accused had raped the boy and we looked for a vehicle and brought him to Eldama Ravine Police station.

The accused is the one in Court (points out).

<u>Cross examination by accused</u>

I did not take your phone nor money nor lights."

14. PW4, the mother of the minor complainant (PW1) testified how she received her son's first report of the incident that *"he came crying and saying the employee of Tungo Tuluso who had done bad manners to him"* and also confirmed the arrest of the appellant in her testimony set out in full as follows:

"PW4

I come from Metipso and I am a peasant farmer. On 22nd May, 2016 on a Sunday I sent my son KK. to buy me tea leaves in the evening at Metipso Centre at 6.00 pm and he returned while I was closing cows around 7.00 pm and ***he came crying saying the employee of Tungo Tuluso who had done bad manners to him I understood he meant defilement****. I then took child to Tungo Tuluso and informed her what had happened and she said she did not know where the accused had gone. I then telephoned my neighbor Thomas (PW2) and on arriving home while he arrived I explained and he made calls to the shopping Centre and in particular Hezekiel Cheruiyot (PW3) and informed him to look for the accused and shortly Ezekia arrested him and we went towards the shops and on arrival the employee of Tungo had been tied with a rope on the hands outside the hotel. We looked for vehicle and went home to collect child to the Eldama Ravine Police Station and was with Thomsa and Ezekia and we also had*

accused in the vehicle. We then took child to hospital as accused remained at Police Station and we went to Eldama Ravine District Hospital and treatment chit Serial No. 9220 dated 22nd May, 2016 MFI – 3.

Child was treated and we left for home and the following day we came to record statements and pick P3 form which we took for filling by Dr. Kamau at Eldama Ravine District Hospital – MFI 4.

My son was 12 years at time of offence born on 23rd February, 2004 and I have the child health card (refers) – MFI 5.

I used to see the accused work at Tungo's homestead as we boarder each other as neighbours and I never used to know his names but used to see looks and he is the one in Court (points out).

Cross examination

I sent child at 6.00 pm and he returned around 7.00 pm. I was not with the accused at any time that day. My neighbor Thomas Chemirmir called Hezekiah so they look for you. I was not present when Hezekia arrested you but we had called him to arrest you."

15. PW5, Dr. Philip Kamau, presented the complainant's P3 form on his examination of the complainant on 23rd May 2016, the day after the alleged incident as follows:

> *"PW5*
>
> *Medical Superintendent Eldama Ravine Sub-County Hospital. I have a "P3 form for a minor (male) aged 12 years and I am the one who examined the patient who alleged to have been defiled by one well known to him. Was stable and no injuries on the rest of the body. Sodomy was thought to have taken place a day before examination and had been treated.*
>
> ***The injuries to anal area was soiled with mud but no tears and no discharge apart from the soiling and I filled the P3 form on 23rd May, 2016 and as per examination I opined in section 3 that probable type of weapon was sodomy due to muddy soiling and consistent with findings in PRC form.***
>
> ***PRC form was filled by our Clinical Officer which showed dry semen on scrotal area of victim and posterior was soiled with mud with no tears***.
>
> *He was treated at our facility on 23rd May, 2016 with complainant of sexual assault and brought in by parents and accompanying Police man and that he had been sent to buy tea leaves and on way back was chased by a known person to him, trailed into the bush and penetrated him through the anus and which soiled anus with mud and appeared terrified and penile soil with spermatozoa as well as the scrotal region and child was examined having changed clothing but had not bathed. Other tests were normal and anal swab showed non-motile spermatozoa and he was treated with antibiotics prevention against HIV and painkillers. At time of filling P3 form the injuries were one day old. MFI 4 – pexb 4.*
>
> *Treatment card MFI 3 – pexb (a)*
>
> *PRC form MFI 6 – pexb (b)*
>
> *Cross examination by accused*
>
> *There is no confirmation of the spermatozoa seen was yours. The mud was on the child's buttocks."*

16. PW6, the Investigating Officer confirmed the receipt of a complainant at Makutano Police station on the day of the incident 22nd May 2016 and he produced the blue shorts and black inner wear that the minor had worn during the incident and a clinic card showing the age of date of birth of the complainant as 23rd January 2004. He also confirmed the cause of delay in prosecuting the appellant as his mental health as follows:

> *"I later prepared the charges against the accused herein who at first could not answer any questions and [by] an order of 15th July 2016 I took him to Provincial general Hospital Nakuru and later he was referred to Mathare hospital for medication. I looked for his family members and could not trace and later he recovered from treatment at Mathare Hospital and found fit to stand trial [continued] with trial of his case."*

17. When put on his defence, the appellant confirmed the circumstances surrounding his arrest as related by Thomas (PW2) and Hezekiah (PW3) in a fluent and coherent chronology as follows:

> ***"DW1***
>
> *I come from Kericho and I was a casual labourer. On 22nd Many, 2016 I was at Metipso Centre besides a hotel while with another person and I saw two people come out of the hotel and Hezekiah came and greeted us and asked of my names and I told him I am*

Wesley and he said he was looking for me and took me inside a hotel and asked another for the rope and tied me saying Thomas had telephoned I be arrested and he got a rope from a shop and tied me.

I asked why and he said he did not know why but had been instructed by Thomas. Shortly Thomas and parents of complainant and had arrived and took me outside and started to beat me and they called driver of matatu one Maila who put me in the vehicle together with parents of complainant, complainant, Hezekiah and Thomas and took me to Eldama Ravine Police Station as I was locked in around 9.00 pm and a lady officer took me with complainant for examination and following day I was brought for examination and I was taken for medication at Mathare and after recovery my matter proceeded."

Findings on Defilement

18. Medical evidence did not point to partial or complete penetration. The only evidence of penetration is that of the complainant minor which was unsworn and, therefore, required corroboration unless, pursuant to the proviso to section 124 of the Evidence Act, the court for recorded reasons indicated to have believed that the sexual offence victim was telling the truth. The principle of evidential review by the 1st appellate court as elaborated in ***Okeno v. R*** (1972) E.A. 32, requires the 1st appellate court to defer to the trial court on issues of observation of demeanour of the witnesses. The trial court in this case did not, however, record any reasons why it should believe the complainant or, at least, that it had warned itself on convicting on the unsworn evidence of the minor complainant. The trial court sought and purported to find corroboration in the medical evidence. However, none of the findings of the trial court on the evidence presented by the doctor (PW5) alleges to confirm penetration.

19. When weighed as a whole, the evidence of the prosecution witnesses and the unsworn statement of the defence, the court is left with no doubt as to the fact that the complainant had while coming back from the shops at 7.00pm where he had been sent to buy tea leaves by the mother, the minor had been attacked and sexually assaulted by a person whom he had identified as the appellant. The extent of the sexual attack required to be confirmed by evidence from the medical examination, which did not appear to support a finding of penetration a key ingredient of the offence of defilement.

20. The court finds it unsafe to convict for defilement as medical examination report on treatment card PEX 3 dated 22nd May 2016 had showed –

"*Anal region – mud soiled on gluteal areas*

No tear around the anal ring,

Perineum soiled with spermatozoa/semen and along the scrotal inguinal region. *Other systems normal."*

One would expect tears or bruises in the anal ring in a case of defilement, and the semen on the outside of the anus raises a question whether penetration was achieved. I would agree with the DPP that the evidence pointed to attempt rather than defilement.

Whether alternative charge proved

21. From the evidence, there is no doubt that the offence of indecent act was complete in the contact of the assailant's penis with the complainant's anus. The complete picture painted by the evidence of the child complainant, the medical evidence and the exhibits of mud-soiled shorts and examination treatment card recording spermatozoa on the scrotal region is one definitely of indecent act or attempted defilement but not certainly, or beyond reasonable doubt, one of penetrative defilement.

Whether appellant shown as perpetrator

22. This was a case of recognition rather than mere identification and as held in ***Anjononi v. R*** (1980) KLR 59 ***"the recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."*** In this case, the complainant testified that he knew the appellant *"as he used to see him every day where he used to work at the family of Toloso who are our neighbours (nearby) and I used to know his names"*. The appellant was well known by the complainant who recognized him using the light from the appellant's mobile phone which he had shone until he met with the complainant, and who on first report to his mother told the mother that it was the employee of Tungo Tuluso and who had headed towards the shopping Centre, and the mother in turn calling her neighbour PW2 who reports and seeks the help of the shopkeeper PW3 in arresting the appellant, leading to the arrest of the appellant at the shopping Centre shortly after the incident. For this reason, I have no doubt that the appellant was properly identified. His own unsworn statement confirms being arrested from the shopping Centre, the place where the complainant had said he was headed, as the two witnesses PW2 and PW3 testified.

Mental status of the appellant

23. Mental assessment of the appellant was ordered by the trial court on 24/5/2016, the first day of the trial on arraignment when the appellant is shown to have respondent to the charge of defilement saying *"it is true"*.

24. The accused was, on the finding of Psychiatrist that he did not follow the proceedings, referred for mental treatment at the Mathari Mental Hospital on 15/7/2016. By a mental report from Mathare Mental Hospital of 13/102016 declaring the appellant fit to make his defence, the trial resumed under section 164 of the Criminal Procedure Code (upon the confirmation by DPP of intention to continue with his prosecution in terms of section 163(2) of the CPC) on 28/11/2016 when the accused denied the charge and a plea of not guilty was entered and trial commenced on 18/1/2017, the prosecution calling 6 witnesses and concluded on 27/9/2017 with the unsworn statement of the appellant DW1.

Guilty but insane?

25. No inquiry as to whether the appellant was unwell and mentally unstable at the time of the commission of the offence was made. The defence did not raise the defence of insanity under section 12 of the Penal Code, which provides as follows:

> *"**12. Insanity***
>
> *A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."*

26. Upon confirmation by the DPP under section 163(2) of the Criminal Procedure Code of its intention to continue with the prosecution of the appellant after the psychiatrist confirmed the appellant to be fit to proceed with the trial, the appellant could have raised, when the trial resumed under section 164 of the CPC, the defence of insanity that he was insane at the time of commission of the offence. Having failed to do so, the court has no basis for considering such a defence and there was indeed, no evidence along that line of defence. Section 164 of the CPC provides as follows:

> *"**164.** Resumption of proceedings or trial*
>
> *Wherever a trial is postponed under section 162 or section 280, the court may at any time, subject to the provisions of section 163, resume trial and require the accused to appear or be brought before the court, whereupon, if the court considers the accused to be still incapable of making his defence, it shall act as if the accused were brought before if for the first time."*

27. The appellant in his unsworn statement gave lucidly related events as to his arrest and pointed to alleged inconsistencies in the evidence of prosecution witnesses defence saying:

> *"When PW3 testified he said he did not know why he arrested me. I did not ask PW1 and PW2 all questions. The complainant said I took him to the forest and investigating officer said I dragged him down in the forest. The doctor said PW1 had soil on his short yet PW1 did not say he had soil and all the other evidence was false."*

28. Significantly, there is in the record of the trial court a minute of the Psychiatrist at Nakuru PGH on a follow up review ordered by the court before committal to Mathari mental hospital, where the psychiatrist on 15/6/2016 notes as follows:

> *"Reviewed today and still appears confused, or having thought block, or **malingering**. I really wish to interview a close relative to get corroborative information. Meanwhile he should continue with medication."*

There was no evidence that the close relatives of the appellant were interviewed to confirm the findings of mental unsoundness of the appellant.

29. All this does is to question the appellant's state as having been mentally unsound at any time. However, had there been evidence of he was insane so as not to be responsible for his act at the time of the commission of the offence, the court should have returned a finding of guilty but insane in terms of section 166 of the Criminal Procedure Code, as follows:

> *"**166. Defence of lunacy adduced at trial***
>
> *1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.*
>
> *2) When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.*
>
> *3) The President may order the person to be detained in a mental hospital, prison or other suitable place of safe custody.*
>
> *4) The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the President's order and thereafter at the expiration of each period of two years from the date of the last report.*
>
> *5) On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.*
>
> *6) Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a*

person has been detained by order of the President under subsection (3), make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.

7) The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital."

Conclusion

30. The chain of events between the attack on the complainant and the arrest of the appellant at the shopping Centre where the complainant had said he had headed after the assault as related by the prosecution witnesses PW1, PW2, PW3 and PW4 gave no room for doubt as to the sexual assault of the complainant by the appellant. The only question that arose was as to the extent of the sexual assault, whether it was defilement, complete with penetration – partial or full penetration – or whether it was an indecent act with merely touching as charged in the alternative count. The law requires that the unsworn evidence of a minor complainant be corroborated before it can be used to found a conviction, save in cases of sexual offences where for reasons to be recorded the Court believes the victim of sexual offence/complainant to be telling the truth.

31. The conviction in this case ought to be on the one for indecent act c/s 11(1) Sexual Offences Act as charged in the in the alternative count.

Orders

32. Accordingly, for the reasons set out above, the court makes the following orders:

1. The appellant's appeal is allowed and his conviction and sentence for defilement c/s 8(1) as read with 8 (3) of the Sexual Offences Act are quashed and set aside, respectively.

2. The appellant is convicted and sentenced to the minimum sentence of imprisonment for 10 years for indecent act with a child c/s 11 (1) of the Sexual Offences Act.

3. The sentence of imprisonment for ten (10) years shall commence on **04/12/2017** the date of conviction and sentence in the trial Court.

Order accordingly.

DATED AND DELIVERED THIS 24TH DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Kitilit, Prosecution Counsel for the Respondent.