REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.36 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. T. OKELO - SPM delivered on 31st October 2012 in Kibera CM. CR. Case No.5489 of 2009)

MAURICE OMBAJO LUGWIRI……..……APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellant, Maurice Ombajo Lugwiri was charged with six (6) counts of **child phonography** contrary to **Section 16(1)** of the **Sexual Offences Act**. The particulars of the offences were that on diverse dates between August 2008 and September 2009 at [particulars withheld] Estate in Nairobi, the Appellant unlawfully and intentionally showed obscene images and sounds by means of audio-visual media with the intention of encouraging the commission of sexual offence against M A , a child aged 7 years, M A , a child aged 10 years, P L, a child aged 6 years, N C , a child aged 10 years, J A , a child aged 13 years and C K, a child aged 5 years (hereinafter referred to as the complainants). In the alternative, the Appellant was charged with six (6) counts of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offences were that between the same period and in the same place, the Appellant unlawfully and intentionally committed an indecent act by touching the female genital organs of the six complainants. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was acquitted of the main count but was convicted of the alternative count of **committing indecent acts** with the six complainants. The Appellant was sentenced to serve twenty (20) years imprisonment in each of the counts. The sentences were ordered to run concurrently. The Appellant was aggrieved by his conviction and sentences. He duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of prosecution evidence that did not support the charge. He faulted the trial magistrate for relying on contradictory, uncorroborated and baseless and worthless evidence of the prosecution witnesses to convict him. He took issue with the fact that the trial magistrate had not properly evaluated and analyzed the evidence that was adduced in the case, which in his view, exonerated him from the crime. The Appellant was aggrieved that he had been convicted on the basis of evidence that had not established his guilt to the required standard of proof beyond any reasonable doubt. He stated that his rights under **Section 200(3)** of the **Criminal Procedure Code** were not explained to him when the convicting magistrate took over the proceedings from the previous magistrate. He was aggrieved that his defence had not been considered before the trial court reached the decision to convict him. In the premises therefore, the Appellant urged the court to allow his

appeal, quash his conviction and set aside the sentences that were imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He also made oral submission urging the court to allow his appeal. Ms. Nyauncho for the State opposed the appeal. She submitted that the prosecution had established its case on the charge of **indecent assault** to the required standard of proof. She urged the court to disallow the appeal. This court shall revert to the argument made on this appeal after briefly setting out the facts of this case.

The facts of this case according to the prosecution's witnesses are as follows:

The five children who testified in the case were at the material time residents of [particulars withheld] estate. They lived with their parents. They lived in the same compound or as they called it, the same plot. They were pupils of [particulars withheld] Primary School. PW1 M A was aged 9 years at the time while PW2 N was aged 8 years old. PW3 P L was aged 7 years while PW4 M A was aged 11 years old. PW5 J A was aged 13 years old. The five witnesses testified that on various dates in 2008 and 2009, the Appellant, who also lived in the same plot, invited them to his house. While at his house, the Appellant showed them videos of European adults having sex. Each of these witnesses testified that during these sessions, the Appellant requested each of them, in turns to go to his bed where he asked them to re-enact what they had seen in the videos. The five witnesses testified that the Appellant asked them to undress by removing their underpants upon which the Appellant also removed his clothes and then inserted his penis into the respective vaginas of the complainants. From their respective testimonies, it was clear that the Appellant did not actually have sexual intercourse with them but touched their private parts in the course of these sessions. After each session, the Appellant gave the complainants money to buy sweets. He also warned them not to tell their parents or anyone else what was happening during these sessions.

PW9 R M was at the material time a teacher at [particulars withheld] School where the complainants were schooling. She testified that on 11th October 2009, while she was at the school, one of the pupils told her that PW4 had been sexually assaulted at their home. She investigated the issue and learnt that indeed PW4 and other complainants had been sexually assaulted by a man known as Maurice (the Appellant) who lived within their plot. She informed the parents of the complainants who immediately took action by reporting the incident to the police at Kabete Police Station. The complainants were taken to Nairobi Women Hospital where they were examined. It was established that none of the children had been penetrated. However, two of the children showed signs of sexual assault. Their respective medical reports were produced in court by PW12 Dr. Charles Gacheria Woyoe. The case was investigated by PW13 PC Schola Adhiambo. Upon conclusion of her investigation, she was of the view that a case had been made for the Appellant to be charged for the offences for which he was convicted.

When he was put on his defence, the Appellant denied committing the offences. He attributed his troubles to the disagreement he had with a parent of one of the complainants by the name G K M. He told the court that the said G K M was unhappy that he was having a relationship with his sister-in-law by the name of P. As regards when he was alleged to have sexually molested the complainants, specifically on 10th October 2009, the Appellant stated that on that day he was on duty at his place of work along River Road. He gave an alibi defence. He denied showing the complainants phonography. He reiterated that all his troubles were caused by the fact that the said G K M did not approve of his relationship with his sister-in-law.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (see **Njoroge – vs- Republic [1987] KLR 19).** The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant of **committing indecent acts** contrary to **Section 11(1)** of the **Sexual Offences Act** to the required standard of proof.

The first issue that the Appellant raised in this appeal is the question whether his rights in accordance with **Section 200** of the **Criminal Procedure Code** were complied with. **Section 200(3)** of the **Criminal**

Procedure Code requires that where a magistrate who has partly heard the case ceases to have jurisdiction, the magistrate taking over the proceedings is required to inform the accused of his right to recall any of the witnesses before the succeeding magistrate can proceed with the case. In the present appeal, although the Appellant said that his rights pursuant to the said **Section 200(3)** of the **Criminal Procedure Code** was not complied with, however, the proceedings of the trial court shows the contrary. The convicting magistrate took over the proceedings after the prosecution had closed its case. The Appellant had already been put on his defence. The convicting magistrate did inform the Appellant of his rights under **Section 200(3)** of the **Criminal Procedure Code**. The Appellant confirmed to the court that he understood his rights. However, he told the court that he wished to proceed with the case from where the proceedings had reached. That ground of appeal has no merit and it fails.

The Appellant stated that the prosecution did not prove its case against him to the required standard of proof beyond any reasonable doubt. In particular, the Appellant argued that the evidence adduced by the prosecution witnesses was contradictory and uncorroborated. Having re-evaluated the evidence adduced by the prosecution witnesses, particularly the complainants, this court reaches the same decision that the trial court did. The five complainants who testified in court narrated how the Appellant lured them to his house. The description the complainants gave of the lay out of the Appellant's house was consistent. This court had no doubt in its mind that the complainants were indeed present in the house of the complainant. They all narrated how the Appellant showed them pornographic videos from his mobile phone, before he asked them to re-enact the sexual acts with him on his bed. Although the mobile phone that the Appellant used during these sessions was not recovered, nevertheless, this court has no doubt that the Appellant used the said mobile phone to show the complainants videos of sexual acts.

It was clear from the evidence adduced by the five complainants that the Appellant did this on several sessions that he had with the complainants. He gained their trust by giving them money to buy sweets. He warned them against telling their parents what they had done with him in his house. The Appellant's claim that the charges were contrived against him because of an existing grudge with one of the parents of the complainant does not hold. It is improbable that the five children would have been coached to narrate the same events if the events did not actually take place. This court holds that the evidence adduced by the five complainants was corroborated in all material respects by the evidence of their parents and that of their teacher. The evidence adduced by the prosecution witnesses was cogent, consistent and corroborated in all material respects. Any minor discrepancies in the narration of the events that occurred can be explained by the fact that the complainants were children and cannot be expected that they would remember all the minute details of what took place as an adult would. The alibi defence in so far as it related to the alleged events in one day did not, taking into consideration the entire circumstances of the case, displaced the strong culpatory evidence adduced by the prosecution witnesses.

The upshot of the above reasons is that the appeal lodged by the Appellant against conviction lacks merit and is hereby dismissed. The Appellant was properly convicted of **committing indecent acts** with children contrary to **Section 11(1)** of the **Sexual Offences Act**. On sentence, the trial court sentenced the Appellant to serve a term of twenty (20) years in prison on each count. The sentences were ordered to run concurrently. **Section 11(1)** of the **Sexual Offences Act** states that where a person is convicted of the offence of **committing an indecent act with a child**, he shall be liable to serve a term of imprisonment of not less than ten (10) years. In the present appeal, this court is of the considered opinion that the sentence of twenty (20) years imprisonment was harsh and excessive in the circumstance of this case. The Appellant was a first offender. That sentence is set aside and substituted by a sentence of this court sentencing the Appellant to serve ten (10) years imprisonment on each count. The sentences shall run concurrently. That sentence shall take effect with effect from 31st October 2012 when the Appellant was sentenced by the trial court. The further sentence imposed by the trial court under **Section 39(2)** of the **Sexual Offences Act** shall apply upon the release of the Appellant from prison. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF JULY 2015

L. KIMARU

JUDGE