REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 316 OF 2011

PETER MBUGUA KABUI …… APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 2310 of 2010 in the Chief Magistrate's Court at Nairobi – L. M. Wachira (SRM) on 10/11/2011

JUDGMENT

Introduction

1. The Appellant, **Peter Mbugua Kabui** was charged with three counts of Sexual Assault contrary to **Section 5(1)(b) (2) Sexual Offences Act No. 3 of 2006**. He was convicted in two alternative counts in which he faced charges of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. In those two counts it had been alleged that on 5th June 2010 and 4th June 2010 respectively, at School of ***[particulars withheld]*** in Ruiru, he unlawfully touched the genital organs of T.M.M. and A.K.K. (initials used to protect the minors' identity), who were children aged below 13 years.

Case summary

2. A summary of the prosecution's case is that the appellant was the caretaker at the complainants' school. That on 5th June 2010 at 8 p.m., **PW1** went to the appellant's room to use his phone to call his mother. That while waiting to talk to his mother he fell asleep and when he woke up at midnight he found the appellant having lowered his shorts to his knees and raised his T-shirt to the chest. The appellant was rubbing **PW1**'s genitals and trying to insert his own into **PW1**'s anus.

3. **PW1** struggled to free himself from the appellant and in the process the appellant ejaculated on the minor's belly staining his shorts and T-shirt. **PW1** managed to break free and return to the dormitory. He confided in a colleague and the following day he and the colleague ran away from school and went home where they reported the matter to **PW4** his mother. **PW1** received medical attention at Ruiru sub district hospital, and thereafter a report was made at Ruiru Police Station.

4. **PW2** gave a similar narration except that his encounter with the appellant occurred on 4th June 2010. He testified that he received a message through a fellow student that the appellant wanted to see him. He went to the appellant's room at 10 p.m. and he too fell asleep waiting for a call

from his sister. He woke up at midnight to find himself in the appellant's bed, with his shirt pulled up and his shorts and underpants lowered. The appellant was caressing his genitals with one hand and trying to insert his genitals into the minor's anus with the other.

5. **PW2** extricated himself, went to the tap and cleaned himself of some wet substance he said was semen, which had been deposited on his chest. He returned to the dormitory and confided in a fellow student but did not report to the authorities. He only came forward to make a report after **PW1**'s plight came to light.

6. The police came to the school with **PW1** following his report and arrested the appellant. Investigations were conducted which led to the appellant being charged as set out in the charge sheet.

7. The appellant gave sworn testimony in his defence and denied the charges. He raised a defence of alibi in which he testified that he travelled to Murang'a on 31st May 2010 and only returned to the school on 6th June 2010. That although he recalled the dates in issue, to his knowledge nothing happened.

8. At the close of the trial, the appellant was acquitted on count 3 and convicted on the alternative to count 1 and 2 respectively. He was sentenced to serve 10 years imprisonment on each of the two counts and the sentences were ordered to run consecutively.

Grounds of Appeal

9. The appellant being dissatisfied with the conviction and sentence filed an appeal on grounds that his fundamental rights were violated contrary to **Section 85 (2)** and **88(1)** of the **Criminal Procedure Code Cap 75 laws of Kenya**; that vital witnesses were not availed, contrary to **Section 146** of the **Evidence Act Cap 80** and **section 150 Criminal Procedure Code;** that the trial magistrate relied on flimsy expertise evidence contrary to **Section 107** of the **Evidence Act**; that the prosecution case was not proved beyond reasonable doubt and that the sentence of twenty years was manifestly harsh and excessive.

10. Learned counsel Miss Nyauncho opposed the appeal on behalf of the state.

11. Sitting as the first appellate court, I have reconsidered and re-evaluated the evidence to make my own findings and draw my own conclusions. In so doing I have made allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses which I did not have. See - **Ngunu v Republic [1984]KLR 729**.

12. In the first ground, the appellant complained that the trial magistrate at page 20 of the proceedings only stated "coram as before". He argued that this offended **Section 85(2)** of the **Criminal Procedure Code**, and cited the case of **Bernard Elirema Ekimat vs Repulbic C.A. 151 of 2004 ELD,** to fortify his argument. In the said case the Court of Appeal held that it was difficult to understand what the phrase "coram as before" means and that the court could not assume that the Inspector of Police who was there before was the one present.

13. Miss Nyauncho submitted that the court record was not prejudicial to the appellant as this recording came in the afternoon, following a proper recording of coram when proceedings commenced in the morning.

14. **Section 85** of the **Criminal Procedure Code** refers to the persons whom the Attorney General was mandated to appoint to prosecute cases on his behalf. The record shows that the page adverted to contained the proceedings of 14th October 2010 and that the prosecution was led by CIP Wambua. When the proceedings of the day commenced, he brought it to the attention of the court that the police file was in court No.3. The court made an order to mention the case later, no doubt to give him a chance to retrieve the police file.

15. At noon the record reads: **"Coram as before**. **Prosecutor – 'I now have the file".** This indeed is a lazy way of capturing proceedings but in the context of this case it does not amount to a mistrial. The coram was complete on all other days and on this particular day it is evident that CIP Wambua was still in court during the subsequent mention of the matter. This case is distinguished from the case above, relied upon by the appellant. In that case the appellant appeared in court severally, while the coram continued to indicate that it was as before.

16. The appellant's second ground was that the prosecution's evidence was frail and that vital witnesses were not availed contrary to **Section 146** of the **Evidence Act Cap 80** and **section 150 Criminal Procedure Code**. Miss Nyauncho contended that the prosecution tendered sufficient and credible evidence and proved the charges beyond any reasonable doubt. She urged that the complainants testified, together with the government Analyst **PW5**, who upon examining the clothes of **PW1** found that they were stained with semen.

17. As the practice is, the prosecution is always at liberty to call the witnesses they deem relevant to their case and who are able to establish the prosecution case. See - **High Court Criminal Appeal Number 54 of 2011 Martin Ochieng Opiyo vs The Republic**.

18. I note that the appellant raised an alibi defence stating that he was away in Murang'a at the material time. An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer. It is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable (*see* Court of Appeal's decision in **Kiarie v Republic [1984] KLR pg 740**). I therefore re-evaluated the evidence to establish if there was any reasonable doubt cast by the defence.

19. **PW4** the mother of **PW1,** corroborated his evidence and stated that **PW1** arrived home on 6th June 2010 and announced that he had run away from school because one Peter Mbugua had sodomised him. She noted that his clothes were stained. She took him to hospital and to the police to report the matter. She also went with him to school where he identified Peter Mbugua the appellant herein for purposes of arrest.

20. I note that the narration of both **PW1** and **PW2** was so detailed and vivid as to be convincing. **PW2** stated that he only confided in his friend Joel, because it was not easy to reveal such an incident. That he did not report to the authorities because of fear. I am satisfied that these were experiences the minors lived through and not stories born out of their boyish imagination. I find therefore, that the testimonies of the two witnesses **PW1** and **PW2** squarely placed the appellant at the scene of the offence at the material times.

21. The appellant seemed to suggest in his cross-examination of **PW4,** that she had framed him because he turned down her sexual advances. Her response was however firm and convincing. She denied that she could have organised to frame him and said she did not know him before this incident and that in fact, she did not harbour such intentions. The trial court made an observation that she was truthful and I have no reason to find otherwise.

22. **PW5** testified that upon analysis of the stains on **PW1**'s clothes, and the blood and saliva of the appellant, he found that the semen belonged to a group B secretor and that the appellant's blood and saliva were also of group B. This in my view lends credence to **PW1'**s testimony that the semen on his clothes came from the appellant.

23. On the third ground that there were several contradictions in the testimony of the witnesses, the appellant urged that it was in evidence that the clothes examined did not contain any stains. Miss Nyauncho however argued that the said evidence referred to **PW2** whose clothes did not have stains. Indeed the evidence referred to in this regard is that of **PW7** but he was referring to the clothes of **PW2.** The clothes which were examined by **PW5** were those of **PW1** and they were found to have stains which matched the appellant's secretion.

24. Lastly the appellant contended that the term of twenty years imprisonment was manifestly harsh and excessive. Miss Nyauncho answered that the sentence was lawful, and it should rightfully run consecutively because there were two different complainants. The record shows that the appellant committed the offence on different occasions against two different complainants. Each offence was proved beyond reasonable doubt. **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006** carries a minimum sentence and provides for a term of not less than ten (10) years imprisonment upon conviction. I therefore find that the sentence is lawful and the manner in which it was ordered to be served was lawful and justified.

25. In sum, I have anxiously considered the evidence before me and the manner in which the learned trial magistrate evaluated it and find no reason to depart from her findings. In the circumstance, I am satisfied that the Appellant's appeal is without merit and I accordingly dismiss it.

SIGNED DATED and DELIVERED in open court this 21st day of May 2014.

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L. A. ACHODE

JUDGE