REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 30 0F 2005

(CONSOLIDATED WITH)

CRIMINAL APPEAL NO. 31 OF 2005

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 1434 of 2003 – H. WASILWA (P.M.)

JAMES OUYA OCHOI………………………..1ST APPELLANT

PETER TERER PARTANY…………………..2ND APPELLANT

VERSUS

REPUBLIC……………………………...……..RESPONDENT

JUDGMENT

The appellants, James Ouya Ochoi and Peter Terer Partany, were each charged with five offences under the Penal Code. The 1st appellant, James Ouya Ochoi was charged with five counts of committing an unnatural offence contrary to **Section 162(a)**. The particulars of the said offences were that on diverse dates between the months of March and June 2003 at Railway grounds in Nakuru, the 1st appellant had carnal knowledge of LM, PO, TK, BZ and KB against the order of nature. The 1st appellant was alternatively charged with indecently assaulting the said LM, PO, TK, BO and KB contrary to **Section 164.** The particulars of the alternative charge were that the 1st appellant had either touched or inserted his fingers in the anus of the said complainants. The 2nd appellant, Peter Terer Partany was likewise charged with five counts of committing an unnatural offence contrary to **Section 162(a).** The particulars of the charge were similar to the particulars of charge facing the 1st appellant. He was likewise alternatively charged with five counts of indecently assaulting the complainants contrary to **Section 164 of the Penal Code.** The particulars were similar to the particulars in respect of the 1st appellant. Both appellants pleaded not guilty to the charges facing them. After a full trial, the appellants were convicted as charged on the main counts. The 1st appellant was convicted on all five counts and sentenced to serve ten years imprisonment. The 2nd appellant was convicted on three of the counts. He was sentenced to serve ten years imprisonment. The sentences were ordered to run concurrently. The appellants were aggrieved by their said conviction and sentence and have appealed to this court on both the conviction and sentence.

At the hearing of the appeal, the two separate appeals filed by the appellants were ordered consolidated as they arose from the same proceedings in the lower court. The appellants filed more or less, similar

grounds of appeal; They were aggrieved that the trial magistrate had convicted them without evaluating carefully the evidence of the prosecution and the defence; that the trial magistrate had erred in believing the evidence of children of tender age which was contradictory; that the trial magistrate erred in holding that they had been properly identified; that the trial magistrate erred in holding that the prosecution had proved its case beyond any reasonable doubt. Finally, the appellants were aggrieved that the trial magistrate had meted out sentences that were manifestly excessive in the circumstances.

At the hearing of the appeal, Mr Konosi, Learned Counsel for the appellants urged the court to allow the appeal as the appellants were wrongly convicted based on insufficient evidence. On his part, Mr Koech, the Learned State Counsel, urged the court to dismiss the appeals and confirm the conviction of the appellants. He urged the court to enhance the sentences meted upon the appellant in view of the serious nature of the offences that they had committed. I will revert to the arguments made on this appeal after briefly setting out the facts of this case.

There were five complainants in this case. All the complainants were aged between nine and ten years. All the complainants were pupils at [particulars withheld]. They were variously in standard two or standard three. All of them narrated more or less similar story. PW1 BO testified that on some unknown date he saw people grazing cattle near railway grounds. He was called by the people. He was given a sweet. He was taken to an abandoned house. He was instructed to remove his underpants after which the person inserted his penis on his anus. After the act, PW1 went home. He did not tell his parents but later informed his teacher. He was taken to the Provincial General Hospital, Nakuru where he was treated. He testified that he did not bleed but felt pain. He could not be able to identify the people who committed the unnatural offence. Similarly, PW2 TK testified that on an unknown date, he was with PW6 near the Railway grounds. He saw people grazing cattle. He testified that the people were the accused before court. He stated that the two forced them into an abandoned house, removed their underpants and inserted their sexual organ in their anus. It was his testimony that one of the accused committed the unnatural act on PW6. PW6 testified that he did not tell anybody because he was afraid. Later he told his teacher and his father. He was not taken to the hospital. At the time they were so assaulted, the accused persons were together.

PW3 PO similarly testified that as he was walking on a path near the railway club, on unknown date, the two accused persons who were herding cattle called him. They took him to an abandoned house. They removed his underpants. He testified that the two accused put their fingers in his anus. They then released him. He did not tell anyone. Later he informed his teacher. He was taken to the hospital for examination. He says he did not feel any pain. He testified that when the accused persons did it to him, they were alone. PW4, LM testified that someone called him when he was walking on a path at the railway grounds on an unknown date. He took him to a maize farm and ordered him to remove his clothes. He touched his behind with his fingers and told him to go home. He did not tell his parents as he had been threatened. He later told his teacher and was taken to the Provincial General Hospital Nakuru. He said he felt pain when he was touched on his anus. He did not identify his assailant. PW6 KB testified that on an unknown date he was walking along a path near railway grounds in the company of PW2 and another boy called E. He testified that three men approached them from a nearby house. One of them was armed with a knife. They got hold of PW2 and the boy called E. He testified that he was held by the person who had a knife. The person attempted to remove his underpants. He held on them tightly. He escaped and went home and informed his mother. His mother went to school and informed his teacher. PW1 identified the 1st accused as the person who held him. He did not identify the 2nd accused.

PW5 Patrick Njogu, a Senior teacher at [particulars withheld] School received a complaint from a teacher called Kingori who informed him that some herdsmen were disturbing the students near the railway line. He asked the students to assemble at the parade. Six students told him that they had been sodomised by the herdsmen. He called their parents. He informed them. The parents were surprised. The matter was reported to the police. The children identified the people who had sodomised them. They are the appellants. He stated that the children did not have fresh injuries. He testified that the children pointed out the accused persons and identified them to him when they were standing about fifty metres away from where the accused persons were herding cattle. PW7 BB, the mother of PW6 saw PW6 at some unknown date in June 2003 appearing scared. Later she received a letter from school. She went to school and was

informed that some herdsmen had attempted to sodomise her son. PW6 told her that he had screamed and therefore had not been sodomise. PW6 however told her that some of his friends had been sodomised. PW6 also told her that he could identify the persons who attempted to sodomise him. The persons were the accused persons.

PW8 Police Constable Daniel Njoroge testified that a complaint was lodged at Nakuru Police Station on the 25th of June 2003 that some children learning at [particulars withheld] School had been sodomised. He took the statements of the complainants. Later he went to the show ground and was shown the two accused persons by PW6. He arrested them. He took the complainants to hospital so that they could be examined. He testified that the offences were committed in a disused house at the railway grounds opposite the show ground. He further testified that the offence had been committed for a long time although the complainants did not have any injuries. He reiterated that he had arrested the accused persons after they had been identified by the five complainants on the 25th of June 2003. He testified that the offences were committed about fifteen metres from the school. He stated that the complainants had identified the accused persons when they were standing some distance from them. PW9 Dr Peter Aduwo, testified that he was based at the Provincial General Hospital, Nakuru. On the 26th of June 2003 he examined PW3, PW4, PW1 and PW6. His examination did not reveal any evidence of erectile penetration. He produced the duly filed P3 forms as evidence before court.

When the appellants were put on their defence, the 1st appellant testified that he was innocent. It was his testimony that he had been framed. He stated that he was arrested by the police without being told the reason why. He further stated that although he was a herder, he had not grazed the animals at the railway grounds. The 2nd appellant testified that he was a watchman. He denied that he had been involved with commission of the offences which he was charged. He testified that he was arrested while walking from work near the show ground. He testified that on the period that he was alleged to have committed the offence, he had been given leave by his employer to travel to his home in West Pokot. He denied that he ever herded cattle at the railway grounds. DW2 Washington Kariga confirmed that he had known the 2nd accused for eight years. He knew that the accused worked for his employer as a watchman and had not been involved in the offences which he was charged.

This is a first appeal. As the first appellate court in criminal cases, this court is mandated to reconsider and re-evaluate the evidence adduced before the trial magistrate and reach its own independent determination whether or not to uphold the conviction of the appellants. In doing so, this court is required to give allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. (See **Charles Mwita –versus- Republic C.A. Criminal Appeal No. 248 of 2003 (Eldoret)** (unreported). In the instant appeal, the case facing the appellants was based on the evidence of five children of young and tender age. The five witnesses testified that on unknown dates, four of the five children were sodomised by the appellants. One child, PW6 testified that the 1st appellant attempted to sodomise him. All the five children gave conflicting narration of the events that actually took place. PW1 and PW2 testified that on unknown date they saw people grazing cattle at a field near the railway grounds. PW1 testified that he was lured with a sweet by a person who then took him to an abandoned house and sodomised him. He did not tell anyone of his ordeal neither was he able to identify the person who sodomised him. PW2’s evidence was that on unknown date, as he was walking on a path near the railway grounds, he was forced into a house and sodomised by the two accused persons. After the incident he was afraid and did not tell anyone of his ordeal. He however did not tell the court how he was able to be positive that it was the appellants who had sodomised him. He did not give their description neither did he tell the court the clothes that the appellants were wearing when he was allegedly sodomised.

PW3 testified that he was called by the two accused persons as he was walking along a path near the railway grounds. He was taken to an abandoned house. The appellants then inserted their fingers in his anus. He did not tell anyone what had happened immediately after the incident. PW1, PW2 and PW3 came to the fore with their story after they were asked by PW5 Patrick Njogu (a Senior Teacher at [particulars withheld] School) to come forward on the 13th of June 2003 during an assembly at the school. PW4 testified that, on unknown date, one person called him as he was walking on a path near the railway grounds. He was then taken to a maize plantation. His clothes were not removed but the person touched his behind with his fingers and then told him to go home. He did not tell his parents as he was

threatened by the person. PW4 did not identify which accused person touched him on his behind (anus).

The critical evidence in this case is that of PW6. He testified that on unknown date, as he was walking with PW2 along a path near the railway grounds three people accosted them. One of the them was armed with a knife. They got hold of them. The person who was armed attempted to sodomise him. He resisted. He held tight on his underpants. He managed to escape. He went home and informed his mother. His mother PW7 BW went to the school and reported the incident. It is the report by PW7 that triggered the chain of events that led to the arrest and subsequent charging of the appellants. PW1, PW3, PW4 and PW6 were examined by Dr Peter Aduwo when they were taken to hospital. He formed an opinion that there was no evidence of erectal penetration. PW8 arrested the accused after they were identified by the complainants. I have re-evaluated the evidence adduced. I have also considered the submissions made in this appeal. The point for determination by this court is whether the prosecution established beyond reasonable doubt that the complainants had indeed been sodomised. The other point of determination is whether the prosecution established beyond any reasonable doubt that it was the appellants who had committed the offences for which they were charged, that is, committing unnatural offence against the complainants against the order of nature. From the outset, I would like to state that I was not convinced that the complainants were sodomised. Their story did not add up. Four of the five complainants testified they were taken to an abandoned house where three of them were sodomised. One of them testified that he was taken to a maize plantation and had his behind touched and then told to go home. PW6 testified that they were accosted by three men, one of whom was armed with a knife. PW2 did not see the knife. Neither did he see the third person. PW1 did not identify the person who sodomised him. PW6 told a different story to his mother compared to the testimony he gave to court. He testified that he was not sodomised because he had held tightly on his underpants. He told his mother, PW7, that he was not sodomised because he had screamed.

As stated earlier, this story did not add up. If indeed the 1st appellant was armed with a knife and had attempted to sodomise PW6, could he have resisted? I suppose the knife was meant to threaten and subdue PW6. Could PW6 have managed to scream in the face of mortal danger facing him? I do not think so. It is PW6's report to his mother that led to the chain of events that ultimately resulted in the appellants being charged. From the evidence adduced, PW6 appeared to be a very impressionable and imaginative child. The possibility that he created the story to caught attention of his parents and his schoolmates cannot be ruled out. PW9 confirmed that the children whom he examined were not sodomised. There was no evidence of erectile penetration. It is therefore the finding of this court that the complainants were not sodomised. The subsidiary question for the determination by this court is whether an attempt was made to sodomise the complainants. From the evidence adduced, there was no discernable pattern to the events that the complainants narrated. There was no time span upon which a determination can be made without contradiction that indeed attempts were made to sodomise the complainants. By publishing the issue, PW5 ensured that the chain of events took a life of its own. It gained its own momentum as the allegations raised a nightmare scenerio for any parent. No investigations were conducted by the police to establish the existence of the alleged abandoned house where some of the complainants were sodomised. In my mind, the evidence adduced by the prosecution on this point left a lot to be desired. This court cannot therefore with certainty reach a finding that an attempt was made to sodomise the complainants. Upon further re-evaluation of the evidence, I do hold that the prosecution did not establish that the appellants were the one who perpetrated the alleged offences. The circumstances of their arrest raises doubts as to whether they were properly identified. None of the complainants was able to positively identify the appellants. No description of the alleged offenders was given. Neither was the description of the clothing that they wore when the offences were allegedly committed given. The evidence adduced by the complainants did not specifically identify either appellant. The evidence adduced by the prosecution was of a general nature. This court could not tell if the identification made was that of a passing glance or that of recognition.

Furthermore, the circumstances of the arrest of the appellants raises doubt as to their guilt. PW5 testified that the complainants identified the appellants when they were standing about fifty metres away. It is inconceivable that a positive identification can be made by an adult, let alone a child, from a distance of fifty metres. This court finds that it was rather fortuitous that the appellants could be found and arrested in the exact spot that the alleged offences took place. While at this point, the trial court did not allow the

appellants to cross examine PW1, PW2, PW3 and PW4. The appellants were therefore denied the chance to test the evidence of said complainants to establish their veracity.

In premises therefore, I do find that the prosecution failed to prove its case against the appellants to the required legal standard. The charges against the appellants were not proved. The appeals filed by the appellants must therefore succeed. Their convictions is quashed and sentences imposed set aside. The appellants are acquitted of all the charges. They are set at liberty unless otherwise lawfully held.

DATED at NAKURU this 17th day of May 2005.

L. KIMARU

JUDGE