REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 108 OF 2018

THOMAS MSABERI KADEMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against Conviction of Sentence in Nakuru Chief Magistrate's

Adult Criminal Case Number 105 of 2017 by Hon. E. Kelly (Senior Resident Magistrate).

J U D G M E N T

The appellant Tom Musabire Kidemi was charged with two (2) counts of **Child Pornography Contrary to Section 16(1) (e) of the Sexual Offences Act.**

It was alleged that in the month of March 2017 at an unknown date at Nakuru Railways Estate within Nakuru County, knowingly and unlawfully showed audio-visual pornographic material to **SKM** and **JMN**, children, each aged 12 years, with intention of encouraging them to engage in sexual acts. On the same facts he faced two counts of **Child Prostitution Contrary to Section 15(a), (e), (f) of the Sexual Offences Act** with respect to each child, where it was alleged that he knowingly and unlawfully permitted the two (2) children SKM and JMN to remain in his house for the purpose of exposing them to pornographic material with intention of encouraging the children to engage in sexual acts.

On the same facts he also faced two (2) other counts of **Promotion of Sexual Offences with a child Contrary to Section 12(b) of the Sexual Offences Act No. 3 of 2006.**

It was alleged that he did so by intentionally and unlawfully displaying pornographic material to **SKM** and **JMN**, both aged twelve (12) years with intention of encouraging such sexual acts.

The trial court in the judgment dated on 28th November 2019 found the appellant guilty of all the charges, convicted him accordingly. The sentence was meted out on 18th December, 2018, where the court sentenced the appellant as follows;

> ***"I hereby sentence the accused person to serve a prison term of 6 years for count 1, I sentence him to serve a prison term of 15 years for count V, and a prison term of 5 years for Count VI. It's my finding that the offences however committed in the same transaction…I order that they shall run concurrently"***

Meaning that the appellant would serve a sentence of fifteen (15) years' imprisonment.

Aggrieved the appellant filed this appeal vide petition dated 24th December 2018.

> ***1. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution did not prove its case to the required standards of beyond reasonable doubts.***
>
> ***2. THAT the learned trial magistrate erred in law and fact by failing to find the medical evidence adduced did not corroborate the charges.***
>
> ***3. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the evidence adduced was contradictory and inconsistent and as such could not sustain a safe conviction.***

4. THAT the learned trial magistrate erred in law and in fact by dismissing my defence yet the same was cogent and raised considerable doubt against the prosecution case.

5. THAT I pray to be supplied with a certified copy of the trial proceedings and the judgment.

By dint of these he set out the issues for determination: *whether his defence raised considerable doubt against the case for prosecution, whether the case for prosecution was riddled with contradictions and inconsistencies rendering the conviction unsafe, whether the medical evidence as adduced corroborated the charges, whether the prosecution case was proved beyond a reasonable doubt.*

He later filed his undated written submissions which he augmented with oral submissions during the hearing of the appeal.

He submitted that he denied the offence and continued to deny the same. He urged the court to find that the prosecution had failed to prove its case beyond a reasonable doubt. He took the position that the actual complainants in this case were the parents of the children who testified parents, but none of those parents took the stand to testify. That the investigating officer PW7 gave contradictory evidence yet this was the key evidence which led to his conviction; that PW7 testified that when he conducted search in the appellant's house he had found CDs of pornographic material yet on cross examination testified that he had not found anything. Ultimately PW7 did not produce any evidence of the existence of those pornographic CDs.

The appellant submitted further that this whole case was set up whereby a girl, who appeared to have some mental retardation was sent to his house with a "*bamba 10*" to request him to make a phone call for her. He refused to make the said phone call. When he came out of the house he found the whole press (media) there with allegations that he had impregnated the child.

Further in his submissions he pointed out how there was no ***"speak of truth"*** in the case for the prosecution for failing to call key witnesses and produce exhibits.

The state on its part opposed the appeal through Ms. Chelang'at the prosecuting counsel. She submitted that the prosecution had proved all the charges against the appellant to warrant the conviction and sentence. The court was urged to dismiss the appeal.

This being the first appeal the appellant is entitled to a re-evaluation and fresh relook at the evidence, without losing sight of the fact that this court neither heard or saw the witnesses testify. See **Okeno vs Republic (1972) EA 372** where it was stated

> *"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."*

The case for the prosecution was presented by seven (7) witnesses. The first four (4) being minors, PW5 a school teacher, PW6 a doctor and PW7 No. 86392 PC Nyatete Nyakundi, the investigating officer.

According to the prosecution this case began on 17th May 2017 when an unnamed parent reported to PW5, teacher MMN, a teacher of class 6, 7 and 8 at [particulars withheld] Primary School then, that her child one H, had not been home since Friday. This report was made on a Monday. PW5 testified that he checked the school register and confirmed that indeed H had been in school on Friday, and left for home. He advised the parent to make a report to the police and return to school.

According to PW5, *(and this is hearsay evidence because the parent never testified)* this parent went and reported at Central Police Station where she identified her son among children who had been arrested from the street by police.

In the meantime, the teacher and ostensibly with others, *(because he says, "we")* inquired as to who this H had left school in company of. He testified *(More hearsay evidence)* that the children told them that they had seen H near the accused's house in home clothes. It is then the other pupils began to urge one of them by the name K to tell everything. The said K then narrated how he and other pupils whom he named would go to accused's house to watch pornography and engage in pornography. PW5 and others then called the named pupils and spoke to each separately, and that these students independently, individually confirmed K's story.

He named the pupils to be *SK, JM, PM.*

The witness further testified that further investigations by the school revealed that these students would abscond class almost daily between 9.30 a.m. and 11.00 a.m. and they said they went to Tom's house to watch pornography.

That their colleagues *MN* and *DN* were forced to have sex with a mentally retarded girl in Tom's house and each was paid Kshs. 50/=. That each narrated details of their sexual encounter. Thereafter the matter was reported to the education office, then police and a PC Nyakundi (PW7) went to the school and examined the pupils, then police took over the matter.

On cross examination PW5 told the court he did not know whether the said H ever went to Tom's house, that MN had Hepatitis B, that N said he was unable to penetrate the girl, that he saw that the said girl was expectant, that he was told that children from [particulars withheld] Primary School would also go to Tom's house; that Tom had told them he had powers to bewitch book thieves whose stomachs and penises would grow extremely big.

He also testified that he was there when police raided the appellants house and took away CDs and a photo of the appellant and some of the children from [particulars withheld] Primary School. He said he was not aware that the accused was taking care of some adopted children.

According to **PW7 No. 86392 PC Nyatete Nyakundi**, the Investigating Officer, he received the report from a teacher at [particulars withheld] Primary School that there was a man who was showing children pornographic movies. That before that a child had been reported to have failed to return home from school, and the reportee, had identified the child from among others who had been arrested from the streets.

PW7 testified that it is this child who revealed that he had been going with 19 others to accused's house to watch pornography.

He went to the school,

> *"to investigate the said child and later confirmed each individually that they often visited accused's house to watch pornography and irritate(sic) (imitate) sex acts by doing the same with a mentally challenged girl who often came to accused's house. The pupils some of them confirmed engaging in sexual acts in presence of others and accused with the mentally challenged girl in accused's house under accused's instructions.*
>
> *Proceeded to accused's house with some of my colleagues. We did not find accused home at the time but waited nearby until he came. We then proceed to accused's house. The pupils identified accused and the mentally challenged girl. On conducting a search, we were unable to find the pornographic movie CDs we arrested accused."*

He added;

> *"I was informed by the children and the neighbours of accused that the accused had engaged in the said act since 2015…."*

On cross examination the witness testified that;

- He did not find the CDs or a CD player in his house.
- That when the police first went to the appellant's house he was not in.
- That the second time, they found him, and the mentally challenged girl in his house.
- That the girl confirmed that he made her have sex with the school pupils.
- That the appellant's house was about 10 metres from the next house in the same compound.
- That there was a television in the house.
- That the case of the mentally challenged girl was not before the court.

The boys who testified were PW1, PW2, PW3 and PW4.

Parts of the record of their evidence contains incomplete names, full names in other parts of the record, without explanation.

PW1 was recorded as **JM.** The trial court conducted a brief *voire dire* and formed the opinion that he was *not vulnerable* and understood the nature of an oath and importance of telling the truth, he would give sworn testimony.

He then proceeded to testify that on a day they were sent away from school, he met M (who was not a witness) and they went to accused's house to get sugar cane. They found the accused with a lady who left. The accused proceeded to play a CD on the TV of people having sex. He, K, M and accused, watched the movie together. Then the lady came back and had sex with Ml on the chair in front of all of them. That D, another classmate also did the same. That he personally refused to have sex. He had been to accused's house three times prior to this and had only been given sugar cane and that it is only this once that they watched porno.

On cross examination he said that on that day he had been sent home to bring his parent. He mentioned 50/= but the record is not clear in relation to what.

PW2 said his name was **SK.** He too had been sent away from school and one M asked him to accompany him to Tom's house. When they got there M requested Tom to play a porno movie. That Tom complied. That the movie was of "a man having sex". That a girl by the named M who was a sister to his classmate came in and accused gave her Kshs. 50/= and asked them to have sex with her. M and D had sex with her while he and others watched. He personally declined the offer to have sex. He said he went back with his friends.

On cross examination he said that appellant held D's penis and inserted it in M's vagina. On re-examination he said D warned them from telling their parents about it.

PW3 was **PM,** who testified that on 11th March 2017 he left school and went to appellant's house, where he watched pornography with V, B and P. They found seven (7) other boys in the house. They first watched a DJ Afro movie, then pornography. He said he watched pornography three times. That he had found M in accused's house more than once. That M was mentally retarded.

On cross examination he said M and B were sibling children of a police officer. That when they went in B sent M away.

PW4 was recorded as **WO**. The trial court found that he was *not vulnerable.* He testified that he went to accused's house with J. That they ate bananas there. That while there, Job complained that he had lost his book and the accused told him that he would bewitch the thief. That he went home and left Job at Tom's house. The next time he went there they were given *"ngumu"* and watched a soap opera for about 30 minutes. When they were leaving some children came in, and demanded to watch pornography. He left them there. On cross examination he told the court that the accused only gave them bananas and nothing else.

On re-examination he said;

"I'd heard that accused do give children sugarcane. Some children from [particulars withheld] Secondary School demanded to be played for pornography to watch. We left them there. K had told me accused has pornography and usually plays them."

PW6 Dr. Steven Onyango produced the Post Rape Care filled by Sr. Murage for JMN. He did not state what was in the document.

It is on the basis of the foregoing evidence that the appellant was put on his defence.

He told the court that he was a resident of Nakuru Railways since1991. In 2015, he did not have electricity in his house, and only bought a second hand TV in 2016.

He was a farmer, owned a boda boda and would sometimes give children lifts, worked for a certain Indian, and also did small contracts for lawyer's firms.

He said that his mother owned a clinic for circumcision for boys and he would stay with some of the boys for some time and no girl was allowed in that house, but would leave the boys one of the boys from the same school.

He spoke about his neighbours. There was a woman who was 2nd wife but had issues with her husband. That the girl who often went to his house was daughter of her co wife who was the first wife. That this woman did not understand him and his relationship with the children. That he was living with three boys. He used to bring them guavas and they brought their friends. He said he had never shown any children any such movies and had no CD's. He denied instructing the children to have sex. That police found a spoilt TV in his house. That it was one of the parents who influenced the girl to implicate him and that these offences were trumped up charges.

The Law:

the appellant is charged under the following provisions of the Sexual Offences Act:

16**. Child pornography** (1) Any person including a juristic person who—

> *(a) knowingly displays, shows, exposes or exhibits obscene images, words or sounds by means of print, audio-visual or any other media to a child with intention of encouraging or enabling a child to engage in sexual acts*;
>
> *(e)…*
>
> *is guilty of* ***an offence of child pornography*** *and upon conviction is liable to imprisonment for a term of not less than six years or to a fine of not less than five hundred thousand shillings or to both and upon subsequent conviction, for imprisonment to a term of not less than seven years without the option of a fine*.

15. **Child prostitution** Any person who—

> *(a) knowingly permits any child to remain in any premises, for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show;*
>
> *(b)*
>
> *(c)*
>
> *(d)*
>
> *(e) threatens or uses violence towards a child to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show;*
>
> *(f) intentionally or knowingly owns, leases, rents, manages, occupies or has control of any movable or immovable property used for purposes of the commission of any offence under this Act with a child by any person*
>
> *(g)…*
>
> *commits* ***the offence of benefiting from child prostitution*** *and is liable upon conviction to imprisonment for a term of not less than ten years*

12. **Promotion of sexual offences with a child** A person including a juristic person who—

(a)…; or

(b) who supplies or displays to a child any article which is intended to be used in the performance of a sexual act with the intention of encouraging or enabling that child to perform such sexual act,

is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than five years and where the accused person is a juristic person to a fine of not less than five hundred thousand shillings

The offence of **child pornography** is committed when it is proved that an offender has with the intention of encouraging or enabling a child to engage in sexual acts knowingly *displayed, shown, exposed or exhibited obscene images, words or sounds by means of print, audio-visual or any other media.*

In this case the prosecution was expected to prove beyond a reasonable doubt that the appellant did that to SKM and JMN.

On the second count the prosecution was expected to prove that the appellant had committed acts with the two that amounted to **benefitting from child prostitution.** That he caused the minors **to** *be either to be sexually abused or to participate in sexual activities or in be involved in any obscene or indecent exhibition or show.*

That he also *threatened or used violence towards the minors to procure them for sexual intercourse or any form of sexual abuse or indecent exhibition or show,* and that he *had control over the premises where this happened together with other movable property related to that.*

And for the third count that *he had supplied the children with or displayed to them articles which they used in the performance of sexual acts with the intention of encouraging or enabling that child to perform such sexual act.*

Analysis

The first concern for this court was the identity of the complainants. The use of their initials in the charge sheet and subsequent use of names in the body of the record clearly presents a challenge on this ground. Who was SKM? How would this court know that SKM was any of the minors who testified?

PW1 spoke only of being with M and D in the appellant's house. PW2 spoke of being with M and D.

Both testified that they watched pornography in the appellant's house. PW1 said it happened only once. PW2 said he visited the second time with two (2) of this friends.

PW1 and PW2 spoke about being in the appellant's house together with appellant, one D and D and M. That they watched pornography together, and D and had sex with M who was paid Kshs. 50/= by the appellant. That appellant held D's penis and put it in M's vagina. PW1 and PW2 each testified that each was offered the sex but each declined. PW1 testified that he visited the appellant's house a second time with his two (2) unnamed friends and they watched pornography again.

PW1 said the pornography was in a CD played on the appellant's TV, PW2 said they watched it on TV.

PW3 P said he watched pornography with his six (6) friends in appellant's house. No active sexual intercourse took place although M was present, her brother PW3 classmate B told her to leave.

PW4 WO. went to the appellant's house, but never saw any pornography – he however heard some children demanding to be shown pornography movie.

From the testimony of these four boys, it is evident that boys from primary schools near the appellant's house, would visit his house to watch pornography in his house, and for some of them, he paid for them to have sex with M, though neither PW1 nor PW2 testified to having sex with M. M herself, did not testify. Those who were alleged to have had sex with her did not testify either.

The investigating officer's testimony that the children confirmed to him that they watched the pornography and then imitated the sexual acts, was not corroborated by the evidence or statements of those alleged to have actually had sexual intercourse. If that was the case, why did D/D or M or M (the girl) testify? Why where there no witness statements from them? Considering the nature of the acts alleged to have been committed the prosecution ought to have availed the minors who were alleged to have imitated the sexual acts.

This part of the evidence is doubtful because the minors who testified said M was a bit mentally challenged, that her brother B was their classmate and if he found her at the appellant's house he would sent her away. Her parents did not raise any complaint; the investigating officer did not explain why the appellant was not charged with an offence specifically related to the abuse of the said child. Without an explanation by the investigating officer as to why the key witnesses or complainants did not testify, that the allegation the allegation that the accused paid encouraged the children to imitate what they watched was not proved.

The offence of child prostitution is established where it is proved that the offender benefits in some way or other in the acts of child prostitution. In this case it is the appellant who is alleged to have paid the money, and therefore he cannot be said to have been living off the income made from the alleged sexual intercourse between the children hence the offence of child prostitution was not proved. This is

because none of the ingredients set out under Section 15 (a) of housing the children for purposes of sexual abuse/participation in sexual activity was established. No evidence that the children participated in any obscene or indecent show. There is also no evidence that the children were threatened or appellant used any violence to make them perform sexual acts. There was no evidence of any threats to the children. The allegations that the appellant had witchcraft powers was not proved. In any event it is alleged that he offered to use them to catch book thieves.

Clearly therefore the ingredients of child prostitution were not established.

On promotion of sexual offence, the prosecution ought to have proved that the appellant supplied or displayed something, that could be used in the performance of sexual acts.

This must be distinguished from child pornography, which is about the child being exposed to audio-visual, images, words, print or other media.

Section 12 would therefore be in reference to something akin to sexual toy (*dictionary.cambridge.org/english/article)* defines article

> ***"A particular thing especially one that is of several things of a similar type or in the same place."***

Section 12 (b) must be read together with **12 (a)** where the manufacture or distribution of the said things is prohibited, these are items specifically made to promote sexual offences with children.

There was no evidence that the appellant had supplied or displayed any items that could answer to the description of **Section 12 (a).**

What remains then is the offence of pornography.

It is true that nothing incriminating was recovered. No CDs. However, the appellant either as a pervert or a person addicted to pornography or just a reckless man who thought it was ok to watch pornography with boys did expose the boys to pornography. The question is, was it with the intention to encourage or enable the children to have sex?

None of the complainants alleged that the appellant touched them inappropriately or engaged them in any sexual manner upon their watching the pornography. While the *actus reus* was proved, the *mens rea* was not proved.

In **Sheikh Ali Samoja v Republic [2016] eKLR**.

> ***"There is a general rule in criminal law expressed in the maxim "actus reus non facit nisi mens sit rea" … an offence can only be said to have been committed where a criminal act (actus reus) is accompanied by a criminal intention (mens rea) without evidence of mens rea, then the unlawful act cannot be deemed to amount to an offence in law."***

In this case while there is evidence that the appellant watched pornography with the minors herein, there is no evidence that he did so with the intention of encouraging or enabling them to have sexual intercourse.

It is clear to me that the charge of pornography could not lie on the facts before the court.

Should the appellant go scot free yet he the adult in the room recklessly exposed children to pornographic material without considering the consequences to their development? No, the facts clearly establish the charge of **Indecent Act with a child Contrary to Section 11(1) of the Sexual Offences Act**. This form of indecent act is defined at s. 2 (b) of the Sexual Offences Act ***as exposure or display of any pornographic material to any person against his or her will***; A child cannot consent to any form of abuse.

Exposure of pornography renders a child to be in need of care and protection, as it affects the child mental and social development, **Section 119 (i) (n) Children Act;**

> **"S. 119. When a child is in need of care and protection**
>
> ***(n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography;"***
>
> **Section 42 Sexual Offences Act** defines consent:
>
> > ***"For the purpose of this Act, a person consents if he or she agrees by choice and has the freedoms and capacity to make that choice."***

The **Sexual Offences Act** makes it clear that children, persons under the age of eighteen (18) do not have the freedom or capacity to make that choice as it is forbidden to expose them to such materials.

I find therefore that;

1. ***The prosecution established that PW1 and PW2 were children below the age of eighteen (18).***

2. ***Appellant exposed them to pornography Contrary to Section 11(1) as read with s, 2(b) of the Sexual Offences Act***

3. ***Counts 2, 3, 5 and 6 were not proved.***

The appeal succeeds in part. Conviction is quashed and the sentences meted set aside,

The charge of **Pornography Contrary to Section 16** is substituted with **Indecent Act with a child Contrary to Section 11(1)** as read with **2(b) of the Sexual Offences Act.**

I find the appellant guilty and sentence him to serve five (5) years' imprisonment to run from 18th December 2018 which takes into account the time spent in remand before the sentence by the subordinate court

Right of Appeal 14 days

Delivered and Signed at Nakuru this 9th October 2020

In the presence of: VIA ZOOM

Court Assistants Edna/Martin

For state

Appellant present

Mumbua T. Matheka

Judge

2nd September, 2020.