REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 156 OF 2018

BETWEEN

DAVID WACHIRA KABUGI……..……..……..APPELLANT

AND

REPUBLIC……..……RESPONDENT

(Being an Appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara in Cr. Case No. 3598 of 2015 delivered by Hon. H. M. Nyaga (CM) on 4th July 2018).

JUDGMENT

1. The Appellant, **David Wachira Kabugi**, was charged with several offences under the **Sexual Offences Act No. 3 of 2006** namely:

a. In count 1, he was charged with defilement contrary to **Section 8 (1)** (3) of the **Sexual Offences Act**. The particulars of the same were that on diverse dates between 14th December, 2014 and 22nd November, 2015 at Zimmerman in Kasarani within Nairobi County intentionally caused his penis to penetrate the anus of **DK** a child aged thirteen (13) years. In the alternative, he was charged with committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act in that** he touched the buttocks of **DK.** a child aged thirteen (13) years.

b. Counts II to VII were charges of attempted defilement contrary to **Section 9 (1) (2)** of the **Sexual Offences Act**. The victims were children of different ages but the place of offence was the same. Each of the counts carried an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The offences in respect of each count were committed on different dates as enunciated below;

(i) In count II, the offence was perpetrated against **DT** a child aged twelve (12) years on diverse dates between 14th December 2014 and 22nd November 2015.

(ii) In count III the offence was perpetrated against **MO** a child aged eleven (11) years and the offence was committed on diverse dates between 6th December 2014 and 22nd November 2015.

(iii) In count IV the victim was one **MN** a child aged eleven (11) years and the offence was committed on diverse dates between 1st August, 2015 and 22nd November 2015.

(iv) In count V the victim was **JK** a child aged twelve years and offence was committed on diverse dates between 1st May, 2015 and 22nd November, 2015

(v) In count VI the victim was one **MM.** a child aged twelve (12) years and the offence was committed on diverse dates between 1st November 2015 and 22nd November 2015.

(vi) In count VII the victim was one **DN** a child aged eleven (11) years and the offence was committed on diverse dates between 1st August, 2015 and 22nd November, 2015.

2. The Appellant pleaded not guilty to all the seven counts. Upon trial he was found guilty of the following offences: defilement in count 1; sexual assault in count II and attempted defilement in counts III, V and VI. He was convicted of the same and sentenced to serve a total of

sixty (60) years imprisonment. In count I he was sentenced to twenty years imprisonment and ten years imprisonment in respect of the rest of the counts. The Appellant was aggrieved by that decision and preferred the instant appeal. All the victims were minor boys whose identity I have concealed for their privacy.

3. The Appellant raised five grounds of appeal in his Amended Petition of Appeal filed on 7th March, 2019. I replicate them as under:

> ***a) The learned trial magistrate erred in law and facts when he conducted an unfair trial contrary to Articles 25 (c), 50 (2) (h) & (j) and 159 (2) (a) of the Constitution of Kenya.***
>
> ***b) The learned trial magistrate erred in law and fact when he passed the sentences in contravention of Section 38 of the Penal Code and Article 50 (2) (p) of the Constitution of Kenya.***
>
> ***c) The learned trial magistrate erred in law and fact when he conducted an irregular trial.***
>
> ***d) The learned trial magistrate erred in law and fact when he convicted whilst relying on unsatisfactory evidence.***
>
> ***e) The learned trial magistrate erred in law and fact when he dismissed his plausible defence.***

Evidence.

4. This being a first appeal, this court, as a matter of law, is enjoined to analyze and re-evaluate the evidence adduced by the witnesses before the trial court afresh so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, the court is required to take into account the fact that it neither saw nor heard any of the witnesses and give due regard for that. (See **Okeno v Republic (1972) EA 32).**

5. The Prosecution called a total of eleven (11) witnesses five of whom were the victims of the alleged offences. The prosecution's evidence can be summarized as follows:

6. PW1, DK was the complainant in count I. He gave a sworn statement of evidence. He was then aged thirteen (13) years old and a class five (5) pupil at [particulars withheld] Primary School. He testified that the Appellant was well known to him as he used to see him at Zimmerman, Kambu area and had been introduced to him by his friends Irungu and Edwin. He recalled that sometime in December 2014, he went with his two friends to the Appellant's house to play with the Appellant's play station. The Appellant who was sitting on his bed called him aside and asked him about his parents' whereabouts. PW1 told him that he lives with his uncle. The Appellant called PW1's uncle and sought his permission to take PW1 along with his friend Edwin to KICC Nairobi. His uncle agreed and as such, they went to Nairobi town by bus. Upon reaching town, they first passed by a hospital to see the Appellant's brother one Francis before going to KICC. Thereafter, the Appellant took them to a play park along Thika Road Mall (TRM) where PW1 and his friend Edwin rode an electric motorcycle. He also bought them some cakes and juice and then took them back to his house where they played on the play station and later left for their homes.

7. The following evening on a Monday, the Appellant went to PW1's house and requested his uncle to allow him to spend the night in his house. PW1's uncle agreed hence they went back together to his house. PW1 played on the play station as the Appellant prepared supper while patting him playfully. After eating, the Appellant told PW1 to switch off the TV and remove his trouser before getting to bed. PW1 undressed and remained with his pants only. As he was sleeping, the Appellant started touching his private parts while patting him playfully. He warned him to remain quiet or else he would beat him. He removed PW1's pants and smeared saliva on his anus. He then used a nylon paper to cover his own penis before inserting it in PW1's anus. Thereafter, the Appellant slept but woke up later and had sex with him again. When morning came, the Appellant gave him Kshs. 100/= to buy milk and break. PW1 washed the utensils, cleaned the house, spread the bed and went back to his uncle's home but did not disclose the incident to anyone.

8. PW1 continued to go to the Appellant's house during weekends after schools had opened. The Appellant had sex with him about five (5) more times when he spent the night at his house and would give him money afterwards. PW1 never disclosed that to anyone as the Appellant said he would deal with him if he did. It was only when news broke out that the Appellant had defiled several other boys that PW1 told his uncle what he had been doing to him. He was taken to hospital at Eastleigh.

9. PW2, DT was the complainant in count II. He too gave a sworn testimony. He was twelve (12) years old and in class seven (7) at [particulars withheld] Primary School. He evidence was similar to that of PW1. He knew the Appellant very well. He recalled going to the Appellant's house for two consecutive Sundays to play games on the play station with his male friends, some whom were victims. On the third occasion however, the Appellant who was lying on his bed which was separated by a curtain pulled him towards the bed as the other boys were playing. The Appellant pulled down PW2's trouser, told him to be quiet and inserted his finger in PW2's anus then released him.

10. Thereafter, the Appellant called one M. (complainant in count III) behind the curtains. PW2 heard M. telling the Appellant to stop although he could not tell what was going on behind the curtain. M. came back to where the boys were and then the Appellant called M. (complainant in count VI). M. started crying and a neighbour came. PW2's mother asked him who the Appellant was and PW2 told her what he had done to him.

11. PW3, MO (complainant in count III) entirely corroborated the evidence of PW2. He was thirteen (13) years old and in class seven (7) at [particulars withheld] Primary School. In his sworn testimony recalled going to the Appellant's house with PW1 one Saturday to play on the play station. Upon going back the following Sunday, the Appellant attempted to pull down his pants but he stopped him. The Appellant pinched him on his thighs because of that so he never went back to his house again. He also recalled that the Appellant once took him to Thika Road Mall (TRM) and back home in his car.

12. PW4, MM (complainant in count VI in his sworn statement said he was twelve (12) years old and in class seven (7) at [particulars withheld] Primary School. He too used to go to the Appellant's house to play games on his play station. He stated that at one time, the Appellant took him and his friends J. and D. to a play zone where they played games. The Appellant used to show him pornographic images on his computer and would give him money to buy snacks. Another day while other boys were playing, the Appellant called him to his bed. He tried to pull down his trouser and lay on top of him. He felt the Appellant's penis rubbing against his buttocks and screamed but the Appellant had put his radio volume very high. As he struggled to free himself, the Appellant bit him (*showed court a bite mark on his left arm*). A neighbour of the Appellant came to find what was going on. The Appellant was then arrested by a mob.

13. PW5, JK was PW2's twin brother and the complainant in count V and the last victim to testify. He was thirteen (13) years old and in class seven (7) at [particulars witheld] Primary School. In his sworn testimony thereafter, he testified that one Sunday, PW4 took him to the Appellants house to play games on the play station. While there, the Appellant asked him to hug him which he did. He also told him to lie on top of him as he lay on the bed. PW5 did and heard the Appellant sigh and produce a noise that sounded like "shhh haaah". When they went back to the Appellant's house on the following Sunday, the Appellant pulled him behind the curtain that separates the room. He pulled down PW5's trouser and attempted to insert his finger in his anus. PW5 told him to stop. The Appellant told him that he was smelling of feces and released him but warned him not to tell anyone. He then called M. who screamed and a neighbour came to see what was going on.

14. PW7, FWM PW4's mother was walking home on 18th November, 2015 when she met a neighbour who informed her that there was a report that children in that area were not going to church on Sundays. PW7 went home and questioned PW4 who was reluctant to speak. She beat him once after which he owned up but stated that the Appellant would kill him if he told the truth. She reassured him that all will be well. PW4 told her that the Appellant used to take him to his bed and try to undress him but he escaped twice. He also mentioned several other boys who had been sexually molested by the Appellant. PW7 called **PW6, SN,** who was a mother to MN, complainant in count IV to her house. She told her what had happened to their sons. They decided to lay an ambush on the accused. They told their sons to go towards the church as usual. The Appellant saw them and did not call them. Later, PW7 heard a commotion. She went out and found the Appellant being beaten by a crowd but was saved by the police. PW7 took her son PW4 to MSF Clinic and later went recorded a statement.

15. PW8, Dr. Joseph Maundu of Nairobi Police Surgery **e**xamined PW1, 2, 3, 4 and 5 on 1st December, 2015. None of the boys had any physical injuries on their external genitalia. However, PW1's anal sphincter tone was reduced/ loose. PW8 formed the opinion that a forced opening may have caused it to be loose. He also opined that repeated trauma to the anal opening can cause looseness which trauma can be caused by anything. He produced their P3 Forms as exhibits 8, 9, 10, 11 and 12. PW8 also examined the Appellant who was found to have no physical injuries on his genitalia. His P3 Form was produced as exhibit 14.

16. PW9, PWK. was the mother of PW2 and PW5 who were born on 1st April, 2003 according to their birth certificates. She was a [particulars withheld] at PCEA church Zimmerman. She noticed that several boys used to go to the Appellant's house near the church to play on a play station. On 22nd November, 2015, she learnt that the Appellant had been arrested over molestation of some boys including her two sons. The Appellant was frog marched to the church compound and the police officers guarding the church took him to the police station. She took her sons to MSF Clinic in Eastleigh where they were examined and treated. She also stated that she had noticed a change in PW2's demeanor and PW2 had complained of diarrhea but only revealed the cause after the Appellant was arrested.

17. PW10, PC Paul Kivuva of Kasarani Police Station investigated the matter. He was on duty on 22nd November 2015 when the Appellant was taken there by members of the public. He visited the scene and confirmed that the Appellant's house was near a church. He took the boys to MSF clinic Eastleigh for examination then to a police doctor for filling of P3 Forms. He produced PW4, PW2 and PW5's birth certificates as exhibits 5, 15(a) and 15(b) respectively.

18. PW11, Barbara Salano Kere a Clinical Officer at MSF France Gender Violence Recovery Centre, Eastleigh produced the victims' medical reports. She stated that PW1, PW2 and PW5 gave histories of sexual violence. On examination none of the three boys had physical injuries. However, both PW1 and PW2 had loose anal sphincter tones consistent with sodomy cases. As regards, PW3 and PW4, she stated that they gave histories of attempted sexual assault. On examination, none of them had visible physical injuries. She produced the victims' medical certificates and PRC forms in evidence.

19. The Appellant gave a sworn statement of defence in which he denied committing the offences. He stated that the boys were coached to fix him led by PW4's mother (PW7). He testified that he used to worked for Property World Limited as a driver and would park the company vehicle outside his house during weekends when he was around. While driving around the neighbourhood, the boys who were not well known to him would hang at the back of the pick-up. This caused him to beat up PW4 and several other boys. PW4's mother (PW7) saw him and promised to teach him a lesson. She called the mothers of other boys. One Sunday, he went to church and upon getting back home, PW7 came with five men who inquired to know why he had beaten PW4. The men beat him up and left a mob to deal with him. Luckily, he was saved by a police officer guarding the church and was placed in a store. He saw PW9 who told him that she would teach him a lesson for beating her sons PW2 and PW5.

20. The Appellant further stated that the investigating officer (PW10) was pressurized to charge him. The deputy OCS gave him a cash bail. He went to hospital then returned to the police station where he was locked up for a week and then charged with the offences in question.

21. In the trial court's judgment, the learned trial magistrate found that all the three elements of defilement had been proved in respect of count 1 and as such convicted the Appellant of the same and sentenced him to serve twenty (20) years imprisonment. As regards count 2, the trial magistrate convicted the Appellant of sexual assault pursuant to **Section 179 (1)** of **the Criminal Procedure Code** since there was no evidence of penetration. He sentenced him to serve ten (10) years imprisonment for the same. On counts 3, 5 and 6, the trial court convicted the Appellant of the main charge of attempted defilement and sentenced him to serve ten (10) years for each count. The trial magistrate went on to hold that the sentences will run consecutively since the offences were committed at different times and involved different victims

Analysis and determination.

22. The Appellant appeared in person and tendered both written and oral submissions. His written submissions were filed on 7th March, 2019. The Respondent was represented by learned State Counsel, Ms. Nyauncho who only tendered oral submissions. Upon carefully reevaluating the evidence on record and considering the parties' respective submissions, I find that there are only two issues for determination namely; *whether the prosecution proved its case beyond a reasonable doubt, whether the Appellant's right to a fair trial was violated, whether the prosecution failed to call crucial witnesses, whether the Appellant's defence was considered and whether the sentence imposed was legal and proper.*

Proof of the case.

23. The Appellant submitted that the prosecution did not prove the offences beyond a reasonable doubt. He stated that the ages of the victims were not established since no documentary evidence was produced in court to that effect. It was also his contention that the information contained in the P3 Forms pertaining to injuries created doubt as to whether the victims suffered any injuries since it was indicated that they had no physical injuries on examination. He argued that PW1 did not inform the court whether he developed any outstanding signs associated with penetration in minors such as feeling pain during the act, developing difficulty in walking and/or suffering any physical injuries as a result thereof. He alleged that it was possible that the loosening of PW1 and PW2's anal sphincter notes may have been caused by other factors other than sodomy.

24. In rebuttal, the learned State Counsel, Ms. Nyauncho submitted that the offences were proved beyond a reasonable doubt and as such, the Appellant's conviction was safe. In the premises, counsel urged that the appeal be dismissed and the Appellant's conviction be upheld.

25. As regards count I, it was incumbent upon the prosecution to prove three elements namely the age of the victim, penetration and the positive identification of the Appellant as the perpetrator. PW1's age was duly proved by his P3 form which indicated his estimated age as thirteen years. No further documentary evidence was required to prove that he was a child. As regards penetration, it is notable that PW1's evidence that the Appellant inserted his penis in his anus on several occasions was well corroborated by the medical evidence adduced by PW11 and his P3 Form adduced by PW8. Both documents indicated that upon examination, PW1 was found to have a loose and/or reduced anal sphincter tone which was consistent with sodomy. On the third element of the identity of the perpetrator, this court is convinced that the Appellant was positively identified by PW1 since he was well known to him. PW1 had been to his house on several occasions and would even occasionally spend the night there. The offence of defilement was therefore proved beyond a reasonable doubt and the Appellant's conviction thereof was safe.

26. On the offence of sexual assault perpetrated against PW2, the prosecution was enjoined to prove two elements namely penetration and the positive identification of the Appellant as the perpetrator. This is because **Section 5 (1)** of the **Sexual Offences Act** does not require the proof of age of the victim. From the evidence on record, it is not in doubt that the Appellant was well known to PW2 as he had been to his house on more than one occasion to play games on his play stations with friends PW3, PW4 and PW5 among others. As regards the element of penetration, PW2's testimony that that the Appellant pulled down his trouser and inserted his finger into PW2's anus was accordingly corroborated by the medical evidence which confirmed that his anal sphincter tone was also found to be loose and consistent with a case of sodomy. I am therefore satisfied that the evidence adduced by the prosecution established that PW2 was sexually assaulted by the Appellant herein.

27. In the third offence of attempted defilement committed against PW3, PW4 and PW5, it was necessary for the prosecution to prove three elements being; the age of the victims, the positive identification of the Appellant and that the Appellant had the *mens rea* to defile the victims but was prevented from perpetrating the *actus reus* by whatever reason. As pointed out hereinabove, the Appellant was well known to all the victims herein as they would go to his house to play games on his play station. The element of identification is therefore not in issue.

28. Regarding the ages of the victims, it was important for the prosecution to prove that PW3, 4 and 5 were children since the sentence to be imposed for this offence is premised on the same. PW4 and PW5's birth certificates were produced as exhibit 5 and 15b respectively. PW3's birth certificate was not produced in evidence. Further, their P3 forms indicated their estimated ages at the time of examination to be between twelve and thirteen years. PW was nevertheless a grown up child who knew his age which this has no reason to doubt. The court is alive to the fact that age of a minor victim must not necessarily be established by documentary evidence. It can be proved by age assessment, oral evidence and even observation. I am therefore satisfied that the prosecution established that PW3, 4 and 5 were all children aged twelve years as stated at the time of the alleged offences.

29. As regards whether the Appellant had the *mens rea* to commit the offence, PW3 testified that all the three victims testified that at one point, the Appellant separately attempted to pull down their trousers behind the curtain that separated his bed from the rest of the room but they stopped him. He pinched PW3 on the thighs when he resisted his actions; bit PW4 on his left arm as he struggled to free himself upon feeling the Appellant's penis rubbing against his buttocks and told PW5 that he was smelling of feces when PW5 stopped him from inserting his finger in his anus. All these actions indicate that the Appellant had the *mens rea* to defile PW3, 4 and 5 but did not complete the *actus reus* because of their resistance. I am therefore satisfied that the prosecution proved beyond reasonable doubt that the Appellant attempted to defile the three boys.

Whether the Appellant's right to a fair trial was violated.

30. The Appellant claimed that he was not furnished with witness statements before the trial commenced which prejudiced him as he was not able to competently conduct the cross examination of PW1, 2, 3, 4 and 5. However, it is evident from the record that upon taking plea on 8th December, 2015, the prosecutor informed counsel for the Appellant that he was at liberty to obtain copies of the charge sheet, witness statements and other documents from the police file which he had in court. Counsel for the Appellant made no effort to obtain the statements prior to the hearing date of 29th January, 2016 despite the court's order that the matter would be heard on priority basis. When the matter came up for hearing, the Appellant was represented by the same counsel one Mr. Ouya who sought an adjournment to enable him obtain the witness statements. His application was allowed and the matter scheduled for hearing later that day at 2.00 pm. Counsel conveniently failed to show up at 2.40 pm and the Appellant did not tender any explanation for his advocate's absence and/or complain about the matter

proceeding in his absence. Instead, he proceeded to cross examine PW1, 2, 3, 4 and 5 accordingly. In the premises, the Appellant cannot now blame the trial court for his advocate's indolence and this court is of the view that he was not prejudiced in that respect.

31. He also faulted the prosecution for failing to produce in evidence the play station that allegedly attracted the victims to his house as well as his phone which allegedly contained pornographic videos which he used to show the victims. However, it is obvious that none of those items were in issue in these proceedings. Their being produced in evidence or lack of it was irrelevant to the proof of the case.

Whether the prosecution failed to call crucial witnesses.

32. He also argued that the prosecution failed to call some of the most crucial witnesses namely PW1's uncle; the neighbor who came to his house when PW4 started crying and the members of the public who arrested him. It is well settled that there is no legal requirement in law on the number of witnesses that should be called to prove a fact (See **Section 143 of the Evidence Act (Cap 80) Laws of Kenya** and **Bukenya & Others V Uganda [1972] EA 549**). *Be that as it may, it is clear that the Appellant's conviction was based on the strong case the prosecution offered.*

Whether the Appellant's defence was considered.

33. The Appellant further contended that the manner in which he was put on defence violated the provisions of **Section 211** of **the Criminal Procedure Code** as the trial court failed to remind him of the charges he was facing after the ruling on a case to answer before calling upon him to offer his defence. In his view, this infringed his right to fair trial under **Article 50 2) (b)** of **the Constitution** which requires an accused person to be explained to the charges he is facing with sufficient details to be able to answer to it. A perusal of the trial court's proceedings of 22nd August, 2018 reveal that this is not factual as the record clearly show that upon the delivery of the ruling on a case to answer, **Section 211** of **the Criminal Procedure Code** was duly explained to the Appellant and thereafter, the Appellant elected to give a sworn testimony in his defence and even informed the trial court that he had no witness to call.

34. He further contented that the trial court's evaluation of the evidence was partial as it did not consider his plausible defence. This contention also lacks basis since it is very clear from the said judgment that the trial magistrate duly considered the Appellant's defence. The trial magistrate was categorical that his defence that he was framed for beating up PW4 could not outweigh the overwhelming evidence tendered by the victims whom he claimed were coached to implicate him.

Whether the sentence was legal and proper.

35. The Appellant further submitted that the trial court passed excessively harsh and cruel sentences in contravention of **Section 38** of **the Penal Code** and **Article 50 (2) (p)** of **the Constitution**. Section 38 (b) provides for whether a sentence shall run concurrently or consecutively. He was of the view that the court should have ordered that the sentences run concurrently instead of consecutively. On her part, the learned State Counsel stated that the sixty (60) years imprisonment sentence was proper since the offences were committed at different times and involved different persons. In the case of **Peter Mbugua Kabui v Republic [2016] eKLR** the Court of Appeal when confronted with a similar issue stated thus:

> ***"As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. In the instant case, the offences were not committed at the same time and in the same transaction; they occurred on diverse dates. Furthermore, the acts complained of were perpetrated against different complainants. Thus we find that the trial court and the High Court did not err in directing or ordering a consecutive term of imprisonment for the conviction in the two counts."***

36. Similarly, in the instant case, I find that the learned trial magistrate rightfully held that the sentences ought to run consecutively and not concurrently since they were committed on different dates and involved different victims. Further, I am unable to find the total of sixty (60) years imprisonment excessive since each sentence was commensurate with the different offences committed by the Appellant. They were imposed in accordance with the law. The sentence was therefore legal and proper and this court has no basis to interfere with it.

Conclusion

37. In the, I find that this appeal lacks merit and is dismissed in its entirety. The Appellant's conviction and sentence are also upheld accordingly. The period the Appellant spent in remand custody of three years three months and nine days shall be taken into account to constitute part of the sentence. It is so ordered.

DATED and **DELIVERED** this 9th day of **April, 2019**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person

2. M/s Nyauncho for the State/Respondent.