REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 60 OF 2016

JOHN GICHIA MUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the judgment in S. O. No. 18 of 2015 at Murang'a by J. J. Masiga, Resident Magistrate dated 15th June 2016]

JUDGMENT

1. The appellant was adjudged guilty on *nine* counts of *committing indecent acts with minors* contrary to section 11 (1) of the **Sexual Offences Act**. He was sentenced to *ten years imprisonment* on each count; the sentences to run *consecutively*.

2. The particulars of the 1st count were that on 18th May 2015 at *M.* Primary School *[particulars withheld]*, within Murang'a County, he committed an indecent act by touching the penis, buttocks and anus of *BMW [particulars withheld]*, a boy aged *14* years.

3. The particulars of the other eight counts were fairly similar save that they involved *other eight* boys aged between *13* and *16* years. The offences took place on *diverse* dates between 1st February 2015 and 21st May 2015 at the abovementioned primary school. The alleged acts of indecency on *all* the eight boys involved touching their penises, buttocks and anal orifices.

4. The appellant lodged an appeal on 29th June 2016 raising *five* grounds: Firstly, that the learned trial magistrate erred by not warning himself of the danger of convicting the appellant on the evidence of a single witness. Secondly, that the complainants were untruthful because they initially claimed that they were sodomized. Thirdly, that the corpus of evidence was weak or unreliable. Fourthly, that the proceedings were defective because the charges were not read out; and, lastly, that the sentences were manifestly excessive.

5. At the hearing of the appeal, learned counsel for the appellant, *Mr. Mwaniki*, contended that the prosecution did *not* prove the charges beyond reasonable doubt. He submitted that the charges of indecency were preferred only after the medical evidence revealed the boys were not sodomized. He said their evidence was not credible.

6. Learned counsel highlighted discrepancies between the charge sheet and the evidence, contradictions on the dates, and variances between the evidence of PW1 and PW11. Two witnesses who saw PW10 being indecently touched were not also called to the stand. He wondered why only 10 out of the 12 original complainants pressed charges.

7. Regarding the sentence, he submitted the net effect is a *90* years jail term. Considering the age of the appellant, it was tantamount to a *life* sentence.

8. The appeal is contested by the State. Learned State Counsel, *Mr. Mutinda*, submitted that the evidence was overwhelming; and, that all the ingredients of the charges were proved to the required standard. He left the matter of sentence to the discretion of the court.

9. This is a *first appeal* to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. ***Njoroge v Republic*** [1987] KLR 19, ***Okeno v Republic*** [1972] E.A. 32.

10. *None* of the complainants was a child of *tender years*. They were all 13 years and above. Their respective *birth certificates* were produced in evidence. They all testified under *oath*.

11. PW1 was *DLM*, the complainant in count 2. He knew the appellant. The latter was his science teacher. On the 15th April 2015 at about 8:30 p.m., the appellant asked him to collect gumboots from the staff quarters. When he delivered them, the appellant started to caress him on the chest. It was not the first time. The following day the appellant fondled PW1's penis. On 20th May 2015, the appellant threw him onto a bed and forcibly kissed him.

12. PW1 reported the matter to the head teacher, Mr. Kariuki (PW11). A report was subsequently made to Kahuro Police station. The complainant was escorted by the matron and the chairman of the board.

13. Under cross examination, he admitted that the appellant neither sodomized him nor touched his buttocks. He denied that he was fabricating the story or out to scandalize the appellant.

14. PW2 was *DKW*. His age was 16. He is named as the complainant in count 4. He said that on the 19th February 2015, the appellant summoned him to the staff quarters. He held him by the belt. He told him not to raise an alarm. The appellant opened his trouser but did not touch him. PW2 never reported the incident. I must agree with the learned trial magistrate that count 4 was *not* proved.

15. PW3 was *PKC*, the complainant in count 5. His age was 15 years. On 18th May 2015 at 21.00 hours, the appellant summoned him to the staffroom. He fondled his penis and squeezed it hard. PW2 complained to one Njuguna. On 25th May 2015, he underwent a medical examination after reporting the matter to the police.

16. PW4 was *EW*, the complainant in count 6. He was aged 15 years. He claimed that in the month of May 2015, he was asleep in the dormitory when the appellant called him out. Somewhere behind *class 6*, the appellant asked him to stand in front of him. He then started fondling the complainant's penis.

17. PW5 was *DMK*, the complainant in count 7. His age was 14 years. On 21st May 2015 at 23:00 hours, the appellant led him to the dormitory toilets and fondled his penis. He also requested the complainant to return the favour. He said that on the following Saturday, he was taken to hospital and given some drugs for an infection on his buttocks. On cross-examination, he conceded that the appellant did not penetrate him.

18. PW6 was *EKW*, the complainant in count 8. His age was 15. He testified that on 19th May 2015 at 9:00 p.m., the appellant summoned him through his classmate, *DM*. The appellant asked him to wait for him outside *Block 6 Ruwenzori*. The appellant then took him behind *6 Longonot*, removed his inner wear and fondled his penis. When he resisted, the appellant threatened to pull his penis.

19. PW7 was *SKK*, the complainant in count 9. His age was 13. In March 2015, the appellant called him at 10:00 p.m. and asked him to go behind *6 Longonot.* He pulled him close and touched his penis for about 5 minutes. He tried to pull away but could not escape the grip by the appellant. The appellant touched his penis for about 5 minutes. In May 2015, the appellant summoned him again, slapped him and fondled his penis.

20. PW8 was *JMC*, the complainant in count 10. He was aged 15 years. In January 2015, the appellant would call him, lead him to the toilets and touch his penis. It happened *eight* times. The appellant would issue threats. He also forced the complainant to touch the appellant's penis. PW8 also said that the appellant would show him lurid pictures on his cellphone. The complainant revealed the matter to another teacher.

21. PW9 was *BMW*, the complainant in count 1. On 18th May 2015, at 9:00 p.m., he was called from his dormitory by the appellant. The latter played with the complainant's penis. He threatened to kill the complainant. The incident took place behind the teachers' quarters. He reported the incident to the head teacher (PW11).

22. PW10 was *SKG*, the complainant in count 3. His age was 13. He testified that during the first term of 2015, the appellant took him behind *class 6 Longonot* and touched his penis. He would call him between mid-preps or after prep. He would fondle his penis. On some occasions he asked the complainant to also touch him.

23. In another incident, the appellant lied to him that his sister was calling. He asked his classmates *DM* and *VK* to follow him to the teacher's quarters. The appellant took him inside the staff quarters, closed the door and touched his penis. His friends started throwing stones. He reported the matter the following day to Mr. Kariuki (PW11).

24. PW11 was the head teacher, Kariuki. On 23rd May 2015 at about 18:00 hours he was in his school office. PW10 reported that the appellant was in the habit of touching his private parts and displaying pornographic material.

25. PW11 then summoned another student, *JM*, who gave him a list of 12 boys who were intimate with the appellant. His enquiries confirmed that the 12 boys had their penises touched by the appellant; or, were exposed to pornographic materials by the appellant.

26. PW11 summoned the appellant for a meeting. He flatly denied the accusations. He said that he was only helping the boys with their classwork. On 22nd May 2015 PW11 reported the matter to Kagaa Police Post. He also briefed the Board.

27. The appellant had at that point disappeared from the compound. On 23rd May 2015, the chairman of the board and the school matron reported the matter to Kahuro Police Station. The complainants were issued with P3 forms and taken to Muriranjas Hospital.

28. PW11 said that the police conducted further investigations on 25th may 2015. The same day medical results were delivered the same day. On cross -examination, he conceded that he only saw the medical reports and not the P3 forms. He also admitted that he never saw the appellant's cellphone or the pornographic materials.

29. The narrative by PW11 was largely confirmed by PW12, Police Constable Mberia. He confirmed that the medical examination did not reveal penetration. Later he and P.C. Kirwa arrested the appellant and detained him at Kahuro.

30. The police officer produced the birth certificates for all the complainants as exhibits. On cross-examination he admitted that the first report to the station related to *sodomy*. Following the medical examination, he preferred the charges of *indecency*.

31. PW13 was Kairu Kimende. He is a medical officer at Muriranjas Hospital. The complainants had alleged that they were sexually assaulted. They were all male. *DM* had septic sores on his buttocks. All the boys had not been penetrated. He produced the P3 forms as exhibits 2, 4, 6, 8, 10, 13, 16, 17 and 18. Under cross examination he said that the boys complained of being touched on their penises.

32. When the appellant was placed on his defence, he protested his innocence. In particular, he denied committing the various acts of indecency against any of the boys. He said he was being framed up by some parents and teachers. He said that Ms. Kamau, Mr. Mwangi and Mr. Njuguna pressured *DL* to implicate him. He claimed Ms. Kamau held a grudge against him because he was heading the Department of Science, a position that Ms. Kamau envied.

33. The appellant gave a blow by blow rebuttal of the allegations by the complainants. He questioned their credibility. He said that the dormitories, kitchen and staff quarters are near each other. They are public spaces. He was sharing his quarters with a Mr. Kimani. He was at a loss why the alleged incidents did not attract the attention of other students or staff.

34. I will commence with ground 4 of the appeal. The appellant submitted that that the proceedings were defective because the charges were not read out. Nothing could be further from the truth. On 9th July 2015, the *original* charges were read. The record shows that all the counts were read out to the appellant. The language was English with Kiswahili translation. He denied all the charges. The appellant is a teacher; and, had legal counsel from the start.

35. On 15th October 2015 and 23rd October 2015 *respectively*, the charges were *amended*. On *each* of those occasions, all the ten counts were read out *afresh* to the appellant in a language he understood. He denied them. A plea of not guilty was entered. Ground 4 of the appeal is without legal or factual foundation and is *disallowed*.

36. I will now *re-appraise* the evidence. As I stated earlier, the evidence by PW2 was superficial and insufficient to found the charge in count 4. The appellant did not touch him; and, PW2 never reported such an incident. I concur with the learned trial magistrate that count 4 was *not* proved.

37. I will now turn to the evidence on the remaining counts. I will deal first with the *ages* of the complainant. From the *birth certificates* produced, I am satisfied that *all* the complainants were aged between *13* and *16* years.

38. They are thus *children* as defined in section 2 of the **Children Act**. See also ***Martin Wanyonyi Nyongesa v Republic***, Eldoret, Criminal Appeal 661 of 2010 [2015] eKLR.

39. Section 2 of the **Sexual Offences Act** defines an *indecent act* in the following terms-

> *"An unlawful intentional act which causes;*
>
> *Any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration.*
>
> *Exposure or display of any pornographic material to any person against his or her will."*

40. The next important element relates to *identification*. The appellant was a science teacher in the school. The complainants were all his pupils. The offences took place within the school quarters. Granted the circumstances, the identification of the appellant was not in doubt. This is evidence of *recognition*; stronger evidence than mere identification. ***Wamunga v Republic*** [1989] KLR 424, ***Republic v Turnbull & others*** [1976] 3 All ER 549.

41. My inescapable conclusion is that the appellant was *positively* identified by all the complainants except *DKW* (PW2).

42. Ground 1 of the appeal is that the trial court failed to warn itself of the *danger* of convicting the appellant on the evidence of a *single* witness. That claim is *unfounded*. The learned magistrate was alive to the proviso to section 124 of the **Evidence Act**. In sexual offences, the court can convict on the sole evidence of the victim *"for the reasons to be recorded in the proceedings, [and if] the court is satisfied that the alleged victim is telling the truth."*

43. The trial court has clearly *recorded* its reasons; and, it reached the conclusion that the complainant's evidence was *truthful* and reliable. I concur with the lower court that in a case such as this one, medical examination may not reveal physical injuries. None of the boys was penetrated. Except for *DM* who had septic sores on his buttocks, the P3 Forms would not tell much.

44. The appellant is a pest who was preying on children who relied on him. In each of the attacks, he would call out the victim and lead them into a secluded place; often at night. It would be behind a classroom, dormitory, toilet, and staff quarters or staff room. There is a clear pattern; a repeated line of conduct that *corroborates* each of the complainants.

45. The appellant admitted that he was also living in the school compound. He had a clear *opportunity* to prey on the boys. It amounts to further corroboration. ***Opo v Republic*** [1976-80] 1 KLR 1669.

46. It is true that the first report to the police was on *sodomy*. It was not backed by medical evidence: there was *no* penetration. That did not preclude the police from preferring the charges of indecency. It is a cognate offence.

47. The complainants were *graphic* in their testimony that the appellant touched their *penises*; and, in some instances issued threats or promises. In some instances, he asked the boys to also touch his *penis*. That evidence was unshaken by cross-examination. I however agree with the appellant that there was no proof they were touched in the buttocks or anuses. The same can also be said about exposure to pornography. That variance is not material.

48. It is true that *two* of the 12 boys who had complained about the appellant were *not* called as witnesses. Under section 143 of the **Evidence Act**, no particular number of witnesses is required to prove any particular fact unless any other law provides to the contrary. In my view the evidence in this case was sufficient to sustain the charges.

49. On the totality of the evidence I am not persuaded that the complainants were lying or couched to lie; or, that they conspired with some teachers or parents to fix the appellant merely because he was heading the science department. There was no evidence of a grudge. The entire defence is a sham. Grounds 2 and 3 of the appeal are thus *without* merit.

50. That brings me to the last ground on *sentence*. Section 354 (3) of **Criminal Procedure Code** empowers this court to *review* the sentence. As a rule, the appellate court will not interfere with the discretion of the trial court *unless* the magistrate acted upon some *wrong principles*; or, *overlooked* some material factors. ***Macharia v Republic*** [2003] 2 E. A. 559.

51. The learned trial magistrate considered that the appellant was a *first offender*. The appellant in *mitigation* said that his siblings and mother looked up to him for support; and, that he was continuing with his studies. But the learned trial magistrate's hands were tied by the *minimum* sentence.

52. Section 11 of the **Sexual Offences Act** provides for a *minimum* sentence of *ten years*. That is the sentence that was handed down to the appellant. The appellant committed acts of indecency on *9* boys on *different dates*. Each count was thus a distinct and *separate offence*. The learned trial magistrate was entitled to order the sentences to run *consecutively*. I cannot then say he applied *wrong principles* or *overlooked* some material factors.

53. The upshot is that the entire appeal is devoid of merit. It is hereby *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 4th day of June 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant.

Mr. Muturi holding brief for Mr. Mwaniki for the appellant.

Ms.Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.