

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 255 OF 2000

PETER GITHAMBO IRAI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

**(From original conviction and sentence in Criminal Case no. 255 of 2000 of
the Senior Resident Magistrate's Court at Kilifi – P. Mutani)**

J U D G M E N T

This is an appeal from the ruling of the Resident Magistrate, Kilifi, dated 2nd May, 2000 in Criminal Case no. 2115 of 1998.

The appellant was charged with two counts of unnatural offence contrary to section 162(a) of the Penal Code and the counts of indecent assault contrary to section 162(a) of the Penal Code. In the course of the trial counsel for the accused applied to court to visit the alleged scene of crime. The prosecution objected. The Honourable Magistrate ruled in favour of the prosecution. The accused then appealed against that ruling, which appeal is now under consideration.

At the hearing of this appeal Mr. Mburu who appeared for the appellant submitted that the Honourable Magistrate erred in law in refusing the defence application to visit and establish the house where the appellant allegedly committed the offence. He contended that it was necessary for the court to identify the house where the offence was allegedly committed for the purposes of affording the appellant a reasonable opportunity to conduct his defence. He then urged this court to allow the appeal and to order that the trial court to visit the scene before proceeding further with the hearing of this case.

Miss. Kwena opposed the appeal. She contended that what was in issue was the committal of the crime not the scene of crime. She submitted that the Honorable Magistrate properly exercised his discretion in refusing to grant the defence applicant.

I have perused the particulars stated in the charge sheet as well as proceedings and ruling of the Honorable Magistrate. While in some particular cases the accused may have the right to have the trial court to visit the scene of the alleged crime I do not consider that this was a case deserving a visit of the scene of crime by the Magistrate. I concur with the respondent's counsels submissions to that effect. The Honorable Magistrate exercised his discretion properly by holding that visiting the scene of alleged crime was unnecessary exercise. The offences were allegedly committed almost two years before trial. The environmental conditions and human movements could have altered the scene. In any case it was not the nature of the scene which was under consideration in the changes facing the accused. It is the fact of occurrence of alleged crimes which was under trial. The appeal is dismissed accordingly.

DATED and delivered on this 7th November, 2001.

G.A. OMWITSA

COMMISSIONER OF ASSIZE