REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CRIMINAL APPEAL NO. 14 OF 2016

ROBERT MULWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an Appeal from the original conviction and sentence in

Criminal case no. 46 of 2013 of the Resident Magistrate's Court

at Kitui on 11.02.2016.

J U D G E M E N T

1. **Robert Mulwa**, the Appellant herein, was charged with the offence of defilement **Contrary to *Section 8 (1),*** as read with **Subsection 3** of the **Sexual Offence Act Number 3 of 2006**. The particulars of the charge, as per the charge presented to the trial court are that, on 4th October, 2013 at about 7PM in [particulars withheld] Location within Kitui County with another before court, unlawfully and intentionally did an act of penetration to (name withheld) a child aged 14 years by inserting his penis into her genital organ namely, vagina.

2. The Appellant also faced an alternative charge of indecent act with a child Contrary to ***Section 11(1) of Sexual Offence Act***, but since he was convicted of the main charge, the alternative charge is of no relevance in this appeal.

3. As observed, the Appellant was convicted on the main charge after trial, though he pleaded his innocence.

4. This Court has perused through the record of proceedings from the lower court which shows that, the prosecution called a total of five witnesses to prove their case. The trial court evaluated the evidence tendered and found that the 3 key ingredients of the offence had proved by the prosecution's case. The three elements are: -

(i) Prove of penetration

(ii) Age of the victim

(iii) Positive identity of the culprit

5. The Appellant felt aggrieved and filed this appeal, but before I look at the grounds, I will consider the evidence tendered, with a view to re-evaluating them and coming to my own conclusions because, that is the mandate of an appellate court on first appeal.

6. The victim testified as PW1 and told the trial court that, she was a form one student at [Particulars Withheld] Girls Secondary School and that, on 4th October, 2013 at about 7PM, she was heading home after fetching water from a river with three other persons. She further testified that, while on her way back home at a bushy section, a man just appeared and grabbed her by the throat and pulled her to the bush as her friends took off, leaving her alone with the assailant. She stated that, she struggled with the said man who was wearing a brown shirt, jeans, trouser and brown shoes. She told the trial court that, the man defiled her, leaving her bleeding and feeling pain in her abdomen. She added that, she did not recognize the culprit and that, after the ordeal, she dragged herself to a nearby neighbour named AJ who called her parents who in turn, came and took her to Kabati Police Post, to report and later to Kitui District Hospital for treatment.

7. JMM (PW2), the mother to the victim on her part, testified that, on the material date and time, one VM went to her and reported to her that her daughter (PW1) had been defiled. She told the trial court that she went with the said V to look for her daughter and found her at the

canteen of a lady named A. The mother further testified that, she found her daughter lying down in pain and with blood stained pant, petticoat and dress. She further told the trial court that her daughter alleged that the man who burns charcoal at the river defiled her and that she took her to Kabati Police Station to report and later to Kitui District Hospital for treatment. She testified the victim was later issued with P3 and PRC Form adding that, the Appellant was identified by the victim at Kabati at police station on 5th October, 2013 after he was arrested.

8. Augustus Katula Ngemi (PW3), the Area Assistant Chief, Kithima sub-location also testified and recalled that on 5th October, 2013, he received a call from one Cyrus Titus at around 12:10 am informing him that people had gathered at the home of one MM, the father to the Appellant herein, and that he rushed to the home and found around 50 people arguing with the Appellant. He testified that the group of people were suspecting the Appellant as the person who had defiled the victim and that on that account, he escorted the Appellant to Kabati Police Station where he handed him over to the police.

9. Police Constable Noel Kalio (PW4) a police officer from Kabati Police Station testified that he was at work on the material date when at around 9PM a lady and a girl in the company of other people went to Kabati Police Station and reported that the girl (PW1) had been defiled. The officer testified that the girl was crying and blood was flowing down her legs staining her lesso and dress. According to the police officer, the report given at the time was that the girl (victim) had been defiled by two people and that she could recognize one of the culprits as Robert Mulwa, the Appellant herein, who used to burn charcoal at the river where she fetched water. He testified that he recorded the report and referred her for treatment at Kitui District Hospital.

10. The officer further testified that the following day, members of community policing unit brought the Appellant to the police station where he locked him up. He testified that, he later called the victim's mother and others to record statements and recovered the blood stained clothes worn by the victim which he tendered as exhibits. He further testified that the victim was defiled by two men one whom was identified as the Appellant adding that, he did not conduct an identification parade because the victim allegedly knew the culprit. He added that he was the investigating officer but did not recover the victim's pant and shoes at the scene of crime when he visited the scene adding that the co-assailant was reported to have fled the scene with the items after committing the crime.

11. Dr. Christopher Watunya (PW5) on his part, testified and informed the trial court that he filled the P3 form upon examining the victim. He corroborated the evidence of PW4 regarding the background information he received about the victim being defiled by two men. He testified that the victim was in a blue dress which was blood stained and torn from behind adding that, she was also in a white petty coat which was blood stained as well. He estimated the age of the victim as 14 years and noted that the victim's private parts had tender lavia and minora and bruises on the vagina. He also confirmed that the hymen had been perforated and noted bloody discharge from her vagina.

12. The doctor tendered the P3 as Exhibit 1 and PRC as P. Exh. 2, though he testified that the PRC form was authored by a clinician, she had known and had worked with. The doctor also tendered the age assessment report as P. Exh. 3 which showed that the victim was aged 15 years, 6 months at the time of age assessment.

13. When placed on his defence, the Appellant denied on oath committing the offence and raised alibi as his defence, stating that, on the material date, he was at his place of business at Matuu Town. He testified that, he closed his business at around 9PM and headed home at Kabati where he arrived at around 10PM. He told the trial court that while sleeping in his house at around 11PM, he was woken up by people who asked him to accompany them to a river where some people had kept on disturbing them. He added that, he declined to accompany them though a neighbour had advised to do so and that when he declined to go with the group, a local Area Chief was called he went there shortly and thereafter escorted him to Kabati Police Station.

14. The Appellant further testified that, when he was at the police station, he was asked to pay Kshs. 15,000 to have the matter resolved but since he could not pay, he was charged with the offence of defilement.

15. The trial court upon evaluating the evidence tendered, overruled his defence and found him guilty of committing the offence for which he was charged. He was convicted and sentenced to serve 20 years' imprisonment.

16. Aggrieved, he lodged this appeal and raised the following seven grounds namely: -

(i) That he was convicted despite inconsistent, insufficient and contradictory evidence.

(ii) That the medical evidence relied upon by the trial court was dubious and unreliable.

(iii) That failure to adduce vital and independent witnesses, amounted to obstruction of justice.

(iv) That the trial court erred by shifting the burden of proof on him.

(v) That the prosecution's case was not well investigated.

(vi) That the trial court relied on dock identification to convict him.

(vii) That the trial court failed to consider his defence and mitigation.

17. In his written submissions, the appellant faults the trial court for failing to comply with the provisions of Section 200 of Criminal Procedure Code after taking over the conduct of the trial after the magistrate who initially heard 3 witnesses was transferred. The Appellant claims that the magistrate who took over never informed him of his right under Section 200 of the Criminal Procedure Code. He contends that, the trial court was inconsistent when it made comments in the judgement that it is the Appellant, who never followed up his rights.

18. He faults the trial court for relying on inconsistent evidence on identification, pointing out that, the complainant gave description on how the assailant dressed because she was not able to recognize him adding that the same witness could not later state that she knew him.

19. The Appellant submits that, there are many people at the scene and that failure to call them as witnesses, left grey areas in prosecution's case which in effect meant that the case could not stand that and it was unsafe to convict him under such circumstances.

20. On defence, the Appellant contends that, he gave sworn defence that he was in his place of business on the material time and that he returned home after work only to be woken up by a crowd of people as he was sleeping.

21. He faults the police for not conducting an identification parade and that he was framed up and charged in court because he could not pay Kshs. 15,000 demanded by the police.

22. He submits that the prosecution's case was not proved to the required standing given the anomalies he has pointed out.

23. The Respondent on the other hand has opposed this appeal through written submissions dated 27th May, 2021 done by Mrs. Christine Nthiga Kabaale learned Counsel for the DPP. The Respondent contends that the Appellant in his written submissions mentions ''Amended grounds of Appeal'' yet he never sought leave to amend his petition of appeal.

24. The State submits that this court should only consider the grounds in the petition of Appeal filed on 24th February, 2016.

25. The Respondent further contends that, they were able to prove the 3 ingredients of the offence under which the Appellant was charged. It points out that the age of the victim was established and proved through the evidence of PW5 Dr. Christopher Wahinya who tendered age assessment report (P. Ex.3) indicative that the victim aged 14 years old and few months at the material time.

26. The Respondent also contends that, the element of penetration was well established through the evidence of the victim (PW1) and corroborated by PW4 who tendered blood stained dress, petty coat and blouse the victim wore at the material time (P Ex. 4, 4(a) and (b). The Respondents further points out that, the evidence of PW5 proved beyond doubt that the victim had been defiled.

27. On defence, the State asserts the defence was duly considered but the same was found untenable as it did not make sense. According to the State, the prosecution's case was too strong adding that, they are mere allegation on demand of bribe of Kshs. 15,000 could not shake it.

28. On sentence, the State supports the sentence meted out by the trial court adding that, the victim was aged 14 years and an orphan therefore, vulnerable. The State adds that, the child suffered permanent injuries and scars which justified the sentence of 20 years meted out against the Appellant.

29. This court has considered this appeal and the response made by the State. The Appellant as observed above, was charged and convicted of the offence of defilement Contrary to ***Section 8(1) (3) of the Sexual Offence Act*** Number 3 of 2006 which provides;

> ***''A person who commits an act which causes penetration with a child is guilty of the offence termed defilement.''*** *Subsection 3(b) provides the sanction for a person found guilty of defiling a minor aged between 12 and 15 years which is not less than 20 years' imprisonment.*

30. The charge under which the Appellant was convicted, going by the above provisions, shows that for prosecution's case to be sustained the following elements must be established and proved beyond doubt;

(i) Penetration of the male member into the genitalia of the female victim.

(ii) Age of the victim.

(iii) Positive identification of the offender.

31. To begin with the age of the victim, there is no doubt that the prosecution's case on this score is not contested. The medical evidence tendered by the doctor (PW5) that is the age assessment report (P.Exhibit 3) and the P3 (P.Ex. 2), indicate that the complainant aged 14 years 10 months old at the material time which age lies within the age bracket under S***ection 8(3) of the Sexual Offence Act.*** The prosecution's case on that element cannot be faulted and the trial court was correct to find that the age of the victim had been well established.

32. The other element of penetration was contrary to the Appellant's contention was equally proved beyond doubt by the evidence tendered by the prosecution.

The evidence of the complainant (PW1) regarding penetration was well corroborated by the exhibits tendered which were blood stained petticoat, yellow blouse and blue dress (P. Ex. 4(a), 4(b) and 4(c) respectively).

33. The same evidence on penetration was further proved by the medical evidence tendered by PW5 who tendered P3 (P. Ex. 3). I am persuaded that the PRC Form (P. Ex. 1) was not properly tendered by PW5 because under ***Section 33 of the Evidence Act,*** the said witness should have been led to lay basis as to why the author of PRC was not called. The prosecution is required by law of evidence to lay basis particularly in respect to evidence of experts witnesses whose attendance may not be procured without amount of delay or expense that may be unreasonable or unnecessary in the circumstances. I have gone through the proceedings and find that, apart from the doctor (PW5) stating

that he knew the clinical officer who filled the P.R.C form, he did not say where the said witness was placed and the trial court did not find out from the Appellant if he had objection to the said witness testifying on behalf of his colleague.

34. The evidence tendered in form of PRC (P. Ex. 1) was therefore, inadmissible but despite that, I am still persuaded that the other evidence tendered that is the evidence of the minor in light of the corroboration provided by PW5 and the P3 tendered were sufficient on their own to prove beyond reasonable doubt that penetration had taken place.

35. The evidence of PW2 and PW4 who corroborated the evidence of PW1 particularly in respect to bleeding from her private parts also established that requisite element of penetration.

36. The Appellant in this appeal has raised an important issue that touches on the 3rd ingredient which is the positive identification of the perpetrator. The Appellant contends that, the trial court erred by basing his conviction on dock identification or the fact that the complainant was only able to positively identify him on the dock.

37. This court has considered the evidence tendered by the prosecution. The Respondent has submitted that the Appellant was positively identified by the complainant as one of the culprits who defiled her and has stated that it was not yet completely dark at the material time therefore, it was still possible for the complainant to identify the Appellant because she used to see him burning charcoal at the river. However, the perusal of evidence tendered by the complainant appears a bit shaky in respect to positive identification.

38. From her evidence in chief, it is clear that, apart from the fact that he clearly saw that the assailant was wearing a brown shirt, jeans trouser and brown shoes, she did not recognize him. This is what she said;

> ***‘‘…….. a man appeared from the bushes and held me by the throat. My friends ran away. I struggled with the man as I surrendered. ……I did not recognize the man ……’’***

39. I have considered the evidence of JMM (PW2 and the mother to the victim) in regard to identification and find that her evidence was also insufficient because she only testified that the appellant was identified after he was arrested by members of the public and escorted to the police station.

40. The Area Assistant Chief (PW3) testified that he was called to the home of the accused after around 50 people surrounded the homestead and rushed to the scene and escorted the Appellant to the police station for further investigation/action by the police probably to prevent the crowd taking the law into their hands. The Assistant Chief further told the court that he went with some witness to the police station but looking at the evidence tendered, it is evident that the police either did not record statements from any of them or if they did, they may have found the evidence not useful.

41. There is no denying the fact that the prosecution’s case left some gaps which evidently points to the fact that the investigations were not properly carried out. I say this for the following reasons: -

> a) For one, the complainant states that, she was in company of 3 persons and no one really knows for sure the ages of the 3 persons but one could assume that they were children because she refers them as ‘‘my friends’’. The ‘‘friends’’ were BM, K za n and MK. The 3 were present when the man (assailant) emerged from a bush but ran away when he grabbed the complainant. Now the big question is why did the investigation officer fail to take statements from the 3 ‘‘friends’’ or at least any of them?’’
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> b) Secondly, the complainant also reported that, when she reached the river she found some ladies at the river drawing water but the police never made any effort to trace any of them to at least shade light in what the Appellant has correctly described as the ‘‘grey area’’ in the prosecution’s case.
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> c) Thirdly, is the unexplained omission by the investigating officer, to record statement and call as a witness one. AJ, the first person who came into contact with the victim after the ordeal. In fact, the mother to the complainant (PW2) clearly testified that she found her daughter in the canteen of the said A.

42. Besides the above, I find that the victim’s mother also told the trial court that she was alerted by one VM that her daughter had been defiled. Again the said VM was not called to testify to at least inform the court of how she learnt about the offence. Was she one of the ladies who were found by PW1 drawing water from the river? Did she see the perpetrator or perpetrators? All these questions should have raised some lingering doubts in the mind of the trial court as to whether the appellant was positively identified.

43. The investigation officer on his part stated that the complainant was taken to the police station on the material date and that he was not able to have a conversation with her at the time because ‘‘She was not able to talk to me because she was crying’’. That was around 9pm and the investigation officer stated that the mother (PW2) reported to him that her daughter had been defiled by two (2) people. That fact of two people defiling the minor appears inconsistent with the evidence of both PW1 and PW2 both of whom were candid that it was only one person who committed the offence. This inconsistency shows that there is a possibility that the initial report made to PW4 (the police officer who was at the police station when the actual initial report was made) was different from what the witness later recorded in their statements.

44. This court also notes some significant inconsistency from the investigating officer (PW4) who while stating that, the complainant could not communicate at the time the report was made, also states that the same complainant reported that she could recognize one of the perpetrators as the appellant because she used to see him burning charcoal near the river where she fetched water. So the question is if the victim could not talk at the time how did the investigation officer conclude that it was the appellant who had committed the offence? That was not all, because when PW1 testified, she stated that, she had seen the Appellant only once prior to the incident. The Complainant was not quite familiar with the Appellant and that is evident from what she told the trial court in cross examination. Under cross examination, she

clearly stated that, she did not know the appellant by name;

> ***''I did not know your name''*** she stated in answer to the question put to her by the Appellant adding that, she ***''was new in the area''.***

45. The evidence laid before the trial, showed that the complainant's knowledge about the Appellant was scanty and insufficient in my view, to conclude that recognition was positive and beyond doubt.

46. The conclusion made by this court has been arrived at, on the basis of the evidence tendered by PW1 (the complainant) and the investigating officer. The complainant stated that, he did not know the appellant well, as she had only saw him once before/prior to the incident and had not talked to him to be familiar with his voice so that at least she could recognize him through voice (which is an aspect in positive identification).

All she did when she reported was to give a description on how the offender was dressed. The police under such circumstance, was required by law to conduct an Identification parade as per the law in order to pick out the perpetrator and have independent and sufficient basis to pin down the perpetrator.

47. In ***Mohamed Athman Abdi versus Republic [2019] eKLR,*** the court expressed caution when dealing with the identification of an accused when it observed the following: -

> ***''*Where identification is based on visual identification, it is paramount that the court warns itself on the dangers of relying on visual identification**. In ***Cleophas Otieno Wamunga versus Republic Court of Appeal, Criminal Appeal Case No. 20 of 1989 eKLR***. The Court of Appeal was even clearer on the question when it held;

> ***''Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.''***

48. The Court of Appeal also in ***James Tinega Omwenga versus Republic - Criminal Appeal Case No. 59 of 2011 [2014] eKLR, held as follows-***

> ***''…. This is because the purpose of an identification parade is to test the correctness of the identification of an accused person by a witness who did not know him prior to the incident. Therefore, the identification parade conducted by PC Joseph was to test the correctness of the identification of the Appellant by M based on the description she had given of the attacker in her initial report. The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless.''***

49. In ***Donald Atemia Sipendi versus Republic [2019] eKLR.*** The court expressed the same opinion when it observed as follows:-

> ***''Identification evidence is defined as evidence that a defendant was or resembles a person who was present at or near a place where the offence was committed, or an act connected with the offence. It is an established principle that there is a special need for caution before accepting identification evidence.***

50. In ***Kariuki Njiru & 7 Others Versus Republic [1987] eKLR 204.***, the court held inter alia that the;-

> ***''law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.''***

51. Our system of justice is mainly concerned that an innocent person should not face conviction on the basis of erroneous identification. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the accused as the person who committed the crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate given the circumstances.

52. In this instance however, PW4 (the Investigation Officer) stated that the complainant had already identified the Appellant when he was arrested and escorted, to the police station which I find inconsistent with the evidence of PW1. PW1 stated as follows;

> ***''I gave the description of the man (offender) to the police. I later learnt that the man who defiled me is the man who burns charcoal near the river. I had seen the man once burning charcoal near the river. I had not talked to him earlier……''***

It is therefore, evident that, after giving description to the police, she only came to learn about the identity of the Appellant later after his

arrest, which in my view, shows that the only connection between the offence and the Appellant was the fact that around 50 people gathered around his homestead and arrested him before frog marching him to the police station where he was locked up by the police.

53. The police in my view, bungled up the investigations because, instead of conducting an identification parade to strengthen the evidence of the complainant in respect to identification, it failed to do so. It should not be lost that the incident occurred at 7pm which means that darkness was fast approaching. In such circumstances, identification can be a challenge particularly if the person is not familiar to the assailant as it was the case in this instance.

The trial court in my view, fell into error when it misdirected itself that because the crowd had arrested the Appellant him and escorted him to the police station where the complainant identified him, recognition was positive. In my view identification could only have been positive if one of the members of the public who went to arrest the appellant had testified on how they suspected the appellant or if identification parade had been carried out.

It was not safe to base conviction on positive identification on circumstances obtaining. The circumstances obtaining was such that, mistaken identity could not be ruled out. In such circumstances, it was certainly not safe to render conviction based solely on the action of a mob.

54. The investigation officer did not give the identity of the other offender though he testified that he made efforts in vain to trace him and after failing to trace him, he decided to charge the appellant alone which could have been proper had identification parade done, to rule out the issue of mistaken identity. It was improper for the investigation officer to show the complainant the appellant alone and state that complainant had positively recognized him without conducting an identification parade in accordance with the law.

55. The appellant has also raised an issue in this appeal which requires a comment. He contends there was obstruction of justice during his trial. I have gone through the proceedings from the lower court and do find that the appellant contention is legitimate and not far fetch for two reasons: -

a) The appellant was not supplied with the statements and as late as of 23rd September, 2015, when 3 witnesses had already testified he had not been supplied with the statements.

The prosecutor on 7th October, 2015, stated perhaps with a tongue in check that it was too late for the accused to ask for statements after the 3 witnesses had testified and that he had been educated at prison remand. That in my view was really unfortunate coming from the prosecution because it knew that the appellant as an accused has a constitutional right as stipulated under *Article 50c)* to be supplied with the statements. It was not a favour and it mattered little if he had been enlightened about that right at the prison remand or anywhere for that matter. He was entitled to be supplied and the record shows that though the prosecution promised to supply the statements on the next hearing date on 14th October, 2015, it was not to be and the prosecution later proceeded and closed its case totally rendering the rights of the appellant as an accused a mirage. That needlessly subjected the appellant to unfair trial and I would not have hesitation in finding so and declaring the trial a mistrial. However, in view of my above finding on recognition that would only be academic but at least the appellant deserved a comment in that regard for the interest of justice.

(b) Secondly, when the initial trial magistrate was transferred after 3 witnesses had been heard, the succeeding magistrate was required under ***Section 200(3) of Criminal Procedure Code*** to ensure that the rights of the Appellant as the accused were explained to him and a response from him recorded. This court finds that, the succeeding Magistrate did this well, but when the accused asked for statements of the witnesses who had testified to inform him whether he would apply to recall them for further cross examination, the court directed that the case would proceed from where it had reached and that the statements of witnesses who had testified to be supplied to him. That was not done and trial court appears to have inadvertently failed to ensure that the right of accused was actualized and only came to realize the anomaly when it retired to write the judgement because in its judgement, the trial court blamed the Appellant for failing to raise the issue again. That was erroneous because once the trial had made directions that the Appellant be accorded all his rights, the same ought to have been done. The failure to do so prejudiced the Appellant's right to a fair trial.

56. Before I pen off, there is something from the proceedings from the trial court that caught my eye and that is the conduct of Police Constable Noel Kalio from Kabati Police Station. He says that, when he received the report of defilement, from the complainant, and her mother, he noticed that the girl was crying and saw she was bleeding because the lesso she had and the dress were soaked in blood and that blood was flowing down to her legs which really points a sad picture of a girl who had undergone a terrible ordeal but to add salt to the injury, the policemen (PW4) went ahead, and to use his own words ''***I checked her by lifting up her clothes and discovered that its (blood) was coming from her private parts***.''

The invasion of privacy by a policeman was regrettable and callous because, it must have traumatized the girl the more. It could have made sense if it was a lady doing so but for a policeman to do that, is unacceptable. He should have simply let the victim be attended by medical personnel and other experts in that field to lessen the agony and misery the girl was undergoing at that very moment.

57. Having said that, as observed above, I persuaded that, the prosecution's case in regard to positive identification, did not meet the threshold, the identification of the Appellant was not free from possibility of an error. Given the circumstances I have highlighted which the time the offence took place, the complainant had seen the Appellant only once prior to the incident and later learnt about him identify after the incident without the benefit of a proper Identification Parade being conducted.

For the above reasons, this appeal is merited. The prosecution's case was not proved beyond reasonable doubt and for that reason, I will allow this appeal. The conviction of the appellant was not safe and is hereby reversed. The sentence meted out against him is set aside. He shall be set free forthwith, unless lawfully held.

DATED, SIGNED AND DELIVERED AT KITUI THIS 20TH DAY OF SEPTEMBER, 2021.

HON. JUSTICE R.K. LIMO

JUDGE