



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL APPEAL NO. E001 OF 2021**

**WALADI MUSA MMADI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Lamu*

*Criminal Case No. S.O 17 of 2018 by Hon. T.A Sitati (PM) dated 14<sup>th</sup> February 2018)*

**Coram: Hon. Justice R. Nyakundi**

**Mr. A. M. Omwancha advocate for the appellant**

**Mr. Mwangi for the state**

**JUDGEMENT**

The appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence was that on 14<sup>th</sup> October 2018 at around 1800Hrs at Mkomani within Lamu County unlawfully and intentionally touched the vagina of **SM** a girl aged 8 years old.

He was charged with an alternative count of The particulars of the offence were that on 19<sup>th</sup> December 2015 at [Particulars withheld] Village in Tana River Sub-County within Tana River County intentionally touched the vagina of **HB** a child aged 13 years old with his hand against her will.

At the end of the trial, the appellant was convicted and sentenced to 10 years imprisonment. Aggrieved by the sentence and the conviction of the trial court, the appellant lodged an appeal on the following grounds:

- 1) That the learned trial Magistrate erred in law and fact by convicting the Appellant by relying upon an identification parade which was not proper and therefore negating the importance of identification parade as a result therefore occasioning an improper conviction.**
- 2) That the learned trial Magistrate erred in law and fact by disregarding the medical examination evidence by PW1 (the clinical officer) which was crystal clear that there was nothing abnormal seen or observed on the girl after undergoing the medical examination.**
- 3) That the learned trial magistrate erred in law and fact by failing to do a proper, comprehensive and give a detailed evaluation of his reasoning on how he convinced himself that there was an indecent act committed by the Appellant on the girl when there was no iota of evidence demonstrated by the prosecution or in any manner as required by law.**
- 4) That the learned trial Magistrate erred in law and fact by solely and wholly misinterpreting the provisions of section 124 of the evidence act and believing the complainant's testimony to be truthful which was not the case and therefore misdirecting himself in convicting the Appellant.**
- 5) That the learned trial magistrate erred in law and fact by failing to propound, interpret and give clear meaning of the words used by the complainant that is to say "He did bad manners to me" for the girl to be understood what exactly was done to her.**

6) *That the learned trial magistrate erred in law and fact by failing to list down, single out and ascertain the issues for determination as required by law and only stated in his judgment by a sweeping statement that “the only issue to be decided in this case is whether the charge has been proved to the required standard.”*

7) *That the learned trial magistrate erred in law and fact when he failed to question, address and take into account the glaring fabrication presented by the prosecution witnesses especially PW2 who was the mother of the complainant and had similar agenda of incriminating the Appellant by all means possible. The prosecution heavily relied on mere hearsay and rumours from PW2 that formed the backbone of the conviction.*

8) *That the learned trial magistrate erred in law and fact by ignoring and disregarding the defence by the Appellant which was tenable and truthful.*

## **Background**

(PW1) Madi Sheyumbe Mali a clinical officer based at King Fadh Hospital produced the medical evidence. He stated that the examination was normal there were no bruises, lacerations or bloodstains and that the hymen was intact. The urinalysis was normal and a white plain discharge was normal. The conclusion was that the complainant had not being defiled. He produced the medical notes (P.Ex1) and the P3 form (P.Ex2).

(PW2) LWN the mother of the complainant informed the court that the complainant was born on 7<sup>th</sup> October 2018. She produced the minor’s birth certificate (P.Ex3). (PW2) testified that on two different occasions the complainant had informed her that she had collected Ksh.50/- which aroused her suspicion. On questioning the complainant as to where she got the money, the complainant informed her that she would meet a man near Bagdam’s shop and they would go to his workshop around Utukuni area where the man would undress her and caress her. The complainant further stated that he used to put his penis in her vagina. That the man would promise to marry her and would give her Ksh.50/-.

(PW2) alerted her husband and reported the matter at Lamu Police Station where she was referred to King Fadh Hospital. She stated that two weeks after the incident, the appellant in the company of his brother and relatives claiming that they had done it. The complainant was called to pick out the person who had assaulted her. According to (PW2) the complainant picked out the appellant from amongst her relatives.

(PW3) SK the victim was sworn in after a voire dire examination. It was her evidence that the first time she met the appellant he gave her Ksh.50 and asked her to her to meet him at Utukuni but she had tasks and did not go. The second time she encountered the appellant, he gave her Ksh.50 and kissed her on the cheek but did not say anything.

On the third time meeting the appellant, the appellant told her that she need to follow him if she wanted another Ksh.50. The complainant followed him to a carpentry shop where the appellant undressed her and undressed himself and lay her on the floor. He then touched her on the head, neck, breasts, stomach, thighs, buttocks and her vagina. When the appellant was done he gave her Ksh.50/- and promised to marry her. He then instructed her to take a shower immediately she got home.

The complainant testified that when got home she took a shower and then asked (PW2) permission to buy a CD. However, (PW2) asked her where she got the money from and threatened to beat her. (PW3) told her about her encounters with the appellant. It was the complainant’s evidence that she could recall the man’s face and that he had a cut on his finger. She then pointed out the appellant in court.

(PW4) S/No. xxxxx Corporal Mariam Suleimani based at Lam Police Station was the investigating officer. He recorded the witness statements and escorted the complainant to hospital. He told the court that PC Salim effected the arrest of the appellant and he. The I.O) re-arrested him and brought him to court.

**At the close of the prosecution case, the trial court found that a prima facie case had been established and the appellant was placed on his defence.**

The appellant was sworn in and he testified that stated that on 17<sup>th</sup> November 2018 he met a certain man who informed him that the complainant’s father was looking for him and that he was wanted for sexual offences. He stated that he tried to contact **chief Majid** and **chief Ali** but they ignored him. His brother traced the complainant’s father they and proceeded to his house. At the house, the complainant was asked to identify the perpetrator at which she pointed at the appellant. The appellant returned home and left to take his sick child to hospital but on his way his brother called him back. At the house he found the complainant’s father and police officers waiting for him and he was arrested.

The appellant stated that there were people inciting (**PW2**) against him. He negotiated with them and they agreed to abandon the issue. He referred to (**PW2**) as a lie and claimed that she wanted him to be wrongly convicted because he refused to bribe her. He denied committing the offence stating that he stopped going to the workshop in 2016.

## Submissions

### Appellant's written submissions

The Appellant relied on his written submissions dated 26<sup>th</sup> February 2021 and filed by his advocates, **A. M. Omwancha** on the 1<sup>st</sup> March 2021. The appellant submitted that the trial Magistrate relied on a mock identification parade illegally conducted to convict and sentence the appellant. He submitted that the trial court was enjoined to examine evidence of identification carefully to satisfy itself that the conditions were favourable and free from a possibility of error and must be watertight.

He contended that the family of the complainant put the complainant in a situation which she had to point the person who committed the crime, a process the appellant argued ought to have involved the police. Failure of the police to conduct a viable identification parade rendered the purported identification parade worthless. He cited the case of **David Mwita Wanja & 2 Others v R Criminal Appeal No. 117 of 2005** where the court stated that the value an identification parade depreciated where it was not conducted in accordance with the Police Force Standing Orders. He also relied on **Njihia vs R (1986) eKLR**.

On the application of Section 124 of the Evidence Act, it was the Appellant's submission that the trial Magistrate misinterpreted the provision wholly believing the complainant without weighing the evidence of identification. He contended that there was no contradiction between Section 124 of the Evidence Act and principles of identification by a single witness outlined in case law. He argued that the trial Magistrate must be satisfied that the child was telling the truth and record the reason for such belief as stated in **Felix Kiarie Margaret & Another (1976) eKLR**.

The appellant further submitted that the complainant gave sweeping statements and was not specific of what happened. That the complainant's evidence was only corroborated by her mother who had unclear motive. He submitted that the medical evidence did not support the complainant's evidence as examinations were all normal. He faulted the trial Magistrate for believing the evidence of the minor and (**PW2**) while disregarding the Appellant's defence.

### Respondent's submissions

**Mr. Sirima** for the respondent filed his written submissions dated 19<sup>th</sup> March 2021 on the 22<sup>nd</sup> March 2021. It was his submission that the prosecution had proved its case to the required standard. On the age of the complainant (**PW2**) produced her birth certificate that showed without a doubt the complainant was a child. On the indecent act, he submitted that the complainant unequivocally described where the appellant had touched her. The description of which fell within the description of an indecent act in Section 2 of the SOA. He placed reliance on **Francis Kennedy Owino v R [2017] eKLR**.

On the application of Section 124 of the Evidence Act, counsel submitted that the complainant was forthright and candid and there was no inconsistency in her testimony as held in **Michael Maweru v R Criminal Appeal No. 133 of 2014**.

On identification, **Mr. Sirima** submitted that the identification was by recognition. That the complainant met the appellant on three occasions at daytime and further the complainant came to know the appellant's name when she heard his friends call him. He further submitted that the appellant being well known to the complainant there was no need to conduct an identification parade. That in his defence the appellant stated that he and his brother presented themselves before the complainant's father and insisted on seeing the complainant. The complainant pointed out the appellant as the one who committed the offence. There was no need for the police to carry out an identification parade as it would not have any probative value. He cited the case of **Criminal Appeal No. 274 and 275 of 2009 at Eldoret Peter Okee Omukaga & Another vs R (unreported)**.

### Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record. **See Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR**.

I have considered the grounds of appeal, the respective submissions, and the record and the issue for determination is whether the prosecution proved its case against the appellant; whether the judgment did not conform to the provisions of Section 169 of the CPC.

Section 2 of the SOA defines an indecent act as:-

*an unlawful intentional act which causes—*

*(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;*

**(b) exposure or display of any pornographic material to any person against his or her will;**

From the facts outlined in the charge sheet, the appellant fell within the first part of the definition of an indecent act. Evidence of the indecent act was given by the victim, **(PW3)**, who testified that the two occasions the appellant approached her, he gave her Ksh.50/-. The third occasion happened on a Tuesday the appellant told the appellant to follow him if she wanted to receive Ksh.50/-. The victim followed the appellant to a carpentry workshop. At the workshop the appellant removed the victim's clothes before removing his own clothes and lay her on the floor. **(PW1)** testified that the appellant touched her on the head, neck, breasts, stomach, back, thighs, buttocks and her vagina. **(PW3)** tried to push him off but she could not. When the appellant was done he promised to marry her and gave her Ksh.50/-. He then instructed the victim to shower once she got home.

The appellant in his submission argued that the trial Magistrate relied on the victim's general statement that the appellant "*did bad manner*". However, **(PW3)** was clear in her evidence of what transpired on the day of the offence. She narrated how the appellant lured her to the scene of the crime and named each part of her body that the appellant lustfully, intentionally and unlawfully touched. It was her evidence that the appellant touched her breast, buttocks and her vagina, all three parts that have been specified in section 2 of the SOA. The appellant's contention is not borne by the trial court record.

The appellant further contends that the medical evidence produced by **(PW1)** did not support the charge levied against him. The offence of committing an indecent act is based on the offender making unlawful intentional contact the genital organs, breasts or buttocks of another person. How can contact be proved medically? The only way for contact to be evident medically or otherwise would be in a situation where the contact was done with such force that it would cause scarring of the tissues leaving a mark on the skin. This was not such a case. **(PW3)** never stated that it was painful or that she was scarred, from the description one would imagine that the appellant was caressing the victim. It would be therefore wrong for the appellant to contend that the medical evidence did not corroborate the victim's evidence.

Even in the absence of medical evidence, the court can rely on the sole testimony of the complainant as provided for in Section 124 of the Evidence Act which provides:

***Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***

The Court of Appeal in **Sahali Omar vs. R [2017] eKLR** held that:

***"On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the Evidence Act...The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful...It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)...In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim."***

The trial Magistrate in his Judgment invoked Section 124 of the Evidence Act and found the victim to be a truthful witness and stated:

***"In the present case the complainant was a truthful and straightforward witness. She gave clear cut and consistent evidence which even become stronger during cross-examination as the details of the offence fully crystallized as a result of the questions put forth to her by the accused advocate."***

I have considered the evidence on record; **(PW3)** gave clear concise recollection of what happened on the day. She recounted how the Appellant lured her into the workshop with an offer to give her Ksh.50/- if she followed him. Once at the workshop he undressed PW3 and the proceeded to violate her body. She mentioned all parts of her body that the appellant unlawfully touched. In cross-examination the appellant's advocate did not question her about the offence, rather all questions were focused on the issue of identification of her assailant. **(PW3)** testimony on the indecent act committed against her remained unchallenged by the appellant. I find that the indecent act was proved.

On identification, recognition has been held by courts to be more reliable than identification of a stranger as long as the court is convinced that the circumstances of identification were favourable. See **Francis Muchiri Joseph – V- R [2014] eKLR** and **Wamunga –vs- R, [1989] KLR**

In the instant case, the complainant testified that she could recall the appellant's face and that he had a cut on his finger. It was her testimony that she had encountered the appellant on three occasions including the day of the offence. On the first **(PW3)** had left church when the appellant followed her and gave her Ksh. 50/- and requested her to follow him but she did not follow him. Her second encounter with the appellant was around the time children leave school when she met with the appellant who gave her Ksh. 50/- and kissed on the cheek without

saying a word. Their third encounter was on the day of the offence. The appellant approached her and told her to follow him. She followed him to a carpentry workshop where the appellant committed the offence.

From the evidence of (PW3) the court finds it is palpable that the appellant was not a stranger to (PW3) having met with him on two different occasions before the fateful day. However, despite finding that the victim, (PW3), was truthful under the provision of section 124, it is trite that the court warns itself on the dangers of relying on visual identification even in instances of recognition and examine the evidence with utmost care. The Court of Appeal in **Cleophas Otieno Wamunga vs R Court of Appeal Criminal Appeal No. 20 of 1989 KLR 424** held that:

“..where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

In the celebrated case of **R v Turnbull and others (1976) 3 ALLE 2549** the court gave guidelines on circumstances of identification and stated that:-

“Secondly the Judge should direct the jury to examine closely the circumstances in which the identification by such witnesses came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance”

I have examined closely the evidence relating to identification, as stated earlier (PW3) met with the appellant on three different occasions. All their meetings happened in the afternoon when there was sufficient light for observation. Furthermore, PW3 spent considerable time with the appellant on the day of the offence in the privacy of a workshop affording him considerable time to undress her and shamelessly caress her to his satisfaction.

Additional evidence of identification came from the appellant in his defence. He stated that after he could not get the assistance of the chiefs, he requested his brother to look for the victim's father. They traced the victim's father and informed him that they wanted to meet (PW3). They went to the victim's home and asked that (PW3) be summoned to identify the person who committed the offence. (PW3) pointed at the appellant. His evidence was corroborated by (PW2) and (PW3) during cross-examination. The court has no doubt in its mind that (PW3) was able to recognize the appellant. The identification came about one week after the incident. (PW3) pointed out the appellant instead of his brother. The parents of the victim were strangers to the appellant, there was no evidence of influence or coercion on the decision of (PW3).

The appellant took issue with the manner of identification that occurred at the victim's house stating that it was a flawed identification parade. Identification parades are not organised by civilians but are conducted by the police in the process of their investigations and are guided by the regulations in the Police Force Standing Order. To term the identification at the victim's house as an identification parade would be wrong.

The question then would be whether it was necessary for the police to conduct an investigation parade once they arrested the suspect. The Court of Appeal in **Andrea Nahashon Mwarisha v R [2016] eKLR** pronounced itself thus:-

**“Identification parades are necessary though not absolutely where the witness purports to identify a suspect did in extremely difficult conditions, say, where the offence is committed at night and when visibility may have been a challenge having regard to the availability or lack of light and when the circumstances under which the offence is committed are harrowing to the witness thereby impairing his ability to positively perceive and with certainty identify the culprit or where the incident lasts for a short time. The purpose of identification parade as explained in Kinyanjui & Others v Republic, (1989) KLR 60: "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify and for a proper record to be made of that event to remove possible later confusion.....” Further identification parades are meant to gauge and test the correctness of a witness's identification of a suspect given the circumstances under which he claims to have identified the suspect. See John Mwangi Kamau v Republic (2014) eKLR.**

***In this case, the offence was not committed in difficult circumstances at all. It was during the day and visibility was not poor. The complainant too spent some time with the appellant at the scene of crime. Indeed, when the appellant and his accomplices dragged him into the forest, it was the appellant who used the complainant's scarf to gag him. He is also the one who tied him to a tree. Thereafter, as soon as the appellant was found in possession of the motorcycle, the complainant was summoned to the scene upon which he identified his motorcycle in the possession of the appellant before they all ended up at Kwale Police Station. In those circumstances, of what evidential value would have been the identification parade? We cannot think of any. To our mind, it would have been superfluous. The identification parade would even have been hampered by want of earlier description by the complainant of any attributes of the appellant. Even if the complaint by the appellant was valid, we are still of the view that given the circumstances under which the identification was made, there was no room for mistaken identity. The complainant had all the opportunity to properly and positively identify the appellant as one of the robbers....” (Emphasis added)***

Guided by the above precedent, it is clear that though it would be ideal to always conduct identification parades it is not always necessary depending on the circumstances of a case. In the present suit, as the court earlier found, the conditions for identification were good and the appellant was not a stranger to (PW3). The appellant was positively identified by (PW3) in the presence of her parents and the appellant's brother when he visited their home on his own volition. The appellant stated he was arrested on the same day he was identified by the police accompanied by the victim's father. I find that there would be no reason for an identification parade to be conducted. The appellant was positively identified.

Whether the appellant's defence was considered, it was his defence that strange people incited (PW2) to have him arrested. He negotiated with them and they agreed drop the matter. He accused (PW2) of being a liar who wanted him to be convicted because he refused to bribe her. He stated that he stopped going to the workshop in 2016 and that the workshop was a public place where he would have been caught.

The trial Magistrate considering the appellant's defence stated that it corroborated crucial details of the victim's identification of the suspect and that on realizing that he had been identified he tried to unlawfully dissuade the family to abandon the case conduct synonymous with a guilty person. While this court may not necessarily agree with the deductions of the trial Magistrate, the evidence that the appellant is meant to taint (PW2), the mother of the victim in bad light that she wanted a bribe and that the case was a set up by instigated by suspicious people. The appellant never informed the court why these strangers wanted to frame him nor their connection with (PW2). Furthermore, the appellant did not inform the police of the frame up to give them a chance to interrogate the case from this angle. Moreover, the appellant never raised these issues with (PW2) during his cross-examination only stating it in his defence. The appellant's defence raise more questions than answers. It was an afterthought that did not shake the prosecution case.

The appellant faulted the judgment of the trial Magistrate stating that he did not give a detailed evaluation of his reasoning and failed to list down issues for determination.

Section 169(1) of the CPC which provides that:-

***Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***

Upon perusal of the judgment this court notes that the trial court set out the factual background of the case, laid out a general issue for determination and analysed the elements of the offence giving his reasons for his findings based on the evidence that was tendered. Eev if the Judgment had not complied with the provisions of section 169 of the CPC, is trite that non-conformity to Section 169(1) of the CPC does not lead to a miscarriage of justice and that a conviction shall be upheld.

In **R vs Edward Kirui [2014] eKLR** the Court of Appeal held:-

***“Non-compliance with the requirements of section 169 does not automatically result in the trial process being vitiated. See the authority of HAWAGA JOSEPH ANSANGA ONDIASA V R Criminal Appeal no. 84 of 2001 where the appellant asked the court to set aside his conviction at the trial saying that that court had not complied with section 169 Criminal Procedure Code. This Court found that –***

***“It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare his judgment strictly in accordance with section 169 of the Criminal Procedure Code, this would not, of itself mean that the conviction of the appellant was wrong or is to be invalidated”***

In the upshot, having evaluated all the evidence on record, it is my finding that the main charge was proved beyond reasonable doubt that the appellant was the culprit. I find that the both the conviction and the sentence was well founded on law.

I find no merit in the appeal and consequently dismiss it forthwith.

Orders accordingly.

**DATED, SIGNED ON 15<sup>TH</sup> DAY OF SEPT 2021 and DISPATCHED via email ON 15<sup>TH</sup> DAY OF SEPTEMBER 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mr. Mwangi for the state
2. The appellant