REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.19 OF 2019

BETWEEN

MOSES KIMINYI.....APPLICANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal from the original conviction and sentence from the Chief Magistrate's Court at Makadara Sexual Offence Case No. 45 of 2017 delivered by Hon. E. Kanyiri on 13th November, 2018).

Background

1. The Appellant faced two counts. In count I, he was charged with committing an indecent act with a child contrary to **Section 11(1) of the Sexual offences Act No. 3 of 2006**. It was alleged that on 21st July, 2016, at [particulars withheld] Police Lines within Nairobi County, intentionally touched and examined the buttocks, anus and vagina of BN a child aged 5 years 10 months by using a spotlight torch. In Count II, he was charged with abuse of position of authority contrary to **Section 24(a)(b) of Sexual Offences Act No. 3 of 2006**. It was alleged that on 31st July, 2016 in [particulars withheld] Police line within Nairobi County took advantage of his position as a police officer to commit an indecent act with a Child namely BN at his house within the limits of the station in which he is appointed.

2. After the trial, the court found him guilty of count I and convicted him accordingly. He was sentenced to serve ten years imprisonment. Aggrieved by both the conviction and sentence he preferred the instant appeal to this court. By a Petition of Appeal filed by his counsel, Olando, Okello and Lusenaka Advocates, on 31st January, 2019, he raised ten grounds of appeal which I duplicate as under:

a. The Learned Magistrate erred in Law and fact in relying on suspicion coupled with personal opinion and preferences that were prejudicial to the Appellant to convict him on Count I.

b. The Learned Magistrate erred in Law and fact in relying on uncorroborated, inconsistent and insufficient evidence tendered by the prosecution more so by PW1.

c. The Learned Magistrate erred in law and fact in relying and finding the evidence of PW1 as truthful, whereas failing to properly warn herself of the implication of a single identifying witness.

d. The Learned Magistrate erred in law and fact in relying on hearsay evidence without warning herself of the danger of reliance on such which was inadmissible.

e. The Learned Magistrate erred in law and fact in failing to consider the duration between the date of the offence and the arrest of the Appellant whereas he had not fled from the area he resided.

f. The learned magistrate erred in law and fact in finding that the totality of the facts based on the complainant's testimony, existing antecedents and the state of relations amongst the parties to the offences and the appellant could lead a free from error allegation about having committed the offence.

g. The Honourable Magistrate erred in law and fact that the appellant was positively identified by the victim and the process was free from any error.

h. The Honourable Magistrate erred in law in failing to consider the exculpatory evidence, facts, circumstances and occurrences attendant to the offence thereby arriving at an erroneous finding.

i. The Honourable Magistrate erred in law and fact in upholding that the Appellant's defence was untenable, untruthful and inconsistent whereas finding merit in the prosecution's case.

j. The Honouranbe Magistrate erred in law and fact in finding that there was evidence proving commission of the offence attributable to the accused.

Summary of evidence

3. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its independent conclusions. The court must however bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See: **Okello vs Republic EA, 32.** It is now the onerous duty of this court to summarize the evidence adduced before the trial court.

4. In total, the prosecution called 12 witnesses. This is a case in which the complainant who testified as PW1 was playing with other children within [particulars withheld] Police Lines. The Appellant passed by where the children were playing and called her. He led her to his house which was on a flat but a house that PW1 could identify as Block 1 door number 5. When they were inside the house, the Appellant asked PW1 to undress. He sat down and placed her on his laps. He then took a torch and shone it on his private parts which PW1 identified to the court as his buttocks and vagina. Thereafter, he gave her biscuits and asked her to go home. She dressed in her shorts, pants and dress and left. In her testimony, PW1 named the other children she was playing with as S, A and N. She stated that after she left the Appellants house, she informed one Z who in turn informed M and in turn M informed her mother who was also a Police Officer at [particulars withheld] Police Station.

5. ZC, SK and MW, were children who testified as PW 2, 3, and 4 respectively. According to PW2, she was playing with her friends AC, K and R when shortly afterwards B (PW1) joined them and informed them that the Appellant had removed her clothes shone a torch on her private parts and gave her a biscuit. She pointed the Appellant's house to them. PW2 stated that she informed M who in turn informed PW1's mother. She thereafter recorded her statement. PW3 a class 4 student then testified that she was playing with Z and C when PW2 informed her what the Appellant had done to PW1. PW4 was a 13 years old girl who confirmed that on the material date, she was playing within the Police Lines with S, C, C, I, S and S when she was informed by PW4 that the Appellant had inspected PW1's private parts to see if they were clean. She confirmed that she informed PW1's mother about the incident after which she recorded her statement with the police.

6. PW 6, PC (W) JL worked at [particulars withheld] Police Station and was the mother to PW1. Her evidence was that she was informed by one Monica (PW4) about what had transpired between PW1 and the Appellant. She took the matter seriously and informed the OCS, Chief Inspector Amos Shamalla. The OCS in turn asked her to report to the duty officer Inspector Maingi. She obliged and the report was recorded on the Occurrence Book. She was thereafter referred to the hospital for examination which was done at Mariakani Cortage Hospital. On the following day she recorded a statement. She identified a Birth Certificate in respect of PW1 which showed that she was born on 27th September, 2010. According to her testimony PW1 told her that the Appellant took her to [particulars withheld] where the incident occurred. PW1 in turn accompanied her to the house and positively identified it. She testified that she learnt about the occupant of the house after an identification parade was conducted.

7. PW7, Corporal MWM was the mother to PW4 and her testimony was basically that PW4 informed her about what had transpired. She accordingly recorded her statement in that respect.

8. PW8, Chief Inspector AM was the officer in charge Police Driving School where the Appellant worked. His testimony was that on the fateful day, the Appellant asked him for permission to go home because he needed to attend to school children prayers. He next saw him on the following date at work.

9. PW9 Corporal CNM shared the same house with the Appellant. He indeed confirmed that they occupied house door number [particulars withheld]. His testimony was that he left for Eldoret on 30th July, 2016 and was not therefore in the house on 31st July, 2016, the date of the incident. He met the Appellant on 1st August, 2016. He testified that he learnt of the incident on 5th August, 2016 and confirmed that the same had been recorded on the Occurrence Book as No. 91/31/7/2016. He further stated that he and the Appellant were arrested as the key suspects but was released after an identification parade where the Appellant was identified as the culprit.

10. PW10, PC (W) EN worked at [particulars withheld] Police Station. On 6th August, 2016 while working at crime branch office was requested by Inspector Rono who was in charge of petty crimes to accompany him together with Seagent Sigei to the Police Lines for purposes of PW1 identifying the house where the incident had occurred. They fetched PW1 who led them to block [particulars witheld]. She was also tasked to accompany PW1 during the identification parade exercise. Whilst they were inside the Appellant's house, they conducted a search which yielded a red and black torch which PW1 confirmed was used by the Appellant to inspect her private parts.

11. The identification parade was conducted by PW11, Inspector Bernard Maingi of [particulars withheld] Police Station at which the Appellant was positively identified by PW1. He testified that he complied with all the rules guiding identification parades and that the Appellant confirmed that he was satisfied with the manner in which the parade was conducted. Both himself and Appellant signed the parade forms which were produced as P. Exhibit 5 (a) and (b) respectively.

12. The case was investigated by **PW12, Inspector Henry Rono** of Pangani Police Station. He summed up the prosecution evidence and in

addition adduced in evidence PW1's Birth Certificate as exhibit no. 6, work ticket from 1st August to 8th August, 2016 for motor vehicle where the Appellant worked as exhibit 7, duty roster from the Driving School from 2nd to 31st July as exhibit 8 and a red black torch as exhibit 9. He also preferred the charges against the Appellant.

13. After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave a sworn testimony and called two witnesses in support to his defence. He testified that on 29th July, 2016 he went to his place of work where he requested for permission to travel home and was given the permission. He reached home on 30th July, 2016. On the following day he travelled to his child's school, [particulars withheld]. He named his child as M whose birth certificate he adduced as evidence. He also produced a letter from school dated 31st July, 2016 indicating that he had visited the school on the said date. He went on to state that he began his journey back to Nairobi on same date 31st July, 2016 by an Eldoret Express bus. He produced a bus ticket in this regard. He reached Nairobi on 1st August, 2016 at 5.00 pm and immediately informed his boss **Inspector M PW8**. He thereafter worked as usual until 7th August, 2016 when he was called by **Inspector Rono (PW10**) and informed about the incidence and how it had occurred. He stated that he was summoned alongside his house mate, PW9. They were locked up but after an identification parade, PW1 identified him as the assailant. He went on to state that a search was conducted in his house in his absence when a torch was discovered. After he was charged, he was served with an interdiction letter.

14. In cross examination he denied that he was in his house on the date of the incidence and that therefore he could not have committed the offence. He however did not deny that the complainant and other children could have been playing near his house.

15. DW 2, one **MT** was a son of the Appellant, then in form III at [particulars withheld]. He testified that the Appellant visited him on school prayer day on 31st July, 2016.

16. DW3, DNO was a teacher in the said school who testified that indeed the Appellant was in school on 31st July, 2016.

Submissions

17. At the hearing of the appeal, the Appellant was represented by learned counsel Mr. Mathenge. He relied on written submissions dated 29th October, 2019 and filed on 31st October, 2019 which he also briefly highlighted. The Respondent was represented by learned State counsel Ms. Chege who entirely relied on written submissions dated 18th November, 2019 and filed on even date by learned State Counsel Mr. Momanyi Nyamberi.

18. In summary, the Appellant took issue with the fact that he was not properly identified. Mr. Mathenge submitted that the Appellant was identified by a single witness and which identification was not full proof. He averred that PW1 had testified that he did not know the perpetrator prior to the date of the offence. Further that, she did not testify that she could identify the witness if she saw him again. That is what prompted an identification parade to be conducted. He took issue with the identification parade which he termed as irregular. He supported this by stating that the members of the two parades were the same save for the suspects. Yet, it was on record that the suspects in the two parades did not possess similar attributes.

19. Further on identification, learned counsel faulted the lack of credibility of the identifying witness, stating that the identification of the Appellant by PW1 was mere dock identification which he invited the court to decline reliance on. In this regard, he cited the case of **Gibson Mwangi Gituro vs Republic eKLR** and **Wilson Kamotho Giuthi vs Repuplic [2018] eKLR** to buttress the submission.

20. Further on this issue, Mr. Mathenge faulted the evidence of the identifying witness stating that it was not corroborated. In urging the court to dismiss the uncorroborated identification evidence, counsel relied on the cases of **Njihia vs Republic [1986] eKLR and Robert Ogetto vs Republic [2004] eKLR**. He urged the court to consider it as a hearsay evidence.

21. On the issue of proof of the offence, Mr. Mathenge submitted that the evidence adduced did not disclose the elements constituting the offence of indecent act. He buttressed this by stating that PW1testified that the Appellant torched her private parts but did not disclose what private parts were torched. In this regard, learned counsel distinguished the present case from the authorities cited by the Respondent, being **MBO vs Republic [2010] eKLR**. He submitted that in the cited case, the court was categorical that the private parts were disclosed as the buttocks which were intentionally touched and exposed. That however, in the present case, the private parts which were exposed and torched were not disclosed. For this reason, he urged the court to hold and find that the offence charged was not proved beyond all reasonable doubts.

22. On the part of the Respondent, it was submitted that the Appellant was properly identified. Specifically, that PW1was able to identify the block and the house number that she was led to by the appellant. That a subsequent identification parade was conducted in which the Appellant was positively identified. It was a further submission of the Respondent that the issue of a mistaken identity could not arise because the identification parade was not biased given that the Appellant's roommate was also subjected to an identification parade. PW1 being clear in her mind as to who committed the offence, only picked out the Appellant as the culprit.

23. Mr. Momanyi in his submission stated that the Appellant's alibi defence was ousted by the strong prosecution witnesses' evidence, more so his colleagues who stated that he was on duty on the material date of the incident. This effectively implied that the Appellant concocted his alibi defence.

Analysis and Determination

24. Upon a reevaluation of the evidence on record and the respective rival submissions, I find that there are only two issues for determination, namely whether the offence charged was proved beyond a reasonable doubt and whether the Appellant was positively

identified.

25. On prove of the charge, Mr. Momanyi submitted that there was no doubt that by the act of inspecting PW1's private parts, he exposed them which act constituted an indecent act as provided under the Sexual Offences Act. In this regard, he relied on a Court of Appeal decision (Nakuru) in the case of **MBO vs Republic [2010] eKLR**. Counsel urged the court to dismiss the appeal in its entirety and uphold both the conviction and sentence.

26. The Appellant was charged with the offence of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act. The definition of what constitutes an indecent act is provided under Section 2 of the Act as follows:

> **"Indecent act "means" an unlawful intentional act which causes-**
>
> > **a. Any contact between any parts 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."**

aa. Sub Section (1) of Section 11 provides that:

> **"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."**

28. From the above definitions, it implores the court to firstly determine whether the victim of the offence was a child. Under Section 2 of the Act, a child is defined as meaning the definition accorded under the Children's Act. The Children's Act No. 8 of 2001 at Section 2 defines a child as ***"Any human being under the age of 18 years".***

29. In the present case, PW5 the mother to the victim identified a Birth Certificate of the minor which showed that she was born on 27 th September, 2010 which then placed her age as at the time of incident at five years ten months. In sum, PW1 fell under definition of a child.

30. The next paramount test is the determination of whether any of the elements of the offence of indecent act as defined under the Sexual Offences Act were disclosed by the evidence adduced. The evidence of PW1 was that the Appellant called her as she was playing with other children and led her to his house where he asked her to remove her under garments including the pants after which he shone a torch on her purportedly to inspect whether her private parts were clean. A scrutiny of the evidence shows that she did not categorically state what private parts were torched. It is however common sense and by usage and operation that private parts are implied to mean either the vagina or the penis or the buttocks of a person whichever gender applies.

31. In the present case, PW1 was categorical that as at the time the Appellant shone the torch on her private parts, she was naked. It is a safe conclusion to state that both her buttocks and vagina were exposed upon undressing. Therefore, the Appellant could only have been inspecting both the vagina or the buttocks or either of them.

32. Under Section 2, an indecent act constitutes 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. In the present case, after PW1 undressed, the Appellant took a torch after which he held her on his laps and started the inspection of the private parts. There is no doubt therefore, the Appellant's body came into contact with the buttocks and, or, the vagina of PW1. Conclusively, an element of the offence of indecent act was established. I accordingly disagree with counsel for the Appellant that the fact that PW1 did not specifically state what part of her body came into contact with that of the Appellant the offence of indecent act was not established. In so holding, I find solace in the Court of Appeal decision cited by the Respondent in the case of **MBO vs Republic [2010] eKLR** where the Court had this to say:

> **"To strip a female naked constitutes indecent assault even if it is done for the sake of it and it is not accompanied by further indecent gestures either by speech of physical contact." The alternative counts in this case referred to "private parts" and only mentioned "buttocks" in parenthesis. There was ample evidence that the private parts of the children were touched by the appellant with his male organ. There was evidence that the children's underwear was removed thus exposing their buttocks. The law does not stand still. It has to keep apace with society. If in days of yore, buttocks, even for women, were liberally exposed and were therefore not considered as private parts, it cannot be the case in this day and age. Nor was it the case when the charges in this case were framed in 2005. Indeed, the following year, 2006, the Sexual Offences Act was passed by Parliament to clarify what "genital organs" are. They include the "anus". "Indecent act" now means any intentional act which causes, inter alia, "Any contact between the genital organs of a person or her breasts and buttocks with that of another person." It is our view, even without this new development, that the buttocks of a woman were private enough to attract the charge of indecent assault if they were intentionally touched or exposed. The finding of fact in this matter was that the children were indecently assaulted on their private parts which was an element of the offence charged in the alternative counts and was proved. We reject that ground."**

33. The Appellant committed the seemingly little act of having PW1 strip naked, thereby exposing her private part. That alone is an act constituting an indecent act.

34. This drives me now to determine the most crucial aspect of whether the Appellant was positively identified as the assailant. Of course he faults the evidence of identification stating that it was one of a single witness and was thus unreliable. It was urged that the court considers it as worthless dock identification. It behooves the court in such a circumstance to recount how the offence took place.

35. This is a case in which PW1 was picked from amongst other children and led to a house she clearly remembered was Block [particulars withheld]. When she was recalled to testify, she was very categorical that it was not yet dark when she was led to the house. Her further evidence is that she did not know the Appellant prior to the incident. What confirmed that she indeed was in Block [particulars withheld] was that upon her return to the playing ground, she informed her playmates that she had just come from the afore stated house where somebody had done bad manners to her. Each of the minor witnesses who testified adduced corroborative evidence with regards to where PW1 was led to and what had transpired in that house. The bombshell fell after the eldest of them all, PW4 then aged 13 years decided to inform PW1's mother who in turn escalated the matter to the police.

36. I do agree that the identification of the Appellant was by a single witness, PW1. In relying on such evidence, the court must warn itself as to the circumstances and conditions prevailing at the time of identification so as to avoid a case of mistaken identity. This was the holding in the case of **John Mureithi Nyaga vs Republic [2014] eKLR.** Also in the case of **Kiilu and Anotehr vs Republic [1995] 1 KLR 174** the Court of Appeal observed as follows:

> **"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct, pointing to the guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the probability of error"**

37. In the present case, it was not dark at the moment. The issue as to which house PW1 was led to was not in issue. What needed to be established was who the occupant of the house was and whether PW1 was able to identify the occupant as the assailant. The investigators undertook what I would describe as great precaution because after learning that the house was occupied by two persons, subjected them to identification parades. It is in the parade that the Appellant was a suspect that PW1 positively identified him.

38. As regards to whether the identification of the Appellant amounted to dock identification which the court should consider worthless, it is trite that dock identification is generally frowned upon by courts. However, t**he court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification. (See the Court of Appeal in *Muiruri & 2 Others versus Republic [2002] KLR 274*)**.

39. However, in the present case, the identification of the Appellant by PW1 was not by way of dock identification. The identification parade conducted by PW 11 on 9th August, 2016 was done way before PW1 testified on 12th April, 2017. As such, I find no reason to analyse the credibility or lack of credibility of dock identification.

40. The Appellant took issue with the credibility of the parade stating that it was flawed because the members of the parades did not change. A look at evidence of PW11 who was the parade officer was clear that he conducted two distinct parades. He made sure that each of the parades constituted members of similar traits with the suspect in that specific parade. He also asked each of the suspects where they wanted to stand. In the first parade in which the Appellant's roommate was the suspect did not yield any positive results. But in the second parade where the Appellant was the suspect, he was positively identified. It is clear both from the identification parade forms in respect of the Appellant and the evidence of PW 11 that the Appellant was satisfied with the manner in which the parade was conducted. I do not therefore find any fault that casts credibility of the identification parades. My view is that the chain of events pieced together lead to the conclusion that the assailant was the Appellant.

41. In his defence, which was an alibi, he stated that he was not within [particulars withheld] Police Lines at the time of the incidence. He alluded to have travelled to attend to his son's school prayer day. To purportedly buttress this, he called his son as well a teacher from the school to demonstrate his assertion. The most unfortunate thing is that the Appellant forgot that one of his seniors, PW8 Chief Inspector M, then in charge of Police Driving School confirmed that he worked alongside the Appellant and supervised him. His testimony was that on the material date 31st July, 2016, at around 5.00 pm, he gave Appellant permission to travel home. He had earlier on the 29th July, 2016 mentioned to him that he would wish to travel to Nzoia but he released him on 31st at around 5.00 pm. He next saw him on 5th August, 2016. His roommate CN (PW9) stated that he could not confirm whether he (Appellant) was in the house on the material date because he left the house on 30th July, 2016 for Eldoret. He recalled that on 29th July, a day earlier, the Appellant had indicated to him that he intended to travel out of the station. The witness however confirmed that both occupied a house number 5 Block 1.

42. From the testimony of the two witnesses it is clear that although the Appellant had intended to travel upcountry on 29th July, 2016, his immediate boss declined to give him permission until 31st July, 2016 at 5.00 pm. He was therefore within his duty station up to this hour.

43. Back to the scene of crime, it is clear that the offence took place on the evening of 31st July, 2016 just before it got dark. It is not a mistake then to conclude that it was any time after 5.00 pm but before 7.00 pm. This was a period confirmed that the Appellant was still within his duty station. I have no doubt in my mind that after he was released by PW8 he went to his house where he committed the mischievous crime. His alibi defence was thus ousted by the strong prosecution witnesses. It was a concocted defence that could not withstand the test of the evidence adduced by the prosecution.

44. I also dismiss the assertion that the charge was a culmination of a grudge existing between the Appellant and PW1's mother as lacking in substance. He introduced this issue at defence but was never in issue on cross-examination to the respective witness or any other witness that would have brought out any material evidence to confirm the same.

46. In sum, I find that the prosecution proved this case beyond all reasonable doubts and I accordingly uphold the conviction. As regards the sentence, **Section 11(1) of the Sexual Offences Act** provides for an imprisonment term of not less than ten years which was imposed by the trial court. With the emerging jurisprudence frim the Supreme Court decision in the case of **Francis Karioko Muruatetu and Another [2017] eKLR** mandatory minimum sentences were declared unconstitutional. The rationale attached to it was because more often than not

where minimum mandatory sentences are provided, most accused persons do not mitigate. This, it was argued, fettered the trial court's power to impose an appropriate sentence premised on both the aggravating and mitigating circumstances.

46. In this case, the aggravating circumstances far outweigh any mitigating circumstances. Before he was sentenced, the Appellant sought leniency on the account that he was a father who had been interdicted from his work. As at now, he does not seem to recognize his mistake, I take into account that he took advantage of a vulnerable child who save that she spoke out one thing would have led to the other. Even if no penetration occurred, the fact of indecently assaulting a child is bad enough as she will live to remember what happened to her the rest of her life. It is an act that must be discouraged by a deterrence sentence which should also send a signal of the seriousness of the offence to other would be offenders.

47. Nevertheless, also having regard to the magnitude of the offence, I am of the view that the minimum mandatory sentence is unwarranted. I accordingly set aside the ten year jail term and substitute the same with five years imprisonment. It is so ordered.

DATED and **DELIVERED** this **4th** day of **March, 2020.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant present in person.

2. Mr. Momanyi. for the Respondent.