REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 169 OF 2019

LESIIT, J.

ABEDNEGO MWONGELA MWEMA……..……..APPELLANT

-VERSUS-

REPUBLIC……..……..RESPONDENT

(Being an appeal from the original conviction and sentence in Makadara CM's Criminal Case No. 2401 of 2015 by Hon. S. JALANGO PM)

JUDGMENT.

1. The Appellant, **Abednego Mwongela Mwema**, was accused and charged at the Chief Magistrate's Court at Makadara with the offence of **defilement** contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. He was faced with an alternative charge of **indecent act with a child** contrary to **section 11(1)** of the **Sexual Offences Act No. 3 of 2006.**

2. The Appellant was tried and found guilty on the first count and was convicted and sentenced to serve 15 years imprisonment. This appeal now arises from the conviction and sentence thereof. The Appellant through counsel raises nine (9) grounds of appeal being as follows:

> ***I. That the learned trial magistrate erred in law and fact by convicting the Appellant while relying on inconsistent and uncorroborated evidence thus leading to a miscarriage of justice.***
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> ***II. That the learned trial magistrate failed to look at the medical evidence i.e. the P3 form and the Post Rape Care (PRC) form whose findings were negative and not supporting defilement.***
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> ***III. That the learned trial magistrate erred in law and fact by dismissing the Appellant's plausible defence.***
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> ***IV. That the learned trial magistrate erred in law and fact in failing to accept the Appellant's plea to get another advocate to represent him when the first advocate who appeared failed to attend court and proceedings in the absence of counsel thus denying the Appellant the right of representation and thus prejudicing the Appellant's right to fair trial.***
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> ***V. That the learned trial magistrate erred in law and fact by failing to appreciate that section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 requires that there must be proof of penetration, corroborated by medical evidence before proof of the offence of defilement thus no proof beyond reasonable doubt.***
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> ***VI. That the learned trial magistrate erred in law and fact on the issue of positive identification thus causing a miscarriage of justice.***
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> ***VII. That the learned trial magistrate erred in law and fact when he considered extraneous circumstances in arriving at the decision he did.***
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> ***VIII. That the learned trial magistrate erred in law and fact by failing to appreciate that the investigation as done was shoddy and inadequate.***
>
> ***IX. That the Appellant was never taken for medical examination to rule out the possibility of any third party being the person who may have committed the offence.***

3. The Appellant prays that the appeal be allowed and the conviction be quashed, the sentence be set aside and that he be set free.

4. In summary, the facts of the Prosecution's case are that on the 18th day of July 2015, the victim, six-year-old E left home and did not return for lunch. PW1, his mother looked for him but did not find him. She called her husband and informed him that E was missing. When her husband came back home at around 11pm that night, he found E outside the house, sleeping at the verandah. According to PW1, E did not tell them what happened and the following day he refused to go out of the house to play.

5. Meanwhile, PW1 noted that the complainant was not able to control his anus and was defecating on himself. When PW1 asked him what the problem was, he told her that a certain man gave him kshs. 20/= and thereafter sodomized him. PW1 said that she then took him to Kenyatta National Hospital where he was examined. She said that upon examination it was noted that he had a tear on the anus. PW1 was advised to take him for counseling. PW1 testified that they were later issued with a P3 form and a Post Rape Care form. PW1 added that the accused resided at the same estate as her family and that she took a shoe to him so that she could get to know him. She later went and reported the matter at Embakasi Police station. The police arrested the accused after the complainant led them to the accused work place and identified him by pointing at him.

6. In his testimony, PW2, the victim in this case stated that he went to visit his friend called J and met the accused who was repairing shoes. That he was playing with N when the accused took him to his house, removed his penis and inserted it into his anus. The Complainant testified that the Appellant threatened to kill him if he disclosed the incident to anyone. PW2 stated that he used to "pupu" on himself and he therefore told his mother what had happened and identified the accused to her. PW2 stated that he later led two policemen to the accused place of work and identified him to them after which he was arrested. The Complainant identified the accused in the court. PW2 added that he did not know the exact time the accused sodomized him but that it was in the evening. He said that the Appellant took him to the first floor where he defiled him. He said that on the way the accused informed members of the public that he (PW2) was his child. PW2 said that he did not scream.

7. PW3 was the doctor who examined the Complainant on 29th July, 2015. He stated that the report was that the Complainant was sodomized on 22nd July, 2015. He testified that upon genital examination, he found no injury but noted that there was pain along the anal region. PW3 stated that the Complainant had been treated in hospital and a PRC form filled, before his examination.

8. PW4, was the investigation officer. He stated that on 23rd July, 2015, the case was minuted to him for investigation. He said that he recorded the witness statement of the Complainant, PW2, who told him that while he was playing with other young children, a certain man held him and took him to his house where he removed his trouser and that of the Complainant then insertedhis penis in his (PW2's) anus. PW4 stated that he also recorded the witness statement of the complainant's mother who told him that the Complainant had developed incontinence and was unable to control his stool after the incident.

9. PW4 testified that the Complainant was taken to hospital for treatment. He said that the incident took place in Pipeline Estate. PW4 testified that the Complainant said that he knew the assailant well as a cobbler who used to repair shoes near their home. He said that the Complainant led him to the accused home where they found him in the company of two other men. He said that the Complainant positively identified the accused as his assailant, and he was arrested. This was on 1st August, 2015.

10. In his defence, the Appellant told the court that on 18th July, 2015, he was a student at [Particulars Withheld] School of Management. That he left school at around 7pm and arrived home at Pipleline plot 10, fourth floor at 8pm. He stated that he did not commit the offence and further stated that he was arrested at his friend's business premises, one Amos Mboru. That he was not informed of the reason for his arrest and only came to know about the charges while in the police vehicle. The Appellant stated that no parade was conducted and that he was not taken for medical examination. Further, that the P3 form and the PRC form stated that there was no injury on the genital area and the anal region was intact. In addition, the Appellant stated that no trading licence was availed to prove that he was the owner of the business in whose premises he was found.

11. I have carefully considered the Appeal and taken into account the written and oral submissions made herein. As this is the first appellate court, it is mandatory that the court subjects the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that it neither saw nor heard any of the witnesses and to give due allowance. The Court of Appeal case which sets out the principles that apply on a first appeal is the case of **ISSAC NG'ANG'A ALIAS PETER NG'ANG'A KAHIGA VS. REPUBLIC, CRIMINAL APPEAL NO. 272 OF 2005**, whereby it was stated as follows:

> ***"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO VS. REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:***
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> *The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)."*

12. Mr. Mbeche for the Appellant filed written submissions which he highlighted in court. Mrs. Kimaru for the State opposed the appeal and urged that the Prosecution discharged the burden of proof beyond any reasonable doubt, and proved all the ingredients of the offence charged.I will consider this appeal against the issues raised by the counsels in this appeal.

IDENTIFICATION

13. Mr. Mbeche urged that the prosecution did not adduce sufficient evidence of identification. Counsel urged thatit was the Appellant's defence that he was a student at [Particulars Withheld] School of Management and on the date of the alleged offence, he left school and went to Pipeline plot no. 10 where he resided on the 4th floor. Counsel urged that the prosecution evidenceclaimed that the accused was a resident of the building where he was found and arrested, and that he resided on the 1st floor. That for proper identification, the prosecution ought to have inquired further to know whether the accused was indeed a resident of the plot where he was found and in the premises. Counsel urged that PW1 did not state that she had known the Appellant prior to the commission of the alleged offence.

14. Mr. Mbeche submitted that the caretaker or landlord should have been called as a witness to confirm if indeed the accused was a resident there. He urged that in the absence of that evidence, the evidence adduced was not sufficient to prove that the accused was at the place where the offence was committed, on the date of the alleged offence. Counsel urged that the accused was arrested just because he was found at the place where the offence was committed.

15. It is Mr. Mbeche's submission that the evidence of PW1 contradicted the evidence of PW4 on the issue of identification. He urged that whereas PW1 stated that the victim was induced with kshs. 20/= and then lured to the house, PW4 stated that the victim said "that a certain man held him and took him to his house". It is the Appellant's submission that the court did not analyze this contradiction and that in the absence of proper identification, the arrest and subsequent arraignment of the Appellant in court was done without proper investigation and thus led to a miscarriage of justice.

16. Mr. Mbeche relied on the case of **Gabriel KamauNjoroge Vs. Republic (1982-88) 1 KAR**for the proposition that dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade. Counsel also relied on the case of **Wamunga Vs. Republic (1989) KLR 424**.

17. Mrs. Kimaru the learned counsel for the State,on the issue of identification, submitted that the complainant knew the Appellant well before the incident sincethe Appellant used to repair shoes near their home. Counsel urged that the Complainant led the police to the Appellant's home where he singled out the Appellantas the culprit, from two other men he was with, and that therefore the issue of identification was sorted out.

18. On identification, the learned trial magistrate found that the Complainant identified the accused person in court as the person who sodomized him, and that in addition, he took two policemen to the place where the accused was arrested and further, the complainant told his mother that the accused was the one who had sodomized him. The court found that the Complainant described the assailant as a person who repairs shoes, which prompted his mother to take a shoe to the Appellant to get to know him.

19. I have considered the rival arguments on this point, together with the findings of the trial court. It is clear that the investigating Officer told the court that the Complainant first described his assailant to him as a person he knew very well because he saw him often repairing shoes outside the estate where he lived with his family. The Complainant also told him that the assailant had taken him to his house where he defiled him. PW4 stated that the Complainant both led him and his colleague to the Appellant's house and identified the Appellant to them out of three men they found in the house. I find that this was not the case of dock identification, but of recognition. The Complainant described his assailant before identifying him to the police. He also identified him in court. The case cited of **Gabriel Kamau Njoroge**, supra does not apply.

20. The question to determine is whether the evidence of identification was positive and free from mistake or error. I will consider the case Counsel relied on, of **CLEOPHAS OTIENO WAMUNGA vs. REPUBLIC [1989] e KLR.** In that case the court of appealheld:

> ***"What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. 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.***
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> ***Whenever the case against a defendant depends wholly or to a great extent on thecorrectness of one or more identifications of the accused which he alleges to be mistakenthe court must warn itself of the special need for caution before convicting the defendant inreliance on the correctness of the identification."***

21. The Complainant stated in his evidence that he could not tell what time the incident took place, but was clear it was in the evening. He said he had been playing with his friend Nicholas when the Appellant, whom he knew before as a cobbler outside their home, took him away to his house. PW1, Complainant's mother said that the Complainant had gone to play with friends in the morning. She said that he did not return for lunch and she called her husband and reported. She was nursing a new born at the time. PW1 said that her husband found the Complainant sleeping on the corridor outside their house at 11pm when he returned home that day.

22. PW1 confirms that the Complainant did not return home for lunch and even by evening. She said that he told her later that he was sodomized by the cobbler outside their home. PW1 went to the cobbler and in court confirmed that he was the Appellant in this case. Further, PW1 confirmed the Complainant's change of behavior, first sleeping on the ground outside their home at night, secondly being unable to control his stool due to incontinence which confirmed defilement; thirdly complaining of having been defiled by a cobbler; and, fourthly of being withdrawn and refusing to go out to play the day following the incident.

23. I have analyzed and examined the evidence adduced in this case afresh. The Complainant was a child of six years. He was a child of tender years. There was no direct evidence to corroborate his evidence of identification of the Appellant. The incident took place in the evening according to him. I do find that the Appellant was no stranger to him.

24. The learned trial magistrate came to the conclusion that the evidence on identification was overwhelming as the Complainant had positively identified the Appellant both to his mother after the incident, and to Police at the time of arrest and in court.

25. The law on identification by a single witness is that the court must exercise caution and also warn itself before relying on such evidence. **Section 124** of the **Evidence Act** regarding the evidence of children provides as follows:

> **"S.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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.**
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> **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."**

26. I have perused the judgment of the trial court and find thatthe trial magistrate found the prosecution case overwhelming, the identification positive, and the confirmations given to PW1 and PW4 before the physical identification of the Appellant to them by the Complainant removed any doubt as to the veracity of his testimony. I have on my part analyzed the evidence, and evaluated it afresh and I agree with the trial court. The Complainant was impressive as a truthful witness worthy of belief. Having known the Appellant before, and having spent time with himduring the incident, the possibility of an error on identification is ruled out. Not to mention that what befell him in the hands of the Appellant must have created a permanent impression in his mind that will be a reason for him not to forget the person who committed such an act to him.

27. I noted that the Complainant, a child of six years, had been threatened with death by the Appellant and his delay to return home that day and to report the matter to his parents is understood against that background. I have cautioned myself that PW2's evidence was not corroborated. I find that the evidence of identification by the complainant, was positive and free from any possibility of error. I find the complainant was a truthful witness worthy of belief, and who impressed the trial court as telling the truth. I find under section 124 of the Evidence Act that even though the complainant was a child whose evidence of identification was not corroborated, he nevertheless told the truth and should be believed.

28. I find complainant was able to consistently identify the Appellant twice, first to his mother and then to the police without contradicting himself. In the circumstances there was no need of the evidence of a landlord to prove where the Appellant lived. Nothing turns on this point.

INGREDIENTS OF THE OFFENCE AND MEDICAL EVIDENCE

29. Mr. Mbechesubmitted that the lower court erred in convicting the Appellant on medical evidence that was not corroborated; the context being that it has always been the standard of proof required in cases of defilement, that the chain of evidence, whether material or independent, should be corroborated for it to be acceptable in court. Counsel drew court's attention to the Appellant defence where he explained that the medical evidence contained in the P3 form and the PRC form show that the victim, on examination had no injuries, wounds or discharge; and also the victim did not attend any health facility, was not treated or given any referral notes and there was no significant or surgical history.

30. Further, the forensics showed that the victim changed clothes and the state of the clothes was not ascertained; and in addition, the victim had taken a shower on several occasions before he was presented to the hospital for filing of the PRC form. Lastly, on genital examination, the victim had no physical injuries, no anal, skin or oral swab taken and neither were samples of urine, blood, pubic hair, nail clippings or foreign body taken or removed from the complainant to assist in investigations. The Appellant stated that the evidence tendered by the doctor, PW3, confirms that no injuries were noted on the genitals and as such, this evidence does not in any way corroborate the testimony of the complainant.

31. The other issue brought up by the Appellant was that the element of penetration was not proved as required to establish the offence under **section 8(1)** of the **Sexual Offences Act, 2006**. That the medical evidence of the PRC form shows that on general examination of the complainant, no injuries were noted and there is no confirmation of any penetration.

32. Mrs. Kimaru for the State submitted thaton the issue of the medical evidence not corroborating the offence, PW3 who examined the Complainant confirmed that there were no injuries in the genitalia, but that there was pain around the anal region. Counsel urged that the law on penetration was that it could be partial or complete. She urged that the fact the report was made some days after the incident, it was possible injuries had healed. Counsel drew the courts attention to the PRC form which she urged confirmed that the Complainant had developed stool incontinence, which was proof there had been penetration.

33. On penetration, the learned trial court restated the evidence provided by the Prosecution and then considered the results of the examination of the complainant by PW3, which were to the effect that on physical examination, no injury was noted but that there was pain along the anal region. The P3 form and PRC form were produced as Exhibits 2 and 3 respectively. The court found that the Prosecution had proved beyond reasonable doubt that there was penetration on the minor and the same was corroborated by medical evidence.

34. In this regard, it is instructive to note that that whereas **section 36** of the **Sexual Offences Act** provides for medical examination and specifically, DNA testing, that provision is not mandatory. In **EVANS WAMALWA SIMIYU VS. REPUBLIC [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> **"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word"may". Therefore, the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who**

saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover, the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."

35. Indeed, in **AML VS. REPUBLIC [2012] eKLR** the Court expressed the view that:

"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

36. In my considered view, the lower court was well guided in its analysis of the evidence on the matter in issue, and I am in agreement with the learned trial magistrate that all the ingredients of defilement were proved to the required standard. The only thing I would add is that I fully concur with the submissions of the State with regard to medical evidence that was adduced.The PRC form, Exhibit 3 clearly shows that the victim was taken to hospital on 22nd July, 2015, approximately four (4) days after the alleged incident and a report made that the victim had been sodomized.

37. Failure to take blood samples and anal swabs at the time of reporting is not so material considering that the matter was reported four days after the incident. The possibility of getting samples being slim due to passage of time. There was an entry in the PRC form that indicates that the victim had stool incontinence. The fact of incontinence was corroborated by both PW1 and PW2. Further, in the P3 form, the doctor, PW3, indicated that the victim had pain along the anal region, which he said that since he saw the Complainant long after the incident, it was possible injurieshe had could have healed.

38. I find that the evidence of incontinence soon after the day of the offence considered collectively against the evidence adduced by the prosecution,and considering the charge facing the Appellant, it canonly lead to one conclusion, that there was sufficient evidence to support proof that there was penetration of the Complainant's anus at the material time, beyond any reasonable doubt.

INCONSISTENT AND UNCORROBORATED EVIDENCE

39. It was Mr. Mbeche's contention that the learned trial magistrate erred in basing the conviction on inconsistent/contradictory evidence. That the evidence of PW1 was that the Complainant told her that "a certain man gave him 20/= and thereafter sodomized him". As such, it is clear that the person who purportedly committed the act was not known. Mr. Mbeche urged that it was PW1's evidence that she carried a shoe for repair and when they reached the cobbler's shop, the Complainant was asked to confirm if the person who was there repairing the shoes was the one who committed the offence and the victim confirmed that position.

40. Mr. Mbeche urged that PW4 said that the Complainant led the investigators to the Appellant's house. Counsel urged that PW1 and the Complainant gave conflicting evidence whereby they said that the Complainant took PW4 to the cobbler's place where he identified him and he was arrested.

41. Regarding inconsistency in evidence, in the case of**Philip Nzaka Watu vs. Rep. [2016] eKLR** the court of appeal held:

"In evaluating discrepancies contradictions, omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

42. I have considered the entire evidence on record. Nowheredoes it say that PW1 took the Complainant to point out the Appellant to her. From the evidence it is difficult to know at which placeor stage PW1 meant that the Complainant identified the Appellant to her. She does say however that when he said it was the cobbler who defiled him, she took a shoe to him in order to know him.

43. I do agree that PW1 and 2 both say that PW2 took the police including PW4 to the Appellant's place of work where he identified him and he was arrested. There is inconsistency in the evidence of PW1 and 2 on one hand and PW4 on the other. PW4 did not mention whether PW1 accompanied the Complainant, him and the other officer when he went to identify the Appellant. It is not clear whether PW1 went with the complainant and police for Appellant's arrest.

44. I have considered the inconsistency and contradictions in this case. The witness creating the contradiction was the investigating officer. It is possible that he is the one confused. I find that the same is minor and does not go to the root of the case. I do find the inconsistency minimal and not material as to affect the substance of this case. It is trite law that inconsistencies in evidence are bound to happen, but that does not mean a person lied. Nothing turns on this point.

DENIAL OF RIGHT TO REPRESENTATION

45. Mr. Mbeche submitted that the learned trial magistrate erred when he denied the Appellant the right of representation. Counsel urged that the trial court proceeded with the trial in the absence of the Appellant's counsel on 28th October, 2015, without seeking any clarification from the Appellant on the whereabouts of his advocate. Further, on 4th October, 2017, the matter was again called and despite the fact that the Appellant had an advocate, the court proceeded with the case without giving the accused the benefit of his advocate thus causing a serious breach of the Constitution. Counsel invoked the provisions of the Constitution flouted as**Articles 52(1)(c)** and **53(1)(g), (h)** and **(i)**.

46. Mr. Mbeche took issue with the trial court for declining the Appellant's request to re-open the prosecution case for re-calling of witnesses on 26th April, 2019, when his new advocate expressed his desire to challenge the evidence. That the trial court then directed that the case proceeds for defence hearing therefore technically denying the Appellant his constitutional right. Counsel urged that the Appellant was denied his right under **Articles 72** and **73**of the **Constitution,** leading to a miscarriage of justice. Counsel relied on the case of **Moyer Vs.**

Workplace Health Safety And Compensation Commission (2008) NBCA 41. The case was not provided and I was unable to lay my hands on it. However, from its citation, it is clear it is not a criminal case and its relevance to the facts in this case is doubtful.

47. Mrs. Kimaru on her part submitted that the Appellant was represented at the trial except on few occasions. Counsel urged the court to take Judicial Notice of the proceedings of 26th April, 2019 where the counsel for the Appellant sought to have the case start *de novo*, at the stage of the case where the Appellant had already been placed on his defence. Counsel urged that no prejudice has been suffered by the Appellant as the prosecution case had already been closed.

48. I have perused the court proceedings and they show that the initialdefencecounsel to the Appellantattended court on and off. When the trial officially took off on 28th October, 2015 and PW1 and PW2 testified, the Appellant cross examined the witnesses in person. On the next trial date, the same advocatefor the Appellant was present in court and he indicated that he was ready to proceed with the case. He did not apply to re-callor cross-examine the two witnesses who testified in his absence. The case did not proceed that day and on several other subsequent hearing dates due to one reason or the other, including the absence of the Appellant.

49. The trial proceeded without the initial counsel for the Appellant. The Appellantraised no objection. However, when the Prosecution closed its case and the Appellant was put on his defence, that was the time he stated that his advocate had requested for an adjournment and he added that he would be engaging another advocate. An adjournment was granted but on the next scheduled defence hearing, the Appellant's advocate was absent. The court granted the Appellant a last adjournment. During the next subsequent trial date which was on 11th April, 2019, the accused indicated that he was ready to proceed with his defence but on that date, the trial magistrate was attending a seminar. Afterwards, on the next trial date which was on 26th April, 2019, Mr. Mbeche came on record for the Appellant and requested for the re-opening of the prosecution case for purposes of cross-examination of the witnesses for the prosecution, before he proceeded with the defence case. The reason for the request was because the accused previous advocate did not attend trial, and further that would ensure that the Appellantwas accorded a fair hearing. The trial court dismissed that application and gave the following reasons:

> ***i. there is no law for re-opening of prosecution case for purposes of cross examination.***
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> ***ii. the accused/Appellant had counsel before.***
>
> ***iii. no reasons had been given why the accused decided to change advocates.***
>
> ***iv. it is the accused right to elect defence counsel at his own time and he chose to have the same at the defence hearing.***

50. **Articles 52(1)(c)** and **53(1)(g), (h)** and **(i)** do not exist in the Constitution. I am aware of **Article 50(1) and (2) (g) & (h)**which provides:

> **"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**
>
> **50(2). Every accused person has the right to a fair trial, which includes the right—**
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> > **(g) to choose, and be represented by, an advocate,and to be informed of this right promptly;**
> >
> > **(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;"**

51. Mr. Mbeche's argument was that the trial court erred by failing to inquire from the Appellant why his advocate was not in court and chose to just continue with the case in his absence. The record shows that the Appellant had come with an advocate at the beginning of the case. However, at the start of his trial, counsel did not show up. He had, at that point exercised his right under **Article 50 (2) (g)**by choosing an advocate of his choice. The next time he appeared alone, he did not express any difficulties with proceeding with his case, never sought adjournment and did not mention anything about representation. I do not find fault on the trial magistrate's part over this issue save to mention that it is advisable for the court to find out how an accused person, previously represented by counsel who has not showed up during trial, wished to proceed with the case. I find however that no prejudice was suffered by the Appellant, and that none of his constitutional rights were trampled on.

52. I wish to quote another legislation relevant to this point. The preamble to T**HE LEGAL AID ACT, 2016, reads:**

> **AN ACT of Parliament to give effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the Constitution to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes ENACTED**
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> **3. The object of this Act is to establish a legal and institutional framework to promote access to justice by—**
>
> **(a) providing affordable, accessible, sustainable, credible and accountable legal aid services toindigent persons in Kenya in accordance with the Constitution;**
>
> **(b) providing a legal aid scheme to assist indigent persons to access legal aid;"**

53. Even though the Constitution makes representation by advocates in criminal matters a right, the law enacted to bring to fruition that right

is yet to take off, largely due to lack of funds. It is unreasonable to expect every accused person who comes to court to get legal aid for now. The ones who benefit as of right are persons facing capital offences and children in conflict with the law.

54. As to re-opening of the trialI am in agreement with the reasons advanced by the learned trial magistrate to decline the request. The grounds upon which a re-trial can be ordered are well settled. They do not include a re-trial on whimsical or fanciful grounds, just for the sake of it. That would create an absurd situation if persons were allowed to ask for a re-trial on flimsy grounds. A criterion as set in case law must be met. In this case, none existed.

55. I find that the Appellant is not justified in claiming that he was not accorded a fair trial. The Appellant was given audience, he was accorded good opportunity to fully participate in his trial and did cross-examine all the witnesses. The case proceeded sequentially until its logical conclusion. I find that the Appellant was accorded a fair trial.

DEFENCE NOT CONSIDERED

56. Mr. Mbeche for the Appellant urged that the learned trial magistrate erred by failing to consider the Appellant's defence and instead dismissed it, and that it constituted a breach of the rules of natural justice and therefore sufficientground to unsettle the judgment. The case of **OKETHI OKALE VS. REPIUBLIC (1965) EA555**, was referred to. In addition, the Appellant stated that PW2, in his testimony, mentioned several people namely, J and N but that there was no evidence from the investigating officer to show that they were asked to write statements or were questioned to find out what the truth was.

57. That the Appellant in his sworn defence said that he was arrested at his friend's business premises, one Amos Mboru. During oral submissions, it was stated that the Appellant was found where he had gone to train as a cobbler and he did not own that business. That thus, the investigation should have found out who the owner of the business was and if he had committed the offence.

58. Mrs. Kimaru on her part urged the court to find that the Appellant's defence was heard. She submitted that the Appellant's appeal has no merit and should be dismissed.

59. The trial court was of the considered view that the Appellant'sdefence that he was a student and in school on the material day was an afterthought because the same was not raised at any point during trial and in cross examination of the prosecution witnesses. As such, the court found, the evidence against the accused was overwhelming and the defence, in its view, did not create doubt in the prosecution case.

60. Regarding the Appellant's contention that there was a mention of J and N the police did not question or make prosecution witnesses. The Prosecution is required to avail to the court all the relevant evidence to enable the court to make an informed decision based on the evidence available. Having said that, this court is alive to the fact there is no legal requirement on the number of witnesses required to prove a fact. **Section 143 of Evidence Act (Cap 80) Laws of Kenya** provides:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"***

61. The Court of Appeal, in the case of **KETER VS. REPUBLIC [2007] 1 EA 135**, held inter alia thus:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."***

62. Regarding J and N mentioned in PW2's evidence, these were his age mates. Even though prosecution are required to call evidence, there is a rider that the same should be those who can helpthe court arrive at a just conclusion. It is not the duty of the prosecution to bring everyone mentioned in a case.

63. Was the Appellant's complaint that his defence was not considered merited? What should be contained in a judgment is prescribed under section **169** of the **Criminal Procedure Code** which stipulates judgment as thus:

> ***"(1) Every judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of a 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.***

64. I have perused the judgment of the learned trial magistrate. I find that he did consider the entire evidence adduced in the case, including that of the Appellant. He then dismissed the defence. The learned trial magistrate gave reasons as to why he dismissed the Appellant's defence. In his judgment, he stated, *inter alia*, that:

> ***"In my considered view, the defence of the accused that he was a student and in school on the material day is an afterthought, the same was not raised at any point during trial and in cross examination of the prosecution witnesses. I find that the evidence against the accused is overwhelming, the defence of the accused in my view did not create doubt on the prosecution case."***

56. I find that the learned magistrate analyzed and evaluated the entire evidence adduced before him, drew conclusions giving reasons for those conclusions. I find that the Appellant's defence was heard and considered.

57. Having evaluated the entire evidence and analyzed the same, I find that the learned trial magistrate's judgment cannot be faulted.

58. As for the sentence, the Appellant was sentenced to 15years imprisonment.The Complainant was a child of six years. **Section 8 (2)**of the **Sexual Offences Act**prescribes that any person who defiles a child aged 11 years and less shall upon conviction be sentenced to imprisonment for life.

59. The Appellant challenged both the conviction and sentence in this appeal. This court is therefore under an obligation to look into the sentence. I find that the sentence meted out in this case wastoo lenient for the offence committed. The Complainant was aged six years. That was a child of tender years. The offence is aggravated, not only for the reason of the harm caused to the Complainant, first by causing him injury to his anal region of his body which let to incontinence, secondly threatening to kill the child if he told anyone causing him psychological effect which led him to be withdrawn from the day after the offence was committed. For that reason, the sentence is too lenient in the circumstances and I will accordingly interfere with it.

60. Accordingly, under **section 354 (3) (a)(iii) & (b)** of the **Criminal Procedure Code** I set aside the sentence of 15 years imprisonment, and in its substitution impose a sentence of 20 years imprisonment.

61. In the result, subject to the order on the sentence, I find that the Appellant's appeal lacks in merit and therefore fails and is accordingly dismissed in its entirety.

DELIVERED AT NAIROBI THIS 10TH MARCH, 2020.

LESIIT, J.

JUDGE