REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 122 OF 2019

JACKSON MUENDO MUTIE...APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate Hon. C. A. Mayamba dated 1/07/2019 in Kilungu PM S.O Case No. 44 of 2019.)

JUDGMENT

1. **Jackson Muendo Mutie** the Appellant was charged with the offence of defilement contrary to section 8(1) as read with sub-section (8)(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on diverse dates between 1st May to 24th day of May, 2019 at [Particulars Withheld] village, Kitaingo sub-location, Kitaingo location in Mukaa sub-county within Makueni county unlawfully and intentionally committed an act which caused penetration of the genital organ of **F.N.M** a child aged 9 years.

He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars being that on diverse dates between 1st May to 24th day of May 2019 at [Particulars Withheld] village, Kitaingo sub-location in Mukaa sub-county within Makueni county unlawfully and intentionally committed an indecent act with **F.N.M** a child aged 9 years by touching her genital organs.

2. He pleaded not guilty and the matter proceeded to full hearing. Thereafter he was found guilty, convicted and sentenced to twenty-five (25) years imprisonment.

3. Being aggrieved, he filed this appeal through Mr. Makundi advocate raising the following grounds:

a) **That,** the trial Magistrate erred both in law and fact by proceeding with the matter owing to the fact that the Appellant herein ought to have been accorded services of an advocate to represent him as provided for under Article 49 of the constitution 2010.

b) **That,** the trial court erred in both law and fact by convicting the Appellant when the case against him had not been proved beyond reasonable doubt.

c) **That,** the trial court erred both in law and fact by failing to find and hold that the prosecution's evidence was full of doubts which doubts ought to have been resolved in favour of the Appellant.

d) **That,** the trial court erred in law by dismissing the Appellant's defence and shifting the burden of proof to the Appellant.

e) **That,** the trial court erred both in law and fact by reaching conclusions based on its own opinions rather than on evidence.

f) **That,** the learned trial Magistrate erred in law by convicting and sentencing the Appellant herein on a charge sheet that was defective.

g) **That,** the learned trial Magistrate erred in law by making and delivering a judgment that was not consistent with the provisions of section 169 of the Criminal Procedure Code

h) **That,** the trial Magistrate misunderstood the defence of alibi tendered *viz a viz* the commission of the offence is clearly evident under paragraph 23 of this judgment.

i) **That,** the learned trial Magistrate erred in law by sentencing the accused person to a sentence that was excessive in the

circumstances.

4. The prosecution called six witnesses while the Appellant gave a sworn statement of defence. A summary of the case is that Pw2 (**F.N.M**) who is the complainant lives with her grandmother (Pw4). She attends [Particulars Withheld] primary school. Pw3 **Wilson Mukiti Muasya** the head teacher of the said school received a report in respect to Pw2. He arranged for a meeting involving his deputy and Pw2's class teacher to discuss the matter. The report was on defilement of Pw2 by a boy staying in their homestead. Pw3 summoned Pw4 to the school and Pw2 gave the same information in her hearing.

5. The matter was then reported to the police and the child taken for treatment. In her evidence Pw2 stated that she used to see the Appellant at her grandmother's home. He would come to the home in the absence of Pw4 and her aunt and it was then that he would remove her clothes and cause her to lie down and thereafter do bad things to her. She said she knew the Appellant very well. She decided to inform her teacher about it.

6. Pw5 **Eric Kasiamani** a clinical officer examined Pw2, and also referred to the treatment notes and PRC form (EXB 3 and 2). His findings were:

- Broken hymen

- Pus in Pw2's urine

His opinion was that she had been defiled.

He produced the P3 form (EXB1) and the age assessment report (EXB4) showing that the child was aged 9-10 years.

7. Pw6 **No. 106956 P.C Cynthia Chebet** the investigating officer produced the investigation diary (EXB6) in which the Appellant's name was mentioned.

8. In his sworn defence the Appellant said he was ploughing his uncle's farm from 23rd May 2019 – 27th May 2019 starting from 8:00 am to 5:00 pm. He denied committing the offence.

9. The Appeal was canvassed by way of written submissions. Mr. Makundi submitted that failure to accord the Appellant legal services of an advocate was a violation of his rights under Article 50(2) of the Constitution, and international and regional instruments e.g. **UDHR – Article-10, ICCPR –Art 4, African Charter on Human & Peoples Rights Art 7**. It's his argument that considering the gravity of the offence the Appellant should have been accorded the services of an advocate under section 40 and section 43(1) of the Legal Aid Act.

10. He referred to the case of **David Macharia Njoroge –vs- Republic (2011) eKLR** where it was held:

> "*State funded legal representation is a right in certain instances. Article 50(1) provides that an accused shall have an advocate assigned to him by the State and at State expense. Substantial injustice is not defined under the constitution, however, provisions of international conventions that Kenya is a signatory to are applicable by virtue of Article 2(6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where substantial injustice would otherwise result" persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new constitution would automatically be entitled to a re-trial where no such legal representation was provided."*

11. He equally referred to a number of foreign decisions and section 4 of the Fair Administrative Action Act (2015) Laws of Kenya which provides:

> ***4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) Every person has the right to be given written reasons for any administrative action that is taken against him.***
>
> ***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***
>
> ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
>
> ***(b) an opportunity to be heard and to make representations in that regard;***
>
> ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable; (d) a statement of reasons pursuant to section 6;***
>
> ***(e) notice of the right to legal representation, where applicable; (0 notice of the right to cross-examine or where applicable; or***
>
> ***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

He contends that the court ought to have taken up the plight of the Appellant as he could not afford to represent himself.

12. On the charge sheet being defective he submits that EXB4 showed the age of Pw2 as 9-10 years. That this meant the prosecution was not sure of Pw2’s age. He went on to submit on the importance of proof of age saying EXB4 was not reliable.

13. He submits that though a *voir dire* examination was done the learned trial Magistrate did not make a proper finding in terms of section 19 of the Oaths and Statutory Declarations Act (*Cap 15*). Further he contends that all the prosecution witnesses were not credit worthy at all and their testimonies are of doubtful integrity. On this, he cites the case of **Ndungu Kimanyi –vs- Republic Criminal. Case No. 22 of 1979.**

14. Further citing **Bukenya & Others –vs- Republic (1972) E.A 349** he submits that Pw2’s class teacher ought to have been called as a witness. He submits that Pw1, Pw3, Pw4 and Pw6 were only told of this incident. Even Pw4 who lived with Pw2 could not be said to be a caring guardian. Their evidence could not be relied on. He also dismisses Pw2 as not being a credible witness.

15. Finally, he submits that the judgment by the trial Magistrate was not consistent with the provisions of section 169 Criminal Procedure Code. That the evidence by the prosecution did not link the Appellant with the offence. He blames Pw1, Pw3 and Pw4 for not protecting Pw2.

16. He wonders why the Appellant was not medically examined upon his arrest. In brief he submits that the trial court did not analyze the evidence to ensure every ingredient of the offence was proved.

17. The appeal was opposed through the submissions by learned counsel Mr. Kihara for the Respondent. He submits relying on the case of **S vs- Halgryn 2002(2) SACR 211(SCA) and Legal Aid South Africa –vs- Vander Merwe & Others (2010) ZAWCHC 525** that the right to choose a legal representative is fundamental but not absolute. He submits further that an age assessment was done and age was proved. Based on the evidence of Pw2 and the medical report of Pw5 it was established that Pw2 had been penetrated. He argues that Pw2 clearly explained what the Appellant had been doing to her. The evidence of the prosecution witnesses was water tight and not shaken at all he states.

18. He dismissed the Appellant’s defence saying it did not raise an *alibi*. He was therefore placed at the scene by the evidence and not the court. On a defective charge, counsel submits that citing section 8(1)(2) Sexual Offences Act, was an error curable under section 382 Criminal Procedure Code.

19. On sentence he contends that the 25 years’ imprisonment is lenient and should be enhanced.

Analysis and determination

20. This being a first appeal, it behoves this court to re-analyze and re-consider the evidence and arrive at its own conclusion. An allowance should be given owing to the fact that the court did not see nor hear the witnesses. See **Okeno –vs- Republic 1972 E.A; Boru & Another –vs- Republic (2005) I KLR 649; Simiyu & Another –vs- Republic (2005) I KLR 192.**

21. I have considered the evidence on record, grounds of appeal, both submissions and the law and I find the following to be the issues for determination:

i. Whether the Appellant’s rights under Article 49 and 50 of the constitution were violated.

ii. Whether the charge sheet was defective.

iii. Whether the judgment complied with section 169 Criminal Procedure Code.

iv. Whether there was sufficient evidence to support the conviction.

v. Whether the sentence was excessive.

Issue no. (i) Whether the Appellant’s rights under Article 50 of the constitution were violated.

22. Although Mr. Makundi cited Article 49 in his grounds of appeal, there is nothing he has submitted in respect to that provision. The Appellant’s complaint is based on Article 50(2) (g)(h) and (j) of the constitution. Article 50 of the constitution provides as hereunder:

(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, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right –

(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.

23. Mr. Makundi submitted at length on this issue of failure by the court to inform the Appellant of his right to legal representation at State expense. In response to this Mr. Kihara has submitted saying:

> ***"In the instances where resources are limited one cannot compel or demand that such representation be given. In the event that the resources are available, the court can only do so if the accused demonstrates that he is not able to retain services of a defence counsel. During the hearing the Appellant did not request to be given time to source for a counsel nor request that he be assisted by the court for a pro-bono advocate and the court declined to offer such assistance."***

He referred to two cases mentioned at paragraph 16 of this judgment.

24. I have also considered a number of our own decisions in respect to Article 50(2)(g)(h) some of which are: **Republic –vs- Karisa Chengo & 2 Others (2017) eKLR, Nicholas Tambula –vs- Republic (2018) eKLR; Meshack Juma Wafula –vs- Republic (2019) eKLR. Macharia –vs- Republic (2014) eKLR.**

25. In **Joseph Kiema Philip –vs- Republic (2019) eKLR** the court held:

> ***"In this matter, the Appellant was convicted of the offence of defilement and sentenced to 20 years' imprisonment. I have gone through the trial record and nowhere does it communicate whether or not the accused was informed of his rights under section 43(1) of the Legal Aid Act and Article 50(2)(j) and (g) of the constitution regarding right to legal representation. Furthermore, given that the accused was charged with an offence which carries a severe sentence of life imprisonment but however he was not accorded his right to legal representation as required by law. In that regard there is substantial injustice unless represented. The trial court ought to have at least informed him of this right. I therefore find that the Appellant according to section 41 of the Legal Aid act is eligible to make the Application to the National Legal Service Aid in person or through any other person authorized by him in writing. The mandatory duties imposed on trial courts by section 43(1) of the said Legal Act and Article 50 of the constitution were therefore not complied with and in the circumstances, I find that the trial proceedings were conducted in a manner prejudicial to the Appellant and caused grave injustice to the Appellant. Such proceedings ought not to stand."***

26. In Vincent **Muchera Isalano –vs- Republic (2019) eKLR** the court stated that:

> ***"It is my view that if the Appellant was represented by a counsel he would have been able to mount a good defence from his case. This aligns with the constitutional underpinning that an accused person is entitled to legal representation at the State's expense."***

27. In the case of **Republic –vs- Karisa Chengo & 2 Others (2017) eKLR** the Court of Appeal stated as follows:

> **[87] Article 50(2)(h) of the Constitution provides that** *"[e]very accused person has the right to a fair trial, which includes the right…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."* **It does not define what "substantial injustice" means. However, in *David Macharia Njoroge v. Republic*, (supra), the Court of Appeal held that "***substantial injustice***" results to "***persons accused of capital offences***" with "***loss of life***" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are** *"if substantial injustice would otherwise result…."* **While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in *Thomas Alugha Ndegwa v. Republic;* C.A No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.**

28. Upon considering all these decisions, I find that an accused person has a right to legal representation. The court has a duty to promptly inform the accused person of this right. The assignment of an advocate by the State at State expense however depends on whether substantial injustice would otherwise occur. The reason is very simple, as provision of legal services involves finances. Even the probono services are paid for but at a subsidized rate. Therefore, Article 50(2)(h) is a right that will be achieved progressively.

29. I have examined the record and noted that the Appellant was charged with the offence of defiling a nine (9) year old child. The penalty is life imprisonment but the Appellant was given 25 years' imprisonment. Plea was taken on 28th May 2019 and hearing fixed for 10th June 2019. When the matter came for hearing on 10th June 2019 the prosecution had three (3) witnesses ready present. The Appellant told the court he was not ready for hearing as he had just been supplied with the witness statements. The court indulged him and granted an adjournment and gave another hearing date.

30. On 24th June 2019 when the matter again came for hearing, both parties were ready as can be seen from the record below:

> ***"Prosecutor:*** *I am ready.*
>
> ***Accused:*** *I am equally ready.*
>
> ***Court:*** *Case to proceed."*

31. The prosecution proceeded by calling six (6) witnesses who were cross examined by the Appellant. The prosecution closed its case and a ruling made placing the Appellant on his defence. This was still on 24th June 2019 and the following is what transpired in court

> **Court:** "Prima facie case established as against accused who is put on his defence."
>
> **C.A Mayamba**
>
> **Principal Magistrate**
>
> **<u>24/6/2019</u>**
>
> Provisions of section 211 of the Criminal Procedure Code explained to the accused:
>
> **Accused:** Sworn evidence and no witnesses. **I am ready**.
>
> **Court:** Defence hearing to continue."

32. The record therefore shows that the Appellant actively participated in the proceedings. He was supplied with witness statements and when he was not ready he promptly informed the court and was indulged. After being placed on his defence and the provisions of section 211 Criminal Procedure Code explained to him, he elected to give a sworn statement, and stated that he was ready to proceed with his defence.

33. He had no difficulty in making his defence on the same day. If he was not ready, I am sure he would have asked for time to do so. He did not ask for such time. My finding is that the Appellant understood all that went on in court, and cannot claim to have been denied legal representation.

Issue no. (ii) Whether the charge sheet was defective

34. According to Mr. Makundi, the defect in the charge sheet was failure by the prosecution to show the child's age as reflected in EXB4. He even doubts the credibility of EXB4. In one breath he wants the age stated in EXB4 to be adopted as the age in the charge sheet and at the same time he doubts the credibility of EXB4.

35. EXB4 is an age assessment report from Kilungu sub-county hospital. It was produced by Pw5. It shows that Pw2 was aged 9-10 years. EXB4 shows the findings that led to that conclusion

> **Section 8(1)** of the Sexual Offences Act provides:
>
> ***A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> **Section 8(2)** provides:
>
> ***A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***

Section 8(2) Sexual Offences Act therefore covers cases where a child below the age of 11 years is proved to have been defiled. Whether Pw2 was aged 9 or 10 years the sentence provided for under section 8(2) Sexual Offences Act is the same. There is nothing before this court to show that EXB4 is not credible.

36. Furthermore, an error in citing the age in the charge sheet amidst the overwhelming evidence on age by Pw1, Pw5 and the court which saw the child and conducted a *voir dire* examination cannot make the charge sheet defective. The learned trial Magistrate tackled this issue of age very well and relied on the case of **Kaingu Elias Kasomo –vs- Republic Malindi HCRA No. 504 of 2010** in confirming his decision. This ground therefore fails.

Issue no. (iii) Whether the judgment complied with section 169 Criminal Procedure Code.

37. Section 169 of the Criminal Procedure Code provides:

> ***(2) In the case of a conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which the accused person is convicted, and the punishment to which he is sentenced.***
>
> ***(3) In the case of acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty.***

38. I have read through the impugned judgment and find that the learned trial Magistrate set out the prosecution and defence case. He clearly identified the issues for determination and made a decision on each of them. He has stated the offence the Appellant was convicted of. Whatever Mr. Makundi has submitted under this head is on the reasoning of the trial court which has nothing to do with section 169 of the Criminal Procedure Code.

Issue no. (iv) Whether there was sufficient evidence to support the conviction.

39. The three ingredients to be proved in a case of defilement are: *Age of complainant; proof of penetration of her genital organ and identification of the perpetrator.*

40. The issue of age has already been sorted at paragraph **36** above. On penetration the evidence before court is that of Pw2 and the medical evidence by Pw5. Pw1, Pw3, Pw4 and Pw6 only received the complaint from Pw2 who explained to the court what had been done to her. The medical evidence by Pw5 confirmed that the child had been penetrated as her hymen was not intact and her urine had pus cells. It was Pw2's evidence that she had been penetrated severally, and not just once.

41. In any given sexual offence case where all the material ingredients have been proved the issue of identification remains a key issue. The court must take extra precaution when dealing with identification by a single witness especially where the conditions for such identification are not favourable.

42. In the case of **Murube & Another –vs- Republic 1986 KLR 356** the Court of Appeal stated thus:

> **(1) Though a fact may be proved by the testimony of a single witness, there remains the need to test with the greatest care the identification evidence of such a witness especially when it is shown that the conditions favouring a correct identification were difficult.**
>
> **(2) In the evaluation of the evidence of the identifying witness, the Court was to ensure beyond all reasonable doubt that the witness was honest and unmistaken about her identification of the Appellants.**

43. Later in **Kiilu & Another –vs- Republic (2005) IKLR 174** the same court held that:

> ***(1) Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but his 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 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.***

44. The identifying witness in this case is Pw2. She reported this incident to her teacher Mrs. Susan Ndiwa who did not testify. Pw3 **Wilson Mukiti Muasya** who was the head teacher of [Particulars Withheld] primary school where Pw2 schooled testified on behalf of the school. Upon receipt of the report from Pw2's class teacher, he sent for her guardian (Pw4) who came. The issue was addressed in the presence of Pw4 class teacher, deputy head teacher Dorcas Nthenya Musyoka and Pw2. He said Pw2 told them that the person she complained about, stayed within their homestead. She gave the name of Muendo wa Mutia who is the Appellant as the perpetrator.

45. In his defence the Appellant denied committing the offence saying he had been busy ploughing his uncle's land from 8:00 am – 5:00 pm from 23rd May 2019 – 27th May 2019 when he was arrested.

46. First of all, Mr. Makundi for the Appellant has dismissed the manner in which the *voir dire* was conducted. He further contends that the order by trial Magistrate is at variance with his final decision which allowed the complainant to adduce unsworn evidence. He refers to the following as the words recorded by the trial court:

> ***"Voir dire examination confirms that the minor witness does not understand or know what truth is because of his tender age as such he will give unsworn evidence, however pursuant to Article 50 of the Constitution, he can be cross-examined."***

47. The *voir dire* examination of Pw2 is found at page 7 of the Record of Appeal. This is how it went:

> **Voire dire examination**
>
> ***Court: What is your name?***
>
> ***Minor: I am called FM.***
>
> ***Court: How old are you?***
>
> ***Minor: I am 9 years old.***
>
> ***Court: Do you go to school?***
>
> ***Minor: I go to [Particulars Withheld] primary school in class 3.***
>
> ***Court: Do you go to church?***
>
> ***Minor: I go to Baptist church.***

Court: What are you taught in church?

Minor: We are taught not to abuse people or fight.

Court: The minor is intelligent but does not understand the meaning of oath owing to her tender age. To give unsworn testimony.

48. With due respect to learned counsel there is no other order on this *voir dire* examination besides what is cited above. His submission on this issue is therefore misleading. What he has cited is also not borne by the record. The trial court has also not referred to the *voir dire* examination in his judgment.

49. Pw2 testified that the Appellant frequented their home to tie cows. She knew him very well and he used to have sex with her during the day. She reported this to her teacher and there was nothing wrong with that. Pw4 is the grandmother that Pw2 stayed with. She knew the Appellant as a neighbour. She learnt of this matter when she was summoned to the school. Mr. Makundi upon relying on the case of **Kimani Ndungu –vs- Republic (1979) I KLR 282** submits that Pw2 is an unreliable witness. The reason being that she did not state on which date she was defiled.

50. The charge sheet shows the dates of offence. The report to the teachers was on 27th May 2019. This is what Pw2 states at page 8 lines 11 of the Record of Appeal.

> ***"He made me to lie down. He did bad things to me (tabia mbaya). It was not the first time he was doing the same to me. He was doing it to me during the day. Yes, I was able to see him. I know him as he was frequenting our home."***

According to Pw2 this was done to her severally and not just once. This was a nine (9) year old child who may not give specific dates.

51. She said it was done during the day. When she reported to the teachers she gave the Appellant's name and even told them that he used to go to the home to tie cows, and so he was known. The Appellant has not cited instances that can show that Pw2 was an unreliable witness. The learned trial Magistrate who heard and saw Pw2 found her to be a truthful witness.

52. Mr. Makundi for the Appellant faulted the prosecution for not calling crucial witnesses. E.g. the class teacher and deputy head teacher. To support this, he cited the case of **Bukenya & Others –vs- Republic (1972) E.A 349** where it was held:

> ***"The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."***

53. It is true that the prosecution has a duty to avail crucial witnesses to prove its case. This does not however call for the availing of many witnesses just to prove a single point. **Section 143 of the Evidence Act** 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.**

54. In the case of **Donald Majiwa Achilwa & 2 Others –vs- Republic Criminal Appeal No. 34 of 2006** the Court of Appeal held thus:

> ***"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case."***

55. The head teacher who testified as Pw4 told this court what was said in the presence of the deputy head teacher and class teacher and later in the presence of Pw4 (*grandmother*). I find that failure to call the other two teachers as witnesses was not fatal to the prosecution case. The evidence of Pw4 was sufficient to cover that point.

56. In his defence the accused said he was busy ploughing his uncle's farm from 23rd May – 27th May 2019 when he was arrested. He did not explain where this farm was and how far it is from Pw3's home. Secondly the offence is alleged to have been committed between 1st May – 24th May 2019 on a number of occasions. His defence did not therefore displace Pw2's evidence.

57. He did not deny being a neighbour to Pw3 and also coming there to tie cows. He did not also deny knowing Pw2. Lastly he did not give any reason that would have made Pw2 lie against him. The trial court found her to be a truthful witness, and I find nothing on record to make this court dismiss her as an unreliable witness.

58. Upon re-evaluating the evidence on record I find that the learned trial Magistrate analyzed the evidence well and arrived at the right conclusion. The conviction is safe.

Issue no. (v) Whether the sentence was excessive.

59. Section 8(2) Sexual Offences Act provides for a sentence of life imprisonment for the offence the Appellant has been convicted of. The Appellant was sentenced to twenty-five (25) years imprisonment after considering that the Appellant was a young man. In his mitigation he indicated that he was aged 21 years then.

60. I have taken note of the fact that the Appellant is a young man. However, in doing so I must appreciate that the complainant's interest must also be considered. She was only nine (9) years when this beastly act was committed not once, not twice and not even thrice. I find no reason to make me interfere with the conviction or sentence.

61. The result is that the appeal lacks merit and is entirely dismissed.

Orders accordingly.

Delivered, signed & dated this 30th day of July 2020, in open court at Makueni.

………………………..

H. I. Ong'udi

Judge