REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 35 OF 2016

JEREMIAH WACHIRA MUCHIRI……...APPELLANT

-V E R S U S –

REPUBLIC ……RESPONDENT

JUDGMENT

(Appeal from the judgment, conviction and sentence in Nyeri CM CR. (S.O) NO. 30/2014 OF 20/5/2016, Hon. P. MUTUA)

The appellant Jeremiah Wachira Muchiri was charged with Sexual Assault contrary to section 5(1)(a)(i)(2) of the Sexual Offences Act No.3 of 2006. It is alleged that on 3rd July 2014 within Nyeri County in Republic of Kenya unlawfully used fingers to penetrate the vagina of one LMW. The prosecution called 5 witnesses to prove the case.

PW1 **LMW** was 6 years old at the material time, and in class one. On 3rd July 2014 she was playing with one W, her school mate and the son of Jeremiah Wachira, the accused. At some point during their play they went to Wachira's home. the accused person was at home. He sent W away, and was left alone with her.

It is then that he took her and they sat on a seat. He sat her on his legs, removed her panty and her biker. He did bad manners to her by inserting his fingers into her vagina. She resisted saying she was feeling pain, but he still continued. When someone knocked on the door, he released her. He told her to put on her clothes and warned her not to tell anyone what had happened.

As she left she was crying. She met the grandmother of W, who asked her why she was crying. She told her that it was because W father had put his fingers into her vagina. The grandmother of W did nothing except escort her to the gate. She went home where she told one Mama Ciru what had happened. Mama Ciru told her to tell report her own grandmother, L M G, PW2. When she told her what had happened, PW2 took her to hospital at Giakanja. After she received treatment they went to the police. From the police they went to hospital again.

She identified the appellant as the person who had inserted fingers into her vagina.

Upon cross examination by Mr. Nderi for the appellant, she told the court that she had known appellant since she was born as he was their neighbour and that he rode a motor cycle; that after he sent W he took her to his sitting room, placed her on his thighs removed her pants and biker. She told him to stop but he did not. When he removed her clothes she suspected he wanted to do something bad to her but she could not get away because he held her firmly. It is only after someone knocked on the mabati gate that he let go of her. From there she went to Cucu wa Cambe who called Mama Shiru to whom she reported the issue, and who now told her to report to her own grandmother. She confirmed that she did not report to her grandmother about the insertion of the fingers the same day.

P.W.2 **LMG's** testimony was that she noticed that there was something wrong with the child on 6th July 2014 when she told her she was in pain and had itching on the legs. Upon examination she noticed that the child's private parts were not only red, but inflamed and she was in pain. When she asked what happened she simply cried.

On 7th July 2014, she took the child to Giakanja Clinic for treatment. When the doctor asked the child whether anything had happened to her she just shook her head, in a 'no' sign. It was on n 11th July 2014that the child told her the cause of the pain. She said that the grandfather of W had inserted his fingers into her vagina on 3rd July 2014 when she had gone to his house with W.

With this new history she took the child back to hospital the following day, on 12th July 2014.She also made a report at Ndugamano Police Station. She was referred to Provincial General Hospital Nyeri. Later she was issued with the P3 which was completed was completed by the doctor. She took it back to the police station where she and the child recorded statements on 17th July 2014. Consequently, the accused was arrested.

She produced the child's birth certificate.

Upon cross examination she told the court that initially on 6th July 2014, when she asked the child what was wrong the child just shook her head. It was only when the pain persisted, and she was asked again what was wrong that the told about the insertion of the fingers into her vagina by the accused person. She confirmed that though the child had told her the appellant had inserted fingers in her vagina, she reported a case of defilement. That even her statement to the police spoke about defilement. She explained that this was based on her observations that the child had bruises and felt pain when urinating. She said the accused person as a neighbour, but denied he had any financial relationship with herself or with her husband.

P.W.3 **S W G** was the child's father. He testified that he learnt about the incident on 14th July 2014 when his mother P.W.2 told him that the accused person, who is a neighbour had attempted to defile his daughter. He denied any knowledge that the accused was working for one Muthoga at the material time.

P.W. 4 No. 63092 **P.C. Hilary Kisoi** from Ndugamano police station told the court that he received the complaint on 17th July 2014. He issued a P3 form to the complainant. When it was returned after completion by the doctor, he recorded witness statements and later arrested the accused person.

On cross examination he said the report was made on 15th July 2014 although the incident happened on 3rd July 2014. He said there was a report of an attempt of reconciliation through "Nyumba Kumi."

P.W. 5 **Dr. Elizabeth Awuor**, was a medical officer working at Nyeri Provincial Hospital. She produced the both the P3 and the PRC on behalf of Dr. Mwaka who is the one who had carried out the examination. The P3 report indicated that upon examination of the child, Dr. Mwaka had found that;

- the external genitalia was normal.

- the hymen was broken

- urinalysis indicated an infection but no spermatozoa.

On cross examination, the doctor told the court that the child had been treated at a private clinic before being taken to the PGH Nyeri. She had not seen the treatment notes from the private clinic. She said the child 's complaint was that she had been locked in a house and fingers inserted in her private parts.

The prosecution closed its case. The trial magistrate was of the opinion that the prosecution had establishes a prima facie case to warrant the accused being put on the defence.

In his defence the appellant testified on oath and called two witnesses. His defence was that he was not at home on 3rd July 2014 at the time he was alleged to have committed the offence. He said the complainant was a neighbour but denied being with her on 3rd July 2014. That he heard about the charges for the 1st time on 5th July 2014. This was because from around 24th or 25th June 2014 till 5th July 2014 he had been working in the home of one Lee Muthoga. He would leave home at 6:00pm and return at 7 or 8:00pm. He testified that there existed a grudge between him and the complainant's parents over a certain parcel of land they had bought from his aunt.

On cross examination he accepted that the child's family was his neighbour that she and his grandson were friends and would play together and that sometimes they would go to his house. He denied that she was in his house on 3rd July 2014. He said his wife told him that the children did not go to his house together on 3rd. He confirmed that the working hours were 8:00am to 5:00pm. He said on that day W was in hospital. He said that he had a grudge with the person who was buying the land from his aunt because there was a grave on that land he did not want to be sold. He said he had a grudge with the buyers of his aunt's land but not his aunt for selling the land.

His testimony about working at Muthoga's was supported by DW3 **Peter Muthoga Mutahi** who told the court that his uncle Lee Muthoga had a construction going on at his home , and he DW3 was the supervisor. That the appellant had been working there from around 24th/25th June 2014 to 5th July 2014. That the working hours were 8:00p.m. to 5:00p.m. He said he could not tell where the accused was on 3rd July 2014, but in the same breath that he was at work. His attempt to produce some payment vouchers to support his evidence failed as they were objected to for being copies.

D.W.2 **Agnes Wanjiru Wachira** was the appellant's wife. Her testimony was that on 3rd July 2014 the appellant had left at 6:00am, she left home at 10:00am and went to hospital at Wanduti.. She returned home 6:00p.m. That on the same date the child W was unwell and was taken to hospital at Giakanja by his mother. She said she knew the complainant. She denied seeing the her on the material day or telling her to go and report to her grandmother. She denied having any grudge with the complainant's family.

On cross examination she said she did not know what could have happened at her home between 5:00p.m. and 6:00p.m. on the material date. When she came from hospital she found her grandchild W at home alone. She said she would not say what could have happened after 5.00p.m. in her home. she would not say with any certainty whether there was any other person at home at that time.

After considering the foregoing evidence, the trial court, in its judgment found the evidence of PW1 to be credible and believed her testimony that the appellant had penetrated her vagina with his fingers. That it was not in doubt about the perpetrator as it was common ground that they were neighbours and the families were well known to each. The trial court also found that her evidence was not shaken under cross examination, and that that evidence was corroborated by both the evidence of P.W.2 and the medical evidence.

The trial court also considered the appellant's defence and the *alibi*. Relying on holdings in **Karanja vs. R. [1983] 501, Kiarie vs. R [1983] KLR 739, and Karukenya & 4 others vs. R. [1983] KLR 458** he set out guiding the principles. That it was the duty of the prosecution to prove its case against the appellant beyond a reasonable doubt. That an accused person who put forward an *alibi* defence did not assume the burden to prove it, the prosecution had a duty to disprove the same, however that it was the duty of the court to analyze the *alibi* by weighing it and testing it intrinsically as against the prosecution evidence to see if it might reasonably be true or if it could be safely rejected as false.

Upon consideration of the defence found it not worth of belief and rejected it.

The defence had also raised the issue that prosecution's failure to call the said W as a prosecution witness was could only draw the inference that his evidence would not have been favourable to their case. His view was that such an inference could only be drawn where the prosecution tendered weak and inadequate evidence to support a conviction. For this he relied on **Nguku vs. R (1985) KLR 412**. Relying on section. 124 of Evidence Act, **and Kibet V. Republic [2009] KLR 47**., he was satisfied that the evidence placed before him was sufficient to sustain a conviction. In the end he found the appellant guilty as charged, convicted him, and sentenced him to the minimum sentence of 10 years' imprisonment.

Aggrieved by those findings the appellant filed this appeal. He set down five grounds of appeal.

> **1.The learned trial magistrate erred in fact and in law in failing to appreciate the entire evidence which did not meet the threshold required by the law.**
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> **2.The learned trial magistrate erred in fact and in law in shifting the burden of proof to the appellant.**
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> **3.The learned trial magistrate erred in fact and law in failing to address the inconsistences pervading the entire evidence and resolve the doubts in favour of the appellant.**
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> **4.The learned trial magistrate erred in fact and in law in misapprehending and misdirecting himself on the evidence hence arrived at the wrong conclusion.**
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> **5.The learned trial magistrate erred in fact and in law in relying on the unreliable evidence of a single minor witness without warning of the danger of convicting on such evidence.**

The duty of a 1st appellate court was set out as stated by the Court of Appeal in **Okeno v. Republic [1972] E.A. 32** as follows: -

> *"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination **(Pandya v. R., [1957] E.A. 336)** and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (**Shantilal M. Ruwala v. 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 findings and conclusions; 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 v. Sunday Post, [1958] E.A. 424.***

It was re- stated in **Kiilu and another vs. R (2005) 1 KLR 174** that;

> *"an Appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."*
>
> *It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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."*

I am properly guided.

Mr. Nderi argued the grounds 1,3,4,5 together and ground 2, separately. These grounds are basically that there was insufficient uncorroborated evidence to warrant the conviction.

He submitted argued that the complainant being a minor aged 6 years old and the weight attached to her evidence would depend on her capacity to be truthful. That the court had conducted *voire dire* and found as demonstrated by the record; *"child intelligent enough to testify although understands scantly the value. Will give sworn evidence."* The child then proceeded to give her sworn testimony in Kiswahili.

Mr. Nderi submitted that in conducting the *voire dire* the court failed to record the truthfulness or otherwise of the minor witness. The court did also not record its reasons as required by section 124 of the Evidence Act. As a result, there was a miscarriage of justice and conviction was unsafe as it was based on the uncorroborated evidence of a minor.

He pointed out two apparent contradictions in her testimony; one , on where the appellant allegedly placed her during the assault; that she said the accused placed her on his thighs and sexually assaulted her but on cross examination she said he placed her on the sofa set; and whether the knock that caused him to release her was on the door or the gate– that he released her when someone knocked on the door, but on cross examination that the knock was on Mr Nderi also pointed out the failure on the part of the prosecution to call key witnesses, Cucu

wa Cambe,the first person the child allegedly went to after the incident, W, and the initial treatment notes from Giakanja clinic.He submitted that it was important for those notes to be produced taking into consideration PW2's testimony that at first time the child 'told' the doctor that nothing had happened to her, there was no explanation as to how the prosecution arrived at the date of 3rd July 2014 as the material date, and thirdly, because the incident was not reported until 17th July 2014, when the child was examined the second time. These omissions left gaps that rendered the case for the prosecution weak. The fact that the offence was only disclosed to P.W.2 4 days after it happened is suspect and that she reported a case of defilement on 17th July 2014.

Mr. Nderi urged the court to find that the evidence was riddled with untruths, lacked veracity and credibility. He referred the court to **David Ochieng Aketch Vs. R [2015] eKLR** which he said was in *pari materia* with this case.

On the issue of the alibi, he submitted that the trial court, in considering the evidence, misdirected itself in a manner that was prejudicial to the appellant That the court in finding that the time between 5p.m and 6p.m. was material to the offence and the appellant's failure to account for his whereabouts at that time supported the case from the prosecution that he was at home and he committed the offence, misdirected itself, to the extent that it spent a lot of time disapproving the appellant's alibi, hence placing the burden of proving his alibi on the appellant. The prosecution failed to show that the appellant was at home at the time of the alleged offence

Mr. Nderi further submitted that the case had lingering doubts which ought to have been resolved in favour of the appellant. He relied on **Joseph Munyoki Kimatu vs. R [2014] eKLR.**

The appeal was opposed.

Ms. Jebet for the state submitted that there was sufficient evidence to prove the charge against the appellant. She conceded that there were some contradictions in the evidence of P.W.1 and P.W.2 and their statements to the police but argued that the said contradictions did not in any way prejudice the appellant. That the ingredients of sexual assault were proved. The medical evidence supported the child's allegations as her hymen was broken.

Analysis and determination

I must of necessity begin by pointing out that the charge as drawn was defective, in that it stated the offence was contrary to ***section 5(1)(a)(i)2)*** of the Sexual Offences Act. It is imperative for magistrates to read the charge before signing it to confirm that it is properly drafted. The Sexual Offences Act appears to give a special challenge to the drafters who forget or do not see the need to use the little phrase **'as read with'.** Although to err is human, a majority of the appeals I have handled so far bear this challenge. The fact that this defect may be cured ought not to be an excuse for poor drafting especially now that the prosecutors are lawyers. The court too, has a duty to exercise due diligence to ensure that an accused person is not embarrassed or prejudiced.

Section 5. of the Sexual Offences Act provides for the offence of Sexual assault;

> *(1) Any person who unlawfully—*
>
> > *(a) penetrates the genital organs of another person with—*
> >
> > > *(i) any part of the body of another or that person; or*
> >
> > > *(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;*
> >
> > *(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.*
>
> *(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.*

The prosecution was required to prove penetration of the complainant's genitalia by the body part of the appellant.

I have carefully considered the submissions by both counsel, and the authorities cited.

These issues stood out from the submissions.

(1) The truthfulness of the testimony of the minor

(2) Where she was placed while the assault was taking place

(3) Whether the knock that save her was on the house door or the gate

(4) The appellant's alibi.

On the issue of the evidence of the child. It is true the complainant was a child of tender years aged 6 years old. The trial court upon

conducting *voire dire* formed the opinion that she was intelligent, and had some 'scanty' understanding of the importance of telling the truth. She testified on oath. The court found her testimony on what happened, how it happened and who did cogent and consistent.

Did the magistrate misdirect and convict on uncorroborated the evidence of a single witness? He found that the testimony of PW2 corroborated the child's testimony. He also found that the medical evidence as adduced in court added to this corroboration.

In addition, he alluded to the provisions of s.124 of the Evidence Act stating that;

> *"…, this court is entitled to rely on the evidence of the compliant child if satisfied that the child was telling the truth."*

Section 124 states;

> *Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*
>
> *Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*

In his judgment he said that he accepted and trusted the evidence of P.W.1 as sufficient. That it was not shaken under cross examination. The trial magistrate had the advantage of observing the child and was satisfied that she was telling the truth.

The trial magistrate conducted the voire dire examination and on his own observation, formed the opinion that the child was intelligent, enough to testify, and even though she did not appear to fully understand the nature of the oath, he was of the opinion she was capable of telling the truth. He recorded in the judgment that he believed he evidence.

The Court of Appeal in Erick **Onyango Ondeng' v Republic [2014] eKLR** had this to say;

> *We note that the trial court, before accepting the evidence of PW2 on oath, conducted a voire dire examination and specifically noted that it was satisfied that PW2 understood the nature of the oath. PW2 was subjected to cross-examination after she gave her evidence. We may add that the proviso to section 124 of the Evidence Act as amended Act No. 5 of 2003 and Act No. 3 of 2006 allowed the trial court to convict the appellant on the evidence of PW2 alone, as the victim of a sexual offence, if for reasons to be recorded, the court was satisfied that she was telling the truth. (See **Mohamed vs. Republic (2006) 2 KLR 138** and **Geoffrey Kioji vs. Republic, Crim. App. No. 270 of 2010 (Nyeri)**. The trial court specifically noted in the judgement that it was impressed by PW2 as a witness of truth, who spoke nothing but the truth. (*emphasis added)

Guided by the above holding I find no fault in the magistrate's finding.

With regard to the second and third issues, I looked at the child's testimony. It is clear that she told the court the appellant took her into the house where both of them sat on a seat. He then placed her on his thighs from where he committed the offence.

> *"He took me to his house. We sat down on a seat. He put me on his legs. He removed my biker and my panty. He did me bad manners with his fingers"*

On cross examination she said;

> *"I did not sit on a seat. I sat on his thighs. It is not true that I recorded I sat on a seat… I was sitting on his thighs."*

My reading of the two statements above is that that both the appellant and the child were seated on the seat but she was on his thighs. It appears to me that during cross examination it was put to her that she recorded in her statement that she the sexual assault took place while she sat on a seat, which she denied. It is possible that what she said is what appears on the record, *"we sat down on a seat"*. This read by itself would be inferred to mean that both the child and the appellant sat on a seat. However, when one reads further she clarifies the position "*He put me on his legs,* a point she clarifies on cross examination when she says, *"I sat on his thighs."*

This is the same evidence given in chief by P.W.2 when testifying about what the child told her. –

> *"…she told me…the grandfather of W came, held her hand, took her to his house, placed her on his thighs… put fingers in her private parts"*

PW2 was found to have told the police in her statement that "*the child was placed on a sofa set and fingers inserted into her vagina"*. This in my view does not amount to a contradiction when read together with the rest of the evidence, because a seat was involved in the whole scenario.

There was the issue of whether the knock was on the door of the house or the mabati gate. In her evidence in chief she said *"he heard*

someone knock on the door" under cross examination she said; *"The gate was knocked and he released me. The gate is made of mabati"*.

It is true that there is a difference between a door and a gate. I am of the view that this inconsistency does not go to discredit the truthfulness of the child as a witness, as it is clear that it was the knocking sound that was loud enough to be heard while inside the house that stopped the appellant from what he was doing.

P.W. 2's evidence was also faulted for being untruthful and full on of inconsistencies. She conceded that her report to the police did not include that part where when she took the child to hospital the 1st time, the child shook her head as a sign of denying that anything had happened to her. In her view it was not necessary. The child only told what was done to her after the pain persisted, and she was questioned persistently. She also conceded that she reported a case of defilement despite the fact that the child told her that fingers had been inserted into her vagina. She explained that it is because of the condition the child was in. The child was in pain, felt pain when urinating and had bruises to her private parts. To her that amounted to defilement.

This line of thinking is also seen in the medical evidence. PW 5 Dr. Awuor testified that the complaint by the child was attempted defilement, which she explained thus; *"She complained of attempted defilement by a neighbour known to her who inserted his fingers in her private parts"*. The child's hymen was broken and she had some inflammation. To the doctor the insertion of fingers into the child's vagina was attempted defilement.

Both P.W.2' observation of the child's genital area, and the doctor's examination confirmed that the child's genital area had been interfered with, and the child's story was consistent all through. I find no contradiction in this evidence.

In **Erick Onyango Ondeng' v Republic [2014] eKLR** the Court of Appeal stated that not every contradiction would cause the evidence of witnesses to be rejected. There would need to be more to the contradiction. The Court cited with approval the findings in Court of Appeal case **Twehangane Alfred vs .Uganda, Crim. App. No 139 of 2001, [2003] UGCA.**

*As noted by the Uganda Court of Appeal in **Twehangane Alfred vs. Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6** it is not every contradiction that warrants rejection of evidence. As the court put it:*

> *"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."*

I find that the contradictions pointed out by the appellant did not point to any deliberate untruthfulness on the part of the witnesses. In fact, each apparent contradiction or inconsistency was satisfactorily explained.

There was the issue of the prosecution's failure to call W, and Cucu wa Cambe. The first one was the appellant's grandson. W did not witness the incident. His testimony would only have confirmed whether or not on the material date he was with P.W.1 at his grandfather's house. The same applies to the so called Cucu wa Cambe. She would only have told the court what the child told her. It would have been a good investigation for the I.O to interview all those who were mentioned and to leave it to the prosecution to call whoever they felt was necessary for their case. The I.O did not carry out that investigation and hence their evidence was not available. Nevertheless, I find that lack of their testimony did not weaken the case for the prosecution as there was other evidence that was credible and sufficient to support the charge.

That also applies to the first treatment notes allegedly made on 7th July 2014 when the child was first taken to hospital. Although the injuries noted therein would have assisted in establishing whether so soon after the alleged sexual assault the child had injuries consistent with the alleged assault, I found that the P3 as produced clearly indicated that upon examination the doctor was of the opinion that the injuries that child had on the 17th July 2014 were approximately two weeks old. I did not find any evidence of any deliberate move to cover up anything especially in light of the strong evidence given by the child.

Again in dealing with similar complaints of failure by the prosecution to call witnesses, the Court of Appeal in **Erick Onyango Ondeng' v Republic [2014] eKLR** stated;

> *The appellant took issue with the fact that one Violet, who PW2 mentioned in her evidence as having happened by when the appellant was with PW2 was not called as a witness. In **Bukenya & others vs Uganda (1972) EA 549,** the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case.*
>
> *While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to section 124 of the Evidence Act and the medical evidence must be borne in mind as well Section 143 of the Evidence Act (Cap 80) which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In this appeal, it is not clear to us what value the evidence of Violet would have added to the evidence of PW2, which the court found trustworthy, as well as the medical evidence. In our opinion, Violet would have been a peripheral witness as she was said to merely have happened by when the appellant was with PW2 on a different occasion.* (emphasis added)

From the above case it is clear that adverse inference would be drawn where essential witnesses were not called yet the case for the

prosecution was weak. This is not the case here. Secondly, the proviso to section 124 of the Evidence Act allowed the magistrate, to proceed to convict if he was persuaded by the truthfulness of the complainant. The two witnesses would not have added value to the case for the prosecution. In any event they were available for the defence to call as well.

Regarding the appellant's alibi, it was argued that the prosecution had not dislodged the same.

It its judgment the trial court took time to deal with the whereabouts of the appellant during the hour between 5:00pm and 6:00p.m. on 3rd July 2014. Accordingly, the trial magistrate drew the conclusion that the appellant's failure to account for his whereabouts during that hour was proof that he was at home therefore committed the offence.

A reading of the trial court's judgment clearly shows that the trial court was dealing with the appellant's evidence in support of his alibi that he was not at home on 3rd July 2014. The magistrate formed the opinion that the evidence of the three defence witnesses with regard to the appellant's whereabouts on the material day between 5:00pm and 6:00pm day completely unreliable and untrustworthy, and rejected it hence rejecting the appellant's alibi.

A perusal of the charge sheet reveals that no time was indicated as to when the offence was allegedly committed. In her testimony, the child did not give any specific or general indication as to when the offence was committed, whether morning, afternoon or evening, but she did say, *"I was in school with W…we went to his home with W".* PW2 alluded to the time when she said that the child told her she went with W to his home after school. This explains the trial court's emphasis on the whereabouts of the appellant between the time of 5:00pm and 6:00pm. However, that emphasis is not supported by the facts as no specific time was given in the charge sheet or by the child. The time 'after school' could be any time from 1:00pm. By requiring the appellant to prove his whereabouts between 5:00pm and 6:00pm on the material date, was to place the burden of proof on him, on a fact that was not pleaded by the prosecution so to speak. To the extent that the trial magistrate drew the conclusion that the offence was committed between 5 and 6pm, I agree with the appellant's submissions. He misdirected himself on a point of fact.

He however considered the rest of the defence. The allegation that there was a grudge between him and the parents of the child did not stand up to scrutiny as they were not involved in this case nor were they involved in the land matter. His wife confirmed there was no grudge between her family and that of the complainant.

The allegation that the child W was in hospital the whole day on the material day was not supported by any evidence. His mother who was alleged to have taken him there was not called.

The appellant's defence that he was away at work was also considered. He said he left home at 6:00am and came home between 7:00pm and 8:00pm. DW3 told the court that the appellant would report at work at :800am and leave at 5:00pm. That is not the same as saying that he was not at home at the time of the alleged offence. The complaint placed the appellant in his home at the time the offence was committed against her. I have weighed her testimony against his and I am persuaded she was telling the truth. I have found no reason to disbelieve her. The trial court was justified in rejecting his alibi.

Nevertheless, having reviewed, re-assessed and re-analysed the evidence on record, I am satisfied that the trial magistrate misdirected himself on the issue related to the time the offence is alleged to have been committed. However, it is my humble view that that misdirection did not go to the core of the case, and did not occasion a miscarriage of justice to the appellant, for the reason that there was overwhelming evidence to prove the charge against him.

In conclusion, I find that the upon considering the evidence in its totality the trial magistrate arrived at the correct findings. I find no reason to interfere with the conviction and sentence. Both are upheld.

The appeal must fail and is dismissed.

Right of appeal explained.

Dated, delivered and signed at Nyeri this 13th Day of December 2017.

Teresia Matheka

Judge

In the presence of;

Court Assistant Hariet

Mr Gitonga for state

Appellant present

Ms Mwai holding brief for Mr.Nderi