



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 209 OF 2011

SALIM MUTAI CHELIMO alias MALI MALL.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's

Court at Iten (Hon. B.N. Mosiria) delivered on the 13 October 2011 in Iten

Senior Resident Magistrate's Court Criminal Case No.305 of 2011)

JUDGMENT

[1] This appeal arises from the conviction and sentence passed by the Senior Resident Magistrate, Iten, on the **13 October 2011** in **Criminal Case No. 305 of 2011**. The Appellant herein, **Salim Mutai Chelimo alias Mali Mali**, was arraigned before the lower court on **19 May 2011**, charged, in Count I, with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act, No. 3 of 2006**. In the alternative, he was charged with the offence of **Indecent Act with a Child**, contrary to **Section 11(1)** of the **Sexual Offences Act**. In Count II, the Appellant was charged with **Child Pornography** contrary to **Section 16(1)(a) of the Sexual Offences Act**.

[2] The Appellant denied the charges, whereupon the Prosecution lined up 7 witnesses at his trial. Subsequently, a determination was made by the Learned Trial Magistrate, in the Judgment dated **13 October 2011**, that the allegations against the Appellant had been proved beyond reasonable doubt. He was found guilty and was convicted on both Counts and was sentenced to serve 15 years' imprisonment on Count I and 6 years' imprisonment in respect of Count II. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on a total of 20 grounds which may be collapsed into the following grounds:

[a] The Learned Magistrate erred in law and fact by convicting the Appellant on the charges of Defilement, Indecent Act and Child Pornography on the basis of insufficient evidence;

[b] The Learned Magistrate erred in law and in failing to consider the evidence presented by the defence.

[c] The Learned Magistrate erred in law and in fact in failing to give due regard to the mitigation offered by the Appellant.

[3] On the basis of those grounds, the Appellant prayed that the Learned Magistrate's Judgment, conviction and sentence be reversed and that he be acquitted. Thereafter on the **2 July 2018**, the Appellant filed what may appear to be Amended Grounds of Appeal along with his written submissions, though the document is not expressly styled as such. Likewise, there appears to be no indication that he ever sought or obtained the leave of the Court to file the Amended Grounds of Appeal.

[4] However, no objection having been taken thereto by the State, I would, in the spirit of **Article 159(2)(d) of the Constitution**, treat the Grounds of Appeal filed on **2 July 2018** as having superseded the initial ground that he filed in **2011**. Indeed, I note that his written submissions were fashioned under the five Grounds of Appeal set out on that document. Those Grounds are:

[a] That the Trial Magistrate erred by failing to see that the particulars set out in the Charge Sheet was at variance with the evidence adduced before the court;

[b] That the Trial Magistrate erred in failing to conduct a *voir dire* examination on **PW1** before receiving her testimony;

[c] That the Trial Magistrate erred in failing to observe that the Prosecution evidence was full of inconsistencies, contradictions and suspicions, and therefore could not sustain a conviction;

[d] The Trial Magistrate erred in failing to apply the principles of law applicable after noting that this was a case based on circumstantial evidence;

[e] That the Trial Magistrate overlooked his defence, including the evidence of his witness, which was the truth concerning where he was at the material time.

[5] He urged his appeal by way of written submissions, which he filed on **2 July 2018**, and to which **Ms. Kegehi**, Learned Counsel for the State, responded orally. According to **Ms. Kegehi**, the evidence presented by the Prosecution before the lower court was sufficient to prove the essential ingredients of the offences laid against the Appellant; notably, the age of the Complainant, penetration and that the offence was committed by the Appellant.

[6] It is pertinent to point out at this stage that the appeal was heard by **Hon. Silla Munyao, J.** on **14 October 2013** and a determination rendered by the Honourable Judge on **20 November 2013** by which the lower court decision was affirmed and upheld in respect of Count I while the conviction and sentence on Count II was quashed. The Appellant thereafter filed a second appeal to the Court of Appeal, whose outcome was that the appeal be remitted to the High Court for a fresh hearing. The reason for that decision was that **Hon. Silla Munyao, J.**, a Judge in the Environment and Land Court, had no jurisdiction to handle criminal matters.

[7] Accordingly, the Court has given careful consideration to the appeal and taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. (See **Okeno vs. Republic [1972] EA 32**).

[8] The evidence adduced before the lower court by the Prosecution was that the Complainant, **S.C.R.**, a 17 year old girl who testified before the lower court as **PW1**, told the lower court that, on the **17 May 2011**, she left her parent's home in Aror to return to school after a 3 day sick off. She was then in form four at **[Particulars Withheld] Secondary School**. That as there was no means of transport, it took her 5 hours to walk to **Kapsowar**, arriving there at 2.00 p.m. She went to the shop of one of her relatives for shopping and pocket money. She explained that her father had made arrangements with the shopkeeper to provide her with provisions for which he would pay later.

[9] **PW1** further told the lower court that since her relative did not have a handkerchief in stock, she was referred to the shop next door, which was the Appellant's. She asked for a handkerchief, made her pick and paid for it; but that the Appellant was tardy in giving her change. After waiting for a while, the Appellant increased the volume of his radio to drown out their conversation, made a move as if to provide her with her change, but instead he held her hand, pulled her into the shop and closed the door behind her. Thus, it was the evidence of **PW1** that the Appellant held her against her will in spite of her protestations, until 7.00 p.m., when he left her locked inside the shop only to return at 9.30 p.m. She had put on two television sets on for her entertainment, and assured her she would go to school the following day.

[10] **PW1** further told the lower court that, when the Appellant returned to the shop at about 9.30 p.m., he was panting and agitated as he informed her that the Police were out on patrol within the shopping centre. He gave her a black jacket and cap to wear, and then led her out of the shop to a nearby forest where the Appellant told her they would spend the night. That the Appellant then showed her some pornographic images on his phone before defiling her. She explained that she felt a lot of pain as that was her first time to have sex. The Appellant kept her in the forest up to about 5.00 a.m. when, on the way back they met her aunt, **A**. Her aunt confronted the Appellant, accusing him of leading her astray; whereupon the Appellant ran away. She got to learn from **A** that her father was looking for her. **A** then informed her father who had the Police involved. She led them to the scene in the forest where a used condom and its wrapping were found. She was later taken to hospital for examination and a P3 Form was filled.

[11] **AK** testified as **PW2** and told the lower court that the Appellant was a neighbour at **Kapsowar** where she was then doing business. She also confirmed that the Complainant is her niece. She told the lower court that on the night of **17 May 2011** at 11.00 p.m. she was awoken by hard knocks on her door. She heard the voice of the Complainant's father asking her to open the door; and that he was looking for the Complainant who had left home for school but had not reached school. He was accompanied by **Hillary Koskey**, a shopkeeper at **Kapsowar** who had seen and served the Complainant earlier in the day. They were soon joined by three policemen, and she got to learn that they had gone to look for the Complainant in the lodgings at **Kapsowar** in vain.

[12] **PW2** further testified that, together with the Complainant's father, they kept vigil till about 4.45 a.m. when she went out to make inquiry from the *boda boda* operators as to whether they may have seen the Complainant. She then saw the Appellant walking towards them with a girl who was wearing a black jacket and a cap. When the two came closer, she recognized the girl to be the Complainant. She confronted the Appellant, wanting to know why he was misleading a school girl and lunged forward to get hold of him, but the Appellant ran away. The Police were immediately notified and a visit to the scene made where the Police recovered a used condom. **PW2** added that the Complainant was thereafter taken to hospital for examination.

[13] The third Prosecution Witness before the lower court was **Hillary Koskei Chebii (PW3)**. He was a neighbour of the Appellant at **Kapsowar**. He confirmed that the Complainant was at his shop for her school shopping and that after supplying her with what she needed, including Kshs. 500/= for her pocket money, she went to the shop of the Appellant next door to buy a handkerchief. That he did not see her again and got concerned on noting that the Appellant's shop had been locked early, which was unusual. Out of concern, he contacted the Complainant's father to find out whether the Complainant had arrived in school safely; and, as the Complainant had not shown up by the time her father arrived at **Kapsowar** in search of her, the matter was reported to the Police.

[14] It was the evidence of **PW3** that the Police looked for the girl the whole night but did not find her. He confirmed that at about 11.00 p.m. they went with the Complainant's father and the Police to the house of **PW2** to find out if the Complainant may have gone there but she had not. That they kept vigil with the Police and at about 4.44 a.m. the Appellant was seen walking with the Complainant and on being

confronted by **PW2**, he ran away. The Complainant then led the Police to the scene in the forest where they had spent the night and the Police recovered some condoms at the place, one used and the other was unused.

[15] The Complainant's father gave evidence before the lower court as **PW4**. He confirmed that **PW1** is his daughter, and that in **2011** she was a student at **[Particulars Withheld] Girls Secondary School** in Form Four. He identified her Birth Certificate before the court and it was marked **MFI 1**, confirming her year of birth as **1994**. He told the lower court that, on **17 May 2011**, he was on duty at **[Particulars Withheld] Primary School** where he was employed as a teacher. In the evening, he received a call from **PW3** asking whether his daughter had reached school safely. He then called her Headmistress and was told the Complainant was yet to go back to school. He confirmed that the Complainant had been at home on sick off to enable her get treatment; and that he had arranged for her to obtain her shopping and pocket money from **PW3** at **Kapsowar** on her way back to school.

[16] Upon receiving that information, he immediately went to **Kapsowar** to ascertain the report, and arrived there at about 8.28 p.m. He interviewed **PW3** who was suspicious that his neighbour, the Appellant, may be responsible for the Complainant's disappearance. He decided to immediately involve the Police. They went to the Appellant's shop but found it locked. The Police organized a raid for 11.00 p.m. when bars closed and conducted an inspection of all the lodges but did not find the Appellant or the Complainant. They kept vigil all night, taking their respective places at strategic positions in the town until about 5.00 a.m. when the Appellant was seen walking with the Complainant towards the Appellant's shop. On seeing them, **PW2** who was angered by the incident, confronted the Appellant, but he escaped from her grip and ran away. **PW2** then took the Complainant to her house and disciplined her by beating her up as the rest continued looking for the Appellant.

[17] According to **PW4**, the residents of **Kapsowar** were outraged by what the Appellant had done and everybody was out looking for him. He eventually surrendered himself to the Police. He confirmed that he accompanied the Police and **PW1** to the scene where she had spent the night and the Police recovered some used condoms, which he did not want to see. The Complainant was subsequently taken to hospital for treatment.

[18] **PW5** confirmed to the lower court that the Complainant was taken to him for examination and that she presented a history of having been defiled. On examining the Complainant he noted that there was laceration at the back of her vagina with bruises on the walls of the vagina; and that there was a whitish discharge which was bloodstained, an indication that there was forced penetration of her genital organ. He took a vaginal swab for further analysis but nothing abnormal was detected. From his findings, he concluded that the girl's virginity had been broken. He filled and signed the P3 Form on **18 May 2018** and produced it before the lower court as an exhibit. He also examined the Appellant but noted nothing abnormal, save for the presence of moderate pus cells, an indication of infection.

[19] Evidence was also adduced by the Complainant's mother. She testified as **PW6** before the lower court. She reiterated the evidence of **PW1, PW2, PW3** and **PW4** that the Complainant was a student at **[particulars withheld] Secondary School** and that she was 17 years old at the time of her defilement. She identified **MFI 1** as the Complainant's Birth Certificate. She further confirmed that the Complainant had returned home from school on **13 May 2011** on sick off. She stayed at home until **17 May 2011** when she left home to go back to school. She expressed her shock to learn, on the **18 May 2011**, that **PW1** did not go back to school; and that she had been defiled by the Appellant. She went to **Kapsowar** immediately and found the child at the hospital. After her examination, she escorted the Complainant to school and returned home.

[20] **Corporal Joseph Asugo (PW7)** was then based at **Kapsowar Police Station**. He was asleep on the night of **17th and 18th May 2011** when a report was made by the Complainant's father that she had gone missing. He joined his colleagues at about 4.30 a.m. at **Kapsowar Town** near **Waidi Hotel** where he found the OCS with members of the public, including **Alice (PW2), Hillary (PW3)** and the Complainant's father (**PW4**). The Complainant had also been found. They interrogated her on what had happened. She then led the Police to the forest and showed them the scene where the Appellant had defiled her. They recovered a used condom and a torn condom packet from the scene. They also saw some remnants of food at the scene. He added that, from the scene, they went in search of the suspect and at about 8.00 a.m. the Appellant surrendered himself to the station. He was arrested and taken to the hospital for examination. He thereafter proceeded with his investigations and recovered the rest of the exhibits, including the jacket and cap that the Appellant gave the Complainant to wear over her school uniform and some of the electronic equipment taken from the Appellant's shop. These items were all produced before the lower court in support of the Prosecution case. Ultimately, the Appellant was charged.

[21] On his part the Appellant confirmed, in an unsworn statement of defence, that he was engaged in the business of selling electronic and other items at **Kaposowar**. He however denied having defiled the Complainant as alleged. According to him, he was just framed on account of a grudge that **PW2** harboured against him. He gave his narration of the events and stated that he was at his place of work on the evening of **17 May 2011**; and that he worked upto 8.00 p.m with his son. They then went home to his wife with whom he spent the rest of the night. That he was approached the following morning by two Police Officers, namely, **PC Bii** and **Corporal Asugo**, with a report that something had occurred at their plot and that he was required at the Police Station to provide an explanation; that on presenting himself, he was arrested and escorted to hospital for examination. He therefore denied having committed the offences laid against him before the lower court.

[22] The Appellant called his wife, **Alice Cherotich (DW2)**, as his witness. Her testimony was that, on the **17 May 2011**, she left the salon where she was working and passed via their shop which was ran by the Appellant. That she spent time at the shop with the Appellant and their first born son upto about 7.30 p.m. when she left them to go and prepare supper. The Appellant followed later with their son and they had dinner and slept. The following morning, he asked the Appellant to go and repair a damaged socket at the salon, and he left to go and work on the socket but did not return. She later learnt that he had been arrested for defiling a school girl. She was categorical that the Appellant spent the night of **17/18 May 2011** at home; and that the entire complaint and prosecution was a frame-up by **PW2**.

[23] In the light of the foregoing, can it be said that the offence of Defilement, as laid in Count I and Child Pornography as charged in Count II in respect of which the Appellant was convicted by the lower court, were proved beyond reasonable doubt? **Section 8** of the **Sexual Offences Act** pursuant to which the charges were laid provides as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
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(2)	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.
(3)	A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
(4)	A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

[24] Accordingly, the Prosecution needed to prove the following essential ingredients:

[a] That the Complainant was, at the material time, a child aged 17 years;

[b] That there was penetration of the Complainant's vagina;

[c] That the penetration was perpetrated by the Appellant.

[a] On the age of the Complainant:

[25] From the foregoing summary, it is manifest that sufficient evidence was placed before the lower court, which evidence was entirely uncontroverted, that the Complainant was born on in **1994**, and therefore was aged 17 years as at **17 May 2011**. The Complainant's Birth Certificate No. [...] was produced before the lower court and marked **Exhibit No. 1** to corroborate the evidence of both **PW1, PW4 and PW6** as to the Complainant's age. Accordingly, credible evidence that was adduced before the lower court to prove beyond reasonable doubt that the Complainant was a child for purposes of **Sections 2** of the **Sexual Offences Act**, as read with **Section 2** of the **Children Act, No. 8 of 2001**.

[26] The Appellant however challenged the evidence of PW1, contending that it was admitted violation of **Section 19(1)** of the **Oaths and Statutory Declarations Act, Chapter 20** of the **Laws of Kenya**. According to the Appellant's submission was that it was imperative that before the evidence of the Complainant could be taken, the trial court had to conduct a *voir dire* examination to establish whether she understood the nature of an oath and the need to tell the truth. I have considered that argument but find no merit in it. This is because **Section 19(1)** is specific to children of tender years and it is generally settled that a child of tender years is one below the age of 14 years; which the Complainant was not. For instance in **Patrick Kathurima vs. Republic, [2015] eKLR** the Court of Appeal sitting in **Nyeri** held thus:

“...The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children’s Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes”. (see also **Samuel Warui Karimi vs. Republic [2016] eKLR**)

Thus, the Appellant's argument that *voir dire* was necessary is premised on a complete misapprehension of the law.

[b] On whether Penetration of the Complainant Occurred:

[27] In this regard, the evidence adduced before the lower court was principally that of the Complainant. She testified at to how she had gone to the Appellant's shop to buy a handkerchief, and was detained by him; and that at about 9.30 p.m. the Appellant led her out of his shop to a nearby forest to evade a police raid in the centre. She added that it was in the forest that the Appellant forcefully subjected her to multiple sessions of painful sexual intercourse, the first of which was protected by a condom. Her evidence was buttressed by the evidence of **Dr. Kosgei (PW5)** who confirmed to the lower court that the Complainant was taken to him for examination on **18 May 2011** and that on examining the Complainant he noted that she had a laceration at the back of her vagina with bruises on the walls of the vagina; and that she had a bloodstained whitish discharge in her vagina, which in his view was an indication that there was forced penetration of her genital organ. From his findings, he concluded that the girl's virginity had been broken. He produced the P3 Form that he filled and signed in respect of his examination of the Complainant as the **Prosecution's Exhibit No. 9** before the lower court.

[28] **PW5** also had a look at the clothes that the Complainant wore on that day and noted that her pant was also bloodstained. This was confirmed by **PW7** whose responsibility it was to gather all the exhibits. Again, the Prosecution evidence in this connection was entirely uncontroverted, and was therefore cogent and credible. Clearly therefore there can be no doubt that penetration of the Complainant's genital organ was proved before reasonable doubt. Accordingly, the lower court correctly came to the conclusion that penetration had been proved.

[c] On whether the penetration of the Complainant was perpetrated by the Appellant:

[29] As to the pertinent question whether the penetration of the Complainant was committed by the Appellant, the evidence of the Complainant was straightforward enough; that it was the Appellant, to whose shop she had gone to buy a handkerchief, that detained and

defiled her. Her evidence was buttressed by the evidence of **PW3**, who was aware that she had gone to the neighbouring shop to buy a handkerchief, as he did not have any in stock. Indeed it was the evidence of **PW3** that when he did not see **PW1** again, and noted that the Appellant had locked his shop unusually early, he decided to call the Complainant's father to confirm whether the girl had arrived in school safely. This is what prompted the Complainant's father to check with the Complainant's Headmistress, only to find out that she had not gone to school.

[30] More importantly, since the matter had been reported to the Police and most of the residents were on the lookout, the Appellant was seen by **PW2**, an aunt of the Complainant's, walking the Complainant back to the town in the early hours of **18 May 2011**. **PW2** confronted the Appellant at close range with a view of arresting him but he extricated himself from her grip and escaped. It is also noteworthy that according to **PW7**, the Appellant voluntarily presented himself at the police station on **18 May 2011**. Clearly therefore, there was sufficient evidence that pointed to the Appellant as the perpetrator of the crime of defilement as charged in the Main Count I.

[31] In **Count II**, the Appellant was charged with Child Pornography contrary to **Section 16(1)(a)** of the **Sexual Offences Act**. The particulars of that charge were that on the **17 May 2011** at about 11.00 p.m. in Marakwet West District within the Rift Valley Province, knowingly showed obscene audio-visual images to **S.J.R**, a child aged 17 years with the intention of encouraging the said **S.J.R** to engage in sexual acts. **Section 16(1)(a)** of the **Sexual Offences Act** stipulates that:

"Any person including a juristic person who displays, shows, exposes or exhibits obscene images, words or sounds by means of print, audio-visual or any other media to a child with intention of encouraging or enabling a child to engage in sexual acts ... is guilty of an offence of child pornography and upon conviction is liable to imprisonment for a term of not less than six years or to a fine of not less than five hundred thousand shillings or to both..."

[32] In support of Count II, the Complainant told the lower court that the it was almost 11.00 a.m. when they go to the forest; and that he then embarked on showed her some pornographic images on his phone before defiling her. The mobile phone was recovered and was produced before the lower court. The lower court, having seen and observed the demeanour of **PW1** believed that she was telling the truth. It expressed itself thus:

"...PW1 is a girl aged 17 years. From her demeanour in court she is to be believed because she was candid, coherent and transparent in giving her evidence and even answering questions by the accused, she was also consistent... The girl said accused showed her pornographic pictures before defiling her and identified phone of accused to be one used the said phone was presented before court."

[33] Having reviewed the evidence adduced in support of Count II, I have no reason for faulting the Learned Trial Magistrate for that conclusion, as it is manifest that, the Appellant's objective in showing her the images was to encourage her to have sex with him. Like the lower court, I have no doubt as to the Complainant's sincerity in this respect. It is to be remembered that, when it comes to credibility, this Court, as an appellate court, would defer to and be guided by the impressions formed on the mind of the trial court by the by the witnesses. Accordingly, in **Shantilal Maneklal Ruwala vs. Republic [1957] EA 570**, it was held, *inter alia*, that when the question arises as to which witness is to be believed rather than another and that question turns on demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses. I am therefore satisfied that Count II was similarly proved beyond reasonable doubt.

[34] I paid due attention to the submission by the Appellant that Count I was defective for being at variance with the evidence. His argument was that the particulars encompassed two nights, namely the night of 17th and the night of 18th May 2011; which in his view came after his arrest on the morning of 18th May 2011. He relied on the case of **Sulemat Juma alias Tom vs. Republic** (whose citation was not provided) for the holding that in charging a person, the Prosecution must be careful as the consequences of a conviction are serious, as the life of an individual may be at stake. It is needless to say that night, normally the hours between nightfall and sunrise does straddle two dates. The argument is therefore pointless.

[35] I have similarly taken into consideration the Appellant's argument that the Prosecution Case before the lower court was riddled with contradictions and inconsistencies as set out at pages 6-10 of his written submissions. I however do not consider that the contradictions referred to by the Appellant were not of the sort that would suffice to invalidate the conviction. As was well explicated by the Court of Appeal in **Joseph Maina Mwangi –Vs- Republic Criminal Appeal No. 73 of 1992** thus:

"An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence"

[36] Hence, contradictions and discrepancies are not uncommon in criminal prosecutions; and therefore, the question the Court must bear in mind is whether their sum total is serious enough as to create reasonable doubt on the guilt of the person accused; and, from a review of the entirety of the case presented before the lower court, I am satisfied that that is not the case herein. Indeed, in **Philip Nzaka Watu vs. R [2016] eKLR** it was the Court of Appeal expressed the view that:

"...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question

As pointed out hereinabove, in the circumstances hereof, I am not convinced that the inconsistencies cited are pertinent or that they could have affected the outcome of the trial before the lower court.

[37] In the same vein, there is no truth in the Appellant's contention that his defence was not taken into account, for at page 53 of the Record of Appeal, it is manifest that the trial court did weigh the totality of the evidence including the Appellant's defence before arriving at the conclusion that it arrived at. I did not understand her comment about the evidence of **DW2** to mean that she was not a competent witness. It was all about credibility, which the Trial Magistrate was at liberty to comment on. Her conclusion therefrom was that the defence was an afterthought. She cannot be faulted for so finding. Similarly, I am satisfied that failure to call one of the witnesses and the cited contradictions were not of such a nature as to detract from the Prosecution evidence.

[38] In the result therefore, I am satisfied that the conviction of the Appellant on the main count of Defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act** as well as Count II for Child Pornography was based on sound evidence, and that the sentence imposed by the lower court in respect of those two counts is not only lawful but was also deserved. I would accordingly confirm the Appellant's conviction and sentence and dismiss his appeal in its entirety, which I hereby do.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF NOVEMBER, 2018

OLGA SEWE

JUDGE