



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CRIMINAL APPEAL NO 68 OF 2019**

**STEPHEN MUNGAI MAINA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal from the judgment and sentence of Honourable G Shikwe - RM dated 11<sup>th</sup> October, 2015 in Kithimani Principal Magistrate's SO Criminal Case No. 66 of 2015)**

**BETWEEN**

**REPUBLIC.....COMPLAINANT**

**VERSUS**

**STEPHEN MUNGAI MAINA.....ACCUSED**

**JUDGEMENT**

1. The appellant, **Stephen Mungai Maina**, was charged in the **Kithimani Principal Magistrate's SO Criminal Case No. 66 of 2015** with the offence of Attempted Defilement Contrary to Section 9(1) and (2) of the **Sexual Offences Act. No. 3 of 2006**. The particulars were that the appellant, on the 4<sup>th</sup> day of November, 2015 in Yatta Subcounty within Machakos County, intentionally attempted to cause his penis to penetrate the vagina of **AWM**, a child aged seven (7) years. The Appellant pleaded not guilty

2. In support of its case the prosecution called 4 witnesses.

3. After voir dire examination, the complainant who testified as PW1, stated that she knew the Appellant. On the material day she was from school when the appellant asked her to prepare water for him when they met on the road. She proceeded with him home and found no one there. Once they got into the house, the appellant undressed her and did bad manners to her. According to her, the appellant placed her on the bed, opened his trouser zip, lay on top of her and touched her with his private parts. When the complainant's father arrived, the appellant ran away after which she narrated to her father what had transpired. She was then taken to Matuu Hospital where a P3 form was filled after which they proceeded to Mamba Police Post. Later the Appellant was arrested. According to her, when her father found them, he slapped the appellant.

4. PW2, **NMM**, the complainant's mother testified that the complainant was born on 27<sup>th</sup> October, 2008 and identified her health card which she exhibited. It was her evidence that on 14<sup>th</sup> November, 2015, she was in Matuu when she was called and informed that the complainant had been defiled. When she examined the complainant's private parts she found that she had whitish discharge. She then took her to Matuu Police and to the Hospital. It was her evidence that at the time no one was at home.

5. PW3, **Peter Mwaniki**, a clinical officer from Matuu examined the complainant who was 7 years with a history of defilement. Upon examination, he found that her labia was tender though her hymen was intact. The HIV lab test turned out negative. He concluded that the complainant was defiled, signed the P3 form which he exhibited.

6. PW4, **PC Adalla Kongani**, the investigating officer testified that on 13<sup>th</sup> November, 2015 at around 3pm he was on duty when he was called by the OCS and informed to accompany the driver to Mamba Police Post to collect a prisoner. There they found the appellant having

been apprehended on allegation of attempted defilement. They took him to Yatta Police Station. According to him he was handed over the statement by **Sergeant Kioko** after which he charged the appellant.

7. Upon being placed on his defence, the appellant chose to make an unsworn statement in which he denied any knowledge of the allegations made against him. According to him, the whole episode was a frame up since he lacked the strength to defile anyone since he could not even climb a bed without difficulty. He disclosed that there was a dispute between them and noted that the complainant's father never testified.

8. In his judgement, the learned trial magistrate relied on **Francis Mutuku Nzangi vs. Republic Nbi Court of Appeal Criminal Appeal No. 358 of 2010 [2013] eKLR** and **Pius Arap Maina vs. Republic Eld High Court Criminal Appeal No. 247 of 2011 [2013] eKLR** and held that the intention to penetrate is a key ingredient of the offence. Based on the evidence of the Complainant which he found to have been corroborated by the testimony of PW3 who made a finding of defilement, he found that the appellant did not offer anything by way of credible defence despite being identified by the complainant. He found that the appellant did not pursue his line of defence during his cross-examination of PW2. In the result he found that the prosecution had proved its case to the required standards and convicted him accordingly. On sentencing he found that the maximum sentence prescribed was ten years and proceeded to sentence him to serve the said period.

9. It was submitted by the appellant that had the learned trial magistrate subjected the evidence to an exhaustive examination and scrutiny, he would have found that there were doubts and gaps in the prosecution case. It was his submission that the medical evidence did not prove the ingredients of defilement hence did not prove the offence of attempted defilement. It was contended that since there was no investigation carried out the case suffered from malignant malady of proof.

10. It was submitted that from the medical evidence, the charge was at variance with the evidence hence the conviction was unsafe.

11. It was further submitted that there was non-compliance with section 169 of the ***Criminal Procedure Code*** in that the learned trial magistrate did not identify the law relating to the issue in his judgement and did not provide the reasons for his conviction. According to the appellant the evidence of the complainant tended to show that the offence committed was indecent act rather than attempted defilement.

12. It was further submitted that the evidence was overly inconsistent, uncorroborated and therefore inconclusive to sustain a conviction.

13. The appellant also took issue with the failure to call the complainant's father as a witness by the prosecution. In the result there was no eye witness hence the evidence against the appellant was circumstantial but did not meet the threshold for conviction based on circumstantial evidence.

14. The appellant complained that the learned trial magistrate disregarded his defence and took issue with the manner in which the voir dire examination was conducted. It was further contended that the trial was not conducted fairly as the trial court did not inquire as to whether the appellant was furnished with the statements. It was further submitted that there was discrepancy between the evidence and the charge sheet as regards the date when the offence was committed.

15. On behalf of the Respondent, **Mr Ngetich**, learned prosecution counsel, submitted that the court must satisfy itself of the chain of events and the statements thereto must be such as to rule out a reasonable likelihood of the innocence of the accused. The court has to judge the total cumulative effects of all facts before it which reinforce the conclusion of the guilt of the accused person and should combine effect of the evidence adduced be conclusive in establishing the guilt of the accused the conviction will be justified. He relied on the case of **Republic vs. Silas Magongo Onzere alias Fredrick Namema (2017) e KLR**.

16. It was submitted that since the appellant was charged with the offence of attempted defilement contrary to section 9(1)(2) of the ***Sexual Offences Act***, in an offence of an attempted defilement the prosecution must prove the ingredients of defilement (age, positive identification) except penetration and the steps taken by the Appellant to execute the defilement which did not succeed. As regards the age of the complainant, it was submitted that the prosecution must prove that the complainant was a minor at the time the offence was committed since age is a prerequisite ingredient for the offence herein.

17. It was however submitted that in her testimony, PW1 stated that she was 7 years of age and a student [Particulars withheld] primary school in class 2. Further, the prosecution through PW2 produced a birth card of the complainant as evidence. According to the birth card, the complainant was born on 27/10/2008 hence the birth card placed the complainant at the age of 7 years at the time of the offence.

18. As for the issue of identification of the appellant, it was submitted that the minor positively identified the appellant by his name, **Stephen Mungai Maina**, as the person who told her to take water for him. They went together home and when inside the house the appellant undressed her and attempted to defile her.

19. Regarding the issue of attempt, the Respondent relied on Section 388 of the ***Penal Code*** which defines attempt and submitted based on **Mwandikwa Mutisya vs. R (1959) EA 18** and **Mussa Said vs. R (1962) EA 454** that in accordance with the definition of attempt in section 388 of the ***Penal Code***, the test for attempt requires a demonstration of an intention to commit the offence and overt act towards the commission of the offence which is sufficiently proximate or immediately connected to the attempted offence. Reliance was placed on the decision of **Spry, J.** (as he then was) in **Mussa s/o Said vs. R (1962) EA 454, 455** and the decision of **Madan Ag. CJ.** (as he then was) in **Keteta v. R, (1972) EA 532, 534**.

20. It was further submitted that since the appellant herein was charged with the offence of attempted defilement, the prosecution need only to establish the ingredients of defilement except penetration.

21. As regards compliance with Section 169 of the ***Criminal Procedure Code***, and the Respondent however relied on **Hawaga Joseph Ansanga Ondiasa vs. R Criminal Appeal No. 84 of 2001** and **Samwiri Seyange vs. R [1953] 20 EACA** and submitted that the trial court complied with the provisions of section 169 of the ***Criminal Procedure Code*** in its judgement and that the appellant's conviction is therefore

not invalidated on that ground.

22. With respect to the issue of the uncorroborated evidence of the minor, the Respondent relied on Section 124 of the *Evidence Act* and submitted that though the said provision requires that evidence alleged by a victim of the offence must be corroborated by other material evidence, the section was amended to include a proviso and the Respondent relied on the decision of the Court of Appeal in **Mohamed vs. Republic [2006] 2 KLR 138**. It was submitted that in the present case, the learned trial Magistrate rightfully relied on the proviso under Section 124 of the *Evidence Act*.

23. According to the Respondent, failure by the prosecution to call the father to the complainant, who is said to have witnessed the offence being committed was not fatal to their case. While it is the duty of the prosecution to adduce evidence beyond reasonable doubt, once the prosecution has satisfactorily discharged the burden of proving the main element of a charge as the trial court correctly held that the prosecution had proved the charge facing the appellant beyond reasonable doubt, then there is no need to as many witnesses as possible. This submission was based on Section 143 of the *Evidence Act* and the case of **Keter vs. Republic 2007 EA 135** and **JWA vs. Republic [2014] eKLR** and submitted that the evidence of PW2 (complainant) need not to be corroborated so long as the court was convinced that PW2 was a truthful and consistent witness.

24. It was further submitted that though the Appellant's defense was that the charge is a frame up because of a dispute between themselves, he merely denied the charges in his unsworn testimony.

25. The Respondent therefore contended that the prosecution proved all the ingredients of the offence beyond any reasonable doubt. Further, the defense of the accused person was hopeless denial and could not dispel the overwhelming evidence tendered by the prosecution. In its view, the conviction was safe and that this appeal does not raise any basis to disturb the conviction which should be upheld and sentence confirmed.

### **Determination**

26. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.

27. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”**

28. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows:-

**“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”**

29. It was therefore appreciated by the Court of Appeal in **Kiilu & Another vs. Republic [2005]1 KLR 174**, that:

**1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.**

**2. 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; 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.**

30. The appellant contended that the *voir dire* examination was not properly conducted. Whereas the *voir dire* examination was rather brief, the complainant in her examination confirmed that she was a church going pupil who understood that she was in court and had to speak the truth. She knew that those who lie go to hell.

31. The Court of Appeal gave its guidance on the issue of *voir dire* examination in **Johnson Muiruri vs. Republic [1983] KLR 447** at pages

“We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses.

In *Peter Kariga Kiune, Criminal Appeal No 77 of 1982 (unreported)* we said:

“Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80).

It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions.”

A similar opinion was expressed by the Court of Appeal in England recently in *Regina v Campbell* (Times, December 10, 1982):

“If the girl (ten years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.

Dealing with the question of the girl taking the oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of the nature and solemnity of an oath, the Court of Appeal in *R v Lal Khan* [1981] 73 Cr App R 190 made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen...

There Lord Justice Bridge said:

‘The important consideration... when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.’

There were therefore two aspects when considering whether a child should properly be sworn: first that the child had sufficient appreciation of the particular nature of the case and, second a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day-to-day life.”

It is fortunate that we can reinforce some of the foregoing views by the decisions of our own former perceptive Court of Appeal. As long ago as in *Oloo s/o Gai v R* [1960] EA 86 the Court of Appeal said that it would have been better for the trial judge to record in terms that he had satisfied himself that the child understood the nature of an oath; since the judge had failed to direct himself or the assessors on the danger of relying on the uncorroborated evidence of a child of tender years and had also overlooked significant items of evidence bearing on the reliability of her evidence the conviction could not stand.

In *Gabriel s/o Maholi v R* [1960] EA p 159, again our former Court of Appeal said that even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.

In *Kibangeny Arap Kolil* [1959] EA 92 the Court of Appeal held (i) that since the evidence of the two boys (12-14 years and 9-10 years) was of so vital a nature the court could not say that the trial judge’s failure to comply with the requirements of section 19(1) of the Oaths and Statutory Declarations Ordinance was one which could have occasioned no miscarriage of justice; (ii) the failure of the trial judge to warn himself or the assessors of the danger of convicting upon the evidence of the two boys in view of the absence of corroboration and any admission by the appellant was an additional ground for allowing the appeal.”

32. In *Maripett Loonkomok vs. Republic* [2016] eKLR the Court of Appeal held that:

“Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth...The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient

intelligence or even his or her ability to understand the duty of speaking the truth. *Voir dire*, a latin phrase (*verum dicere*) for saying “what is true”, “what is objectively accurate or honest” has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as “a trial within a trial”, a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. “Voir Dire definition” *Duhaime’s Legal Dictionary*. But the origin of the rule on *voir dire* examination of a child witness as we know it today was first applied in the ancient yet landmark English case of *R v Braisier* (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that; “.. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath... for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence” (our emphasis)

Although this decision, through section 19 of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children’s testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child’s answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child’s answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v Msa Criminal Appeal No.373 of 2006.”

33. In this case it is clear that the complainant understood that she was in a court of law where she was required to say the truth and knew the consequences of not doing so. Considering the evidence in its totality, I am not satisfied that the *bred voir dire* proceedings vitiated the finding made by the learned trial magistrate.

34. The Appellant herein was charged under Section 9(1) and (2) of the *Sexual Offences Act. No. 3 of 2006*. The said provision provides as follows:

*(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.*

*(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.*

35. I agree with **Mr Ngetich** that since the appellant was charged with the offence of attempted defilement contrary to section 9(1)(2) of the *Sexual Offences Act*, the prosecution must prove the ingredients of defilement (age, positive identification) except penetration and the steps taken by the Appellant to execute the defilement which did not succeed.

36. Section 388 of the *Penal Code* defines attempt in the following terms:

*(1) Where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfilment manifests his intentions by some overt act but does not fulfil his intentions to such an extent as to commit the offence, he is deemed to attempt to commit an offence.*

*(2) It is immaterial except so far as regards punishment whether the offender does all that of necessary on his part for completing the commission of the offence or whether the complete is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention.*

*(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.*

37. The offence of attempted murder with which the appellant was charged fall within the category of offences known as inchoate offences. These type of offences were dealt with by **Mativo, J** extensively in the case of *Moses Kabue Karuoya vs. Republic [2016] eKLR* where the learned Judge expressed himself as follows:

“In the case of *Bernard K. Chege vs Republic* this court had the occasion to address its mind and to define in detail ingredients of incomplete offences also described as *inchoate* offences. *Inchoate* crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of *inchoate* crimes are criminal conspiracy, criminal solicitation, and *attempt to commit a crime*, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime. An *inchoate* offense requires that the accused have the specific intent to commit the underlying crime. An *inchoate* crime may be found when the substantive crime failed due to arrest, impossibility, or an accident preventing the crime from taking place. Strictly *inchoate crimes* are a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves. It can thus be appreciated that it could extend the criminal law too far to reach behind those acts and criminalize behaviour that precedes those acts. Every *inchoate* crime or offense must have the mens rea of intent or of recklessness, but most typically intent. Specific intent may be inferred from circumstances. It may be proven by the doctrine of “dangerous proximity”, and the presence of a “substantial step in a course of conduct”. The dividing line between legal and illegal conduct is whether there is a “substantial step” towards committing a *specific* crime. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt or to prepare to

commit the offence. The essential ingredients of an *attempt to commit an offence* have been laid down in the following words:-

“In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An ‘attempt’ is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded”

Thus, for there to be an attempt to commit an offence by a person, that person must:-

a. *Intend to commit the offence;*

b. *Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;*

c. *Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,*

But in fact he does not commit the whole offence. For the offence of or attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond reasonable doubt.

The act relied upon as constituting the attempt to commit an offence must be an act immediately, not merely remotely, connected with the contemplated offence. This was enunciated in the case of *Williams, Ex parte The Minister for Justice and A-G*. The act must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is necessary that the accused should have done his best or taken the last steps towards the intended offence. There can be an attempt to commit an offence where the failure to complete the commission of it is due to ineptitude, inefficiency or insufficient means on the part of the accused person. In fact, the fact that a person, having done something which amounts to an attempt, then voluntarily desists from continuing the attempt, does not relieve him from criminal responsibility for the attempt which he made before desisting. For the prosecution to prove the offence of preparation to commit a felony, they must establish that the accused had the intention to commit the offence. It must be shown that the appellant had put in motion his intention by making preparations to commit the offence. The prosecution must establish that the appellant made the attempt to put into effect his intention. The question that calls for determination is whether or not the conduct of the appellant constituted an overt act sufficiently proximate to constitute preparation to commit an offence. Spry J (as he then was) put it more authoritatively when he stated:-

“The principles of law involved are very simple but it is their application that is difficult.....The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with another reasonable explanation. Secondly, if the intention is established, the act itself must not be too remote from the alleged intended offence”

Criminal law seeks to restore order, decency and social equilibrium in society. It is aimed at curtailing or reducing to the minimum grave incidents of anti-social conduct. Punishment of an offender lies at the root of criminal law. Where an offence is committed, the offender or wrong-doers is punished, however, the criminal law also seeks to punish those who intend to commit offences but could not successfully do so. That is, they merely attempted to commit an offence. The fact remains that they intended to commit an act which they know is unlawful and prohibited, but the completed offence was never accomplished. The offence remains *inchoate* because the accused could not accomplish his desires, or that the end result of his acts or omission is not what he envisaged. He has all the same, attempted to commit an offence. It is a criminal attempt and therefore an offence. Will an accused person be allowed to go scot-free because he could not finish his plans" No. He would be made to face some form of punishment even though he never completed the offence. In my view, any legal system would be defective if criminal liability only arose when substantive offences have actually been committed.”

**Mrima, J** similarly expressed himself as regards Section 388 of the *Penal Code* in **Brian Kennedy Odhiambo vs. Republic [2019] eKLR** as follows:

“The above section brings out the two main ingredients of an attempted offence; the *mens rea* which constitutes the intention and the *actus reus* which constitutes the overt act towards the execution of the intention. In the case of **R vs. Whybrow (1951) 35 CR APP REP, 141**, Lord Goddard C.J., had the following to say on *mens rea* when the court was albeit dealing with the offence of attempted murder: -

..... *But if the charge is one of attempted murder, the intent becomes the principal ingredients of the crime.*

Eminent learned authors in criminal law, J. C. Smith and Brian Hogan in their book *Criminal Law*, Butterworths, 1998 (6<sup>th</sup> Edition) at page 288 while discussing the aspect of *mens rea* in an attempted murder had this to say: -

.... *Nothing less than an intention to kill will do.*

And in **Cheruiyot v Republic (1976 - 1985) EA 47 Madan, JA**, as he then was, while approving the holding in **R v. Gwempazi s/o Mukhonzo (1943) 10 EACA 101**, **R v. Luseru Wandera (1948) EACA 105** and **Mustafa Daga s/o Andu vs. R (1950) EACA**

140, stated as follows on *mens rea* in an attempted murder charge: -

*In order to constitute an offence contrary to Section 220, it must be shown that the accused had a positive intention unlawfully to cause death.... The essence of the offence is the intention to murder as it is presented by the prosecution.*

Recently the Court of Appeal had yet another occasion to look at the aspect of the *actus reus* in attempted offences. In the case of Abdi Ali Bare vs. Republic (2015) eKLR learned Honourable Justices Githinji, Mwilu and M'Inoti had the following to say as they considered the offence of attempted murder: -

*..... The more challenging question in a charge of attempted murder is the *actus reus* of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence. In the work quoted above by Smith & Hogan, the authors give the following scenario at page 291 to illustrate the distinction:*

*D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position. loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder....*

*In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder. In CROSS & JOINES' INTRODUCTION TO CRIMINAL LAW, Butterworths, 8<sup>th</sup> Edition (1976), P. Asterley Jones and R. I. E. Card state as follows at page 354:*

*..[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted....*

*The learned authors add that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit murder or whether the accused had done more than mere preparatory acts."*

39. As was held in Mwandikwa Mutisya vs. R (1959) EA 18 and Mussa Said vs. R (1962) EA 454, in accordance with the definition of attempt in section 388 of the *Penal Code*, the test for attempt requires a demonstration of an intention to commit the offence and overt act towards the commission of the offence which is sufficiently proximate or immediately connected to the attempted offence. According to Spry, J. (as he then was) in Mussa s/o Said vs. R (1962) EA 454, 455:

*"The principles of law involved are very simple but it is their application that is difficult. If the Appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. (Penal Code, s. 380). The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence.*

*The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that the act must be of such a character as to be incompatible with any other reasonable explanation. Secondly, even if the intention is established, the act itself must not be too remote from the alleged intended offence."*

40. On his part Madan Ag. CJ. (as he then was) in Keteta v. R. (1972) EA 532, 534, opined that:

*"A mere intention to commit an offence which is in fact not committed cannot constitute an attempt to commit it. There must also be an overt act which is immediately and remotely connected with the offence intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do."*

41. From the foregone, it is easily deducible that when a court is faced with any charge on an attempted nature, care must be taken to ensure that the attempt as opposed to mere acts of preparation, is proved. However strong the evidence is, if it only relates to actions in preparation to commit a certain crime, that evidence cannot justify a conviction on an attempted charge.

42. For clarity purposes, evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise, the intention to commit the crime must also be proved.

43. Mativo, J in Moses Kabue Karuoya vs. Republic [2016] eKLR held that:

*"At the risk of repeating the position laid down in the above cited authorities, I reiterate that the key ingredients of the offence before me can be summarized as follows, namely, (a) Intend to commit the offence; From the evidence tendered, I*

find that intent was established. The second requirement is the accused must (b) Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve. Evidence tendered is that the appellant knocked her down, lied on her, lowered her panty & forcefully opened her legs. Lastly the accused must (c) Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence. It is said the appellant forced the complainant down, lied on her, lowered her under wear to knee level, forced her thighs open and ejaculated after which he felt relieved and let her go. These were overt acts which viewed in the circumstances show a clear intention to commit the offence, but the appellant fell short of completing the offence owing to the circumstances explained. Justice Asike-Makhandia (as he then was) [in *Abraham Otienovs Republic, High Court Criminal Appeal no. 53 of 2009, Kisii*] put it more succinctly when he said:-

**“For an offence of attempted rape to be deemed to have been committed under the section, the prosecution must prove that the culprit acted in such a manner that there was no doubt at all as to what his intention was. The intention must be to rape. It must be shown that he was about to rape the victim but was stopped in tracks and or in the nick of time. The intention to rape must be manifest. Such intention can be manifested for instance by word of mouth or conduct of the culprit. If the culprit proclaims his intention to rape and directs his efforts towards that goal for instance, by holding the victim or pushing her to the ground, undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but for one reason or another something happens which compels him to stop, again that would be good evidence of attempted rape.”**

44. In this case, the complainant’s evidence was that on the material day she was from school and on the road she met the appellant who asked her to prepare water for him. She proceeded with him home and found no one there. Once they got into the house, the appellant undressed her placed her on the bed, opened his trouser zip, lay on top of her and touched her with his private parts. However, the appellant was interrupted by the sudden arrival of the complainant’s father who slapped the appellant and the appellant ran away after which she narrated to her father what had transpired.

45. It is clear from the narrated circumstances that the appellant had formed the intention of defiling the complainant. From the evidence tendered, I find that intent was established. He begun to put his intention to commit the offence into execution by undressing her and placing her on the bed. He then did the overt act of opening his trouser zip, laying on top of her and touched her with his private parts. These were overt acts which viewed in the circumstances show a clear intention to commit the offence, though the appellant fell short of completing the offence owing to the sudden but unexpected appearance of the complainant’s father. These circumstances were similar to those which were before **Makhandia, J** (as he then was) in ***Abraham Otieno vs. Republic, Kisii High Court Criminal Appeal No. 53 of 2009***, where he found that the culprit proclaims his intention to rape and directs his efforts towards that goal for instance, by holding the victim or pushing her to the ground, undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but for one reason or another something happens which compels him to stop, again that would be good evidence of attempted. In this case the offence was that of attempted defilement.

46. In this case there was sufficient evidence that the complainant was a child aged 7 years. She said she knew the appellant and this piece of evidence was not challenged by the appellant. The appellant has however taken issue with the fact that her evidence was never corroborated. On the issue of whether the evidence of a minor requires corroboration, the law is quite clear: it does. It is not in doubt that the evidence of a minor requires corroboration and in this regard the Court of Appeal in ***Bernard Kebiba vs. Republic [2000] eKLR*** stated that:

**“The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result.”**

47. Similarly, in ***Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR*** the Court of Appeal was of the opinion that:

**“The relevant law in Kenya is succinctly set out in *Chila vs. The Republic (1967) EA 722* at page 723:**

**‘The law of East Africa on corroboration in sexual cases is as follows: the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that here evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.’**

The decision was applied in ***Margaret v the Republic (1967) Kenya LR 267***. In view of Consolata’s evidence, it was necessary for sexual intercourse to be proved by establishing penetration: **Halisbury’s Statutes of England, Third Edition, Volume 8 page 440 para 44**. Be that as it may, the trial magistrate did not warn himself as we have already held. That was a grave misdirection. In the absence of such a warning, the convictions for rape are not for sustaining unless we are satisfied that Consolata’s evidence is true. We are not so satisfied and so the convictions cannot stand: ***Rv Cherap arap Kinei & Another (1936), 3 EACA 124.***”

48. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can,

without corroboration, found a conviction. Section 124 of the *Evidence Act* makes this quite clear:

***“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

***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.*** [Emphasis added]

49. Dealing with a similar issue in the case of **Mohamed vs. R, (2008) 1 KLR G&F 1175**, this Court held that:

***“It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that he child is truthful.”***

50. The Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR** held that:

***“On the first issue, the appellant took issue with lack of corroboration of the complainants’ evidence, which he said ran afoul of section 124 of the Evidence Act...The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful...It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)...In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:***

***“...The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4.”***

***The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail.”***

51. Therefore, what is required of the trial court is to be satisfied that the victim is telling the truth. It was therefore held in **Omuroni vs. Republic (2002) 2 EA 508** that:

***“Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make favourable or unfavourable impression about the credibility of a particular witness.”***

52. This decision was relied upon by Warsame, J (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR** when he stated that:

***“It is required, which is of paramount of importance, that a trial court must indicate or point out instances of demeanour which he noted and which he relies upon as a basis of accepting the evidence of a particular witness. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how he thinks that particular witness is a witness of truth. In this case the trial court did not pay any regard to this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In the absence of any basis for establishing whether the three witnesses were witnesses of truth, the trial court was wrong in its decision.”***

53. In this case the learned trial magistrate set out the law as stated in section 124 of the *Evidence Act* as well as the authorities. He however found that the evidence of the complainant was medically corroborated by the testimony of PW3 the Clinical Officer who examined her and made a finding of defilement. It is therefore clear that the learned trial magistrate did not base his findings on the truthfulness of the complainant but on the fact that there was corroboration of her evidence by the evidence of PW3.

54. PW3’s evidence was that upon examining the complainant, he found that her labia was tender though her hymen was intact. The HIV lab test turned out negative. He concluded that the complainant was defiled, signed the P3 form which he exhibited. It is clear that from his findings, defilement as defined by law was not proved because his evidence did not show that there was penetration. That seemed to have informed the decision to charge the appellant with attempted defilement rather than defilement. The question however is whether the evidence of PW3 met the threshold of corroboration. What then is corroboration? The meaning of corroboration as defined or stated in the

Nigerian case of Igbine vs. The State {1997} 9 NWLR (Pt.519) 101 (a), 108 is thus: -

**"Corroboration means confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses".**

55. In Mukungu vs. Republic [2002] 2 EA 482, the Court of Appeal citing Mutonyi vs. Republic [1982] KLR 2003, held that:

**"An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See Republic vs. Manilal Ishwerlal Purohit [1942] 9 EACA 58, 61."**

56. In R vs. Kilbourne [1973] 2 WLR 254, 267, Lord Hailsham of St Marylebone LC stated:

**"Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroborated in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed."**

57. In Khalif Haret vs. The Republic [1979] KLR 308, Trevelyan and Hancox, JJ pronounced themselves as hereunder:

**"What then, is corroboration? As was put succinctly in R vs. Kilbourne (at page 263) it means "no more than evidence tending to confirm other evidence". It is not, as the judge-advocate correctly stated, confirmation of everything, so that it amounts to a duplication of the evidence needing corroboration."**

58. It is therefore clear that corroborative evidence or material ought to confirm, ratify, verify or validate the existing evidence and must emanate from another independent witness or witnesses. It must affect the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

59. In this case there was clearly no material corroborating the Complainant's evidence that it was the Appellant who defiled her. The one person whose evidence could have corroborated this piece of evidence would have been the complainant's father who, according to the complainant, found the appellant attempting to defile the complainant, slapped the appellant before the appellant ran away. He was however not called to testify and no reasons were advanced why he was not so called.

60. As regards the failure to call the alleged vital witnesses, section 143 of the *Evidence Act* provides that:

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

61. I agree that the holding in the case of Paul Kanja Gitari vs. Republic [2016] eKLR restates the general legal position when the court of appeal expressed states that:

**"the state of the evidence tendered with all of its inconsistencies means that the appellant's complaint that some vital witnesses were not called is also not idle. It is of course trite that there is not number of witnesses required for the proof of a fact. See Section 143 of the Evidence Act. However, it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the court to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case. See BUKENYA & OTHERS VS> UGANDA [1972] EA 549. Given the totality of the evidence and the specific circumstances of this case, we are not satisfied that evidence was tendered that proved the case against the appellant. His conviction was unsafe and this entitles us to interfere."**

62. However, that decision states that such inference is only to be made where the prosecution calls evidence that is barely adequate.

63. I am guided by the case of Mwangi vs. R [1984] KLR 595 where this Court stated:

**"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."**

64. The prosecution is not duty bound to call all persons involved in the transaction and his failure to call them is not necessarily fatal unless the evidence adduced by him is barely sufficient to sustain the charge. In Keter vs. Republic [2007] 1EA135 the court was categorical that:-

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

65. The Court of Appeal sitting in Mombasa in Sahali Omar vs. Republic [2017] eKLR held that:

**"The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto**

adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. *This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. Keter v Republic [2007] 1 EA 135).* In this case, the testimony and evidence adduced by the five prosecution witnesses was sufficient to prove that the complainants had been defiled by the appellant. As such, the situation hardly called for the drawing of an adverse inference with regard to the ‘missing’ witnesses.”

66. I reiterate what the Court of Appeal stated in Benjamin Mbugua Gitau vs. Republic [2011] eKLR that:

**“It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys.”**

67. In this case, there is no evidence that corroborated the complainant’s evidence that the appellant attempted to defile her. While her evidence that the appellant was known to her was not challenged, in this case the prosecution had the opportunity to present evidence from her father supporting her evidence that the father found the appellant preparing to defile her, that crucial evidence was never adduced. The only way in which the appellant’s conviction could have been sustained was if the learned trial magistrate had made a definite finding that he believed the complainant. However, that finding was not positively made.

68. One other aspect that has caused me concern is the finding by the learned trial magistrate that the appellant did not offer a credible defence. In the absence of satisfactory evidence coming from the prosecution, the appellant’s evidence could only be taken on its face value and based thereon, fault if any could only be found based on that evidence taken as the truth. As was held in Sekitoliko vs. Uganda (1967) EA 53:

**“The prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is depended upon the strength of the prosecution case and not the weakness of the defence case.”**

69. In taking the approach he did, the learned trial magistrate seems to have shifted the burden of proof to the appellant. It is trite that even where the accused decides not to adduce any evidence, the burden is not lessened by that mere fact. This was the position of the Court of Appeal in the case of Dorcas Jemutai Sang vs. Republic [2018] eKLR where was faced with a similar case where the complaint by the Appellant was that the trial court and first appellate court had placed the burden of proof upon her to prove her innocence, the court stated as follows:

**“In the present case we are satisfied that both the courts below appeared to or shifted the burden of proving innocence on the appellant. This we say in the light of the quotations we have reproduced above where the learned trial magistrate stated that the appellant:**

***“...did not call witness to support her defence,”***

and the learned Judge remarked that:

***“...it was a significant fact that the appellant did not call ...any witness at the trial.”***

By these sentiments, both the courts below appeared to say that the appellant was obliged to call witnesses to prove her innocence. As stated above, that was a wrong approach regarding the burden of proof in a criminal prosecution and therefore we allow the appeal on this ground.”

70. The appellant also took issue with the non-compliance with section 169 of the *Criminal Procedure Code* in that the learned trial magistrate did not identify the law relating to the issue in his judgement and did not provide the reasons for his conviction. The said Section provides that:

*(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.*

*(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 an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.*

71. That section has been the subject of a number of judicial pronouncements. The Court of Appeal in Patrick Kihara Njoroge vs. R Nakuru Court of Appeal Criminal Appeal No. 27 of 2001 [2002] 2 KLR 200 expressed itself as follows:

“Before we conclude this judgment, we wish to call to the learned Judge’s attention, the contents of a judgment. Section 169(1) of the Criminal Procedure Code (Cap.75 Laws of Kenya) provides:-

*“169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it”.* (Underlining provided)

The learned Judge’s judgment clearly does not comply with the aforesaid provision. We wish to reiterate that trial courts should observe this provision scrupulously, otherwise, in an appropriate case an otherwise sound decision might be set aside.”

72. As was said by Goddard, LJ in Mahon vs. Osborne [1939] 1 All ER 535, 566:

“The most that can be required is that the judge, in addition to stating the law correctly, shall give a fair summary of the evidence and of the contentions of either side.”

73. In Charles Wanyonyi & Others vs. Republic Kisumu Criminal Appeal No. 134 of 2004 the Court of Appeal held that:

“Something needs to be said about the contents of the judgement of the learned trial Judge. It is to be observed that he carefully set out the evidence adduced by the prosecution and the defence of each appellant. Having done so it was expected that he would proceed to analyse and resolve the issues involved, giving reasons for his decision. This appears to have been omitted as the learned Judge merely relied on the evidence of PW1 and suddenly came to the conclusion that the appellants were guilty. We are not introducing any new issue here since this is what is provided for by section 169(1) of the Criminal Procedure Code (Cap. 75 Laws of Kenya)...Having set out what we considered salient points in the appeal and having noted that the learned Judge failed to give due consideration to matters relating to circumstantial evidence, identification of the appellants, contradictions in evidence by prosecution witnesses and the defence of alibi, we do not know what the final judgement by the learned Judge would have been had he applied his mind to them. We venture to state that had he taken all these matters into account, giving due consideration to each of the salient issues he would not have come to the same conclusion as he did...The curtain must come down on this appeal. The journey the appellants commenced in the trial Judge’s court on 14<sup>th</sup> May, 1998 has come to an end. In view of what we have said as regards the unattended and unresolved issues by the learned trial Judge and upon our own evaluation of the evidence on record we are of the considered view that it would be unsafe to uphold the appellants’ conviction on the two counts of murder. In the result, this appeal is allowed, convictions quashed and the sentences of death imposed on the appellants set aside. We further order that the appellants are to be set free forthwith unless otherwise lawfully held.”

74. The same Court in James Kamau Ndirangu vs. R. Nyeri Court of Appeal Criminal Appeal No. 72 of 1999 [2000] eKLR expressed itself as hereunder:

“It is a mandatory requirement of section 169(1) of the Criminal Procedure Code that every judgment shall (inter alia) contain the point or points for determination, the decision thereon and the reasons for the decision. See the case of R.V. PAULO LWEVOEA S/O MUPERE (1943) E.A.C.A. 63. The then Court of Appeal for Eastern Africa said:-

"With regard to the Judgment we should have liked a fuller judgment and we attract the attention of the learned Judge to section 168 of the Criminal Procedure Code."

(Ugandan Section 168 of the Criminal Procedure Code was equivalent to present Section 169 of our Criminal Procedure Code.)

We are not saying the first appellate court should rewrite the judgment. We are saying that the first appellate court ought to examine the grounds of appeal before rejecting them. Such examination need not be lengthy but ought to set out the finding(s) on the grounds of appeal in a manner showing that it has considered them adequately. Even if an appellant does not wish to be present at the hearing of his appeal the court is bound to properly consider his grounds of appeal and if the grounds be frivolous the court ought to say so. The Principal State Counsel Mr. Oluoch conceded, and in our view rightly so, that the judgment of the superior court was sketchy. He added that it had caused a lot of disquiet. He urged, however, that there was enough material before us, to decide the appeal. That may be so but this Court on a second appeal cannot interfere with a sentence. It would therefore be proper and prudent, in our view, to remit the appeal to the superior court for a rehearing by another Judge who should consider the grounds of appeal as well as the severity of the sentence. We note that the records of convictions, if any, in the alleged 31 cases were not produced before that Court to check if those were relevant. For this reason it is not necessary for us to consider the appellant’s other grounds of appeal. We therefore allow this appeal. As the appellant wishes to be present at the re-hearing, the prison authorities must facilitate his attendance in Court for the rehearing of the appeal. These are our orders.”

75. I have considered the judgement holistically and it is my view and I find that the learned trial magistrate’s judgement cannot be faulted for failing to comply with Section 169 of the *Criminal Procedure Code*.

76. However, having arrived at the conclusion that section 124 of the *Evidence Act* was not complied with as well as the impression created in the judgement that the burden of proof was shifted to the appellant, I find merit in this appeal which I hereby allow. I set aside the

appellant's conviction, quash the sentence and direct that he be at liberty forthwith unless otherwise lawfully held.

77. It is so ordered.

78. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic.

**Judgement read, signed and delivered in open court at Machakos this 12<sup>th</sup> day of August, 2020.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Ngetich for the Respondent via Skype**

**Appellant via Skype**

**CA Geoffrey**