REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 118 OF 2019

CALISTUS OKUMU MUKHEBI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable C C Oluoch - CM dated 1st November, 2019 in Mavoko Chief Magistrate's SO Criminal Case No. 21 of 2018)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

CALISTUS OKUMU MUKHEBI.....ACCUSED

JUDGEMENT

1. The appellant, **Calistus Okumu Mukhebi**, was charged in the **Mavoko Chief Magistrate's SO Criminal Case No. 21 of 2018** with the offence of a Child Contrary to Section 8(1) and (3) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that the appellant, on the 13th day of September, 2018 at Syokimau Area in Mlolongo, Athi River Subcounty within Machakos County, intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of **GNK** a child aged 12 years.

2. In support of its case the prosecution called 9 witnesses.

3. After *voir dire* examination, the complainant who testified as PW1, stated that she was 12 years old. On 13th September, 2018, she was outside their house with her cousin, J, who testified as PW4, having gone to switch on the generator, when she was approached by the Appellant, who was a watchman at the residence who told her that he loved her very much and requested her to accompany him to Mlolongo for a walk where he would buy her a very big soda but she turned down the offer. By that time, they were standing near the generator. The Complainant then proceeded to a peep-in hole at the gate to check if her parents were returning because she started to worry. The appellant however followed her to the watch-guard's room at the gate, pushed her down, locked the door with a padlock and took off his clothes. He then undressed her while touching her breast and tried to put his penis in her vagina but the Complainant put my legs together. The Appellant however parted her legs and pushed her down on the floor and pinned her down with his hands. The Complainant's attempts to push the Appellant away were unsuccessful and after removing his penis, the Appellant inserted his penis into her vagina.

4. After doing so, the Appellant told the Complainant to get dressed, unlocked the door and told her to meet him there at midnight. However, PW5 who was working at an unfinished construction site, appeared, went to the store and approached the Appellant who told the Complainant that they would be in trouble and told her stay in the room while the Appellant went to talk to PW5 who had a flash light. When PW5 saw the Complainant, he asked her what she was doing in the watchman's room and the Complainant informed him that she was peeping to see if her parents were around, and this gave her an opportunity to get out, bade good night to PW5 and left without disclosing to him what had happened to her as she was scared. She then returned to the house to sleep.

5. On 14th September, 2018, the Complainant informed PW4 what had transpired and PW4 called the Appellant in the presence of PW5 but the Appellant denied knowledge of those allegations. However, when the Appellant followed PW4 and tried to apologize, PW4 slammed the door on him and PW4 told the Complainant to disclose the incident to her parents. At 7pm when her parents returned, the Complainant

informed them about the incident and her mother, PW1, called her uncle after which the matter was reported to the police and arrested the Appellant. And the Complainant accompanied them to report. After that the Complainant was referred to Nairobi Women Hospital where she was treated. According to the Complainant, there was a flattened cardboard box and a blanket on the floor. It was her evidence that she felt pain when the Appellant inserted his penis into her vagina though she did not scream.

6. In cross-examination, the Complainant explained that she had followed her cousin, PW4, who was 19 years old, when the latter went to switch on the generator about 15 metres from the main house. According to her, the watchman's house is close to the generator room which room was not closed. She stated that nobody else gets into where the watchman sits and that she was not allowed by her parents to go there, but she admitted that she nevertheless went in there. She denied that she was worried because she feared that her parents would find her in there. She stated that PW4 did not go into the watchman's house after switching on the generator. She however, went to peep through the hole to see if her parents were coming since she had no a cell phone and there was none in the house. She denied that she seduced the Appellant or made advances to him by trying to kiss him, placing her hands around his waist and trying to undress him.

7. According to her, the Appellant did not pull me into his house and she denied that she waited for PW4 to go into the house then entered the watchman's house. According to her, she did not even notice that PW4 was not there. It was her evidence that the reason she did not tell PW5 what had happened to her was because she was scared since the Appellant was still there and listening to the conversation. Although there was a CCTV camera, she stated that the camera did not show the defilement incident. In her evidence the Appellant did not penetrate her vagina though he inserted his penis inside of her and the ordeal took around 15 minutes. In her further evidence she stated that the doctor forgot to write in the document that there was penetration when in fact there was penetration.

8. In answer to further questions, the Complainant stated that she had lost her virginity but immediately stated that it was not true that she had lost my virginity since her understanding of virginity was when something is inserted inside of her. She however, stated that the experience was painful.

9. PW4, **JN**, the Complainant's Cousin, testified that on 13th September, 2018 at about 6.40p.m. he had gone to switch on a generator when the Complainant asked the Appellant if he had come with the dog he had the previous day. PW4 then went back to the house to cook. At about 7.00p.m. the complainant returned to the house and when he asked her where she had been, she did not respond. The following day she told informed PW4 that the Appellant had called her previous day when she had gone to peep and see if her parents had arrived and sexually harassed her. The Complainant did not however expound on how she had been sexually harassed. When the appellant arrived, PW4 asked him what he had done to the Complainant but the Appellant became harsh and when PW4 called the Complainant, the Complainant disclosed that the Appellant had attempted to rape her but the Appellant denied it though the Appellant followed him and asked for forgiveness without telling him why he was asking for forgiveness. PW4 went into the house and locked the door and reported the matter to the Complainant's parents when they returned.

10. According to PW5, **Kombo Muli**, a houseboy, on 13th September, 2018, he was in PW3's house working when at about 7.00p.m. PW4 called him and asked him to help him fuel the generator. At that time PW4 was with the Complainant and after fueling and switching on the generator PW5 left the Complainant talking to the Appellant and went inside the house where he stayed for about thirty (30) minutes then left the compound. On his way out he saw the Complainant in the watchman's house and upon asking her what she was doing there, the Complainant told him that she wanted to check if her parents had arrived. The following day on 14th September, 2018 she heard PW4 asking the Appellant if he had sexually harassed the Complainant as alleged by the Complainant.

11. PW1, **MNK**, a business lady who was residing in the United States of America, recalled 14th September, 2018 at about 7.00p.m., when she was in her living room with her husband, PW3, her daughter, the Complainant, aged 12 years, informed her that somebody broke her virginity. According to the Complainant, on 13th September, 2018, she had gone to switch on a generator with her cousin, PW4, when the Appellant told her he could take her to Mlolongo and buy her soda. According to the information she received from the Complainant, when she got into the gate house to peep and see if her parents were coming, the Appellant pulled her down, took off his clothes, took off her clothes and started defiling her. Later PW5 found the Complainant at the guard's house while the Appellant was standing at the door.

12. Upon receiving this information, reported to Mlolongo police station and went to Kitengela Hospital. She identified the Complainant's birth certificate, PRC Form, Treatment documents and P3 Form. It was her evidence that the Complainant was placed on HIV medication for 28 days as well as on Hepatitis B vaccination. According to PW1, the Appellant was not known to the Complainant and was taken to them by a security firm known as Texas Company and had been at their residence for three days.

13. In cross-examination PW1 stated that theirs was a big house with a place for the guard and that there were people in the main house and that apart from the Complainant and PW4, who was aged 19 years, PW5 was also in the compound. It was her evidence that PW4 was going to switch on a generator when the Complainant accompanied him. According to her there was a room for the gateman and a place for the generator and that the Appellant went to where the generator is. It was her evidence that she observed from the CCTV that the Complainant used to peep in the gate house, where the gateman is supposed to sit at night, when they were not there. She however had no idea that the Appellant had ill intentions about a minor but denied that a minor can seduce a grown up. She also disagreed that peeping at parents is a sign of nervousness. According to her the Complainant had been warned against disclosing the matter to anybody.

14. According to PW1, she was present when the doctor took sample and there was no penetration owing to the fact that the Complainant closed her legs. However, the Complainant informed her that she had lost her virginity and did not know what was going on. According to PW1, she was informed by the Complainant that PW4 went to cook after switching on the generator and that though the sentry place is for the watchman, family members are free to sit there and that there is a toile there.

15. PW3, **DK**, testified that though he was a resident of the United States, he also had a residence in Syokimau. On 14th September, 2018 at about 7.00p.m. he was in the house when his wife, PW1, informed him that the Complainant had an issue to tell them. It was his evidence that the Complainant narrated to them the previous day, at around 6.40 to 6.45p.m., she had walked to the watchman's room and as she was peeping to see if they were coming, the Appellant grabbed and defiled her. PW3 confirmed from the CCTV clips that the Appellant had a conversation with the Complainant who had gone out to put on the generator and the camera showed her walking towards the watchman's

room. He then called my brother in law, A, who called the police and they reported the incident. After interrogating the Appellant, they accompanied the police to Mlolongo Police Station and later took the Complainant to Nairobi Women Hospital, Kitengela for examination.

16. According to PW3, he had requested for a watchman with a dog and the Appellant went in with a dog and had worked for about a week. According to him, the Complainant stated that the Appellant said he loved her because she spoke very good English and would like to buy her a soda at Mlolongo.

17. In cross-examination, PW3 stated there were relatives staying with him including PW4 and another **KM** who was not in then. There was also PW5 who worked at a construction site. According to him, PW4 normally put on the generator around 6.30p.m. and he was accompanied by the Complainant to put on the generator. He testified that it was safe for the Complainant to walk around the compound since the compound had a perimeter wall with an electric fence. Since the gate was high, the only way she can look outside was by peeping which she normally did since any one could go into the watchman's house and peep. Though it had a lockable door, it is open all the time and a watchman was not supposed to lock himself inside but was supposed to walk around easily. According to him, the Complainant was very social. She can talk and easily made friends and she had been there for a week and knew the Appellant. He could not tell who between the Complainant and the Appellant started the conversation. He denied having noticed any unusual behaviour in the Complainant.

18. PW3 testified that the Appellant was aware that PW4 had walked back to the house and he was alone with G. After locking the door, the Appellant threatened the Complainant not to scream. According to the information PW3 received from PW5, PW5 saw the Appellant standing at the door and that when he switched his torch on he saw the Complainant inside. It was his evidence that the Complainant had been warned against going back to the house. According to him, the Complainant was scared because she had been found at a compromising situation with a grown up and must have been terrified being a young girl who has not had sexual experiences.

19. In his evidence, he had two houses, one of which was under construction and PW5 was staying in the house under construction. According to him, though the Complainant was not my biological daughter, they were in the process of undertaking adoption having stayed with her from when she was three months.

20. PW6 and PW7 were the police officers who after receiving the report of the incident went to PW3's residence and arrested the Appellant.

21. PW8, **John Njuguna**, from Nairobi Women Hospital, examined the Complainant on 15th September, 2018. According to him, the Complainant was born on 25th May, 2006. She stated that she had been defiled and she looked scared. Upon examination, the Complainant did not have any injuries on the body and genitalia and her hymen was not broken. He proceeded to produce the PRC Form, GVRC Form, and P3 Form.

22. According to him, the Complainant looked scared when she went to hospital. The Complainant had no injuries and he could not confirm if the Complainant was a virgin and her hymen was not broken. He however clarified that hymen is not a way of determining virginity but he could not conclusively determine if she had been defiled.

23. The Investigating Officer, PW9, **PC Maryanne Muyako**, testified that on 15th September, 2018 at about 9.00a.m. she reported on duty and read the O.B. in which there was a case of defilement. She then called the parents of the complainant to go and record their statements which they did. She also recorded the statements from other witnesses, visited the home and scene of crime after which she issued the parents with a P3 Form which was filled in at Nairobi Women Hospital to be filled. When they reported on 14th September, 2018, the officer on duty had referred them to hospital and they had a PRC Form. According to the parents, the Complainant was born in 2006 meaning she was 12 years old at the time and she exhibited her birth certificate.

24. According to her, the alleged offence was on 13th September, 2018 at about 6.30p.m. when there was power failure but the house had a generator near the gate. She reiterated the evidence given by the other witnesses.

25. Upon being placed on his defence, the appellant chose to make an unsworn statement in which he admitted that he was a guard in the complainant's home from 1st to 13th September 2018. On 5th he was given a cheque by his company to take to PW3 to sign who was not willing to sign from 11th. According to him, there is a visitor who used to visit with a Prado and on the material day, he went while walking. It was his evidence that he was on night shift. On 12th the Complainant and PW4 went to switch on the generator and the Complainant asked him about the dog. After that the Complainant went into his room and he saw her holding something. When he told her to go back to the house, she refused and he went out and continued holding the dog. It was his evidence that there was a caretaker known as Kombo, PW5, who asked him what the Complainant was doing there. PW5 then got into the sentry box and told the Complainant to go back to the house and in the morning, he handed over and went home. The following day, PW4 alleged that he had disturbed the Complainant and at 7.00p.m. her parents returned after which the police officers arrived and he was escorted to Mlolongo police station.

26. The Appellant complained that PW3 used to subject him to a lot of harassment and was not paying his dues and used to look down upon him. He denied having committed the offence.

27. In her judgement, the learned trial magistrate found that based on the birth certificate, age of the Complainant was not an issue. As regards penetration, she found that based on the evidence adduced and the case of **Peter Ndoli Adisa vs. Republic [2018] eKLR**, that the Appellant went near inserting his penis into the Complainant's vagina but the Complainant resisted by putting her legs together. However, had she not done so, the Appellant would have easily committed an act of penetration since he had removed all his clothes and taken off the Complainant's pair of pants as well as her undergarment hence he intended to defile the complainant but failed to accomplish the mission.

28. As regards the identification, the learned trial magistrate found that the Complainant and the Appellant knew each other very well as the Appellant was working in their home as guard. That the Appellant met the Complainant on the day of the alleged defilement was admitted by the Appellant and they had a conversation and the Complainant went into his room where PW5 found him. It was the learned trial

magistrate's finding that there was no reason for the complainant to falsely implicate the Appellant in the offence. The Court therefore found that the Appellant was properly implicated in the offence and she had no reason to disregard the evidence of the Complainant regarding the identity of the Appellant. In the result, the court found that the ingredients of attempted defilement had been proved and she proceeded to reduce the charge to that of attempted defilement. She proceeded to sentence the Appellant to 10 years imprisonment.

29. Dissatisfied with the decision of the trial court, the Appellant appealed to this court challenging both the conviction and sentence of the trial court on the following grounds;

1) The trial magistrate erred in law and fact in convicting the appellant on charges which were not proved beyond reasonable doubt.

2) The learned trial magistrate erred in law and in fact in admission of evidence contrary to Section 124 of the Evidence Act also Section 19 of the Oaths and Statutory Declaration Act.

3) The learned trial magistrate erred in law and fact in convicting the appellant on evidence which was not unequivocal.

4) The trial magistrate erred in law and fact when he relied on hearsay evidence to convict the appellant.

5) The trial magistrate erred in law and fact by failing to appreciate that the appellant was not accorded a right to fair trial contrary to Article 50(1) and (2) of the Constitution.

6) Learned Magistrate erred in both law and fact in imposing an excessive sentence on the appellant.

30. The Appellant submitted that from the proceedings herein, the Trial Court failed and/or found it wise to disregard the accused rights as provided under Article 50 of The Constitution. It was contended that from the proceedings, on 26th November, 2019, despite the Trial Court noting that the accused did not have an advocate, failed to inform the Appellant promptly that he had a right to be represented by an advocate and if he was not capable to do so the State had a duty to assign for him an advocate at the its expense. Further, the Trial Court further failed to inform the Appellant the nature of sentence that will be passed upon him in the event of a conviction which would have necessitated the Appellant to seek the services of an Advocate.

31. According to the Appellant, from the record, the Prosecution upon realizing that the accused person did not have an advocate sneaked in a witness statement. It was submitted that the statement could have been doctored to have a predetermined outcome that was to fix the accused person since it was sneaked in witness statement was done after the complainant had testified, and by someone who was not part of the prosecution witnesses list as can be readily noted on the charge sheet. The statement was very strategic as it was meant to corroborate what the Complainant/Minor, and the minor's parents had already testified. Thus their prejudicial value was higher than their probative value and particularly in the absence of the advocate for the accused. It was contended that **JL** whose statement was sneaked in by the prosecution is a cousin to the minor herein and for very obvious reason, he was to sing the rehearsed statement and theme of the prosecution and the minor's parents.

32. Based on section 214 of the ***Criminal Procedure Code***, it was submitted that the prosecution amended the Charge sheet which application was allowed without any objection from the Appellant for very obvious reasons. It was submitted that the Court stated the reasons and read the amended charge sheet to the Appellant and the Prosecution witnesses proceeded to give evidence against the Appellant. This, according to the Appellant was contrary to the provisions of section 214 (ii) of the ***Criminal Procedure Code***. It was further contended that the proceedings do not specifically state the amendment from which date to which date. In support of his submissions the Appellant relied on the decision of the Court of Appeal in **Nyeri H.C Criminal Appeal No. 392 of 2007 - Peter Maina Macharia –vs- Republic.**

33. It was submitted that in this particular case the prosecution failed to prove its case beyond reasonable doubt that would warrant the sentence and conviction of the Appellant on the following grounds. It was contended that the Prosecution failed to establish the state of mind and/or character of PW -2 after the ordeal. And reliance was placed on the case of **Alan Redpath (1962)46 Criminal Appeal 319** cited in the case of **Mutua Mulandi vs. Republic (2005) eKLR.**

34. It was further submitted that PW-1, PW-2, PW-3 and PW- in their evidence in chief testified that they were able to view CCTV footage however the same was not shared to the Court and/or the Appellant. According to the Appellant, from the Prosecution's witnesses the CCTV footage played a major role in the case since parties would have established what had been captured yet no reason was offered by the prosecution why the CCTV footage was availed in court to shed more light on what really transpired. According to the Appellant, the failure to avail the CCTV footage is akin to the failure to avail relevant evidence or witness because that will be a great injustice to the prosecution's case.

35. It was contended that the Trial court failed to take note of the contradictions in the prosecution evidence which was very unsafe to convict the Appellant. Accordingly, the Prosecution failed to adduce sufficient evidence to support the conviction and sentence against the Appellant.

36. On behalf of the Respondent, it was submitted with regard to the right to legal representation that Article 50 (2) (g)(h) of the Constitution of Kenya that the Constitution makes it mandatory for an accused to have this right promptly informed to them at the beginning of the trial before the trial commences. The Appellant contended that his rights guaranteed in Article 50 (g) and (h) of the Constitution of Kenya were violated by the trial court. In other words, he argues that his right to legal representation was violated. He argued that he was not informed of the right to legal representation and that the law mandates the court to inform an accused person of this right. Further, he submitted that section 214 of the ***Criminal Procedure Code*** was violated.

37. The Respondent noted that the Appellant was accorded a chance to plead to the charges afresh after the prosecution amended the charge

sheet.

38. From the above, it was submitted that it is upon the accused person to ask the court for the witnesses to be recalled for him to cross-examine them. From the record, the appellant did not request the witnesses to be recalled at any point during the proceedings. The Respondent relied on **Josphat Karanja Muna -vs- Republic [2009] eKLR**.

39. In this case, it was submitted that the alleged violation of Section 214 (ii) of the ***Criminal Procedure Code*** was done to correct the date on the particulars of the charge sheet. Further, regarding violation of Article 50, the accused was represented by an advocate when the trial started hence a violation of his right was not occasioned.

40. As to whether the case was proved beyond reasonable doubt, it was submitted that attempted defilement is defined under Section 9(1) and the punishment stated in section 9(2).

41. The Respondent relied on **Peter Ndoli Adisa vs. Republic [2018] eKLR**.

42. According to the Respondent, as per 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.

43. It was contended that it was the evidence of the minor that the appellant had informed her that he loved her so much and for her to accompany him to Mlolongo for a walk and would buy her a very big soda.PW2 testified that there was no penetration and that she closed her legs. This is to show that the appellant almost inserted his penis in her vagina. From the evidence, the appellant followed PW2 to the room at the gate where she and her cousin had gone to check whether her parents were coming when the appellant pushed her down, locked the door with a padlock then started taking off her clothes. The appellant then took off his clothes as he touched her breasts and tried to insert his penis in her vagina, the complainant put her legs together and he pushed them apart. This shows that the appellant attempted to defile the minor.

44. The evidence of PW2 was further corroborated by PW8 the doctor who examined the minor. She testified that the minor did not have any injuries on the body and genitalia, her hymen was not broken and that she had no injuries on other parts of the body.

45. On the issue of identification as an ingredient of attempted defilement, it was submitted that the appellant was well known to the minor as he was working as a watchman to her parents. On the issue of establishment of the minor's state of mind, the court followed the law and conducted a *voir-dire* as required under Section 124 of the ***Evidence Act*** and Section 19 (1) of the ***Oaths and Statutory Declarations Act*** and was satisfied that the minor was possessed of sufficient intelligence to testify in court.

46. From the evidence, it was submitted that nobody else was in the room but the minor and the appellant which the appellant did not dispute. The evidence of PW8 was that when the minor went to the hospital for examination, she looked scared. The Respondent relied on ***Mohamed v Republic*** **[2006] 2 KLR 138, Chila vs. Republic (1967) EA 722 at 273 and** ***Moses Nato Raphael vs. Republic [2015] eKLR***.

47. On the alleged failure to produce crucial exhibits, it was noted that the appellant herein confirmed that the complainant was in his room in his testament. The CCTV only showed the complainant entering the appellant's room which the appellant did not dispute. Regarding the ground of failure to analyse the evidence on record wholesomely, it was submitted based on ***Black's Law Dictionary 10th edition page 105*** that the appellant had been charged with Defilement as the main charge and the alternative charged with indecent act with a minor. The learned trial magistrate analysed the evidence on whether the charges brought against the appellant had been proved and further relied on **Peter Ndoli Adisa v Republic** (supra) to establish whether the act of the appellant consisted of defilement or attempted defilement. From the evidence, it is clear that the prosecution proved the ingredients of attempted defilement and not defilement as the appellant had been charged with. From the evidence of the doctor, PW8 it is clear that there was no penetration.

48. In light of the foregoing, it was submitted that the Appellant has not raised sufficient grounds to warrant this Court to interfere with the discretion exercised by the trial court and the court was urged to dismiss the appeal be dismissed and to uphold both the conviction and sentence of the trial court.

Determination

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

50. 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."**

51. 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."**

52. 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.**

53. The Appellant herein, though charged with the offence of defilement, was convicted of the cognate offence of attempted defilement 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.***

54. I agree with **Mr Ngetich** that under those provisions, 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. I therefore associate myself with the holding in **Peter Ndoli Adisa vs. Republic [2018] eKLR** that;

> **"The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except for penetration; it must from the age, of the complainant the identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed. Attempted defilement is as if were a failed defilement, failed because there was no penetration."**

55. 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 avert 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.***

56. The offence of attempted defilement 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 relief 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."

57. **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 (6th 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, 8th 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."

58. 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."**

59. 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."***

60. From the foregone, it is easily deducible that when a court is faced with any charge of 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.

61. 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.

62. **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."**

63. In this case, the complainant's evidence was that on the material day after accompanying PW4 to go and switch on the generator, she proceeded to the watchman's room in order to peep out and check if her parents were coming. The Appellant then pulled her down, removed both his clothes and hers and attempted to insert his penis into her vagina but she crossed her legs hence there was no penetration.

64. 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. The Appellant begun to put his intention to commit the offence into execution by pulling the Complainant down and undressing her. He then did the overt act of opening undressing and attempting to insert his penis into her vagina. 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 Complainants action of putting together her legs. 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.

65. In this case there was sufficient evidence that the complainant was a child aged 12 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."**

66. 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."**

67. I also agree with the opinion of the Court of Appeal in **Moses Kamau Waweru vs. Republic [1988] eKLR** where it expressed itself as hereunder:

"In the same authority cited to us, *Kibozo v Uganda* the Court of Appeal for Eastern Africa confirmed the trial judge's finding based on the authorities of *R v Zieliski* (1950) 34 Cr App R 193 and *R v Alan Redpath* (1962) 45 Cr App R 319 to the effect that in sexual offences the distressed condition of the complainant's evidence, but that this would depend upon the circumstances of the case and the evidence. "It seems to this court that the distressed condition of a complainant is quite clearly capable of amounting to corroboration of course, the circumstances will vary enormously, and in some circumstances quite clearly no weight, or little weight, could be attached to such evidence as corroboration. Thus, if a girl goes in distressed condition to her mother and makes a complaint, while the mother's evidence as to the girl's condition may in law be capable of amounting to corroboration, quite clearly the jury should be told that they should attach little, if any weight to that evidence, because it is all part and parcel of the complainant. The girl making it might well put on an act and simulate distress.""

68. In this case the learned trial magistrate did not rely on corroboration. In sexual offences, 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]

69. 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."

70. 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."

71. 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."

72. 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."

73. In this case the learned trial magistrate did not make any allusion to the law as stated in section 124 of the ***Evidence Act***. However, a holistic consideration of the judgement reveals that the learned trial magistrate believed that the Complainant was a truthful witness.

74. As regards the failure to adduce the evidence from the CCTV I agree with the Appellant that the position is akin to the failure to call crucial witnesses. However, 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.

75. The prosecution is therefore 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."

76. In this case the CCTV only showed the Complainant entering the watchman's room and nothing else. That was not disputed by the Appellant. Therefore, nothing would have turned on the evidence which was gathered from the said camera.

77. Regarding to amendment of the charge, Section 214 of the ***Criminal Procedure Code*** states that;

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

78. In this case the relevant proceedings are as follows:

15/3/19

Before C.C. Oluoch C.M.

Pros. Mwamburi

Court Ass. Nosim.

Accused absent.

Mr. Kimani watching brief for complainant.

Court: Placed aside.

C.C. OLUOCH C.M.

15/3/19

Later

Coram as before

Accused now present.

Ms. Torome: I have one witness but we intend to amend the charge sheet to correct the date on the particulars of the charge.

C.C. OLUOCH C.M.

Accused: No objection.

Court: Charge read over and explained in Kiswahili and he replies as follows in Kiswahili:

Main charge: Not true.

Alternative charge – Not true.

Court: Plea of not guilty entered.

C.C. OLUOCH C.M.

15/3/19

79. After that the evidence of PW8 was taken. It is clear that the manner in which the proceedings were conducted did not fully conform to the provisions of section 214 of the ***Criminal Procedure Code***. Dealing with that section in **Nyeri H.C Criminal Appeal No. 392 of 2007 - Peter Maina Macharia vs. Republic,** the Court expressed itself as hereunder:

> **"These two provisions are obviously for the protection of Persons facing criminal trials and in paragraph (1) of the proviso, it is clear that the trial court had no option but to read the amended charge sheet to an accused person. The expression employed in the provision is that the court, "shall thereupon call upon the accused to plead to the altered charge." In the circumstances of the present Appeal the Trial Magistrate did comply with the requirement since she called upon the Appellant to plead to the amended charge. However, she failed to comply with the more troublesome question of paragraph (ii) of the proviso. The trial court was clearly required to inform the Appellant of his right to have the previous witnesses recalled either to give evidence afresh on the amended charge sheet or to cross-examine the witnesses further is a basic right going to the root of fair trial and clearly it was the duty of the trial court to show in its record that she had informed the Appellant of that right and to record further what the Appellant said in answer to the information…"We think the proceedings in the Magistrate's Court were substantially defective. Failure to inform an Accused person of his rights given to him by law is not a procedural irregularity which can be cured under the provisions of section 382 of the Code. Accordingly, the Appellant's trial is substantially defective and we must allow his appeal on this ground alone."**

80. Similarly, in this case, it is clear that the appellant was given an opportunity to plead afresh. What the trial Court failed to do was to inform the Appellant of his right to have the previous witnesses recalled either to give evidence afresh on the amended charge sheet or to cross-examine the witnesses further. I associate myself with the position adopted in **Josphat Karanja Muna -vs- Republic [2009] eKLR**, a decision of the Court of Appeal, where the Appellant complained that he had not been given a chance to recall witnesses who had testified and the court stated:-

> **"On non-compliance with section 214 of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant. When he gave evidence, on 29th September 2002, he gave his name as Ben Cheche Gikonyo whereas his name Ben Chege name in the first charge sheet was given as Gikonyo. The amendment only took care of that. That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that non-compliance with the provisions of section 214 of the Criminal Procedure Code resulted in injustice to the appellant."**

81. In the instant case what was being amended was the date of the offence and it has not been contended that the said amendment prejudiced the Appellant.

82. The Appellant was initially represented by an advocate. It is therefore clear that he was aware that he had a right to be so represented. This is not a case where the Appellant was unaware of his right but where having appointed an advocate, the said advocate at some point in the proceedings ceased acting for the Appellant. In **Macharia vs. Republic HCCRA 12 of 2012 [2014] eKLR** which was considered and cited with approval by the court in the case of **Joseph Ndungu Kagiri vs. Republic [2016] eKLR**, it was stated as follows:

> ***"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."***

83. In this case the Appellant has not indicated that his circumstances fell within the above cases.

84. It was contended that there was a witness statement which was "sneaked in" by the prosecution. The record however shows that on **26th November, 2018, the prosecution applied to introduce the said statement** after the application by the appellant for adjournment was allowed and the matter stood over to 4th February, 2019. Accordingly, the Appellant had ample time to peruse and understand the said statement. In my view nothing bars the Prosecution from introducing a statement which has come into its possession later in the proceedings as long as the introduction of the new statement does not prejudice the accuse such as by depriving him of the opportunity to put across the contents of the said statements to the witness who testified earlier on. Where however the accused seeks that the witnesses who already

testified be recalled so that he may cross examine them on the contents of the new statement, the Court may in the exercise of its discretion allow such an application in the interest of justice. In this appeal, however, I have not been addressed on any prejudice occasioned by the said action save for the allegation that the statement was sneaked in and the suspicion that it could have been doctored to have a predetermined outcome. There is however no basis for that suspicion.

85. As regards the sentence, it would seem that the learned trial magistrate imposed what was *prima facie* the mandatorily prescribed sentence. It is now trite that the Court is not bound to impose what appears to be the mandatorily prescribed minimum sentence.

86. In the premises while I confirm the conviction I set aside the sentence impose on the Appellant and substitute therefore a sentence of 5 years imprisonment taking into account the fact that he was a first offender. In computing the said sentence, the period between 14th September, 2014 and 9th October, 2018 when the Appellant was in custody before he was released on bond will pursuant to section 333(2) of the ***Criminal Procedure Code*** be taken into account.

87. It is so ordered.

88. 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 29th day of October, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Mwenesi for Mr Wanyonyi for the Appellant

Mr Ngetich for the Respondent

CA Geoffrey