REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NUMBER 181 OF 2019

ROBERT KIPCHUMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Original Conviction and Sentence in Iten Senior Principal Magistrate's Court Criminal Case Number 34 of 2018 delivered on 12th November, 2019 by Hon. C. A. Kutwa (SPM)

R U L I N G

The accused. Robert Kipchumba was charged with *Attempted defilement of a girl contrary to Section 9(2) as read with Section 9(2) of the Sexual Offences Act No. 3 of 2006.*

The particulars of the offence are that *on 28th August 2018 at around 11.00 p.m. at Iten Town within Elgeyo-Marakwet County, intentionally and unlawfully attempted to cause his penis to penetrate into the vagina of MJK a child aged 17 years old.*

In the alternative, he was charged with *indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. That on 28th August 2018 at 11.00 p.m. in Iten Town intentionally and unlawfully touched the private parts of the complainant, namely the vagina and breasts.*

The prosecution called six witnesses to establish their case. PW1 the complainant, PW2 WK her father, PW3, Luka Kiprono Chesesio the Assistant Chief Katalel sub location, and PW4 Leonard Kipchumba the caretaker of Chelel Metrong Lodge, the scene of the alleged offence, PW5 the Clinical Officer from Iten Hospital who produced the P3, PW 6 No. 77346 Sgt Winnie Kameli the investigation officer.

PW1, 2 and 3 were heard by Hon H. M. Nyaberi SPM, while PW4, 5 and 6 were heard by Hon C. A. Kutwa SPM who also wrote the judgment delivered on 31st September 2019. He made the finding the charge of attempted defilement was proved against the appellant and convicted him accordingly. On 12th October 2019 he sentenced him to 10 years imprisonment.

The appellant was aggrieved and filed this appeal on the following grounds:

1. *THAT the trial court erred in law and fact by failing hold that the charge sheet was defective.*

2. *THAT the trial court erred in law and fact as he failed to hold that the case was not proven beyond any reasonable doubt.*

3. *THAT the trial court erred in law and fact as it failed to hold that the circumstantial evidence did not point at the appellant as the exclusive perpetrator of the offence.*

4. *THAT the trial court erred in law and fact as it shifted the burden of proof to the appellant.*

5. *THAT the trial court erred in law and fact as it failed to hold that the evidence of identification was not conclusive.*

He also filed written submissions whose main thrust was that the prosecution had failed to establish a prima facie case as was established by the court in **Bhatt vs Republic**. He urged the court to find that the case for the prosecution as presented in the subordinate court did not amount to one where a reasonable tribunal properly directing its mind to the law and evidence would convict if no explanation is offered by the defence. He urged the court to allow his appeal and set him free.

He submitted that the charge sheet was defective because of the difference in the date on the charge sheet and the date the complainant alleged the offence was committed.

That the complainant was not a minor as she alleged that she was born on 14th September 2000 and that the offence was committed on 28th August 2018. Hence, she was 18 years old. That she lied about her age and on this, he urged the court to rely on **Martin Charo vs Republic [2016] eKLR**. That in any event the P3 did not support the charge and that the prosecution had relied on circumstantial evidence which failed to meet the required threshold.

Further, relying on **R vs Turnbull, (1976) E A 3 ALL ER 549** and **Roria vs Republic (1967) EA 583,** he argued that the evidence of identification was also doubtful.

The prosecution on its part, through the prosecuting counsel opposed the appeal and submitted that the case against the appellant was proved beyond a reasonable doubt.

The appellant is entitled to a review of the evidence given before the subordinate court as was held in **Okeno vs Republic (1972) EA 372**

> *"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."*

PW1 told the court that she was born on 14th September 2000, and was at the material time a form four student. On the 28th August 2018 at about 6.00 p.m. She was at home when she received a phone call from a person who introduced himself as Robert. She did not know who that Robert was. He told her on phone that her father had sent him with some luggage and she was to go to the roadside to pick it.

She went to the road and stayed for about 5 minutes. A matatu came and stopped. It had no passengers. The driver introduced himself to her as the said Robert. She asked him for the luggage. He told her that he had forgotten it at Katalel and urged her to get onto the Matatu so that they could go to Katalel, about a kilometer away. She accepted and boarded the matatu. However, when they reached Katalel Robert did not stop but drove directly to Iten Town where he stopped at a petrol station near Equity Bank.

He alighted from the motor vehicle having told her that the luggage was coming. She stayed in the Matatu until 9.00 p.m. when he returned. She testified that he removed her from the vehicle held her by the hand and led her to a lodging behind Equity Bank. Upon reaching there, the caretaker gave him the key to the room. The said Robert then told her that since it was raining, she was to sleep in that room until the following morning. That he told her since he knew her father, he was going to call him. It was then that he removed his long trouser and pant. When she asked him what he was doing he slapped her 5 times, hit her with his fist while pressing her on the bed and holding her neck.

She was wearing a pair of jeans trouser and a blouse. During the struggle, he tore her blouse and managed to remove her long trouser and pant, while telling her that there was no luggage it was her he wanted. She scratched the side of his face, and he hit her with his fist. He told her was fearless and threatened her with dire consequences. He started touching her breasts and all over her body. He stopped wore his long trouser and went out vowing to return. He took her mobile phone and the padlock to the room. When he stepped out, she locked the door from inside. He was away for about 30 minutes and when he returned, she refused to open the door. He threatened to leave with her mobile phone. That is when she opened the door ajar at angle. He threw the phone, padlock inside, and left. She noted it was about 6.40 a.m. The caretaker came at about 7.00 a.m. She did not bathe.

At about 7.20 a.m., she left and went home by boarding a matatu. She had not bathed. She had Kshs. 50/=. When she arrived home, her father asked her where she had been. She narrated to him what had happened and gave him the telephone contact, which the accused gave her. Her father called the number and the recipient said he was at Bungoma.

On 6th September 2018, her father picked her from school. He told her that he had arrested the suspect. He then took her to Iten Police Station where she recorded her statement after identifying the suspect. She went to hospital on 10th September 2018, and was examined by the doctor. The P3 form was completed. She identified the treatment notes and the P3 together with in court as PMFI – 2 and PMFI – 3 respectively. She said she did not know the appellant before but he claimed to know her. That he had obtained her phone number from her aunt who was a neighbour.

On cross examination she told the court that she was now 18 years, that she did not call her father to confirm whether he had sent any luggage and if so what it was, that where the matatu was parked there were people but she never raised any alarm, she did not recall the registration number of the matatu. She denied being in the company of one, 'Festus' on the material date asserting that she was alone at home. On re examination, she stated that she did not know how the appellant was arrested and she did not know anyone by the name Festus. PW2 WK was the father to the complainant. His testimony was that on 29th August 2018 he arrived home at about 7.30 p.m. His daughter was not at home. He enquired from his worker one Daniel Chesang about her whereabouts. Daniel reported to him that someone had called her to go to the road to collect a luggage that he had sent. He immediately rang his wife and informed her as she was working away from home. The following morning, he left leaving word with his worker to alert him as soon as his daughter got home. At around 11.00 a.m. he received a phone call from the said informing him that she had arrived. He rushed home and found her. She informed him that someone lured her on the pretext that he had sent some goods, which she was to pick from the road. That the person lured her to Iten town. While telling this she started crying. He left her and returned to work.

In the evening, he asked her what happened and where she had spent the previous night. She told him that the said the person had taken her to a lodging. She then took him to Iten to a guesthouse behind Equity Bank. He enquired from the caretaker who confirmed that she had

slept there with a young person who worked at the stage.

The complainant then gave him the telephone contact of the person who had lured her. He tried to call but it was not going through. They returned home.

The following day, he called the number again. It was answered. The person at the other end told him that he was on the way to Busia. The person told him he had been hired to go to Busia. He then called a Madam Lilian who was his neighbour to confirm the claim that this person had been hired. The said Madam Lilian denied the same. At about 11.00 a.m. he reported to the Chief, Iten Town. The chief called the number and the person who received the call promised to meet the chief in the evening. The complainant had told him that the young man who had lured her was known as "Roba". He immediately knew who this Roba was after she told him that Roba had been sent by Madam Lilian.

At around 12.00 p.m. while was at his place of work he saw Roba. He spoke to him and told him he was looking for him. He then alerted the chief who came with police officers. Roba was arrested and the chief took him into his office. Later, Roba was taken to Iten Police Station where he recorded his statement.

On cross-examination by the appellant, he told the court that he did not record in his statement, to the police that he had seen the appellant near his business or that he had spoken to him and had called the chief. He confirmed that he had not left any message at home with the complainant that he would send some luggage for her to collect. He was certain that he was the person who had lured his daughter. That though she was taken by a motor vehicle she did not give him the number plate of the vehicle. She told him she did not get out of the vehicle.

He testified that when he arrived home and missed the complainant he tried to call her but was unable to go through, as she was unreachable. He reported the following day to the Chief and police. He testified further that one Festo was arrested. That this Festo was arrested for taking the complainant from Boundary stage to Iten Town. That this Festo had brought her to Iten with the luggage. That Festo was not arraigned in court because that incident occurred on August. He stated further that the appellant overstayed at the Chief's office because the said Madam Lilian had said she wanted to come to the Chief's office and see him, and that he did not have powers to direct him to take him to police station.

On re -examination he stated that the first incidence took place in August 2018 whereby the said Festo had picked the complainant at Chepkinoyo and brought her to Iten Town. At that time, the complainant had wanted to run away to her sister in Nairobi. He said that that incidence was not related to the one in this case.

PW3 testified that on 31st August 2018 at about 2 .00 – 3.00 p.m. he was in his office when WK reported that his daughter had been picked by a driver after he called her to pick some luggage from the road. That this driver had taken her to Iten Town where he had defiled her. He told him to report the matter to Iten Police Station. On 5th September 2018 at about 3.00 p.m.,WK called him stating that he had seen the suspect at Transvalley stage. He proceeded there in company of police officers and arrested the suspect and took him to his office. He then called Robert. WK then came, and identified the suspect and took him to Iten Police Station. He had not known the suspect before but said it was easy for him to have identified him at Trans Valley Office.

On cross examination he stated that what he had recorded in his statement was true. That after arresting him he took him to his office where he was for about an hour. He said he was not told what motor vehicle the appellant was driving or its registration number. He did not think it was necessary. That at no time did WK leave them alone in the office. He said he was aware that the appellant and WK spoke but he did not know whether they had agreed on anything. He said he was not aware that the complainant had another case with another man. He did not know where the incident had occurred.

PW4 Leonard Kipchumba was the caretaker at Chelelmetio Lodge. He testified that on 28th August 2018 at about 8.30 a.m. he was at the reception when a man called Robert Kipchumba went to the lodge with a lady and requested for a room. He identified the said Robert as the appellant whom he knew very well as a conductor He gave him a room but asked if the lady was a student. Robert told him she was not a student. He paid and they entered the room and he went back to the reception.

On 29th August 2018, the appellant left the room at 6.00 a.m. leaving the lady in the room. He went to the room to check if the lady was in the room. He found her in the room. She told him she was going to shower at the University.

Later that night the lady came with police officers. He accompanied the police officers and recorded his statement. On cross-examination, he stated that he had been a caretaker at the lodge for eight (8) years. He said he knew the appellant very well but requested for the appellant's identity card, which he gave. He also said that the appellant was a frequent customer of the lodge. He said he had a book where he recorded customers' names, but there were times when he gave out rooms without recording in the book. He had not brought the book to court.

He said he did not witness the incident. He said he saw the appellant the following day at 6.00 a.m. The complainant did not tell him what had happened. He now stated that the appellant told him he had left his identification card at home.

PW5 was a Clinical Officer at Iten Hospital. He produced the P3 in respect to the 17-year-old complainant. He testified that the complainant was treated at the hospital. It was alleged that she was taken to a lodge by a person known to her who had attempted to defile her. She had no injuries on the body. Her genitalia had no injuries, no presence of discharge and she had no infection. He filled and signed the P3 on 10th September 2018. He produced the P3 as P. Exhibit 3 and the treatment chit and lab request as P. Exhibit 2.

On cross examination he testified that he was the one who examined her five days after the alleged incident and concluded that she was not

defiled.

PW6 Sgt. Winnie Kameli from Iten Police Station was the Investigating Officer. She testified that on 5th September 2018 she was in the office at 7 p.m. when the appellant was brought by Administrative Police Officers on the allegation that he had attempted to defile the complainant. She re-arrested him and recorded witness statements. She conducted investigations, sent the complainant for medical examination, and later charged the accused. She produced the complainant's birth certificate as P. Exhibit 1.

On cross-examination she said she visited the scene but no photos were taken. She said she established that the appellant called the complainant on phone but she never investigated the said phone number. Neither did she investigate the motor vehicle in which the complainant and the appellant allegedly travelled in. She also did not find out its registration number.

At the closure of the case of the prosecution, the court found that the appellant had a case to answer and put him on his defence. He made a sworn statement but did not call any witnesses.

He told the court that his name was Robert Kipchumba and he came from Iten. He denied the offence. He told the court that he did not know the complainant but knew her father WK. He said he did not know Leonard Kipchumba either. He testified that he began work as a Matatu driver on 13th August 2018. On 28th August 2018 he was given a Matatu which was working the Eldoret Kisii route. He worked that route until 2nd September 2018. He came home to Iten and was arrested on 5th September 2018 by the Chief and some APs on allegation that he had defiled a child. When he was taken to the Chief's office, he found WK there.

From the foregoing, the issues that present for determination are:

> ***1. Whether the charge sheet was defective.***
>
> ***2. Whether the charge was proved beyond a reasonable doubt, and twinned with this whether the burden of proof was shifted to the appellant.***
>
> ***3. Whether the prosecution relied on circumstantial evidence.***
>
> ***4. Whether the evidence of identification was conclusive***.

I will now address the issues not necessarily in that order as some feed into one another.

On whether the charge sheet was defective, the appellant's contention was that, the complainant spoke of the 28th August 2018 while her father spoke about the 29th August 2018. That failure by the prosecution to amend the same as per **Section 214 of the Criminal Procedure Code** rendered it defective, a defect that was not curable under **Section 386 of the same Code,** as the prosecution had closed its case.

Section 214(2) of the Criminal Procedure Code states is the one that refers to time. It states:

> *"(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."*

A reading of the same indicates that variance referred to herein is not the same as the one seen in the testimony of the complainant and her father. That variance in their testimony is a contradiction or inconsistency in the case for the prosecution and points to the strength or otherwise of the case for the prosecution. I would not therefore place it at the level of **Section 214(2) of the Criminal Procedure Code** which would be about the framing of the charges.

The other issues are interrelated.

The appellant was charged under section **9 of the Sexual Offences Act** which provides:

> *Attempted defilement*
>
> *(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.*
>
> *(3) The provisions of section 8(5), (6), (7) and (8) shall apply mutatis mutandis to this section.*

There is no definition of attempted defilement in the Sexual Offences Act. However various Judges have in their judgments given the term a meaning.

The learned Justice *E M Muriithi* , in whose judgment I find some illumination on the issue, dealing with a similar case in **KNL v Republic**

[2019] eKLR proceeded as follows:

> *Principles of the law of attempt*
>
> *8. 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 proximate or immediately connected to the attempted offence. See* ***Mwandikwa Mutisya v. R (1959) EA 18*** *and* ***Mussa Said v. R (1962) EA 454****.*
>
> *9. In discussing the principles of law on attempt in the case of attempted larceny, Spry, J. (as he then was)* ***in Mussa s/o Said v. R (1962) EA 454, 455 Letters C- D*** *said:*
>
> > *"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."*
>
> *10. In* ***Keteta v. R****, (1972) EA 532, 534, Madan Ag. CJ. (as he then was) put the matter succinctly as follows:*
>
> > *"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."*
>
> *11. The resolution of the first issue will, therefore, entail a consideration whether the acts complained herein against the Appellant, if proved, disclose an intention to defile the Complainant and were sufficiently proximate to the intended offence of defilement or immediately connected thereto."*

The offence of defilement is defined by **Section 8(1) of the Sexual Offences Act** Thus:

> *[the] act which causes penetration with a child.*

So, what is attempted defilement? It is defined **by Section 9(1)** as

> *[The] attempt to commit an act, which would cause penetration with a child*

Penetration is defined at **Section 2** as:

> *the partial or complete insertion of the genital organs of a person into the genital organs of another person*;

The learned Justice Makau in **David Aketch Ochieng [2015] eKLR** put meaning to the term attempted defilement; thus,

> ***"The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of Sexual Offences Act No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations from complainant's vagina and/or bruises or lacerations of culprits genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement."***

From the proceedings above, in an attempt there are overt acts that must be established that determine the mens rea. Acts that would demonstrate an unsuccessful defilement, acts which show that there was an intention to defile which failed.

The complainant alleged that the appellant lured her to Iten, then to a lodging where he, removed his trouser and pant, tore her blouse removed her trouser and pant, slapped her five times, hit her with his fist while pressing her on the bed. She scratched his face, he hit her again her with his fist, touched her breasts and all over her body then dressed up and left.

The learned trial magistrate, in convicting the appellant relied on **Section 388(1) of the Penal Code**, and **Abdi Ali Bere vs Republic [2015] eKLR** where the Court of Appeal considered the definition of attempt in dealing with a charge of Attempted Murder thus:

> *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…"*

The authority illuminates the difference between preparation to commit murder and the attempt to commit murder. Viewed from the above rendition, were the acts complained by the complainant preparatory acts to commit the offence or acts that amounted to the attempt to commit the offence?

Let us look at the totality of the evidence.

The appellant denied the charge and therefore it was upon the defence to prove the charge. In his defence he said that he was not with the complainant on the material date and did not even know her.

The complainant told the court that she did know the appellant before. However, she testified how she received a call from a complete stranger about some luggage from her father. Her father had not left any word that he would be sending any luggage or that he was in the habit of sending luggage through the alleged means. She proceeded to board a matatu, with a complete stranger and even when he drove past her stage, she raised no alarm. She had a mobile phone. She did not call or text her father or mother to alert them of this development. When they reached Iten, she was alone in the Matatu in a petrol station for over an hour but did not call her parents or seek help yet there is no evidence that she was being restrained.

She also described the violent assault by the appellant. This was to demonstrate the force the assailant used in effort to subdue her. Torn blouse, five slaps, two blows by the fists. It is noteworthy that there was no evidence of this, first when PW4 saw her the following morning or, secondly when she got home and spoke with her father's workman and later, her father. Neither was this assault reported to the medical officer who examined her, as there was no mention of the same in the evidence. The torn blouse was also not seen by the father, or, or PW4 or the police. Upon arrest the appellant was not checked for nay healing bruises on his face to corroborate the alleged staruggle.

The complainant's father's testimony was that according to his daughter, the person who tricked his daughter was one *Roba* who had been sent by a *Madam Lilian*. This was contradictory to her testimony as she said she did not know her assailant before. PW2 testified that when he rang the number that had rang his daughter, ostensibly the appellant's phone number, he told her he was on his way to Busia. It was PW2's testimony that he rang the said Madam Lilian to confirm this fact and she denied it. This Madam Lilian also caused a delay in the escort of the appellant by the chief to the Police station. The prosecution made no effort to lay out the connection between the said Madam Lilian and the appellant. Neither was there any effort to make the connection between Roba, who was known to the complainant and the person who was being accused of the offence. It is also the complainant's father who identified the appellant for arrest without any connection between the 'Roba' who was connected to Madam Lilian and the appellant. Upon his arrest, there was no effort to have him examined for the scratches that the complainant said she had inflicted on him.

PW4 testified that he knew the appellant very well, as a conductor, and a regular customer at the Lodge. He produced no evidence to show that he was the receptionist at the Lodge on the material time. He testified that when the appellant asked for a room he asked him for his identity card and he gave it to him. On cross-examination he changed his story when it turned out that he ought to have availed the record to court. He did not produce the Lodge's receptionist's record to confirm that the appellant took a room that night, and then he was a regular customer. In addition, he said he saw the appellant leave in the morning. He did not testify as to whether the appellant had scratch marks on the face. It is noteworthy too that the investigating officer PW6 did not even ask for this record as it was the key to placing the appellant at the scene on the material night, neither was the witness queried on the appearance of the appellant as he left the Lodge.

According to the complainant the appellant's Matatu was parked at a petrol station for more than an hour. There was no effort on the part of the prosecution to establish this fact. This would have placed the appellant in Iten that night if indeed he was, because he had denied it.

The complainant had a conversation with the PW2 on the morning after. He testified that she told him she was going to bathe at the University. She lied to the PW2, yet he was the person who could have helped her. Why would she lie?

While being mindful of the fact that a complainant may have had challenges due to the trauma flowing from such an offence, it remains the cardinal rule that the credibility of a witness in any trial is crucial, and ought not to create doubt in the mind of the court. The case for the prosecution must be watertight and ought not to leave gaping loopholes to be filled by the defence.

It was conceded by the prosecution that one Festus was arrested, in August under similar circumstances but was not arraigned in court. The complainant's father testified that that case had nothing to do with this case. It creates a doubt as to whether this case here happened in the manner described by the prosecution witnesses.

There is doubt as to whether the person alleged to have been with the complainant is the person who was arrested by the complainant's father, the appellant.

The learned magistrate who wrote the judgment never saw the complainant testify but applied the provisions of **Section 124 of the Evidence Act** on the basis of the evidence on record, stating;

> *"…that corroboration was not required as long as the court believed the complainant. He was of the opinion that the complainant was forthright in her account to her father and never hesitated to name the accused as the culprit. It is her narration that led to the accused being arrested. In my view there was no need for other oral evidence to corroborate the fact that the accused attempted to defile the complainant".*

However, the record does speak for itself. The complainant was no forthright. She lied to PW4. Her testimony was contradictory to what her father said she told him. She said she did not know the appellant before but told her father that the person who did this was the Roba who had been sent by Madam Lilian. It is this Roba that her father arrested and she was then taken to the police station to identify him. The rest of the testimony fell apart. For the witness to be believed her testimony ought to be credible.

Back to the issues:

Having considered the evidence on record in its totality, it emerges that the prosecution did not establish the charge beyond reasonable doubt. The case was riddled with contradictions and inconsistencies. The case was not investigated. Crucial evidence that would have placed the appellant at the scene was not produced. In addition, if the evidence was credible, then what appears to have happened was preparation to commit the offence. The person involved walked out of the room leaving the complainant on her alone. There is nothing in the testimony to show that the person ever got close to the point where penetration might have occurred. **Section 124 of the Evidence Act** was not applicable. The prosecution failed to settle the issue as to who was the Roba named by the complainant's father vis a vis the appellant raising doubt as to whether the appellant committed the offence as alleged.

The trial court did not consider the appellant's statement of defence. It raised an alibi. It was not rebutted by the prosecution, and the burden of explaining his innocence was shifted to the appellant, yet it was the duty of the prosecution to prove its case.

The upshot is that I found that the conviction was unsafe. The same is quashed. The Sentence set aside and the appellant is to be set at liberty unless otherwise legally held.

Dated and delivered virtually this 30th day of December, 2020.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant Martin

Appellant Present

Respondent: Ms. Limo Prosecuting for Republic