Kasaingu v Republic (Criminal Appeal E004 of 2024)
[2025] KEHC 3235 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 3235 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E004 OF 2024

NIO ADAGI, J

FEBRUARY 13, 2025

BETWEEN

NICHOLAS WAMBUA KASAINGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. Ole Keiwua K.D (CM) in Kangundo CMC S.O Case. No. 40 of 2020 delivered on 21/12/2023)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge are that on 28th June 2020 at Kangundo Sub-County within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of VMM a child aged 17 years in violation of Section 8(1) as read with Section 8(4) of the Sexual Offence *Act No.3 of 2006*.

2. He was charged in the alternative with the offence of Committing an Indecent Act with a child c/ s 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge are that on the 28th June 2020 at Kangundo Sub-County within Machakos County, intentionally caused his genital organ namely penis to come into contact with the genital organ of VMM a child aged 17 years with his penis contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006.

3. The Appellant pleaded not guilty to the main charge and the alternative charge and the matter was set down for hearing. The prosecution called five witnesses in proving its case.

4. The Appellant gave sworn defence and did not call a witness.

5. Upon consideration of the evidence, the trial court found the Appellant guilty and convicted him of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* and sentenced him to 15 years in prison on 28th December 2023.

6. Being aggrieved by the said judgment, the Appellant lodged an undated Memorandum of Appeal herein challenging both the conviction and sentence.

7. The appeal is based on three grounds that :-

    1. The learned trial magistrate erred both in fact and law by convicting the Appellant on evidence that didn't meet the minimum threshold to uphold a conviction.

    2. The learned trial magistrate erred both in fact and law by not considering the Appellant's sworn defence.

    3. The learned trial magistrate erred in law by sentencing the Appellant by virtue of the minimum mandatory sentence provisions.

8. The appeal was canvassed through written submissions. The Appellant filed 15 pages undated submissions whilst the Respondent's submissions are dated 19/10/2024.

Summary and Re-evaluation of Evidence.

9. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. (See Okeno v Republic (1972) EA 32).

Prosecution's Case

10. The prosecution's case can be summarized as follows:

> (PW1), Dr. Mbindyo Dominic from Kangundo Level 4 hospital testified on 28/2/2023. He stated that she had the birth certificate, PRC form, P3 form, treatment notes, ultra sound report, lab investigation results in respect of the Complainant. That Dr. Lilian Kioko filled the P3 Form. I work with her and I am familiar with her handwritings. The patient was treated in hospital. She was a Class 8 pupil aged 17 years old. Her cervic was broken and discharge was around the vagina. The patient was pregnant. I wish to produce documents:Birth certificate PEx.1PRC form PEx.2P3 form PEx.3Treatment notes PEx.4Altra sound report PEx.5Lab investigating result PEX.6

11. The Appellant did not cross examine PW1

12. PW2 was the Complainant VMM. She testified that she resides in [Particulars Withheld]. She was in form 3. She got pregnant. 1st June 2020 was her first sexual encounter. She was in the farm on 1st June 2020. A person came and held her. She was in their farm. The person came from behind her and held her hands. she screamed. Two boys came and rescued her. Nicholas Wambua ran away. She went home and reported to her mother. Nicholas Wambua made her pregnant.

    On 28th June 2020 she was in the farm. She was bending and someone came from behind her. He held her from behind. He laid her down. She got scared and screamed and no one helped her. Two boys came. He ran away. She went home. She didn't know what he did to her. Her eyes were closed. She told her mother she was held. She missed her periods on 28th June 2020, she reported to her mother who took her to hospital. She could not remember the date she was taken to hospital. She got a baby girl

on 5/3/2021. The two boys told her who held her. There are two men. She had no relationship. The two were arrested. She was born 18/8/2002.

13. On cross examination by the Appellant, she responded that one boy who identified him was in court. They were not near neighbours. It was not her who said the Appellant was the one. It was the boys. After 2 days she went to hospital. She was beaten by her mother after she told her. Her brother rescued her from her mother. She was not forced. Her mother wanted to know the truth. The witnesses are the Appellant's neighbours. The incident happened in a coffee farm. It was around 4.00pm 28th June 2020.

14. In re-examination, PW2 stated that the Appellant held her on 30th June 2020. She was not forced to say it is him. It was not on 28th June 2020.

15. PW3 was JK. She testified that she resides in [Particulars Withheld] and does mboga business. PW2 was her daughter. She was her last born. She could not remember her date of birth. She was selling mboga when two men came. It was July 2020 when two boys came. They told her if she heard had the news. They told her they found PW2 and Wambua having sex. It was after one week after they had sex. She went home in the evening and asked PW2. She did beat her to tell her the truth. She told her she feared to tell her. She told her Wambua held her. She told the father that she takes the PW2 to hospital. She took to her to Kakuyuni hospital. PW2 was found to be pregnant. She reported to the father. The father told her to report to the Sub-Chief. They went to children Care office Kangundo. They went to Kangundo police station. They went to Kangundo Level 4 hospital. PW2 was again confirmed pregnant. They recorded statements. The Appellant who was their neighbour was arrested. They are distance apart. The boys who reported to her are near neighbours of the Appellant. She had no grudge with Appellant. PW2 told her she screamed. The Appellant was the accused person in the dock.

16. In cross examination she responded that the Appellant was seen by the boys. The boys knew the Appellant. The farm was a coffee farm. She took PW2 to hospital to check if she was sick. The Appellant had a wife and children. She could not remember the date PW2 was born. No one rescued PW2.

17. In re-examination she stated that she had told the truth.

18. PW4 was BWM a minor aged 11 years old. He gave unsworn evidence. He stated that he had a case in court. The Appellant was his neighbour. He saw PW2 and the Appellant put leaves of bananas and a sack down and started sleeping there. They started doing bad manners. He saw them doing sex and saw them very well. He told mother to PW2. He went to her home to report to her and she told him it was okay. He was alone. He pointed at the Appellant at the dock. He was looking for food for rabbits. The Appellant had a knife and did cut banana leaves. The Appellant did not run. There was no other person who saw the Appellant with PW2.

19. The prosecutor then asked for time to get her last two witnesses, the area assistant chief and investigating officer and the Appellant did not have an objection.

20. On 25/9/2023, PW5 Leonard Maingi David testified. He stated that he was the Senior Assistant Chief. That on 9/7/2020 a customer by the name AMM went to him and told him that his daughter who was aged 17 years old was pregnant. He referred him to Kangundo police station. The police later told him to arrest two suspects the Appellant and Andrew Ngui Kasaini. He arrested the Appellant and took him to the police station. He confirmed the Appellant as the person at the dock.

21. On cross examination, he responded that he was not told who impregnated PW2. The father did not know who impregnated her daughter PW2.

22. There was no re-examination and the Prosecutor informed the court that the investigating officer was not present and proceeded to close the prosecution case.

23. On 2/10/2023, the trial court delivered a ruling on no case to answer and found that a prima facie case had been established against the Appellant sufficiently to require him to make a defence on both charges.

Defence case

24. The Appellant, DWI, gave sworn evidence and did not call witnesses. He testified that on 3/5/2020. PW2 went to his house. She had a phone which had a memory card for pornographic. He was a village elder. PW2 was in Class 7. He deleted the pornographic and called PW2, the father and mother. PW2's father was not happy and started accusing him falsely. PW2 showed him girls' messages. The mother told him that boys chatting with her girls pay her with sugar He reported to the Headman Micheal Muiso Kaoki who was not a witness in the case and asked him to report to the Sub-chief. He was arrested on 17/7/2020 and charged. He denied committing the offence and that the accusations were false.

25. On cross examination, he stated that he had no grudge with the complainant or the investigating officer. That the witnesses were his neighbours. He did not report to the police or chief.

Analysis and Determination

26. Having carefully and cautiously considered and analysed the trial court's record, the grounds of appeal and the Parties' rival submissions on the appeal the issue for determination is whether the Appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.

27. Again, this being a criminal case, the prosecution bore the burden of proving the case beyond any reasonable doubt. I will determine:

    a. Whether the prosecution proved its case beyond reasonable doubt;

    b. Whether the Appellant's sworn defence was considered;

    c. Whether the sentence was illegal;

28. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the cases of Woolmington v DPP 1935 AC 462 and Miller v Minister of Pensions 2 ALL 372-273.

a. Whether the prosecution proved its case beyond reasonable doubt.

29. Section 8(1) of the *Sexual Offences Act* provides as follows regarding the offence of defilement:

    1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

30. In determining this offence, the court is required to consider whether the prosecution proved the following ingredients to the required standard:

    i. age of the victim (minor);

    ii. proof of penetration; and

iii. the positive identification of the appellant as the perpetrator of the offence.

i. Age of minority

31. From the Charge Sheet, the incident herein occurred on 28/6/2020. A Birth Certificate PExbt.1 was produced in evidence showing the Complainant PW1 was born on 20/8/2002. Correctly calculated, the Complainant was 17 years 10 months old at the time of the incident. There is no doubt that the Complainant was at the time a minor. This ingredient of age of minority was therefore proved as shown in her Birth Certificate being the best evidence in relation to age of a person.

ii. Proof of penetration

32. On the ingredient of penetration; Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

33. This court has keenly perused the trial court's finding on this ingredient in its judgment and observes that, in the judgment, the trial court stated that the evidence of PW2 was that she was held by the accused person on the material date. They had sex and as a result she became pregnant. The same was witnessed by PW4. The trial court therefore took the view that on 28/6/2020 the Appellant was with PW2 on the farm. They put leaves of bananas and a sack down as stated by PW4 and the Appellant penetrated into the vagina of PW2 and as a result she got pregnant. That the prosecution evidence was water tight. The Appellant's defence was that he only deleted pornographic materials from PW2's phone. He did not explain where he was on 28/6/2020. Secondly, there was nothing difficult in him going for a DNA test. The trial court went on to state that the prosecution had proved beyond reasonable doubt the Appellant committed the offence as charged and consequently convicted him for the offence of defilement contrary to Section 8(1) as read with Section 8 (4) of the *Sexual Offences Act* No. 3 of 2006.

34. Before I delve into the substance of this ingredient, I wish to deal with an issue of law which was neither raised by the Appellant nor by the Respondent but which might determine the next ingredient on identity of the perpetrator and the entire appeal at large.

35. In considering the matter of evidence by a child of tender years, the Court of Appeal in Johnson Muiruri v. R. (1983) KLR 445 held as follows:

> " Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which [case] his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him."

36. The court record reveals that PW4 who alleged to have witnessed the Appellant engage in sex with the complainant was a child aged 11years. The said witness was not subjected to voire dire examination to determine if he was possessed of sufficient intelligent to understand the importance of telling the truth as this aspect seems to have eluded the trial court.

37. Subjecting a witness of tender age to voire dire examination is founded under Section 124 (1) of the *Evidence Act*, which states: -

> " All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)".

38. Section 19 (1) of the *Oaths and Statutory Declarations Act* provides the procedure of receiving evidence of a child in the following terms:

> " Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".

39. In the leading case of Kibangeny Arap Korir v Republic, [1959] EA 92; the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that tender years means a child under the age of 14 years.

40. In a recent decision of; Patrick Kathurima v Republic, [2015] eKLR, the Court of Appeal held:

> " We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes".

41. In addressing what age would be appropriate for a trial court to conduct a voire dire examination, this court has also considered the holding in the case of Maripett Loonkomok v Republic [2016] eKLR where the Court of Appeal reiterated that children under the age of fourteen (14) ought to be taken through a voire dire examination and held that:

> " The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. The court reiterated the holding in Patrick Kathurima v R, Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 where it categorically stated that the definition in the *Children Act* is not of general application and that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify.

42. The court additionally stated that:

> " It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on

children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person."

43. In HOW -vs- Republic [2014] eKLR, (Per Onyango Otieno, Azangalala & Kantai JJA,) the Court expressed itself thus;

> "In our view, unless such a child's evidence is subjected to cross-examination, it would be impossible to know whether the evidence he gives is false or not. This provision in our view strongly supports the law as above that Section 208 of the *Criminal Procedure Code* applies to all witnesses who give evidence and is not confined to only those witnesses who give sworn evidence. It covers children giving evidence not on oath as well".

44. From the foregoing decisions supported by the definition of a child of tender years to be 14 years, I am persuaded that the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was a minor and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances I find the evidence by the PW4 was not received in the expected manner thus, the conviction of the Appellant becomes unsafe to sustain.

45. Further, this court in its re-analyzation of the evidence on record has established the following several discrepancies and glaring gaps in the prosecutions case that invite the disturbance of the trial court's judgment: -

a. First, the Charge Sheet shows that the alleged defilement took place on 28/6/2020 whereas the testimony of PW2 was that her first sexual encounter was on 01/06/2020 when she was on their farm and a person came from behind and held her hands, she screamed and two boys came and rescued her. She went home and reported to her mother.

   PW2 in her testimony repeats the same narration that on 28/6/2020, almost a month later, she was bending and someone came and held her from behind and laid on her. She got scared and screamed but no one helped her. Two boys came, the person ran away. She went home and did not know what the person did to her. Her eyes were closed. She told her mother she was held. She missed her periods on 28/6/2020. She reported to her mother who took her to hospital but could not remember the date she went to hospital. The complainant delivered a baby girl on 5/3/2021. In cross examination PW2 stated that the incident occurred at 4.00pm on 28/6/2020 but in Re-examination she retracted and categorically stated that the Appellant held her on 30/06/2020 and that it was NOT on 28/6/2020 which is the date shown in the Charge Sheet.

   -From the foregoing, this court is struggling to understand when exactly was the Complainant defiled, was it on 01/6/2020, 28/6/2020 or 30/6/2020?

   -PW2 stated that she missed her periods on 28/6/2020 and this court is left wondering how possible this could be when it is the same date the alleged defilement took place.

   -How come on the two occasions, PW2 was always on the farm when this person came from her behind and held her and whenever she screamed some two boys emerged to her rescue. This leaves a lot to be desired.

   -again, it can be noted that PW2 reported to her mother of what happened on the two occasions but on the other hand, PW4 stated that he went to PW2's home to report to her mother about

the incident and the mother told him it was okay. PW4 was alone and not with the other boy. Between PW2 and PW4, who is to be believed.

b. Secondly, on medical evidence, PW1, testified that that she had the birth certificate, PRC form, P3 form, treatment notes, ultra sound report, lab investigation results in respect the complainant. That Dr. Lilian Kioko filled the P3 Form. She worked with her and she was familiar with her handwritings. The patient was treated in hospital. She was a Class 8 pupil aged 17 years old. Her cervix was broken and discharge was around the vagina. The patient was pregnant. She wished to produce documents

On the above, the prosecution did not apply and lay a basis why PW1 would testify instead of Dr. Lilian Kioko who filled the P3 Form. PW1 did not tell the trial court where the said Doctor was. She did not explain how she knew the complainant was a Class 8 pupil aged 17 years and of much concern is that she failed to state the age of the pregnancy which was more crucial evidence in the circumstances of this case.

This court is aware that in criminal cases, the law allows another witness who is familiar with the signature or handwriting to produce in evidence a document under Section 77 of the *Evidence Act* which provides that:-

> "77. Reports by Government analysts and geologists.
>
> (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
>
> (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof".

It can be noted from the record that the Appellant did not cross-examine PW1 who may be, would not have been in a position to respondent to matters in the documents PW1 produced.

c. Thirdly, on the ingredient of identification, PW2 testified that she never saw whoever held her from behind. She stated "On 01/6/2020 a person came from behind and held my hands".

Further on 28/6/2020, she stated "I was bending and someone came from behind me. He held me from behind. He laid me down. I don't know what he did to me. My eyes were closed"

PW2 stated that on the two occasions i.e. on 1/6/2020 and 28/6/2020 when she bent, a person held her from behind, she screamed and two boys came to rescue her. In contradiction, PW4 stated that he was alone. It is strange that PW2 and PW4 never endeavoured to give the name of the other boy. A question that needs an answer therefore is why wasn't this other boy called to corroborate the evidence of PW2 and PW4.

Was it by coincidence that PW2 would on two different dates be on the farm and while bending a person would hold her from behind, thereafter she would scream and two boys would come to her rescue. This evidence is a bit disturbing and the trial court ought to have noticed the same and give the Appellant a benefit of doubt.

d. Fourthly, on 26/10/2020, the prosecutor, told the trial court that she had discovered PW2 was pregnant. PW2 had told her that she had been defiled by two people and she requested that the matter be adjourned till PW2 who was 5 months pregnant gives birth to enable them do a DNA test.

Further, PW5, stated that he was the Senior Assistant Chief. That on 9/7/2020 a customer by the name AMM went to him and told him that his daughter who was aged 17 years old was pregnant. He referred him to Kangundo police station. The police later told him to arrest two suspects the Appellant and Andrew Ngui Kasaini. He arrested the Appellant and took him to the police station. The father to PW2 did not know who impregnated her daughter.

On the above, it is clear that two people who were known were suspected of having been involved in the offence herein. The Appellant and one Andrew Ngui Kasaini. PW5 did not tell the court why he chose to arrest the Appellant and not Andrew Ngui Kasaini.

In addition, the trial court's record shows that PW2 delivered on 5/3/2021 when the case was still pending determination. Nowhere on the record does it show that following that delivery a DNA test was conducted to establish whether the Appellant was the father of PW2's baby as had been requested by the prosecution.

On the issue of DNA test, in its judgment the trial court stated that the Appellant did not explain where he was on 28/6/2020. Secondly, there was nothing difficult in him going for a DNA test. Clearly what the trial court did was to expect the Appellant to have carried the burden of conducting the DNA test on behalf of the prosecution and this was a grave miscarriage of justice. The trial court simply shifted the burden of proof to the Appellant to prove the prosecutions. Worse still the trial court did not even consider that the Appellant was in custody.

In Republic v Owuor (Criminal Case E002 of 2022) [2024] KEHC 3712 (KLR) (16 April 2024) (Ruling) it was held that:-

> " The burden of proof lies on the prosecution throughout the trial. That burden of proof does not shift to the accused person to prove his innocence. That is the only way fair trial of the accused person can be guaranteed as stipulated in Article 50 (2) of *the Constitution*.
>
> 6. It follows that an accused person is under no duty to give any evidence in defence to rebut the prosecution's case. An accused person has the right to remain silent and the court would decide the case on the basis of the evidence adduced, without making any adverse inference against him.
>
> 7. However, an accused person's right to adduce evidence and challenge the evidence adduced against him is guaranteed under Article 50 (2) (k) of *the Constitution*, albeit he also enjoys the right not to give any self-incriminating evidence. See Article 50 (2) (l) of *the Constitution*".

From this court's own calculation, PW2 delivered on 5/3/2021, wherefore counting nine months backwards falls on the month of early May 2020 and not in June 2020 as alleged. Most likely, the Appellant was not responsible for the impregnating PW2.

The prosecutor having been told by PW2 that two people had defiled her and the prosecutor having requested for a DNA test to be done once PW2 delivered, there is no explanation given by the prosecution why the same was not done. As things stand, the father of PW2's child between the Appellant and the other person remains unknown. Only a DNA test would have connected or exonerated the Appellant from the charge.

e. Fifthly, the record further shows that on 29/9/2023 the prosecution chose to close their case without calling the Investigating Officer to testify. The prosecutor only informed the court that the investigating officer was not present and wished to close the prosecution's case. No explanation or reason whatsoever was given why the said Investigating Officer was absent.

In cases where the evidence of the Investigating Officer is key in linking the accused to the crime, failure to call the Investigating Officer will cause irreparable damage to the prosecution's case. Like in this case, only the DNA test would have linked the Appellant to the offence and it is only the Investigating Officer who would have testified whether the DNA test was done or not and explain why Andrew Ngui Kasaini who was also accused having committed the offence was never arrested and charged alongside the Appellant.

In my view, since the prosecution was required to prove the Appellant guilty beyond any reasonable doubt, the unexplained failure of the prosecution to avail the Investigating Officer in court to testify created sufficient doubt, on his intended testimony, and the court was entitled to make an adverse inference that his or her evidence would most likely contradict the evidence of the other prosecution witnesses who had testified. I make such adverse inference and rely on the case of Bukenya –vs- Uganda (1973)

where it was held that:-

> " It is well established that the Director has a discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence that is inadequate and it appears that there were others witnesses who were not called, the court is entitled, under the general rule of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be averse to the prosecution case"

46. I thus give the benefit of the adverse inference to the Appellant, which means that his appeal will succeed on that account too.

47. I have considered whether to make an order of retrial. In so doing, I have considered that Appellant was convicted on the ground that the Appellant and PW2 had sex and as a result PW2 became pregnant. The defilement was witnessed by PW4. The trial court therefore took the view that on 28/6/2020 the Appellant was with PW2 on the farm. They put leaves of bananas and a sack down as stated by PW4 and the Appellant penetrated into the vagina of PW2 and as a result she got pregnant.

48. From the foregoing, I find that even if the trial had not been vitiated by the failure to conduct voire dire examination on PW4, by failure to do a DNA test and by failure of the investigating officer to attend court to testify, the evidence on record was not substantial and a conviction upon it was unsafe.

49. Based on this court's analysis above, it follows therefore that the trial court misapprehended the evidence and misdirected itself in finding that penetration had been proved based on the testimonies of PW1, PW2 and PW4 without proper scrutiny of the same thus wrongly convicted the Appellant. See the case of Bukenya -vs- Uganda [supra] in which it was held that:-

> " it is not the duty of the court to stage manage the case for the prosecution, nor is it the duty of the court to endeavour to make a case where there is none to an accused person. The duty of the court is to hold the scale to see that justice is done according to the law on evidence before it".

50. In light of my findings hereinabove, I do not find it necessary to analyse the Appellant's third ground of appeal on whether the sentence was illegal.

51. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the Appellant be set at liberty unless otherwise lawfully held.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 13TH FEBRUARY 2025

NOEL I. ADAGI

JUDGE

DELIVERED IN OPEN COURT AT MACHAKOS THIS 13TH FEBRUARY 2025

In the presence of :

In person..... for Appellant

Ms. Agatha..... for Respondent

Milly Grace..... Court Assistant