



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. E036 OF 2021**

**CYRUS MWONGERA NGEERA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the original conviction and sentence of the Senior Principal Magistrate's Court**

**at Githongo in Criminal Case No. 3 of 2020 delivered on 25<sup>th</sup> January 2021 by Hon. S. Ndegwa SPM)**

**JUDGMENT**

1. The Appellant, Cyrus Mwongera Ngeera, was charged with the offence of 'Attempted Defilement contrary to Section 9 (1) and (2) of the Sexual Offences Act No. 3 of 2006.' The particulars of offence as set out in the charge sheet dated 10<sup>th</sup> January 2020 were as follows: -

**'On the 2<sup>nd</sup> day of May 2018 at around 0930 hrs at [Particulars Withheld] Village, Mariene Location in Imenti Central Subcounty within Meru County intentionally attempted to cause his penis to penetrate the vagina of MK, a child aged 17 years.'**

2. He was charged with the alternative charge of 'Committing an Indecent Act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.' The particulars of offence were as follows: -

**'On the 2<sup>nd</sup> day of May 2018 at around 0930 hrs at [Particulars Withheld] Village, Mariene Location in Imenti Central Subcounty within Meru County intentionally touched the vagina of MK, a child aged 17 years with his penis.'**

3. Four Count II, he was charged with the offence of 'Being Drunk and Disorderly Person contrary to Section 33 (1) of the Alcoholic Drinks Control Act No. 4 of 2010.' The particulars of offence were as follows: -

**'On the 6<sup>th</sup> day of May 2018 at around 1700 hrs at [Particulars Withheld] Village, Mariene Location in Imenti Central Subcounty within Meru County was found staggering and shouting abusive words to members of the public due to drunkenness.'**

4. The Appellant pleaded not guilty to both counts and he was placed on his defence. By Judgment delivered on 26<sup>th</sup> January 2021, the trial Court, Hon. S. Ndegwa, SPM convicted the Appellant for Count I and sentenced him to serve 10 years imprisonment. He was acquitted for Count II.

**The Appeal**

5. Being dissatisfied with both the Judgment and the Sentence meted by the trial Court, he has preferred the instant appeal raising the following grounds of appeal: -

**i. THAT the learned trial Magistrate erred in law and facts by concluding that the Prosecution has proved its case beyond reasonable doubt against the Appellant yet the evidence on record is insufficient to prove the offence levelled against him in Count I.**

**ii. THAT the learned trial Magistrate erred in law and facts by shifting the burden of proof to the Appellant.**

iii. **THAT the learned trial Magistrate erred in law in disregarding the defence evidence.**

iv. **THAT the learned trial Magistrate erred in law and facts by failing to take into account the period the Appellant had spent in custody before sentencing him, thus sentencing was excessive.**

#### **Appellant's Submissions**

6. The appeal was canvassed by way of written submissions. The Appellants filed submissions on 5<sup>th</sup> July 2021. He urges that the complainant's evidence which was used to convict him was communicated to the investigating officer (PW2) by the complainant's late father. He urges that the circumstances pointed out by the trial Court do not conclusively prove the offence of attempted defilement. He cites *Peter Ndoli Adisa vs Republic* (2018) eKLR and *Michael Lokomar vs Republic* (2017) eKLR for the ingredients of attempted defilement. He urges that the trial Court relied on the alleged writing on a piece of paper and this is what was used to conclude that he had a guilty mind. He urges that the said piece of paper was never adduced before Court as evidence. He urges that without the production of the alleged piece of paper which was said to bear the words 'sex' the charge against him was not proven beyond reasonable doubt.

7. He urges that in the criminal justice system, the burden of proof is always on the Prosecution. He cites *H. L. (E)\* Woolmington vs DPP* (1935) A.C 462 PP 481. He urges that the trial Court shifted this burden to him by questioning why he was not able to adduce evidence to prove the ownership of the land that had caused truce between the complainant's family and him. That the trial Court also questioned his inability to call one Gerald who was a Bursary CDF Committee Coordinator. He urges that in the criminal justice system, there is no duty on the accused to prove anything on the allegations of a criminal nature. That the burden rests solely on the Prosecution throughout the trial save where there are admissions by the accused person. He urges that when the trial Court opined that he should have called his children whom he alleged to have been in the house as witnesses, it shifted the burden of proof on him which was an error.

8. He urges that in his defence, he urged that he was fixed in the matter and that he had been involved in a land dispute with the complainant's family. He urges that it was this defence that the trial Court cast doubt by stating that he never adduced any evidence to show whether the land in question either belonged to the community or to the complainant's family.

9. He urges that in his defence, he raised an *alibi* and that this defence was not rebutted by the Prosecution. He urges that the *alibi* was raised during cross examination of the complainant as his Counsel put the complainant to test to explain to the Court what exactly happened in the Appellant's house. He urges that none of these assertions by the complainant were brought to the attention of the Court during her examination in chief. He urges that the complainant only revealed the same to Court when cornered by the defence counsel. He urges that this shows that the complainant should not have been taken to have rebutted his allegation that he was not in the house during the alleged incident. He cites *Charles Anjare Mwamusi vs Republic*, Criminal Appeal No. 226 of 2002 and *Bernard Odongo Okutu vs Republic* (2018) eKLR. He urges that he raised the *alibi* defence at the earliest opportunity but the same was never rebutted by the Prosecution.

10. On sentencing, he urges that he was sentenced to 10 years imprisonment and that his conviction came when he was in custody where he had spent a period of 1 year and 16 days. He urges that the trial Court ought to have considered this period when sentencing in accordance with Section 333 (2) of the Criminal Procedure Code and Paragraph 7.10 of the Sentencing Policy Guidelines. He cites *Bathwel Wilson Kibor vs Republic*, Eldoret Criminal Appeal No. 78 of 2009 and urges that the sentence was excessive.

#### **Prosecution's Submissions**

11. The Prosecution filed submissions dated 15<sup>th</sup> September 2021. They urge that in an offence of attempted defilement, they must prove the other ingredients of the offence of defilement except penetration. They urge that they must prove the age of the complainant, the positive identification of the accused and the steps taken by the accused to execute the defilement which did not succeed. They cite the definition of attempt as per Section 388 of the Penal Code.

12. They cite *Kaingu Elias Kasomo vs Republic* (2010) eKLR for the importance of proving the age of the victim of a sexual assault. They urge that they proved the age of the victim to be 17 years and that PW2, the investigating officer produced the child's birth certificate which showed that she was born on 18<sup>th</sup> July 2000.

13. Citing *Anjonini & Others vs Republic* (1989) KLR, they urge that recognition of an assailant is more satisfactory than identification of a stranger. They urge that PW1, the complainant testified that she was accompanied by her father to the chief's home who had indicated that he would help them with the bursary. That on arrival, the father talked to the chief and left her at the chief's home and that the chief welcomed her and she sat down. That the chief went into another room and came wearing a white towel. That the chief pulled down his towel and she looked away as she did not want to see his nakedness. They urge that the offence took place during the morning hours and the complainant could thus see the Appellant clearly.

14. They urge that it was the evidence of PW1 that the Appellant went into the other room and came out wearing a white towel. That he took a paper and pen and wrote the word sex on it, and gave it to the complainant to read and she motioned to him and said no motions. That the Appellant untied the towel and came to where she was and she looked away. That he held her hands and she tried to resist and that he tried to pull her but she wrestled with him and run.

15. They urge that the appeal lacks merit and it should be dismissed in entirety.

#### **Evidence at the trial Court**

16. In a first appeal, the Court is enjoined to consider both issues of law and fact and make its own independent findings, bearing in mind that it is the trial Court that had the benefit of observing the demeanour of the witnesses. See *Okeno v Republic* (1972) EA 32. The evidence

adduces at the trial Court is reproduced hereunder: -

## Prosecution's Case

### PW1

17. PW1, the complainant who was deaf testified as follows: with the help of a sign language interpreter: -

*"I am MK. I come from Meru. I go to [Particulars Withheld] School for the Deaf. I am 19 years old. I was born in the year 2000 November 18<sup>th</sup>. This is my birth certificate. On 2<sup>nd</sup> May 2018 at around 9 a.m, I was at home with my father. He asked me to accompany him to the chief's home and we went. We knocked the door and it was opened. My father is called RM. I don't know the chief's name. My father showed him an identity card. He spoke with my father and left. I was welcomed into the house by the chief and I sat down. The chief went into the other room and came wearing a white towel. He came to where I was seated. Took a paper and pen and wrote the word sex. He gave it to me and I read it. I was surprised and motioned to him and said no motions. He untied the towel and came to where I was and removed the towel and I looked away. I didn't want to see his private parts. He came to where I was and held my hands. I tried to resist. He tried to pull me but I wrestled with my hand. I picked my identity card, opened the door and started running. I saw some people outside, tried to scream but they didn't hear me. I ran to the house. I found my father and told him what had happened. I had seen a group of people before getting home tried to explain but they couldn't understand. My father asked if we had sex and I said no. He said that was good. He then left me and went to a certain homestead. I wouldn't know why my father had left me at the chief's house. My father made a report at the police station on 2<sup>nd</sup> May 2018. K, my uncle took me to the police station. I wasn't taken to hospital. The chief is before court."*

### Cross examination

*"I was taken to the Chief by my father at around 9.00 a.m. It is not true that his children were in the house as he was alone. I wouldn't know if the chief has an office. I had taken my father's identity and disability card to the chief. My father spoke with the chief and then he left me. He told me that the chief and I were to go pick some papers. My father left me with the chief, a short while from the time he took me there. The chief shut the door when my father had left. If my statement states the door was half locked, it is because he didn't lock with a key, he only shut it. If my statement states the chief removed his clothes in front of me, it's because he came in a towel only, removed it and came towards me. He had nothing under the towel. No under wear-naked. It's true he was smelling of beer. I saw him take a bottle of beer from the cup board. It was a brown bottle. If my statement doesn't state the same, I still saw him. He poured the same into a glass. Its true he wrote the word sex on a paper. I didn't take the paper to police. Chief did not touch me. He only held my hand and I pushed him away. He did expose to me his private parts and I was embarrassed and afraid."*

### PW2

18. PW2 testified as follows: -

*"I am No. 83737 Corporal Jerioth Mambo from Makutano Police Station, Embu. I am formerly of Kariene Police Station. I am the investigating Officer herein. On 2<sup>nd</sup> May 2018, a girl came with her father and made a report that on the same day, the chief had had called the father if the girl, RK on the phone and told him he could assist him with CDF cash for the disabled as his child is dumb. He and the girl went there i.e to the chief's house. R was unwell and the chief said he could assist the girl and go with her to the office. He left the chief with his identity card (R) and the child's disability card. He said that after a while, the girl came home and told him that after he had left, the chief had shut the door and said he could get ready so that they go together to the office. He went into one of the inner rooms and emerged with a white towel tied around his waist and wearing nothing else, took a piece of paper and wrote on it the word 'sex'. The child was shocked. The chief dropped the towel to the floor. He was smelling of beer and had some in the cupboard. He came towards her and held her hand but she ran away while trying to scream. She went home to her father and told him what had happened. It is the complainant's father who spoke to me on her behalf as she is deaf and dumb. I asked him for her birth certificate. It is before Court. It indicates she was born on 18<sup>th</sup> July 2000. I wish to produce it as an exhibit. I recorded the witness statement and charged the accused with the offence. The father of the child is now deceased. I wish to produce his statement as an exhibit. He died on 9<sup>th</sup> July 2020. He recorded his statement on 2<sup>nd</sup> May 2018.*

### Cross examination

*"It's the complainant's father who gave me a narration of event for that day. He said he understands sign language and communicates with his daughter as he has stayed with the child since birth and she is dumb. They have developed a way of communicating. I looked for a trained sign language interpreter while recording the complainant's statement but didn't find any. I used the father to interpret to the child and I was thus able to record his statement. The accused didn't touch the complainant but the intention was there as he held on her hand while advancing towards her. The girl said the chief smelt of beer. I asked the father why he had left his daughter with the chief and he said it is the chief who had said he'd go with the child as the father was unwell. The chief had said he would go with her to the office and she would go back home.*

## Defence Case

DW1

19. DW1 Cyrus Mwongera Ngera testified as follows: -

**“I am Cyrus Mwongera Ngera. I come from Mugambone. I am a former Assistant Chief. I know why I am before Court. I know the complainant herein. She was one of my subjects. On 2<sup>nd</sup> May 2018, I was at home with my wife. I left for the office at around 8:00 a.m. It is roughly 700 metres from home. I left my wife and 3 children there at home. I stayed in the office up to 12:00 p.m then spoke to a village elder and went home for lunch. The complainant and her father never came to my house on that day. They have never come to my office either. A week before, they had come to my office inquiring if complainant could get a bursary and I told her father that the vetting had already been done. They said I hated them as I had even taken a shamba belonging to the community from them. I had a building put up. I referred them to Gerald who had been in charge of the bursary committee. On 6<sup>th</sup> May 2018 at 4:00 p.m, I went to the shops with one Gerald. On my way, I met with an officer who arrested me. I was not drunk. It is not true that on 2<sup>nd</sup> May 2018 I had taken some beer.**

#### **Cross examination**

**“The bursary committee is separate from my office. It is headed by the area MP. My only role is to sign the application forms for those seeking the same. I wouldn’t know if there are others apart from the complainant who didn’t get the bursary. Maureen and her father had come on the Monday of the previous week seeking bursary and I said they were time barred as the same had already been processed and allocated. They went away angry. Gerald Mitirti was present. Her father said I would never help them as I had taken away a plot from their family. They have a grudge against me over the plot I took away from their family. It is not true that on 2<sup>nd</sup> May 2018, M and her father came to my house as I was in my office. It’s not true that I absconded when I was initially arraigned before this Court on these same charges in SO 9/18. I was last in Court on 17<sup>th</sup> May 2018. I was re-arrested on 10<sup>th</sup> January 2020. I got confused in that period and that is why I didn’t come to Court. I had a surety. He did not look for me. I am an Assistant Chief and I knew I was supposed to attend Court. On 29<sup>th</sup> May 2018 when I was to come to Court, I was in a matatu that took me to Nkubu instead of Court due to my confusion. I called a brother who lives in Laikipia. I found myself in Laikipia. I passed by my Advocate’s office in Meru town and then found myself in Laikipia. It is not true that I ran away to Laikipia. I am aware that my surety paid Ksh 300,000/= to the Court after I disappeared.”**

#### **Reexamination**

**“The complainant didn’t get bursary as she applied while it was too late. The complainant wasn’t happy about not getting bursary. In S.O 9/18 I attended Court on 9<sup>th</sup> May 2018. When I left Court, I found a group of 100 people in a meeting with the Chief. I feared for my life and ran away. I was of unsound mind and ran away.”**

DW2

20. DW2 testified as follows: -

**“I am Doris Gacheri Mwongera. I come from Mugambone. I am a teacher and I know the accused. He is my husband. I only got to know the complainant when this case started. On 2<sup>nd</sup> May 2018, I prepared breakfast for my husband and then left for work. At around 10:00 a.m, I went to school. I left my children at home. I was at home at 9:00 a.m and no one came. My husband wasn’t drunk. He doesn’t take beer at home.”**

#### **Issues for Determination**

21. Appellant’s grounds of Appeal raise two main issues for determination as follows:-

**i. Whether the Prosecution proved their case beyond reasonable doubt.**

**ii. Whether there is reason to disturb the sentence of the trial Court.**

**i) Whether the Prosecution proved their case beyond reasonable doubt.**

#### **Age of the Complainant**

22. In cases of attempted defilement, what is most important is to show that the victim was below the age of 18 years, unlike in cases of defilement and rape where the exact age of the victim has to be proven. The Court considers that the complainant’s birth certificate was produced indicating her date of birth as 18<sup>th</sup> July 2000. This means that at the time of the offence on 2<sup>nd</sup> May 2018, she was 17 years old. This Court therefore finds that the complainant was indeed a child at the time of the offence.

#### **Identification of the Appellant**

23. With respect to identification, this Court has taken note of how the offence is said to have happened and the relationship between the Appellant and the complainant. The Appellant as admitted in his own evidence was a chief of the area where the complainant lived. The

Court considers that a chief, being an administrator is a public figure and his identity is thus well known amongst his subjects, including the complainant. The Court also considers that the offence took place in the morning at about 9:00 a.m and therefore, the complainant had adequate opportunity to see the Appellant. In his defence, he admitted that the complainant and her father had previously visited his office seeking bursary funds. The Appellant was therefore known to the complainant and this was evidence by recognition. The Court thus find that the identification of the Appellant as the complainant's assailant was positive.

### **Attempted Penetration**

24. On the matter of attempted penetration, this Court observes that PW1 confirmed that on the morning of 2<sup>nd</sup> May 2018, together with her deceased father, they visited the Appellant in his home as they were seeking bursary funds managed by, among others, the Appellant. She testified how her father had left her in the Appellant's house and how the Appellant thereafter closed the door, went into another room, took off his clothes and returned dressed only in a towel. She testified that the Appellant came and sat next to him, took a piece of paper and wrote the words 'sex' on it and then removed his towel and exposed his private parts to her.

25. It is therefore not true, as asserted by the Appellant, that the only piece of evidence that was used to convict him was that of the act of writing the words 'sex' on a piece of paper and handing it over to the complainant. There was other evidence to the effect that he undressed and exposed his private parts to the complainant and thereafter struggled with her until she ran away.

### **Definition of Attempt**

26. Section 388 of the Penal Code defines the term 'attempt' as follows: -

#### **388. Attempt Defined**

**1. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**

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

27. It is evident that intention is a key component of the offence of attempted defilement. It is a requirement, however, that the accused person, at the material time, had begun to put his intention into execution and that he manifested this by way of an overt act. The extent as to how far he went in his mission to commit an offence would not matter and neither would it matter that he was prevented from committing the main act itself, either by his own motion or by other factors independent of his will. What the law is concerned with is the 'attempt' itself, characterized by the setting of an intention into motion.

28. The Court considers that there were a series of overt acts by which the Appellant manifested his intention of defiling the complainant. These are as follows: -

- i. Removing his clothes and coming back dressed in only a towel.
- ii. Writing the words 'sex' on a piece of paper and handing this to the complainant.
- iii. Exposing his private parts to the complainant.
- iv. Holding the Appellant by the hand and struggling with her.

29. The Appellant has urged that the failure to produce the alleged piece of paper on which the word 'sex' is said to have been written creates doubt as to his guilt. This Court, however, considers that the circumstances under which the offence happened and the fact that the complainant was forced to struggle with the Appellant and run for her safety explain the omission to produce the piece of paper. At that point in time, and in the heat of the moment, the complainant must have been pre-occupied with her objective of getting away from the perceived and real danger that was clearly imminent. Had she spent another second in the Appellant's house, she would have been defiled. She, therefore, cannot be faulted for not having taken time to retrieve the piece of paper.

30. The Court also considers that even without production of the piece of paper, there is other overwhelming evidence that proves that there was an attempt to defile the complainant. This is confirmed by the fact of the Appellant removing his clothes and coming to the living room where the complainant was, dressed only in a white towel, showing the complainant his private parts and thereafter holding her hand and struggling with her to the point where she had to run away for her safety.

31. Under Section 388 of the Penal Code, the test for attempt lies in the question of whether an accused person had begun to set his intention of into motion by way of an over act. Indeed, the Appellant herein had begun to set into motion his intention of defiling the complainant. This Court does not see any other reason as to why the Appellant, who was previously fully dressed when the complainant's father was around, would wait for the complainant's father to leave then go and remove his clothes and come back to his living room naked, with full knowledge that there was a visitor in his house. To make matters worse, he exposed his private parts to the complainant and thereafter

struggled with her to the point of causing her to run away for her safety.

32. It is immaterial that the Appellant did not complete his intention or that he was stopped from defiling the Appellant after her narrow escape from his house. It would not even matter if he himself, by his own will failed to complete his intention.

33. The Court has also considered that the trial Court, which had the benefit of observing the witnesses' demeanor held as follows concerning the demeanour of the complainant: -

**“I had occasion to look at her demeanour while testifying. She was straight forward, forthright and vivid - taking the Court into the house as it were - in her description of events.”**

34. This Court thus finds that the ingredients of the offence of attempted defilement were indeed proven beyond reasonable doubt.

#### **Shifting Burden of Proof**

35. The Appellant has urged that the trial Court shifted the burden of proof to himself when it questioned why he had not called any witnesses to confirm that he was at his office in accordance with his *alibi* and why he had not called Gerald, the Bursary Officer. He further urges that the trial Court shifted the burden when it questioned why he did not adduce evidence to prove the ownership of the land that had allegedly caused a grudge between the complainant's family and him.

36. The Court considers that while an accused person is not required to prove his innocence, the Court is required to examine the evidence of the Prosecution and the Defence as a whole in arriving at its finding. This was established in *Ndege Maragwa v. R* (1965) EACA, which was cited with approval by the Court of Appeal in *Okethi Okale & Others. v. R* (1965) EA 555. See also *Ouma v. R* (1986) KLR 619.

37. It would therefore not be wrong for the trial Court to seek to establish the probative value of an accused person's defence and weigh that against the Prosecution's evidence.

38. Further, the Court also considers that DW2 was the Appellant's wife and her evidence therefore, has little credence. Furthermore, she testified to have left the house at 9:00 a.m, which is the same time the complainant testified to have gone to the Appellant's home. She would thus not be in a position to testify as to what happened after 9:00 a.m.

39. The Court therefore finds that a weighing of the Prosecution's and Defence evidence as a whole proves that the Appellant is guilty for the offence of attempted defilement.

Whether there is reason to disturb the sentence of the trial Court.

40. The Appellant was sentenced to 10 years imprisonment which is the minimum sentence for the offence of Attempted Defilement under Section 9 (2) of the Sexual Offences Act.

41. This Court considers that the circumstances of the case reveal aggravating factors which the trial Court must have taken into consideration as it made its finding on sentence. The first aggravating factor was the act of exposing the complainant to his private parts. The court considers that the visual images of the Appellant's nakedness must have been traumatizing to the complainant and they will have a long term psychological effect on her. In her evidence, she testified to have felt embarrassed and afraid at the material time. The second aggravating factor was that the offence was committed by the chief, a public officer and a custodian of the law and order within his jurisdiction. The Court considers that in the guise of assisting her to get bursary, the chief abused his power, authority and public trust by attempting to defile the complainant who had been left to his care by her father. The other aggravating factor is the fact that the complainant was deaf and dumb.

42. The Court considers that the 10 years imprisonment sentence was in fact lenient. However, since there is no cross appeal by the Prosecution seeking an enhancement of the same, the Court will not enhance it.

43. The Appellant has also urged that the trial Court did not take into account the period of pre-trial detention of 1 year and 16 days. The Court has confirmed that indeed, the trial Court, in passing the sentence, did not take into account the period of pretrial detention in accordance with Section 333 (2) of the Criminal Procedure Code, and this Court will thus order that this period be taken into account.

#### **Conclusion**

44. On 2<sup>nd</sup> May 2018, the complainant, a 17 year old deaf and dumb girl and her deceased father went to the Appellant's house seeking assistance to obtain bursary funds. The complainant testified as to how her father left her in the Appellant's house, only for the Appellant to shut the door, remove his clothes and approach her, dressed in only a white towel. She testified how the Appellant came and sat next to her, took a piece of paper and wrote the word 'sex' on it and then removed the towel and exposed his private parts to her. The Court considers that all these were overt acts, being a manifestation of the Appellant's intention to defile her within the context of Section 388 of the Penal Code. For purposes of attempted defilement, it matters not that the Appellant was prevented from executing his intention to completion. The Court has accepted the evidence of the complainant which was given with the help of an interpreter as she is deaf and dumb as truthful, within the proviso of Section 124 of the Evidence Act. The Court has also considered the sentiments of the trial Court which confirmed the complainant's truthful demeanor.

45. The Court does not find that the omission to produce the piece of paper on which the words 'sex' were written, material enough to cast

doubt on the Prosecution's case. The Court rejects the Appellant's defence of *alibi* and grudge as an afterthought. The Court finds that a weighing of the Prosecution's evidence and the defence evidence as a whole, in accordance with the principle in *Ndege Maragwa v. R* (1965) EACA reveals that the Appellant is guilty for the offence of attempted defilement.

46. As to sentencing, the Court considers that the Appellant got the least severe punishment of 10 years imprisonment. Going by the aggravating factors of the case, being that the Appellant was a public officer (chief) and that the complainant was deaf and dumb, the Court finds that the sentence was lenient.

47. The Court will, however, order that in computing his term, the period of pre-trial detention spent in custody be taken into account, in accordance with Section 333 (2) of the Criminal Procedure Code.

#### **ORDERS**

48. Accordingly, the Court makes the following orders: -

**i. The Appeal on conviction is declined and the finding of the lower Court on conviction is upheld.**

**ii. The sentence of 10 years imprisonment meted out by the trial Court against the Appellant is upheld.**

**iii. In computing the Appellant's term of 10 years imprisonment, the period of pre-trial detention spent in custody from 10<sup>th</sup> January 2020 up to the date of sentencing on 26<sup>th</sup> January 2021 shall be taken into account, and therefore, the sentence shall commence on 10<sup>th</sup> January 2020.**

Order accordingly.

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2021**

**EDWARD M. MURIITHI**

**JUDGE**

#### **Appearances**

**Cyrus Mwongera Ngeera, the Appellant in person.**

**Ms Nandwa, Prosecution Counsel for the Respondent.**