Ndeto v Republic (Criminal Appeal E039 of 2023)
[2025] KEHC 2627 (KLR) (28 February 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E039 OF 2023

MW MUIGAI, J

FEBRUARY 28, 2025

BETWEEN

BRIAN NDETO ..... APPELLANT

AND

REPUBLIC ..... PROSECUTION

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars of charges sheet that led to his arraignment were that : On diverse dated between August and December (2021) at Athi River within Machakos County, the appellant intentionally attempted to cause his genital organ (penis) to penetrate the female genital organ (vagina) of EN aged 12 years.

2. The appellant was further charged with the alternative charge of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006.

   It was alleged that the Appellant did an unlawful intentional act which caused contact of his hands with the breast of EN aged 12 years.

3. The Appellant denied the charges and after Trial, he was convicted under Section 215 of the *Criminal Procedure Code* on the main charge of defilement. He was also sentenced to serve 15 years imprisonment.

The Evidence

Prosecution's Case

4. The prosecution called 4 witnesses to testify in proof of the charges.

5. PW1, E.N the victim in the case, was taken through voire dire examination. The court allowed her to give sworn evidence, she testified that she studied at [particulars withheld] Academy and that she was in class 6. The appellant was a teacher at the school and he would teach her in the morning hours after her mother made arrangements for tuition. Her mother would take her to school in the morning and she would leave her with the appellant. That the appellant would tell her to go to the toilet before the lessons but she would refuse. That the appellant told her to enter the toilet there was something he wanted to do. She refused but he said he would put on a condom. There was a girl who came after her. He pushed her inside the toilet and started to rape her, he did 'tabia mbaya'. She had stockings on and he had sex with her he also warned her not to tell anyone.

6. That N used to come to school after her, the appellant would tell her to rush back before the girl arrives. That N would join them and they would continue with the lesson

7. She testified that the appellant raped her every other day and that she refused to go to school and her mother would beat her. That she later told her what had happened and they went to the director of the school. That Mama Shiru who sold cereals also advised them to go the police station. The witness also cried in court during her testimony.

8. She was cross examined and she stated that she knew M who was a PP1 teacher. M also taught PP2 and she was also the church administrator. She would also do tuition in the evening. That E and N were also taught in the morning tuition. The appellant used to beat them if they do not finish homework. She described the school as being close to the church, the toilet was also close to the staffroom although one must take a turn before reaching the toilet. That the appellant used to be at the gate when they arrived at 4:00am. That he used to follow her when she went to the toilet and that they had sex in class and at home. She never had sex before, she did not see the condom after sex.

9. She described how the appellant removed her stocking and panty and he told her to sit on his thighs as he sat on a bucket in the toilet. That he found her at home with her cousins and he sent them to get a book from his house. The appellant raped her at home. That her mother was not at home and the appellant was to do the tuition at school.

10. She was reexamined, she stated that the appellant used to open the gate in the morning, he also had the key. That M would come late, the toilet was also far from the staffroom and the classroom.

11. PW 2, MW is the victim's mother, she testified that Pw1s mother said that that the child refused to go to school on diverse dates from 4/2/2022.

12. That they would go to school at 5:30 am but the child kept complaining and she did not want to go to school, that she also met her telling the brother that she was sick. That she approached a teacher called L to discuss the issue and she advised that homework could be reduced but she still refused to go to school. That she did not wear her tracksuit jacket the next day and she stood at the gate o

13. Pw2 went to buy cereals and the child came to her and told her at the road that the appellant raped her. She was afraid that Pw2 would beat her. Pw3 called the school director but she was away .That the next day she was called by the owner of the school. They went to school with the minor and she told the owner what the child told her .She was sent out and the minor also told the owner of the school about the incidence.

14. The owner assured them that the appellant would not teach at the school. She went to the police station and the appellant was arrested. They later went to Gwata hospital where the minor was treated.

15. She stated during cross examination, that she would find the school gate closed .That she lived in a single room but the appellant could only teach the minor when she was around or when there was

someone. That the minor had academic challenges. That she did not pay him and she did not take any action after the defilement .The owner had asked them to talk and resolve the issue.

16. She also checked the minor's private parts and found that it had a problem. That the post rape care was filled in the year 2022, she also took her to hospital immediately. The minor was 12 years old and they would sleep on the same bed but she never saw any sign of defilement.

17. She confirmed in reexamination that she took her to hospital on 19th January and that the child was defiled before school closed.

18. Pw3, Gedion Kirimi a clinician from Mlolongo hospital referred court to treatment notes and stated that the child attended the hospital on 19/1/2021, he also examined her on 20/12/2021 when he filled the p3 and post rape care forms. The minor said that she was defiled by the teacher although she did not know the dates.

19. There were no injuries or lacerations on the body and her external genitalia was intact but the hymen was broken with no discharge noted .Pregnancy test was negative. He produced the treatment notes as exhibit 1, the P 3 form and Post rape care form as exhibit 2 and 3.

20. He was cross examined, he stated that the child's narration concurred with the clinical examination. That riding a bike could not break the hymen but it can be broken by trauma that is penetrating. They relied on the history, physical examination and the clinical examination to come up with the conclusions.

21. He admitted that the report was not done on time and that some evidence could be missing. He did not find spermatozoa and there were no lacerations. He was the first person to examine the minor on 19th and he filled the P3 form on the same day which should read 19/1/2022.

22. That the appellant was tested and was advised accordingly. That he tested negative to HIV test done after 72 hours. That virus can be detected after 3 months. That the virus load is law when ARVs are used, in this case the viral load was undetectable. No condom was used.

23. PW4 No. 243849 PC Dorcas Kuya from Mlolongo Police station investigated the case and stated that he interrogated the minor who was accompanied by the mother. The child was a student and had been defiled by Brian on several occasions. That the appellant requested the minor's mother to bring the child to school in the morning so that he could tuition her. This happened on diverse dates between August 2021 and December 2021 when the minor was brought at 5:00hours while others came to school at 6:00am.

24. That this went on until 4/1/2022 when the minor started to refuse to go to school, she said the teacher was punishing her and the mother went to school. That she later opened up to her on 18th telling her that when she gets to school Brian could take her to the toilet and would unzip his trouser sit on a bucket remover her dress pant an ask her to sit on him.

25. That the appellant requested to tuition the child at home, he found her with a cousin and sent the cousin to the shops. He locked the door and defiled her in the house.

26. He booked the report and also visited the school with the complainants. He saw the place where defilement took place and the victim also identified Brian who was later arrested. The victim was examined at the health center.

27. He produced the birth certificate as Exhibit 4.

28. He stated during cross examination the school management did not record statements and that the toilet was in a corner and it was possible to defile a child at the place .That one could not see a person from the office, the classes were on the same side, the buildings are distant from each other and are 5 meters directly opposite the office.

29. The appellant was placed on his defence as per the ruling of the court 13/2/2023 on primafacie evidence.

The Appellant's Defence

30. The appellant gave unsworn evidence. He testified that he was aware of the case but he denied committing the offence. He stated that he was employed as a teacher at [particulars withheld] Academy where he worked as he raised funds to join university. That he taught grade 4 and 5 .That the school is owned by the church. Mama N used to stay at the school .The pupils used to come at 6:30 am. That he did not have the keys and the school was closed from inside. That N E and I attended tuition .That parents paid him ksh 1000/= per week and they would come for evaluation.

31. That the victim's mother did not pay him. She did not come for the evaluation and she told him to go to her home in January. He went to the house as directed and she said that she could pay him through other means. She wanted a relationship with him and she continued making advances until 19th when he was arrested.

32. He testified that he was never paid and he also knew about the child's HIV status in court. The child did not come to school from 7th to 19th. That the hymen was broken and it was not fresh.

The Trial Court's Judgment

33. The court delivered its judgement on 23/8/2023 and returned the verdict of guilty against the appellant for the charge of defilement contrary to Section 8 (2) & 8 (3) of *Sexual Offences Act*.

34. The court found that the prosecution had proved the charges of defilement .That the charges sheet reffered to defilement but the particulars indicated that the appellant attempted to cause his male organ to penetrate the minor .The appellant was represented by an advocate and he had notice of the charges.

35. That the minor's cousin and M were not necessary witnesses, the child was also on ARVs. The doctors found that virus was undetectable and transmission was nonexistent.

36. The appellant was heard on his mitigation and he stated that he was 19years old .He was a pursuing his degree and he also supported his family.

37. The court sentenced the appellant to 15 years jail term having considered the appellant's age and decided case. The offence had a negative impact on the victim.

The Appeal

38. Aggrieved, the appellant preferred his appeal against conviction and sentence of the trial court aforesaid on grounds that:

    1. The trial magistrate erred in law and fact when she convicted the appellant and sentenced him based on a defective chargesheet.

    2. The magistrate erred in law and fact when she convicted and sentenced the appellant despite the prosecution having failed to prove penetration.

3. The trial magistrate erred in law and in fact when he held that the charges against the appellant had been proved beyond reasonable doubt and that he failed to consider the fact that the prosecution deliberately failed to parade key witnesses and despite the magistrate acknowledging this anomaly

4. That magistrate erred in convicting the appellant against the weight of evidence place before her which had exonerated the appellant from the alledged offence

5. That the magistrate dismissed the appellant's defence despite appreciating several lacunas in the prosecution's case.

6. The magistrate totally ignored the clinical officer's evidence that the complainant was HIV positive and that the offence took place within 3 months of the examination and the appellant was HIV negative. That if the appellant had defiled her he would have been exposed to the virus.

7. That the court erred when she imposed 15 years custodial sentence when there was no proof to warrant a conviction.

8. The magistrate erred when she convicted the appellant on the basis of uncorroborated evidence and that the magistrate failed to consider Section 124 without evaluating or substantiating whether the child understood the essence of telling the truth.

39. The appeal was canvassed vide written submissions

The Appellant's Submissions.

40. The appellant filled submission and amended grounds of appeal through Kitindio Musembi Advocates. It is submitted on his behalf that the charges were defective and that the particulars related to attempted defilement. The appellant was prejudiced since the offence had different ingredients and could not know what to answer. That the defective charges breached the appellant fundamental rights.

41. The Appellant relied on Bernard Ombuna –Vs- Republic (2019) eKLR .He also submits that the evidence did not prove indecent act and that there was contact with the child's breasts or chest. On ground 2 and 5, the appellant submits that penetration was not proved since the genitalia was found normal. The child was also examined several months later and it was difficult to find injuries. The post rape care also indicated that the child was normal. That the minor was couched and it was not possible for penetration to occur on a 12 year old without blood stains being found. The evidence was not corroborated by medical evidence as per the case of Bassita -Vs- Uganda Cr*iminal Appeal No. 35 of 1995*.

42. That the child testified that she felt something wet and she took a shower while she stated that she was defiled in the morning. That the appellant was not linked to the offence. The child was HIV positive but the appellant tested negative after the alleged defilement.

43. On ground 3 and 4 , the appellant submits that the case had contradictions and that key witnesses were omitted. That the minor testified that she reported to school at 4:00am while the mother stated that they went to school at 5:30 am an also drops her at 6:00am. That the school was opened by the school administrator who did not come to testify. The tuition was also attended by several pupils.

44. On sentence, the appellant's case is that the prosecution had not proved its case beyond doubt and that the sentence was faulty.

The Respondent's Submissions.

45. The prosecution contested the appeal on two grounds, that the charges were not defective and that the prosecution called competent witnesses. That the appellant's participation in the trial proved that understood the charges. He also cross examined witnesses and put up a defence. The prosecution refers to the case of Sigialini -Vs- Republic (2004) 2KLR 480 and Daniel Oduya Oloo -Vs- Republic (2018) eKLR

46. The prosecution concedes to the appellant's grounds on penetration and submit that the medical evidence did not prove penetration. That the Trial Court failed to scrutinize the evidence appropriately. The fact that the victim had a broken hymen with no discharge, clearly shows that penetration was not proved as required by law. The Post rape care indicated that no laceration was noted and that there was no injury. The labia and clitoris was okay but the hymen was broken.

47. The Trial Court ought to have warned itself of the danger of convicting the appellant on the complainant's evidence. Reliance is placed on the case of Arthur Mshila Manga -Vs- Republic as cited in the case of John Mutua Munyoki -Vs- Republic (2017) eKLR

48. The Trial court considered the defence of the appellant that he was not infected with HIV virus [the Trial Court record indicates that the child/victim was born with HIV and was on retroviral drugs] The Trial Court considered the Defence of the Appellant that he was not infected with HIV virus. PW3 testified that the victim was on ARVs therefore the viral load was not detected on transmission.

49. The Trial Court relied heavily on Section 124 of the *Evidence Act* to ascertain whether the victim was telling the truth. The medical evidence on P3 Form and PRC Form cannot stand the test of time to prove penetration

50. Further that the Trial Court also erred in sentencing the appellant to 15 years. The prosecution urges that the Supreme Court decisions in Francis Kariokor Muruatetu -Vs- Republic did not apply to sexual offence.

51. The ODPP/Prosecution sought retrial.

Anaysis & Determination.

52. This is a first appeal and as per the case of Okeno Vs Republic [1972] EA 32 and Pandya Vs Republic this court is to re-evaluate and overhaul the evidence of the Trial Court to determine whether the appellant was properly convicted and sentenced. The Court notes that it neither saw the witnesses nor heard their evidence and due allowance shall be given for this discretion.

53. In Pandya -Vs- Republic [1957] EA 336 , the East Africa Court of Appeal held that :-

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

which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

54. The court has considered the Trial Court proceedings and evidence on record. The appellants grounds of appeal and submissions filed for the appeal and Respondents grounds and submissions against the appeal have also been taken into consideration. The issues for determination of the appeal as follows:-

1. Whether the charges preferred were defective
2. Whether penetration was proved beyond doubt
3. Whether the prosecution omitted crucial witnesses
4. Whether the case had contradictions.
5. The appellant's defense.
6. The legality of the sentence.

Defective Charge(s) Information

55. The issue of defective charge sheet must be determined as a preliminary point during trial. The charge sheet must give notice of the offence charged and the particulars informing it. The offence must be provided in law and the charges must not be ambiguous so as to prejudice or embarrass the accused. See the case of B N D vs Republic [2017] eKLR J. Ngugi J (as he then was now JA),

56. Section 134 of the *Criminal Procedure Code* provides that every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences the accused is charged with together with such particulars as may be necessary for giving reasonable information as to the nature of the offence. In Isaac Nyoro Kimita & another vs. R [2014] eKLR echoed those sentiments as follows:

> " In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants "jointly" defiled the complainant, made the charge fatally defective. To determine this issue what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants.

57. In the instance appeal/case; The Amended charge sheet referred to the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006.

58. The Particulars of the Charge were; the appellant intentionally attempted to cause his genital organ (penis) to penetrate the female genital organ (vagina) of E.N aged 12 years.

59. The Statement of offence and Particulars of offence did not tally the offence prescribed was defilement while the particulars of offence depicted attempted defilement.

60. The Appellant was charged with 2 offences; namely defilement and from particulars of offence attempted defilement. This was contrary to Article 50(2) (b) (c) & (k) of Constitution on tenets of Fair Trial. However, the law of defective charges is also prescribed by Section 134 and 382 of CPC . Whereas the charge(s) preferred ought to be sufficient and contain Statement of offence and particulars of the stated offence, where defect or duplicity of charges arises

61. Section 382 CPC provides;

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before ordering the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> > Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings
>
> In Benard Ombuna v Republic [2019] eKLR on defective charge
>
> The Trial Court held;
>
> > To me, the variance of the particulars and the charge sheet is a technicality which can be cured under Article 159(d) of *the Constitution*. I therefore find that the offence of attempted defilement as defined in Section 9(1) (2) of the *Sexual Offences Act* has thus been committed.
>
> The High Court held;
>
> > I therefore agree with the submissions by the Appellant that the charge in the main count is defective. The charge is that of attempted defilement while the particulars of the offence reflect actual defilement. I substitute the conviction for attempted defilement to that of indecent act with a child.
>
> The Court of Appeal on Defective charge held;
>
> > In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.

62. Has the defective charge sheet /Information caused failure of justice? The Appellant answered to the charges on plea of not guilty and was went through the trial proceedings represented by an advocate through out the proceedings and finally convicted of the offence of defilement under Section 8(1) & 8(2) of the *Sexual Offences Act*. Further the appellant was able to plead to the charges and prepare for his defense .The nature of prejudice was not demonstrated during the trial. There was no prejudice, he understood the charges and particulars and fully and ably participated in the trial.

Standard Of Proof

63. The evidence on record is that of PW1 a child taken through voire dire examination and gave sworn statement and medical evidence by PW3 and medical documents that were not conclusive on the issue of defilement.

64. The offence ingredients of the offence were settled in the case of George Opondo Olunga -Vs- Republic [2016] eKLR where the court listed them as follows :-

a. Proof of age of the complainant.

b. Proof of penetration

c. Proof that the accused person was the perpetrator (identification).

65. The minor's birth certificate was produced as Pexh 4 in proof of age. The victim was 12 years at the time of defilement and evidence indicated that she was in class 6 at [particulars withheld] Academy. The Appellant's defense also confirmed that he was a teacher at [particulars withheld] Academy where he also did tuition for the child during morning hours. I find that age and identity of the perpetrator was proved beyond reasonable doubt.

66. The appellant contests the prosecution's case on penetration on ground that the minor's evidence was not corroborated by medical evidence. Further that he tested HIV negative and would have been infected if he had intercourse with the minor who was HIV positive.

67. However, the court in the case of Kassim Ali v Republic [2006] eKLR held that

> " ... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence

68. PW3 produced treatment notes Exh 1 PRC Form Exh 2 & P3 Form Exh 3. In all medical documents PW1 genitalia was intact no bruises bleeding nor any discharge to suggest commission of defilement except for the hymen was broken.PW3 also gave expert evidence that explained the minor's HIV status and why the appellant could not be infected. That the minor's viral count was low, she was also on ARVs and infection would not occur in such circumstances.

69. The Trial Court relied on testimony of PW1 as shown at Paragraph *20* 21& 22 of the Judgment, the Trial court "...had listened to the child and that there was no doubt that she was telling the truth ."

70. The Trial court relied on section 124 of *Evidence Act* and gave reasons why PW1's testimony was credible.The minor testified that the appellant would send her to the toilet before morning tuition and before other students arrived. That he would rape her while he sat on a bucket and that he used his male organ to insert into her vagina which she pointed out in court. Section 2 of the *Sexual offences Act* defines penetration as partial or complete penetration of genital organs.

71. The evidence was unshaken during cross examination. The child was also able to narrate the incident at the hospital which was recorded, she also told the investigating officer who gave the same account.

72. This Court's concern is that the defective charge sheet/Information coupled with the evidence on record, does not prove beyond reasonable doubt that the Appellant defiled the Child/victim. The testimony of PW1 confirms contact not defilement as provided under the law and the standard of proof is beyond reasonable doubt which though the evidence of PW1 was credible defilement was not proved to the legal required standard.

73. This Court finds that the evidence on record particularly, evidence of PW1 confirms contact and/or proximity with the Appellant from the evidence of PW1, the evidence of PW3 was not conclusive that the victim was defiled and it was by the Appellant. The examination and results confirmed no visible injury, lacerations on the body, the genitalia was intact labia and clitoris was ok and hymen was broken.

74. However, it is trite that the offence and particulars are proved beyond reasonable doubt. In the instant case proof is made of attempted defilement only.It is trite that all criminal offences require proof beyond reasonable doubt. See Miller vs. Ministry of Pensions (1947) 2 All ER, 372

In the case of DS v Republic [2022] eKLR, the court stated that;

> Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration."

In the case of John Mutua Munyoki vs Republic 2017 eKLR

The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration.....

75. The alternative charge of indecent act with a child contrary to Section 11(1) of the *Sexual offences Act* No 3 of 2006. That the Appellant did an unlawful intentional act which caused contact of his hands with the breast of E.N aged 12 years no such evidence was adduced by the Prosecution to prove the above offence.

76. Section 179 (2) CPC provides [also section 186CPC]

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it

70. The term attempt is defined under Section 388 of the *Penal Code* as follows:"

(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.

71. The court finds the evidence on record discloses lesser offence of attempted defilement provided under Section 9 of the *Sexual Offences Act* which reads;

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.

77. This Court upholds conviction but of lesser offence of attempted defilement as the medical evidence adduced was not conclusive on penetration and that it was by the Appellant.

78. The appellant's further ground of appeal is that crucial witnesses were not called, he identified the need to call the victim's cousin and M who was alleged to be the school administrator and a teacher who also tutored children.

79. Section 143 of the *Evidence Act* provides that the prosecution has discretion to call witnesses and that no particular number is required. The witness testimony must prove the offence beyond reasonable doubt.

80. Further, the court can draw adverse inference from omissions where the evidence fails to meet the threshold. In the case of Donald Majiwa Achilwa & 2 Others Vs Republic (2009) eKLR the Court of appeal held that :

> " The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however , the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution . See the case of Bukenya & Others Vs Uganda (1972) EA 549."

81. In this case, the appellant has not invited court to draw an adverse inference and find that the uncalled evidence would have an adverse effect on the prosecution's case .The investigating officer testified that the victim's cousin had visited that day and therefore that evidence would not assist the case.

82. The school administrator was not an eye witness to the case, the evidence proved that the appellant was the first one to come to school and that he would rush the child to the toilet where he would rape her before other students and M came. Ground 3 of the appeal similarly fails.

83. On ground 4 which alluded that the case was contradicted, the law is that the court must also reconcile the contradictions and determine which version is acceptable.

84. In the case of Erick Onyango Ondeng' –Vs- Republic [2014] eKLR the court stated that

> " The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See Okeno vs Republic (1972) EA 32.

85. It must be noted that some contradictions may not go to the root of the charges and that the court may still convict the accused in cases where evidence is inconsistent.

86. The minor testified that she went to school at 4:00am, see page 13 of the proceedings. Pw2 stated during cross examination that she would prepare the child and that she would drop her by 6:00am .There was no other witness from the school to give a proper account of what happens during morning hours. However, the appellant's defence resolved these gaps when he testified that "....students class one come at 6:00am for private tuition while others come at 6:30 am" .

87. The appellant corroborated Pw2's evidence, the minor also testified that the appellant raped her during the morning hours at the toilet which was secluded. That the appellant was the first person at the school and he would open the gate for them. Pw4 visited the school and described the location of the toilet which was blocks away from the office, staffroom and classrooms. Ground 4 of the grounds of appeal was not proved.

88. Lastly, the appellant's defence was that the child's mother had not paid tuition money and that she wanted an intimate relationship with him. This persisted until he was arrested. I note that the appellant opted to give unsworn testimony in exercise of his rights under Section 211.

89. By law, the unsworn evidence has little or no probative value. Further, unlike sworn testimony, it is not tested through cross examination. In the case of Amber May -Vs-Republic [1979]eKLR, the court of appeal held at page 3 that: "It is material in the case. It is right, however, that the jury should be told that a statement not sworn to and that tested by cross-examination has less cogency and weight than sworn evidence. From all this we are satisfied that an unsworn statement is not evidence as that expression is generally understood. It has no probative value, but should be taken into consideration in relation to the whole of the evidence."

90. The defense must be considered against the totality of the evidence. The main issue is whether the defense casts doubt on the prosecution's evidence. The trial magistrate found that Pw2 was not cross examined on the issues raised in the defense. Any allegations against PW2 ought to have been raised during cross examination. The Trial Court record confirms the allegations were raised for the 1st time in the Appellant's Defense.

91. The appellant's defense corroborated key parts of the victim's testimony which placed him on the scene .He confirmed that the morning tuition was a combined tuition for 3 children. Pw1's evidence was unshaken how the appellant targeted her in the early morning before others arrived and that he made sexual advances which she declined.

The is Ground also fails.

Disposition

1. The appeal partly succeeds only on conviction of lesser offence of attempted defilement under Section 9 of *Sexual Offences Act* and not Section 8(1) & 8 (2) of *Sexual Offences Act*

2. The sentence of 15 years imprisonment is set aside and 10 imprisonment is imposed.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT VIRTUALLY/PHYSICALLY AT MACHAKOS HIGH COURT ON 28/2/2025.

M.W. MUIGAI

JUDGE