Kutoto v Director of Public Prosecution (Criminal Appeal E046 of 2023)
[2024] KEHC 16439 (KLR) (23 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16439 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E046 OF 2023

S MBUNGI, J

DECEMBER 23, 2024

BETWEEN

HUMPHREY GEORGE KHAYO KUTOTO ..... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

(Being an appeal from the conviction and sentence delivered on 6th September 2023 by Honorable G. Ollimo SRM at Butere in Sexual Offence No. E015 of 2021)

JUDGMENT

1. The appellant, Humphrey George Khayo Kutoto, was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Acts No. 3 of 2006. The particulars of the offence were that on the 29.11.2021 at (particulars withheld) secondary school's store in (particulars withheld) sub-location in (particulars withheld) location in Khwisero sub county within Kakamega County, the appellant intentionally caused his penis to penetrate the vagina of JN a child aged 15 years old. He also faced 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 the offence were that on 29.11.2021 at (particulars withheld) secondary school's store at (particulars withheld) sublocation (particulars withheld) location in (particulars withheld) sub county within Kakamega County within Kakamega county, the appellant intentionally touched the vagina of JN a child aged 15 years old.

Facts at Trial.

2. The prosecution set out to prove its case and called six witnesses. PW1 was the complainant AJM. She stated that she was 15 years old having been born on 25.11.2005. She stated that the accused was well known to her since he was her business teacher. She recalled that on 29.11.2021 at 7:30am while in their classroom getting ready for parade, the accused came to their classroom and asked her to go and sweep

the store which she obliged and went. She recalled that the accused stepped outside as she continued to sweep, then came back, held her by the shoulders and pressed her against a wall. He then lifted her skirt, rolled down her biker and panty, opened his zip and inserted his private part into her private parts. She recalled that the accused penetrated her briefly then stepped outside, came back in and continued penetrating her. He then left again a second time and returned and penetrated her again. She stated that the accused stepped out again and came back, gave her money and she then left the office cum store and proceeded to the parade. After the parade, while in class, she stated that the accused sent her classmate Bryson to call her but she declined to go. Thereafter, one Mr. Erick walked into the classroom and she followed him and shared her ordeal with him. She testified that he then escorted her to the deputy head teacher where she recorded a statement before going to the principal's office where she again narrated her ordeal. The police then came to school and escorted her to Manyulia Police Station where her father was contacted. She recalled that she was later on escorted to hospital at Khwisero where she was examined. She produced the treatment notes and a copy of her birth certificate as exhibits.

3. On cross examination, PW1 stated that the parade and store were in close proximity (a distance of roughly 100 meters). She stated that at that particular moment, there were no students in her class. She further stated that she could not tell the exact amount of time the accused took penetrating her. She told the court that the accused rolled down her panty and bikers to thigh level, opened her buttons and rolled up her shirt and sucked her right breast. She told the court that she had had sex prior to the incident when in class 7. Additionally, she stated that the accused did not cover her mouth, neither did she scream because she assumed that if she did, no one would hear her since the store has a ceiling board. She affirmed that she did not share the particulars of the ordeal with any of her classmates, including her desk mate. Only Bryson was aware of what had transpired. She stated that she recorded three statements and was tested for HIV at the hospital and the result was negative. She stated that she went for further testing on 29.12.2021 and the same turned out to be negative.

4. The defence produced a card from the Ministry of Health and ARVS as exhibits to show that the accused was on medication for HIV/AIDS.

5. PW2 was FMO the father of PW1. He recalled that he received a call from PW1's teacher asking him to come to Manyulia Police Station, which he did. He furnished them with PW1's birth certificate and was told the particulars of what had transpired. On cross examination, he stated that he was informed by PC Pendo that PW1 was given PEP and P2 to prevent HIV and pregnancy respectively.

6. PW3 was Erick , the class teacher at PW1's school. He recalled that PW1 followed him as he left their classroom and recounted the incident to him. He escalated the matter to the deputy principal. On cross examination, he stated that they made PW1 record three statements to ensure that she was consistent and that the statements were recorded on the absence of the accused person.

7. PW4 was JEO the principal at PW1's school. He recalled that he was informed by the deputy principal that the accused had defiled PW1. He summoned both of them to his office and upon asking the accused whether the allegations were true, he admitted the facts as stated in the statement recorded by PW1.

8. PW5 was Munyo Kigumbo, the OCS at Khwisero at the time. He stated that the matter was reported to the police station by the complainant accompanied by PW4. A P3 form was issued and the complainant was then taken to hospital. He produced PW1's birth certificate as an exhibit. On cross examination, he confirmed that he was not the IO, as the IO had passed on.

9. PW6 was a clinical officer at Khwisero Health Centre. He stated that he attended to PW1 who informed him of the defilement. He told the court that a vaginal exam was done. There were no stains or blood, no bruises on her inner thigh and normal hair distribution. The labia minora and majora were

intact. He stated that the vaginal orifice was red with white patches on the labia minora and majora. He stated that lab tests for HBS pregnancy, HIV, VDRL and urinalysis all turned out negative. On vaginal swab and urinalysis, there were epithelial cells in large numbers. On cross examination, he stated that all the organs were intact save for the opening of the vaginal which was red. He explained that the redness signified an increase in pathology which is a sign of trauma. He further stated that they were unable to ascertain whether PW1 was a virgin.

10. The court considered the evidence adduced and ruled that the prosecution had made a prima facie case sufficient to warrant the accused to be placed on his defence.

11. In his defence, the accused gave a sworn statement and stated that he had been assigned the duty of managing the store. He recalled that he summoned PW1 to clean the store but she never showed up. As he intended to punish her over break time for this, he was summoned to the principal's office on allegations that he had defiled PW1. Thereafter they were escorted to Manyulia Police Post and later on taken to Khwisero Police Station. He stated that PW1 was then escorted to hospital but he was not. He stated that he had been teaching in the school for 8 years and had been assigned to the duty of guidance and counseling due to his maturity and commitment to work. He further told the court that he thought that some of his colleagues had incited the complainant owing to the fact that he had been promoted to manage the store. He stated that he was a HIV patient and had been on ARVs since 2008.

12. The trial court convicted and sentenced the accused to an imprisonment term of twenty (20) years.

The Appeal.

13. Having been dissatisfied by both the conviction and sentence by the trial court, the appellant lodged this petition of appeal on the following ten grounds:

    a. That the Learned Trial Magistrate erred in law and fact in convicting the Appellant against the weight of the evidence on record.

    b. That the Learned Trial Magistrate erred in law and fact in convicting the Appellant when the evidence on record could not sustain a conviction on the charge of Defilement Contrary to Section 8(4) of the *Sexual Offences Act* No. 3 of 2006 Laws of Kenya.

    c. That the Learned Trial Magistrate erred in law and fact in convicting the Appellant on the uncorroborated evidence of the Complainant when the circumstances of the case did not justify a conviction on the evidence on record.

    d. That the Learned Trial Magistrate erred in law and fact in convicting the Appellant in the face of serious contradictory evidence on record by the — 20 Prosecution witnesses.

    e. That the Learned Trial Magistrate erred in law and fact in rejecting the defence raised by the Appellant when the said defence was reasonable and failing to appreciate and take into account the evidence of the defence throughout the case.

    f. That the Learned Trial Magistrate erred in law and in fact in falling to appreciate that the Appellant is a patient of HIV and Aids yet the Complaint was tested negative.

    g. That the Learned Trial Magistrate failed to take into account the evidence of PW 6 the Clinical Officer and more specifically the documentary medical evidence tendered in court.

    h. That the Learned Trial Magistrate erred in law and fact in shifting the burden of proof contrary to law

i. That the Learned Trial Magistrate erred in law and fact in imposing a sentence that was manifestly excessive given the circumstances of the case

j. That in whole, the findings and holding of the Learned Trial Magistrate as contained in his Judgment delivered on 06th September 2023 is inconsiderate, erroneous, unlawful biased and untenable in law.

14. The parties agreed that the appeal be canvassed by way of written submissions.

Appellant's Case.

15. The appellant submitted that there was no direct evidence linking the appellant to commission of the said offence hence the trial magistrate erred in law and fact in convicting the appellant when the evidence on record could not sustain a conviction on the charges of Defilement contrary to section 8(4) of the sexual offenses act No. 3 of 2006.

16. It was his submission that the evidence produced was uncorroborated since PW1 did not prove her case that there was any penetration to support her evidence that she was defiled by the appellant. Further, he submitted that for the alleged offence of defilement to be sustained, there must be penetration into the genital organs as provided by the *Sexual Offences Act* 2006.

17. He averred that PW1 alleged that the incident took almost 20 minutes yet she did not explain to the court why she did not raise any alarm or scream for help. She also did not inform her classmates including her desk mate and the alleged that Bryson knew what happened yet the said Bryson never testified.

18. It was the appellant's submission that PW2,3,4 and 5 all never witnessed the incident yet they were all in school. They all relied on the story by PW1.

19. He averred that the evidence of PW6, the clinical officer provided a medical examination report dated 24.11.2021 and categorically stated that at the time of examination, the complainant did not have any bruises, thus there was undoubtedly no penetration of the penis into the complainant's vagina. The officer further stated that it was normal for the vagina to appear reddish and the same could be caused by any other activities including riding a bicycle or playing.

20. Moreover, the appellant submitted that tests including HIV and pregnancy turned out to be negative whereas the appellant is a patient of HIV and AIDS. He referred the court to the case of Muyale vs DPP(Criminal Appeal E025 of 2021) [2022] KEHC 12615(KLR). He averred that if indeed he would have defiled the complainant, she would have contracted HIV/AIDS and further referred the court to the case of JIRV Republic[2019] EKLR.

21. It was his submission that since the evidence adduced at the trial court was solely based on the evidence of a single witness who was the complainant, the court ought to have treated evidence by PW1 consciously and cautiously.

22. The appellant further submitted that the trial magistrate shifted the burden of proof to the appellant contrary to the law and erroneously rejected his reasonable defence.

Respondent's Case.

23. The respondent submitted that all the three ingredients of defilement were proved by the prosecution at the trial court. The ingredient of age was proved by the testimony of PW1 who stated that she was born on 25.11.2005 and the birth certificate was produced as exhibit. The ingredient of penetration

was proved by the clinical officer PW6 who testified that the vaginal orifice was red with white patches. He also noted that there were several epithelial cells in her urine. The ingredient of positive identification of the perpetrator was proved by the complainant who testified that the accused was his business teacher hence he was well known to her.

24. The respondent submitted that evidence by PW1 that she was defiled was corroborated by PW3 to whom she reported having been defiled. Further, the respondent submitted that there were no evidentiary gaps in the trial court as alleged by the appellant.

25. To add on this, it was the appellant's submission that his colleagues incited the complainant against the appellant because he had gotten a promotion to manage the store. To this claim, the respondent submitted that the appellant did not demonstrate to the court what was lucrative about being a store keeper that would make his colleagues envious of him.

26. On the ground that the appellant was HIV positive, the respondent submitted that page 26 of the typed proceedings clearly stated that the appellant gave the complainant drugs to prevent HIV and other sexually transmitted infections as well as pregnancy. It was the respondent's submission that the evidence was produced by the defence and it was sufficient to find the appellant guilty of deliberate transmission of HIV Contrary to section 26 of the SOA.

27. On the issue of failing to call Bryson as a witness, the respondent submitted that he was not an eyewitness to the defilement and that the prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.

Analysis and Determination.

28. This being first appellate court, it is guided by principles set out by the court of appeal in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the court stated as follows:

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

29. I have looked at the grounds of appeal, the submissions filed by the parties, the lower court proceedings and the trial court's judgment.

30. From the submission by the counsels, it appears the issue of age is settled. The complainant was 15 years old at the time of conviction so at the time of the alleged incident, she was 13 years old. I have also seen a birth certificate to that effect.

31. The other issues the prosecution was supposed to prove was whether there was penetration into the vagina of the complainant and if so, the accused was the perpetrator? So the issue for determination is whether the prosecution proved the two ingredients beyond reasonable doubt.

32. Penetration can be proved by the evidence of a complaint (victim) supported by medical evidence but absence of medical evidence is not fatal. But is essential and extremely necessary in cases where it is the word of the victim against the word of the alleged perpetrator.

33. In the case Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa) the court stated:

> " ... [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."

34. In the case of Sahali Omar v Republic [2017] eKLR it was held in the court of Appeal as follows:

> " On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the *Evidence Act*. The said section, provides for corroboration in criminal cases on these terms..... The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the *Oaths and Statutory Declarations Act*. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful..."

35. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

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

36. Genital organs are defined under Section 2 of the *Sexual Offences Act* as

> " genital organs" - includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;

37. According to the Oxford Reference, the term genitalia refers to the reproductive organs of either a male or female, but is usually used to refer to the external parts of the reproductive system. The female reproductive system includes several organs, including:

    i. Ovaries: Produce eggs

    ii. Fallopian tubes: Transport eggs during ovulation

    iii. Uterus: Also known as the womb, this organ provides protection, nutrition, and waste removal for the developing embryo and fetus.

    iv. Vulva: Also known as the pudendum, this term refers to the external organs of the female reproductive system, including the mons pubis, labia, clitoris, and more.

    v. Vagina: A canal that leads from the uterus to the external orifice of the vulva

38. The Oxford English Dictionary defines labia minora as the two small inner folds of skin in human females that form the margins of the vaginal orifice. The labia minora are part of the vulva, which refers to the external genitalia. The labia majora are the outer lips of the vulva.

39. The appellant's counsel faults the trial court for finding that there was penetration into the complainant's genital organ. I have looked at the proceedings. The victim PW1 testified as follows:

> "I am called AJM. I am 15 years I school at St Matthews Ikomero. I am in form one (1). I recognize Accused. He was my business teacher. I recall on 29th November, 2021 at around 7.30 am we had just finished a lesson so we headed to class to prepare for parade. I was with my companions in our class-room. We were only four when Accused came and called me he asked me to go sweep the store. The store was used as an office by the Accused. I obliged and proceeded to the store and started sweeping. Meanwhile, accused stepped outside after showing me where to sweep. As I continued sweeping Accused emerged, he held me by the shoulders and pressed me against a wall, he the lifted my skirt, rolled down my biker and panty and he opened his zip he then ("akachukua sehemu yake ya siri akawake kwa yangu") (He inserted his private part in my private parts). He penetrated me his private part in my private parts). He penetrated me briefly, he then stepped outside returned and continued penetrating, me. He left again a second time and returned and penetrated me again. The third time he stepped out again and grabbed the door and stepped outside. I told him that I would be scolded. He then gave me money and assured me that I will remain his secret lover. I left the office cum store and proceeded to the parade..."

40. From the above, according to the victim, she was certain that her genital organ was penetrated thrice. The prosecution called PW6 who was the clinical officer to support its case that there was penetration into PW1's genital organ. He said as follows:

> "On examination findings she was fair general condition (She was stable physically). We did vaginal exam, there were no stains or any blood, no bruises on inner thigh, normal hair - distribution. Labia minora and majora were intact. Examination of vaginal orifice (opening) It was red with white patches on the labia majora and minora. We sent her to the lab for HBS pregnancy and HIV and VDRL and urinalysis pregnancy, HIV UDRL (Syphilis) were negative. On the vaginal swab, there were epithelial cells in large numbers. Also the urinalysis, there was nothing significant but epithelial cells were seen in urine. I gave prescription of drugs to prevent HIV, sexually transmitted infections and pregnancy. State of clothing, she was in school uniform, no significant finding. No injuries on head or neck. The same findings I have stated were the same findings indicated in the Treatment Notes. We thus made a diagnosis of defilement based on the history and examination findings."

41. On cross examination he further said:

> "All the organs were intact save for opening of vaginal which was red.- Reddened means there is increased pathology which is a sign of trauma. Pathology means an abnormal occurrence on any part of the body... I indicated that there were no stains on inner clothing, normal hair distribution, no bruises on inner thighs. We were not able to ascertain whether she was a virgin. The only significant finding was the reddening of vaginal orifice (that was an abnormal occurrence."

42. From the medical evidence, it is clear that both the external genital organ of PW1(labia majora) and internal genital organ (labia minora) were intact. There were no signs of bruises on her inner thighs or blood stains on her inner clothing. The genital organ hair distribution was normal meaning it was not disturbed which is ordinarily abnormal for there to be penetration into the female organ obviously the pubic hair must be interfered with.

43. The clinical officer did not explain how he arrived at the diagnosis of defilement after examination of the victim's genital organ. He did not tell the court what could have caused the reddening of the victim's vaginal orifice. Could a penis cause such reddening? Or could an infection cause the reddening? Or could any other activity like games have caused it? Or a touch as a result of itchiness on the orifice cause such? It was expected of the clinical officer to answer such questions which he did not. The net outcome of this failure is that there is no medical evidence to support the evidence of PW1 on penetration.

44. In the case of Muyale v Director Of Public Prosecutions (Criminal Appeal E025of2021) [2022]KEHC12615(KLR) Hon. Justice Musyoka held as follows:

> "In both the medical documents presented and oral testimony, there is no conclusion as to whether whatever PW5 found was evidence of penetration that would have been critical when taken against his statement that PW1 had no tear and no blood stains. On vaginal examination the external genitalia and vaginal orifice were normal. What did the presence of epithelial cells and the yeast cells or bacterial infection mean? PW5 did not bespeak that. PW5 was presented as the person who treated PW1, and prepared the medical documents presented in evidence; and also as a medical expert, to interpret the findings to the court. Unfortunately, he only testified on how he attended to PW1 and his findings, but he did not explain the meaning of the findings. He did not state whether those findings pointed to recent sexual activity or not, for that was why he was called to testify. From his testimony, therefore, I am not persuaded that he established any incident of recent penetration of the vagina of PW1."

45. The above cited authority had almost similar facts with this case save in our instant case the vaginal orifice was reddish.

46. Assuming that the redness was caused by a penis, logically, then it means the penis was trying to penetrate but it was not able to. Moreso, because the medical evidence does not indicate whether there was any sexual activity, partially inside or completely inside PW1's vagina. To me, for there to be penetration, the penetrating object should breach the opening of the vagina and go past the opening and get inside.

47. Having found that there was no medical evidence to support the fact that there was penetration, the court is now only left with the evidence of PW1. The court is alive to the fact that evidence of a single witness can prove a fact so long as the court believes the witness. Section 143 of the *Evidence Act* states:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."
>
> Section 124 of the *Evidence Act* provides as follows:
>
> "Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the

court is satisfied that the alleged victim is telling the truth." (see the case of LOW vs Republic Criminal Appeal No. E027 of2021[SO])

48. Now the question is whether at the position PW1 says she was (pressed against the wall) was penetration possible? The prosecution never tendered any evidence to show the height of PW1 and the appellant for the trial court to make an informed decision as to whether penetration was easily possible given the circumstances. This makes this court doubt whether penetration was possible. PW1 did not demonstrate how the penetration was possible in that situation. She did not say whether he parted her legs or he made her squat or bent or what else he did for both of them to match into a position where penetration could be possible.

49. It is trite law that the burden of proving the charge falls on the prosecution in criminal cases throughout and does not shift to the accused person unless a statute provides so.

50. This principle was enunciated in the case of Woolmington v DPP [1935] UKHL J0405-1 where the 'golden thread' principle was established that, the prosecution must prove the guilt of the accused beyond reasonable doubt. This is the 'cardinal principle' of the criminal law.

51. The remaining question is, was the appellant the possible perpetrator who wanted to penetrate the complainant's genital organ?

52. The appellant disputed PW1's story and said that it was a frame up. She was used by his colleagues who were unhappy with him when he was appointed to be in charge of the store. To show this the appellant questioned why Bryson whom PW1 said was aware of what transpired, was not called as a witness.

53. The appellant contended that the failure to call Bryson was an indication that his evidence would be adverse to the prosecution case.

54. I have also noted that the complainant's desk mates were not called as witnesses to prove that the complainant was actually called by the appellant or at the alleged time, the complainant was missing.

55. Closely related to this, it is also strange there is no one who was called as a witness to say that she/he saw the complainant enter and leave the store at the alleged time given that the store was a few meters away from the parade ground and it was said that students were at the parade at that time. All these inactions in the part of the investigating officer makes me buy the story of the appellant that he might have been framed as a result of his appointment as a store keeper.

56. There are enough authorities saying that failure to call crucial witnesses in support of a party's case an adverse inference can be made that the evidence will contradict the evidence of the party failing to call the witnesses.

57. In DMK v Republic (Criminal Appeal E056 of 2022) [2023] eKLR the court in its judgment held as follows:

> " There is no requirement that the prosecution has to call a number of witnesses to prove a fact. But, if he fails to call crucial witnesses, an inference can be made that their evidence would have been adverse to their case. However, as per the above case, the inference can only be made where the evidence is barely adequate. I do not think that the evidence was barely adequate to quash a conviction on this ground."

58. Similarly, The Court of Appeal in Julius Kalewa Mutunga v Republic stated as follows: -

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

59. The upshot of the above analysis is that I find that it is doubtful whether the appellant was the likely perpetrator and I let him have the benefit of doubt.

60. In criminal cases, the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J (as he then was) in Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR expressed himself as hereunder:

> "...To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge..."

61. Also, it was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as follows:

> "What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-

'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

62. From the foregoing, it is clear that the prosecution did not prove its case against the appellant in the lower court. I fault the trial court for not taking into account the gaps I have raised in my analysis herein above when it was evaluating the evidence placed before it by the prosecution. If the trial court had addressed its mind on these, obviously it would have arrived at a different finding.

63. Consequently, I find that the appeal succeeds. The conviction is set aside and the sentence quashed. The appellant shall be set free forthwith unless otherwise lawfully held.

64. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of:

Appellant – present online

Court prosecutor – Ms. Osoro present online

Court Assistant – Elizabeth Angong'a