Rotich v Republic (Criminal Appeal E037 of 2022)
[2023] KEHC 17982 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17982 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E037 OF 2022

RL KORIR, J

MAY 24, 2023

BETWEEN

GILBERT KIPNGENO ROTICH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number E008 of 2020 by Hon. Jackson Omwange in the Magistrate's Court at Sotik)

JUDGMENT

1. The Appellant was convicted by Hon. J. Omwange, Senior Resident Magistrate for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 27th January 2022 at around 1900hours in Sotik Sub County, within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of BC, a child aged 15 years.

2. The Appellant faced an alternative Charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 27th January 2022 at around 1900hours in Sotik Sub County, within Bomet County, he intentionally and unlawfully touched the vagina of BC, a child aged 15 years with his penis.

3. The Appellant pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case.

4. At the close of the prosecution case, the trial court ruled that a *prima facie* case had been established against the Accused and he was put on his defence.

5. At the conclusion of the trial, he was convicted on the charge of defilement and sentenced to serve twenty (20) years in prison.

6. Being dissatisfied with the Judgment, the Appellant appealed to this court on 6 Grounds listed in his petition of appeal filed on 26th September, 2022 and on his additional four grounds fitted in the Amended Grounds of Appeal filed in court on 20th February, 2023. The Grounds reproduced verbatim read: -

   i. That, I pleaded not guilty at the trial and still maintain the same.

   ii. That the learned trial magistrate erred in both law and fact by relying on uncorroborated evidence.

   iii. That the trial magistrate erred in law and in fact by relying on evidence adduced by the prosecution side which was inconsistent and full of irregularities.

   iv. That the trial magistrate erred in law and in fact by failing to analyse the entire evidence adduced by the clinical officer.

   v. That the trial magistrate erred in law and fact by rejecting my plausible defence without any further explanation to it

   vi. That I pray to be present during the hearing of this Appeal.

   vii. That the learned trial magistrate erred in both law and fact by not finding that the Appellant's charge was so utterly defective, the column of the Charge read "Defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006" and yet on the particulars column, "the age of the victim was 15 years which fell into section 8 (1) (3) of the *Sexual Offences Act*."

   vIii. That the learned trial magistrate erred in both law and fact on convicting the Appellant on plotted evidence purported to shut out the Appellant against testifying against the two cousins, PW1-CM, Accused 1-AC and Accused 2-BB who killed Japhet Kipyegon Rono in Police File Number 801/237/18 Bomet.

   ix. That the learned trial magistrate erred in both law and fact by not observing that penetration was not proved beyond reasonable doubt.

7. This being the first appellate court, I have a duty to re-evaluate the evidence on record. The Court of Appeal in the case of *Odhiambo v Republic* Cr. App No. 280 of 2004 (2005) 1 KLR held that:-

   > "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."

   In order to evaluate the evidence before the trial court I have set out the respective cases in the succeeding paragraphs.

The Prosecution's Case.

8. It was the Prosecution's case that the Accused defiled BC on 27th January 2022 at around 7 p.m. BC the complainant (PW5) testified that on the material day at around 7 p.m., she left her friend's house and on her way home, the Accused pulled her into his house, pushed her to his bed and begun undressing her. That the Accused removed her biker and pant and penetrated her using his penis. PW5 further testified that she tried to scream but the Accused covered her mouth

9. PW5 testified that the whole ordeal lasted around 10 minutes and when the Accused had finished, he told her to dress and leave. That as she went home she was shocked and could not tell anyone. It was PW5's testimony that she later informed her parents and was taken to Chebirbelek hospital and later to Sotik General Hospital.

10. Cherono Viteline (PW1) testified that she was a clinical officer at Sotik Health Centre. That she examined BC on 31st January 2022, 4 days after the alleged incident. PW1 further testified that upon examination, the hymen was absent but longstanding and that upon urinalysis, the pus and epithelial cells were high. It was her testimony that the pus cells were an indication of an infection. That the evidence was not conclusive.

11. It was PW1's testimony that the Accused was also examined by her colleague, Geoffrey Kirui on 1st February 2022 and that there was nothing positive.

12. CM (PW2) testified that he was a farmer and the father to BC That on 28th January 2022, he met his neighbour, Chelangat who told him that she had seen BC with the Accused who was a boda boda rider. PW2 further testified that when he asked BC what she was doing with the Accused, she told him that the Accused took her to his house.

13. It was PW2's testimony that he called his sister two days later and when the sister (PW3) interrogated BC, she said that she had been defiled by the Accused. It was PW2's further testimony that he reported the incident to the Chief and to the Police.

14. ZT(PW3) testified that on 30th January 2022, she received a call from her brother, PW2, who informed her that the Accused had defiled his daughter. That she went to PW2's place on 31st January 2022 to pick BC and take her to hospital. PW3 further testified that her sister, P had informed her that BC had told her that she had been defiled.

15. It was PW3's testimony that when she talked to BC, she told her that on 27th January 2022, the Accused pulled her into his house and penetrated her sexually. That she went to Kapletundo Police Station where a P3 Form was issued and that BC was later on attended to at Sotik Health Centre.

16. SCC (PW4) testified that on 30th January 2022 as she left Nakuru, she was called by her in-law, WM who informed her of the allegations of her child's defilement. That Wilter asked her to take BC for medical attention. PW4 further testified that she took her to a clinic where she later learnt that BC had been sexually penetrated and that the person who penetrated her was the Accused.

17. No. 24xxxx CPL Daniel Fundi Kiragu (PW6) testified that he was the investigating officer and that he was allocated this matter on 31st January 2022. That he recorded statements and visited the scene which had already been disturbed. PW6 further testified that he took BC to Sotik Health Centre where the P3 Form was filled. It was PW6's testimony that B.C was aged 15 years and that he was satisfied that the offence was committed.

The Accused's Defence.

18. The Accused, Gilbert Kipngeno Rotich testified that on 1st February 2022 while working at a petrol station, people in civilian clothes came and took him to the police station. That on their way to the police station, he was informed that he faced charges. The Accused further stated that he was taken to the hospital where he was examined and was later placed in the police cells. That he worked at the petrol station the material day to 31st January 2022 from 5 a.m. to 9.30 p.m.

19. It was the Appellant's case that he was being fixed so that he does not testify in police file number 801/237/2018. That BC called him and threatened him not to testify. It was the Appellant's further case that he was threatened by the same people in 2019 about a case that was pending before court. That AC and BB were the people framing him because of the bad blood between them.

The Appellant's Submissions.

20. It was the Appellant's submission that the charge sheet was defective and he relied on the Court of Appeal case of *Siginali v Republic* (2004) 2KLR, 480 and section 134 of the *Criminal Procedure Code*. That the defect of charging him with section 8(2) of the *Sexual Offences Act* for a child who was 14.5 years was prejudicial and occasioned him an injustice. It was the Appellant's further submission that the prosecution had room to call for an amendment but deliberately ignored to do so.

21. The Appellant submitted that he was arrested and charged for being a key witness in a murder case (police file number 801/237/18 Bomet). That the role of a witness in criminal proceedings was crucial and that the Witness Protection Agency was mandated to provide special protection to a person in possession of important information and who was facing potential risk or intimidation due to their co-operation with the prosecution or other law enforcement agencies. The Appellant further submitted that the Appeal be allowed to enable him testify as this case was plotted to prevent him from testifying in the murder case.

22. It was the Appellant's submission that from the evidence of PW1, there was no indication that the victim was given antifungal medication for the infection. It was the Appellant's further submission that the testimonies of PW1, 2, 3, 4 and 5 were marred with inconsistencies, were unbelievable and untrustworthy.

23. The Appellant submitted that when BC was examined by PW1, pus cells which were indicative of an infection were found and that the evidence according to PW1 was non-conclusive. That BC was not defiled as alleged as all the prosecution's testimonies were cooked to fit their schemed mission. The Appellant further submitted that the victim was his neighbour and that he could not deny that she knew him. That her cousins influenced these charges against him and used her to give false evidence.

The Prosecution's/respondent's Submissions.

24. The Respondent submitted that there was no doubt that BC had been defiled or penetrated. That the victim was taken to Chebirbelek Hospital and later to Sotik Health Centre where PW1 examined her and found that her hymen was missing. The Respondent further submitted that the victim had a lot of pus cells which indicated that she had an infection. That both PW2 (parent of the victim) and PW4 (Aunt of the victim) took her to hospital for medical examination.

25. It was the Respondent's submission that the victim was 15 years old. That PW2 who was the father of the victim identified the birth certificate which indicated that PW5 was born on 7th July 2007 which meant that at the time the offence was committed, BC was 14 years old. It was the Respondent's further submission that the victim informed the trial court that she was a class seven student in Kolwe Primary School. That PW6 who was the investigating officer produced the victim's birth certificate.

26. The Respondent submitted that the evidence of identification was beyond any shadow of doubt. The Respondent further submitted that the Accused pulled her into his house, undressed her and defiled her. That she positively identified the Accused in court and even called him by his name. The Respondent further submitted that from the evidence, it appeared that the victim and the

Accused knew each other even before the offence was committed. That PW2, PW3 and PW4 positively identified the Accused as the person who defiled BC.

27. It was the Respondent's submission that the Accused stated that he was at his place of work on the material day yet he did not produce any letter of employment or avail any witness to corroborate his evidence. That Bernard Cheruiyot whom the Accused stated had framed him was neither a victim nor a witness in this case.

28. The Respondent submitted that the Accused's defence was unconvincing, weak and unsupported. That he did not call anyone to support his evidence.

29. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal filed on 20th September 2022, the Amended Grounds of Appeal and Appellant's written submissions both filed on 20th February 2023, and the Respondent's written submissions dated 10th February 2023. I discern and the following issues for my determination: -

    i. Whether the Charge Sheet was defective.

    ii. Whether the Prosecution proved its case beyond reasonable doubt.

Whether the Charge Sheet was defective.

30. The Appellant contends that the charge sheet relied on by the trial court to convict him was defective. In determining whether a charge sheet is defective or not and the impact thereof the Court of Appeal in *Sigilani v Republic* (2004) 2 KLR, 480 held as follows:-

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence".

31. Section 134 of the *Criminal Procedure Code* provides a follows: -

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

32. In the case of *Isaac Omambia v Republic*, (1995) eKLR, the Court of Appeal expounded on section 134 of the *Criminal Procedure Code* and stated as follows:-

> " In this regard, it is pertinent to draw attention to the following provisions of s. 134 of the *Criminal Procedure Code* which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

33. According to the charge sheet, the Appellant was charged with defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006 which provides that: -

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

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

34. It is clear from the above that the charge sheet clearly spelt out the statement of the offence that the Appellant was charged with. The charge sheet also contained the particulars of the offence. The defilement was alleged to have been committed on 27th January 2022 at around 7 p.m. in Sotik Sub County within Bomet County. It was plain from the charge sheet what charge the Appellant was supposed to meet. There was no ambiguity.

35. The Appellant stated that the charge sheet was defective as it charged him with defilement contrary to section 8(2) of the *Sexual Offences Act*. His reason was that it came out in evidence that BC was aged 15 years and therefore he ought to have been charged under section 8(3) of the *Sexual Offences Act*. He submitted that this caused him prejudice and occasioned a miscarriage of justice. The Court of Appeal in *Peter Ngure Mwangi v Republic* (2014) eKLR stated that:-

> "A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from *Archbold, Criminal Pleading, Evidence and Practice* (40th Edn), page 52 paragraph 53, this Court stated in *Yongo v R*, [198] eKLR that:
>
> > "In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
> >
> > (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
> >
> > (ii) when for such reason it does not accord with the evidence given at the trial."

36. The Court of Appeal in the *Peter Ngure's case* (*supra*) was further guided by the case of *Peter Sabem Leitu v R*, Cr. App No. 482 of 2007 (UR) where the Court held that: -

> "The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

37. Similarly in *Benard Ombuna v Republic* (2019) eKLR, the Court of Appeal addressed the issue of a defective charge sheet in the following terms:-

> 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."

38. The substance of the charge and it particulars were read out to the Appellant in a language he understood and he pleaded not guilty. The Appellant represented himself and cross examined all the prosecution's witnesses. He thereafter presented his defence. This demonstrated that the Appellant fully understood the charge he faced. It is my finding therefore that the charge sheet was not defective as charging the Appellant with section 8(2) instead of 8(3) of the *Sexual Offences Act* was not fatal. Upon conviction, there would be no prejudice at all upon the Accused as the Court would give a graduated sentence according to the proven age of the victim.

Whether the Prosecution proved its case beyond reasonable doubt.

39. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender must be proved.

40. The Accused was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. Section 8 (1) of the *Act* states that any person who commits an act which causes penetration with a child is guilty of an offence of defilement. A child is defined in the *Children's Act* no. 8 of 2001 as any human being under the age of eighteen years.

41. The importance of proving age was underscored by the Court of Appeal in the case of *Hadson Ali Mwachongo v Republic* (2016) eKLR, as follows:-

> " The importance of proving the age of the victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In *Alfayo Gombe Okello v Republic* Cr. App 203 of 2009 (Kisumu) this Court stated as follows:-
>
> > In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. This must be so because dire consequences flow from proof of the offence under section 8(1)".

42. Authorities abound which state that the age of the victim may be proved through the production of a birth certificate or a parent's testimony. In the case of *Francis Omuroni v Uganda*, Criminal Appeal No. 2 of 2000, the Ugandan Court of Appeal held that:-

> " Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ... "

43. In this case, No. 24xxxx CPL Daniel Fundi (PW6) produced a Birth Certificate (P. Exh5). The Birth Certificate indicated that BC was born on 7th July 2007. The authenticity of the Birth Certificate was not challenged during the trial. The victim's father, CM (PW2) also testified to the age of the victim where she stated that she was 15 years old. I am satisfied from this evidence that at the time of the alleged offence, BC was aged 15 years.

44. With regard to the issue of identification, the Court of Appeal in the case of *Cleophas Wamunga v Republic* (1989)eKLR expressed itself as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

45. In *Ali Mlako Mwero v Republic* (2011) eKLR the Court of Appeal expressed itself as follows:

> " The identification of the appellant in this case lay not only on the visual features observed by Mesalim but also on his recognition by that witness. We agree with Mr. Oguk, that in either case, the evidence ought to be tested with utmost care because it is not unknown for a witness to be honest but mistaken ... "

46. The victim (PW5) testified upon cross examination that she knew the Accused was a boda boda rider. This was corroborated by her father (PW2). Both PW5 and PW3 knew the Accused by his street name, Soweto. PW2, PW3, PW4, PW5 and PW6 all positively identified the Accused in the dock. In the case of *Muiruri & Others v Republic* (2002) KLR 274, the court held that:-

> " ... We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification."

47. Identifying the accused as a person known to the witnesses and identifying him as the person who committed the offence are two different things. The evidence must be such that it links the accused to the offence. In this case therefore the evidence of PW2, PW3 and PW4 fell short. The complainant's father PW2 heard from a neighbour that his daughter was seen with the accused. He asked the daughter what she was doing with the accused and it was the daughter who again told him that the accused had taken her to his house. PW3 came into the picture after the incident to interrogate the complainant and to take her to hospital. PW4 on the hand was also informed of the defilement by her in-law one WM. Though they knew the accused, they could not identify him as the person who defiled the complainant. They only heard; they did not see.

48. The only identifying evidence therefore was that of the victim. She testified that the accused had taken her to his house. As earlier stated, this was a person who was very well known to her. He was a boda boda rider and a neighbour. The accused admitted in his defence that the complainant was his neighbour.

49. Upon my re-evaluation of the testimony of the victim, I am satisfied that she positively identified the accused as the person who took her into his house. The next issue therefore is whether she was penetrated. With regards to penetration, section 2 of the *Sexual Offences Act* defines penetration as the

partial or complete insertion of genital organs into the genital organs of another person. In the case of *EE v Republic* (2015) eKLR, Riechi J. stated that: -

> "An important ingredient of the offence of defilement is that there must have been penetration. Penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement".

50. In the case of *Bassita v Uganda* S. C Criminal Appeal Number 35 of 1995, the Supreme Court held that:-

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."

51. 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.

52. PW5 testified that on the material day at around 7 p.m., the Accused pulled her to his house and forced her to enter where he undressed her and defiled her. That she could not scream as the Accused had covered her mouth.

53. Cherono Viteline (PW1) who was the clinical officer at Sotik Health Centre testified that when she examined PW5, she found that the hymen was absent but longstanding. That upon urinalysis, she found pus and epithelial cells and that the pus cells indicated that PW5 had an infection. It was PW1's contention that the infection could be sexual. PW1 testified that the evidence was not conclusive.

54. PW1 produced a P3 Form and Treatment Notes that were marked as P.Exh 1 and 2 respectively. Both documents show that PW5 had an absent hymen and that her labia minora and majora were normal. That she had no lacerations and tears. The P3 Form and the Treatment Notes also indicated that PW5 had a whitish discharge around the vaginal orifice.

55. I am not satisfied or convinced on the strength on the evidence contained in the P3 Form, the Treatment Notes and PW1's testimony that there was penetration on the 27th January 2022. It is my finding therefore that the element of penetration was not established. The by standing absence of the hymen only proved the complainant had had sex before.

56. However, this court is empowered to convict an Accused person solely on the evidence of the victim if this court is convinced of the truthfulness of the victim's testimony. From the evidence on record, and as would be expected, it is clear that no one witnessed the alleged defilement. PW3 and PW4 stated that PW5 (victim) told them that she had been defiled by the Accused. Section 124 of the *Evidence Act* provides:-

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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 material 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. (underline mine)

57. The above position was taken in *George Kioji v Republic* (UR) where the Court of Appeal expressed itself as: -

> " Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

58. PW5 (victim) testified that after she was defiled, she did not tell her parents about the incident despite her testifying that she met her mother as she went home on the material day. That her father also beat her up when she failed to tell him what had happened between her and the Accused. The victim stated that she feared telling her parents what had happened. This court would readily accept the testimony that the victim would fear to inform the parents either because of sex being treated as a taboo subject or out of threats by the defiler. Either way the trial court ought to have recorded its reasons for believing the victim.

59. The victim's father (PW2) stated that he knew the Accused as a boda boda rider. That the father was forced to call his sister (PW3) to come and talk to the victim and find out what had happened to her. The father upon cross examination stated that Chelangat (his neighbour) told him to tame the subject. I also find it disturbing that the parents of the victim did not take her to hospital but instead solicited the help of PW3 and PW4 in taking her to the hospital. I am not convinced at all at the truthfulness of the victim.

60. From my analysis of the above, it appears to me that the victim and the Accused were in a relationship maybe with the knowledge but disapproval of the parents. As the medical evidence has shown, there was no penetration on the material date. However, there was suspicion that the two must have engaged in se either that day or on other days. The suspicion was not far-fetched from PW1's finding that the hymen waws missing. Indeed, the trial court it its judgment made the observation that: -

> " The subject (PW5) testified that the accused penetrated her on 27th January,2022. Though late the subject informed her parent (PW2) that she was pulled by the accused to his house, and to PW4 she said the accused penetrated her. The medical evidence indicated that the hymen was broken but longstanding. Though PW1 testified that there was no conclusive evidence of penetration in his further evidence consensual sexual activity will leave no evidence. Failure by the subject to raise an alarm immediately upon leaving the tentacles of the accused and her failure to inform her parents of the incident until she was prodded by her father points to consensual penetration that accidentally came to the attention of the subject's parent-PW2. Though the accused denied committing the offence, I find no evidence of bad blood between the accused and the complainant that could have moved the complainant to frame the accused."

61. The above notwithstanding, it is trite that suspicion, no matter how strong cannot be used as a basis for a conviction. In the case of *Joan Chebichii Sawe v Republic* (2003) eKLR, the Court of Appeal held that: -

> " The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt... Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

62. Similarly in the case of *Mary Wanjiku Gichira v Republic*, Criminal Appeal No 17 of 1998, (UR), the Court of Appeal held that: -

> " suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."

63. I considered the Appellant's defence. He created an alibi which did not hold any water. He also suggested that the charges against him were motivated by some on-going cases in court wherein a relative of the victim's father had been charged and he(the accused) was going to be a witness in that case. I dismiss the defence as far-fetched since the parties are not directly involved in the stated case.

64. It is my finding however that it was not upon the accused to prove his innocence. The duty fell on the prosecution to prove the charge(s) against the Appellant to the required legal standard. The Prosecution failed to discharge the burden. I therefore, and as the law demands, grant the accused the benefit of doubt.

65. I set aside the conviction and quash the sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 24TH DAY OF MAY, 2023.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant, Mr. Waweru holding brief for Mr. Njeru for the State and Siele (Court Assistant)