Malelo v Republic (Criminal Appeal E017 of 2024)
[2025] KEHC 6286 (KLR) (24 March 2025) (Judgment)

Neutral citation: [2025] KEHC 6286 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E017 OF 2024

DKN MAGARE, J

MARCH 24, 2025

BETWEEN

PETER KITUU MALELO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arises from the trial court's Judgment, Hon. D.N. Bosibori (SRM) in Mûkûrwe'inî SO No. E010 of 2024 dated 22.04.2024. The Appellant was charged with defilement contrary to section 8(1) as read with section 8(3) of the *sexual offences act*. The particulars were that on 16.7.2023 at around Kagarie area of Mûkûrwe'inî sub-county within Nyeri county, intentionally caused his penis to penetrate the vagina of EWK, a child aged 14 years.

2. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006.

3. The particulars of the offense were that on 16.7.2023 at around 1000 hours in the Kagarie area of Mûkûrwe'inî sub-county within Nyeri county, intentionally caused his penis to penetrate the vagina of EWK, a child aged 14 years, and unlawfully used touched breasts and vagina of EWK, a child aged 14 years with his fingers.

4. The Appellant was arraigned, and he denied the charges and a plea of not guilty was consequently recorded. The trial court considered the case and rendered Judgment on 22.04.2024. The court found the Appellant guilty on the main charge and convicted him. He was sentenced to 20 years imprisonment. He has now Appealed against conviction. He set out the following grounds of appeal as follows:

    1. The learned trial magistrate erred in Law and, in fact, in convicting the accused person on charges of defilement contrary to section 8(1) as read with section 8(3) of the sexual offenses

act no. 3 of 2006, whereas the medical evidence presented did not support the charges of defilement and thus, an injustice was thus occasioned.

2. The learned trial Magistrate erred in Law and in fact in convicting the accused person, whereas the evidence tendered by the prosecution witnesses clearly pointed to the appellant's innocence, and thus, an injustice was occasioned.

3. The learned trial magistrate erred in law and, in fact, in failing to consider and evaluate the evidence adduced in its entirety, thus failing to appreciate that the offences were not proven beyond reasonable doubt to safely arrive at a conviction, and thus, an injustice was occasioned.

Evidence

5. The complainant testified as PW1. The court conducted in-depth voire dire on the minor and was satisfied that the minor possessed intelligible knowledge but did not understand the meaning of oath. She gave unsworn evidence and was cross-examined. She stated that she stayed with her grandmother. That her mother stays in Korogocho. She moved to Gichecheni estate during the year but could not recall the month. On 16.07.2023, she was at her classmate PW2. They had been at the gate to the catholic church at Kagari when they decided to go and get maths past papers. They went to that home, which was 5 minutes away.

6. The Appellant was at the gate of his boss's home. The Appellant used to visit her cousin John's and had gone once to their home. The Appellant pulled the minor while PW2 was trying to pull her away. PW2 fell out of the gate while PW1 fell inside the gate. The Appellant dragged the witness about 20 m away. She described the compound in detail.

7. The Appellant tied the Minor with a rope on the wrist and tethered her to the window. The Appellant was tied the other hand to the couch. He lifted the minor's skirt and inserted his fingers in the vagina. He undressed after fingering her. He then inserted his penis in her vagina. He released a whitish mucus-like substance into her vagina from his penis. After the incident, he left her tied to the coach and left. She untied herself and walked to where PW2. She took his mobile phone and left with it.

8. The minor fled and met PW2. She saw PW2 leave with EM, a classmate. She tried all the keys until they opened. She was carrying the accused's phone, which she was to take to the grandmother. The appellant chased them. They run towards the tarmac. They went to W's home inside their grandmother's home.

9. The Appellant sent a minor NN to pick up his phone. She could not tell the grandmother. The next day, she was in school and feeling sad. She told seven minor girls about what happened at 1 pm. At 2 pm, a teacher came and was told after some prodding. Teachers called parents for both PW2 and PW1. A report was made to the head teacher and, subsequently, an officer from Mûkûrwe'inî. identified the Appellant in the dock. He knew the Appellant before her since he had visited the cousin before.

10. On cross-examination, she stated that she did not tell the grandmother because she did not want her to die. She stated that PW2 did not find assistance. This was a Sunday. She stated she wanted to report to the teacher on Monday. She stated that PW2 knocked on the gate, but it was locked. She stated that she was seen even by EM. The court noted that the minor expressed the chronology of events. On re-examination, she stated that she had a tissue paper stuffed into her mouth.

11. Voire dire was carried out on PW2, who was the second witness. She stated that she was in class 8. She was 14 years old and in class 8. PW1 was her friend, having been known to her for less than a month. The Appellant was known to her as Kasee, and a friend to PW1's cousin. The Appellant She also worked for Wa K. On 16.7.2023 at around 9.00am she left home for church, independent church Kagari. She did not find a congregation and left for PW1's church as she has asked to be picked after church.

12. PW2 found PW1 standing by the church gate. They went home and took tea served by PW2. They were going to pw1's home. They found the Appellant at the boss's gate. He wore grey trousers, a red shirt, and slippers. The Appellant pulled PW1 on one hand while PW2 was pulling the right hand. He pulled PW1 into the gate while PW2 fell outside the gate. The Appellant stuffed tissue onto PW1's mouth. The Appellant carried the Appellant about 40 m away into the house. She lifted the flap and saw the appellant Lift PW1. He carried her in her arms like a baby. She did not witness anything after they went into the house.

13. She went to Mitchelle's home to find help, but no one was there. The accused stepped out of the main house and left without uttering a word. ME came by and was alerted. She escorted ME and saw PW1. She abandoned ME and went back to PW1. She saw PW1 running fast with red eyes. PPW1 had the Appellant's file. The Appellant followed them to the tarmac. PW1 carried the phone and went to Pw1'S home. PW1 was beaten by the grandmother for reasons the witness did not know. The Appellant sent NN to collect the phone.

14. The grandmother spoke to the Appellant, but the witness did not hear the conversation. She reported this to the teachers in school on the same day. She was with six others, whom they asked PW1 what was wrong. It was eventually known that Pw1 was defiled. A class teacher, Miriam, was informed. She, in turn, informed Mrs Wambugu. The school called the parents for a meeting the following day. They went to Mûkûrwe'inî police station and subsequently recorded a statement. she Stated that she knew the Appellant as Kasee, a shamba boy.

15. On cross-examination, the witness stated that she was at the gate seeking assistance in vain. She said that she did not know what transpired when they were in the house. She saw the Appellant stuff tissue into PW1's mouth. They feared to report lest they were beaten. She feared to scream as she could be next. He identified the Appellant as working at Wa Ks' before then, he worked at Victor's home.

16. PW3 was Jane Nyanjeu Wambugu a teacher. She stated that PW1 joined her school in term two, that is in May 2023. PW2 is also a student at the said school. On 17.07.2023 she was heading to class 8 when she heard a commotion. On inquiry, she was informed of a personal issue. Five girls, whom she named, joined her. She was told that PW1 and PW2 visited Kasee's home, where PW2 left PW1 with the Appellant.

17. PW 2 gave her the story she had hitherto testified on. The Appellant pulled PW1 to his home while PW2 WAS pulling her away. PW2 was overwhelmed, leading to being taken by the Appellant into their home. The head teacher, PW1's grandmother, and PW2's mother were alerted. They met to discuss the issues, and the head teacher directed that PW2 be taken to the hospital. They found the grandmother recording a statement.

18. On cross-examination, she stated that the head teacher called the parents; she had been told that the Appellant committed the fine.

19. PW4 was JNM. PW1 is her granddaughter from her 3rd born daughter. She stated that on the material day, she met one LG who told her that PW1 and PW2 were at Kasee's house; she went home and found her in the aunt's place in her home. The two girls were there. She milked her cow and went to the auntie;' place. She beat PW1 for not going to church. She could not tell her why she had the Appellant's car. The Appellant came for his phone. PW1 took the phone to the Appellant. The Appellant stated that PW1 wanted to play a game; hence he left the phone with her.

20. She continued that on Monday, the head teacher called. She went to school, and PW1 disclosed the incident. Subsequently, the matter was reported to the police station. She showed the birth certificate as PMFI 1.

21. On cross-examination, she stated that she did not know the Appellant's phone was in her home. She noted that PW2 told her that they feared. She came to know about the incident at school, not at Home. On examination, she stated that the Appellant was at her home on a fateful day.

22. PW5 was the investigating officer, 119894 PC Jecinta, Wanjiku from Mûkûrwe'inî. She was assigned to this matter. She found the minor and escorted her to Mûkûrwe'inî hospital. She recorded a statement. She indicated that the minor recorded a statement on the incident. The minor told the police that they had left the church for PW2's home.

23. The Appellant pulled PW1 while PW2 was resisting. She was overpowered. She stated that PW2 witnessed the incident. The Appellant carried PW1 and defiled her. The parent and grandmother of PW1 and 2, respectively, were called. She established that the appellant was employed at WaK's house. She stated that she had signed the PRC form. She identified the Appellant. On cross-examination, she said that the Appellant cooperated. Nothing was seized from the scene. The Appellant stayed alone as the owner would come once in a while.

24. The Defence applied for cross-examination of all prosecution witnesses who had testified earlier. The recall was because the advocate had just come on record. The court allowed it.

25. PW6 was Martha Wanjiku, a clinical officer from Mûkûrwe'inî district hospital. She testified that the PRC report was prepared, as well as the P3. The Appellant objected to the production of the medical documents, but the objection was overruled. She stated that the history of defilement was given. On examination, there was no presence of spermatozoa, no pus cells and no yeast. There was no lacerations or bruises on the genitalia. The hymen was old broken. Incident was reported 2 days later. There was white vaginal discharge. On cross examination, she testified that the whitish discharge could be normal or abnormal. The hymen was long broken, not freshly broken.

26. PW1 was recalled for cross examination. On cross examination, she testified that it was on Sunday, 16.7.2023. She was passing the Appellant's boss's home. She was with PW2. They were heading to PW2's home. PW2 was her friend. She did not know PW2's home. PW2 would she her. They could pass through Kasee's (the Appellant's) boss's home on their way. Not that they were going to the Appellant but because one had to pass this home that was off the road to where they were going.

27. She stated that the Appellant was at the gate to his home. He held the Appellant's right hand and pulled her inside the home. PW2 also pulled PW1 outside the gate in the opposite direction. The Appellant blocked PW1's mouth. The Appellant tied PW1's hands. She untied herself and left after the defilement. She did not report because her grandmother would be sick since she had high blood pressure. She did not know the Appellant before but had seen him with her cousin.

28. On recall, PW3 also testified on cross-examination that PW1 was her friend. They had not gone to visit the Appellant, when the Appellant dragged PW1 inside the gate, PW2 did not scream for help. PW1 did not also scream. There were no people on the road. PW1 stayed for an hour. The gate was then locked with a padlock. PW1 told him that she was telling juice and did not tell him about the defilement. She saw the Appellant stuff PW1 with tissue paper in the mouth.

29. PW3 was PW1's teacher, Jane Nyawira Wambugu. She testified that she was recalled for cross-examination because PW1 did not report the defilement incident. PW1's classmates alerted her to what had happened to PW1.

30. PW4 was JNM. She had stayed with PW1 since term 2. She did not see PW1 in church. PW1 did not report the incident to her. PW1 and PW2 were together on the material day. The Appellant came to her home asking for his phone. She was in the latrine. She warned the Appellant.

31. PW5 was No. 119894 PC Jacinta Wanjiku, the Investigating Officer. According to her, the incident was reported two days after it occurred. She escorted PW1 to the doctor on 18.7.2023. She conducted an investigation that led to a reasonable belief that the Appellant had committed the offence, and she proceeded to arrest the Appellant on 20.7.2023. he was thereafter charged with the offence.

32. DW1 was the Appellant. he testified that he was outside the gate near the road on the material day, 16.7.2023. PW1 and PW2 passed by and told him they were going to church. They left him there. He went inside to milk the cow. The girls followed him without his knowledge. He went to fetch the bucket, and when he returned, he noticed his phone was missing. He did not get the girls. He followed them to recover his phone. He alerted PW1's grandmother of the purpose of his visit, and she returned the phone to him. On cross-examination, it was his case that the mobile phone was taken from a seat outside the house. His employer was not around. He had no witnesses to prove the incident did not happen.

Submissions

33. The Appeal was argued via submissions. The Appellant filed submissions dated 11.10.2024. The Appellant filed submissions on 11.10.2024. It was submitted that the offence of defilement was not established. Reliance was placed on the case of MM v Republic HCCRA No. 52 of 2018, based on which it was submitted that the missing hymen did not prove penile penetration.

34. The Respondent did not file submissions.

Analysis

35. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> " 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 demeanor which may show whether a statement is credible or not which may warrant a court different.

36. The appellant, on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination as stated in the case of Okeno v Republic [1972] EA 32 at 36, the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was

some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

37. The issue in this case is whether the prosecution proved its case to the required standard. The most oft-quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the prosecution's duty to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

38. An accused person enters criminal proceedings presumed to be innocent. This is called the presumption of innocence. This presumption remains throughout the case until such time as the state's evidence put before the court, is satisfactory beyond reasonable doubt that the accused is guilty. In the case of R vs. Lifchus {1997}3 SCR 320, the Supreme Court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

39. The legal burden is the burden of proof, which remains constant throughout a trial and establishes the facts and contentions that will support a party's case. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the

conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

40. Brennan J, addressed the standard of proof required in such cases, in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 that: -

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

41. 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. Lord Denning in Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372 had this to say:-

> " 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 favour 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."

42. Courts in criminal cases should consider the standard of proof and the effect of a conviction on the accused person. In this case, the Appellant was to no less than 20 years imprisonment upon conviction. This must be a serious offense that requires the clearest view of the evidence to justify keeping the Appellant behind bars for life. Proof beyond reasonable doubt was the standard, also based on the nature of criminal offences, whose punishment went beyond the effect on the individual to the state. Conviction and sentence as a sexual offender was a badge that a convict could only deserve based on undoubted evidence.

43. Truth will often come out in the first statement taken from a witness at a time when recollection is very fresh, and there has been no opportunity for consultation with others. The court will thus evaluate evidence for fidelity to the truth with regard to the limitations related to demeanor.

44. The minor's evidence needs to be corroborated in material particulars by other crucial evidence from the witnesses that presented the case of the Respondent in the court below. The exceptions are set in section 124 of the *Evidence Act*, which 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 the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him 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 offense, 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.

45. In the case of Tekerali s/o Korongozi & 4 Others –vs- Rep (1952) 19 EACA 259 the importance of the first report was appreciated, where the court posited as follows:

> " Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."

46. The key ingredients of the offence of defilement as held in George Opondo Olunga v Republic [2016] eKLR are;

i. proof of the age of the complainant,

ii. proof of penetration and

iii. proof that the appellant was the perpetrator of the offence.

47. Section 8(1) and (3) of the *Sexual Offences Act* provides as follows:

> " 8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) ...
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

48. The first element is age. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

49. The importance of proving age was also 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)".

50. With respect to proof, the Supreme Court of Uganda held in the case of Bassita vs. Uganda S.C. Criminal Appeal Number 35 of 1995, 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. Age forms part of the offence and must be proved beyond reasonable doubt. In the case of Kaingu Elias Kasomo vs. Republic Malindi, the Court of Appeal in Criminal Appeal No. 504 of 2010 stated as follows:

> Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

52. The Appellant in this case against the weight of evidence relied on by the prosecution. It was proved that PW1 was 14 years old. A birth Certificate registered on 19.1.2009 and issued on 19.6.2013 shows that the complainant was born on 17.1.2009. The offence was committed on 16.7.2023. She must have been 13 years and 6 months old, but this still placed her within the range provided under Section 8(3) of the *Sexual Offences Act*, being 12-15 years. The Court of Appeal in the case of Edwin Nyambogo Onsongo Vs Republic (2016 eKLR stated as follows on the proof of age:

> " ... the question of proof of age has finally been settled by recent decision of this court to the effect that it can be proved by documents, evidence such as birth certificate, baptism, card or by oral evidence of the parents or the guardian or medical evidence among other credible form of proof. We think that what ought to be stressed is that whatever the nature of the evidence preferred in proof of the victims age it has to be credible and reliable.

53. The age of PW1 was also verified the medical evidence. This was denoted in the P3 and PRC Forms. I have no reason to doubt it. In the case of Francis Omuroni Vs Uganda Court of Appeal No. 2/2000, the court held that:

> " in defilement cases medical evidence is paramount in determining the age of the victim. The doctor is the only person who could professionally determined the age of the victim in the absence of any other evidence. Apart from Medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

54. On identification, the evidence of PW1 and PW2 that they passed near the gate where the Appellant worked was also confirmed by the Appellant who testified that they passed and even followed him to the homestead where he worked. Identification was therefore proved beyond any shadow of a doubt. This was identification by recognition. No doubt, the Appellant did not lament on identification as

found the learned magistrate. I draw guidance from the case of Peter Musau Mwanza v Republic [2008] eKLR, where the Court of Appeal expressed itself as follows:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition."

55. The evidence of PW1 and PW2 were therefore acceptable to the Appellant as correct regarding how the duo identified and recognized him. The same connected the Appellant to the offence, and what remained was to prove penetration. In Salim Issa Abdalla V Republic [2021] eKLR, Nyakundi J. accepted as evidence of identification a similar factor when he stated thus;

> ''In the instant case, there is evidence of the victim (PW1) connecting the appellant with the actual penetration as he was positively identified as the one who lured her to the house to commit the crime some distinct features arise from the evidence of PW1 evaluated in conjunction with that of PW2. First is the characteristic of evidence when PW1 went to the house of the Appellant. Secondly, as seen from PW2 evidence she was able to recognize the victim (PW1) coming out of the appellant's house. A presumption therefore arises on the evidence that the appellant was the last person to be seen with the victim and therefore expected to explain the circumstances on the defilement of PW1.''

56. On penetration, the same can be proved by medical or circumstantial evidence. The case of PW1 was also that the Appellant tied her hands before removing his trousers and inserting his penis into her vagina. That the Appellant then released a white mucus-like substance into her vagina. The act lasted about five minutes.

57. What is not in doubt, is the event occurred as narrated by PW1 and PW2. It is not the nit-grities about how the event occurred. The question is whether the evidence leads to the proof of penetration. The evidence of PW1 and PW2 were consistent. The evidence was not shaken on cross-examination. The evidence was consistent.

58. What about medical evidence? It is not necessary to prove penetration through medical evidence. The complainant stated that she had been voluntarily penetrated earlier. Though that was still defilement, it was by a boy hence it was a mutual defilement. It is what ordinarily is called Romeo and Juliet s=cases. These are referred to in the case of Timayo v Republic (Cr*iminal Appeal 20 of 2020*) [2022] KEHC 16892 (KLR) (19 December 2022) (Judgment) as follows;

> With respect to the sentence, it is evident that the appellant could have been between 17 and 18 years at the time of the offence. The complainant was 15 years old. The circumstances, as described by the complainant, present what has come to be referred to as Romeo and Juliet scenarios, though we do need to find our own local jurisprudence that we can relate to as this Shakespearean reference does not ring true with us. One community to whom the terms Romeo and Juliet were mentioned in this regard rejected the same and gave their own as Esapat and Epese.

59. While addressing the question of penetration, in the case of Alex Chemwotei Sakong v Republic [2018] eKLR, the court stated as follows:

> " Penetration is defined under section 2 of the *Sexual Offences Act* to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJ A) in the case of Mark Oiruri vs. Republic Criminal Appeal 295 of 2012 [2018] eKLR in which they opined thus:"...and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ... "In any event, penetration can be proved circumstantially taking into account circumstances under which the act was committed. In the case of Kassim Ali v Republic (2021) e KLR the court of appeal stated that;"So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence"

60. The position is that the testimony of the victim in this case, coupled with a medical examination, must be sufficient to determine whether penetration occurred. However, the absence of medical evidence is not conclusive that there will be no proof of penetration. In Onzare *v Republic (Criminal Appeal 15 of 2023*) [2024] KEHC 494 (KLR) (25 January 2024) (Judgment), the court stated as doth:

> 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.

61. On examination, per PW6, there were no lacerations, spermatozoa and abrasions. The hymen was old broken. The only observation consistent with defilement was the presence of white discharge from the vagina, but this, according to the medical doctor, was not conclusive of defilement as such discharge could be caused by other factors and not sex. In totality, I adopt the same position as found the learned magistrate that medical evidence in this case did not conclusively prove penetration.

62. PW1, the victim gave cogent evidence. She was scared and folon the following day. The examination was carried out two days later. Medical evidence could not be useful. However, her evidence was corroborated and unshaken. His conduct was consistent with being a victim of sexual violence. The court was thus entitled to believe the witnesses, in particular PW1 and PW2. Further, the Appellant himself corroborated the story that the victim went with his phone. It is not plausible that the phone happened to be lost.

63. The evidence of the appellant places all three parties in the locus in quo. I am only disturbed that the court had to write a 20-paragraph ruling at the stage of case to answer. This unnecessarily embarrasses the court.

64. Turning to the defence evidence, the same does not explain the basis for being framed or any differences. If the parties never met, and were just following the Appellant, how come the complainant

had a phone? The description of the events by PW1, as corroborated by PW2, was too vivid and unshaken to be false. The appellant's defence does not deal with the questions raised by all witnesses. the altercation at the gate was corroborated well.

65. The court was satisfied with the evidence given. The reasons for believing were cogent. In the case of Kyiaf v Wono [1967] GLR 463, the court made the following observations:

> "It must be observed that the question of impressions or convincingness are product of credibility and veracity, a court becomes convinced or unconvinced, impressed with oral evidence, according to the opinion it forms of the veracity of witnesses. Ac court has to test its impression as to the veracity or truthfulness of oral testimony of a witness against the whole evidence of that witness and the other evidence on record."

66. In this regard, in Mohamed v R [2008] KLR, the court observed that the court must satisfy the criteria that the victim told the truth and must record the reasons for such believe. In trials of this nature offences of defilement are usually committed in total privacy and secrecy. The prosecution's duty is to prove directly or circumstantially that the victim has been defiled. In Republic v Mohammed & another (Petition 39 of 2018) [2019] KESC 48 (KLR), (15 March 2019) (Judgment) (with dissent - MK Ibrahim & SC Wanjala, SCJJ) Neutral citation: [2019] KESC 48 (KLR), the Supreme Court stated as follows regarding circumstantial evidence:

> 55. The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is "indirect [or] oblique evidence ... that is not given by eyewitness testimony." It is "[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact." It is also said to be "[e]vidence of some collateral fact, from which the existence or non-existence of some fact in the question may be inferred as a probable consequence...."
>
> 56. On its application, circumstantial evidence is like any other evidence. Though it finds its probative value in reasonable, and not speculative, inferences to be drawn from the facts of a case,8 and, in contrast to direct testimonial evidence, it is conceptualized in the circumstances surrounding disputed questions of fact, circumstantial evidence should never be given a derogatory tag. Jowitt's Dictionary of English Law, 4th Edition, states thus of circumstantial evidence:
>
> > "... with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, ... a fingerprint recovered from the window forced open by the burglar matches the accused's fingerprints, ... [or where there is] a ... DNA match between the accused's control sample and genetic material recovered from the scene of the crime ...."
>
> 57. This is why, way back in 1928, the English Court of Appeal asserted that circumstantial evidence "is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics."

58. However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court "should proceed with circumspection when drawing firm inferences from circumstantial evidence."

59. However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court "should proceed with circumspection when drawing firm inferences from circumstantial evidence."11 The Court should also consider circumstantial evidence in its totality and not in piece-meal.12 As the Privy Council stated in Teper v. R [1952] AC at p. 489

> " Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another."

67. The quality of the evidence must of necessity be evaluated as the most corroborative evidence if any the persuasive case from the South African Court in S v Trainor [2003] 1 SACR (SCA) the court stated:

> " A conspectus of the evidence is required evidence that is reliable should be weighed alongside such as may be found, to be false independently, verifiable evidence, if any should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of the evidence must of necessity be evaluated as most corroborative evidence if any." Similarly, in Vokere v R [2014] SCCA 41 Domah J held "judicial appreciation of evidence is a scientific rationalization of facts in their coherent whole, not a forensic dissection of every detail removed from its coherent whole."

68. In the circumstances, I am satisfied that the Appeal on conviction lacks merit and is accordingly dismissed.

69. There was no Appeal on the sentence. In any case, the Appeal could not have succeeded as the sentence was a minimum sentence. The only error is that the time for the commencement of the sentence is not given. The sentence given shall commence on, 20.07.2023, the day of arrest.

Determination

70. In the circumstances, I make the following orders: -

a. The Appeal is dismissed.

b. The conviction and sentence in SO No. E010 of 2023 are upheld. However, the 30-year sentence given shall commence on 20.07.2023, the day of arrest.

c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24TH DAY OF MARCH, 2025.

Judgment is delivered physically in court.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Mwai for the Appellant

Mr. Kimani for the State

Court Assistant – Michael