PGM v Republic (Criminal Appeal E024 of 2024)
[2025] KEHC 3035 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3035 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E024 OF 2024

DKN MAGARE, J

MARCH 6, 2025

BETWEEN

PGM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arises from the judgment of the trial court, Hon. Okuche (SPM) given on 12.6.2023 in Nyeri CMSO E016 of 2021.)

JUDGMENT

1. This appeal arises from the judgment of the trial court, Hon. Okuche (SPM) given on 12.6.2023 in Nyeri CMSO E016 of 2021.

2. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. 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 the Appellant, on 14.3.2021 around 1400 hours in Kieni West sub-county within Nyeri County, intentionally and unlawfully caused his genital organs namely a penis to penetrate the genital organs, namely a vagina of MMG, a girl aged 15 years.

4. There was an alternative count of committing an indecent act with a minor contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offense were that the Appellant, on 14.3.2021 around 1400 hours in Kieni west sub-county within Nyeri County, unlawfully touched the breast, buttocks, and vagina of MMG, a girl aged 15 years using his hands and penis.

5. The accused person was arraigned, and he denied the charges. A plea of not guilty was consequently recorded. The trial court heard a total of 5 prosecution witnesses and the Appellant. The court considered the evidence and rendered judgment. The court found the Appellant guilty and sentenced

him to life imprisonment. The Appellant, aggrieved, lodged this appeal. The Petition of Appeal raised the following grounds:

a. That the trial magistrate erred in both matters of law and fact by failing to consider that I caned the complaint for moving around, but not to defile her, the instant matter was being framed up.

b. The trial magistrate erred in law and fact by failing to consider that I was the one who was taking care of the children as parental duties, as their mother had left them.

c. That the trial magistrate erred in law and fact by failing again to make consideration that the medical evidence was inclusive.

d. That the trial magistrate erred in law and fact by failing to appreciate that the crucial witnesses were not called upon to testify before the court.

e. The trial magistrate erred in law and in fact by rejecting my sworn evidence without cogent reasons to do so.

6. The court gave directions on how to dispose of this matter through submissions, which were filed by both parties.

Evidence

7. At trial, the complainant, PW1, testified that her father did something that defiled her. The father is the appellant herein. The complainant stated that she stayed with the grandmother. She stated that she went to her father's house to ask him for a geometrical set during the day. He was asleep; therefore, she woke him up. He stated that he did not have money, but as she was going, he pulled her, put her in the bed, and defiled her. She was facing upwards. She cried, went to the village leader, and reported. The village elder took her to Endarasha Police Station and to hospital on the same day. This was the first time she stated that she rejected the intercourse but the father continued.

8. On cross-examination, she stated that she was at the farm with her younger sister and her aunt, L. The aunt is an elder sister to the Appellant. She stated it was her aunt L who came for a geometrical set on Saturday, 13.3.2021 when the father leased land to someone, and they moved to the grandmother's home. The said incident is said to have occurred on Saturday, 13.3.2021. She stated that she went from the stepmother's house to the aunt's place. The aunt took her to the village elder. She stated that it was the sister who gave her [the witness] a paper where she put the pants in. She went with the pants to the elder's house.

9. She stated that the stepmother took her to the elder's house. The Appellant prayed for the recalling of PW1. The prayer was allowed. Nevertheless, the prosecution never had her cross-examined. This will be dealt with shortly.

10. PW2 Edith Ndegwa testified that she was a farmer. The Appellant went to her home and told her that she had been defiled by her father. She called the area Chief. On cross-examination, she stated that the complainant went to PW2's house alone. She took the minor to the police station and hospital on the same day. The minor was also not carrying anything when she went to her house. It was her case that it was at night, and she was wearing her clothes. The children she played with never slept on her. She did not inform the grandparents of the incident.

11. PW3 was George Mutate Wagechi, a nurse at Endarasha Health Centre. He examined the minor who had menses. The hymen was broken, and there were a few epithelial cells. He stated that there was a clinical officer who did not endorse the PRC.

12. PW4 Dr. Cecilia Muwei who works at PGH. She testified that PW1 was sent from Endarasha on 15.3.2021. She stated that nurses are allowed to do a PRC report.

13. PW5 was PC(W) Ruth Mwaura of Endarassha Police Station. She had been informed of the defilement by the village elder. They arrested the Appellant. They confirmed the minor was defiled. On cross-examination, she stated that she interrogated the minor after getting the initial story from PW2. She stated that she did not have a report on the stepmother. She retrieved the undergarment that she was wearing. She gave her other pants to wear. She stated that she feared the grandmother as she was misdirecting her. She did not elaborate.

14. The Appellant was placed on his defence. He stated that she was having relationships. He caned her. She ran away from the said date and came back later to have him arrested. He stated he was framed. The children had been left in his custody by their mother. He stated that he caned the minor, but that was not the first time. The last one was the only one he was framed.

Submissions

15. The Appellant filed submissions on 1st March, 2024 and submitted that the critical elements of the crime were not proved beyond reasonable doubt; that is penetration. He cited among others the case of Fappyton Mutuku Ngui v Republic (2010) eKLR.

16. Based on the above case, the Appellant submitted that it was not proven that he penetrated the minor with his penis on the material day. He further submitted that the age of the minor was not proved as no certificate of birth was produced. He relied on the case of P.W.K vs. Republic (2012) eKLR.

17. The Appellant also submitted that crucial witnesses were not called to testify. The grandmother of the minor was not called to testify, and the stepmother was also not called. He relied on Joseph Opondio v Repubic HCRA No. 91 of 1999.

18. Therefore, it was submitted that the prosecution witnesses' testimony and evidence lacked credibility. Reliance was placed on the case of Ndungu Kimani vs. Republic (1979) KLR 282 to submit that a witness's evidence should not create an impression on the part of the court that he is not straightforward and has doubtful integrity. It was also submitted that the Appellant's defense was not considered and was prejudicial.

19. On sentencing, he cited Philip Mueke Maingi v DPP Pet No. 17 of 2021 to submit that the sentence of life was not constitutional and should be interfered with.

20. The Respondent filed submissions dated 5.2.2025. It was submitted that the prosecution proved the 3 ingredients of the offence of defilement as required under the law. It was also submitted that age was proved and reliance placed inter alia on Stephen Gitwa Kimani v Republic (2017) eKLR as follows:

> " Thus it matters not that no formal age assessment form was tendered. Contrary to the Appellant's submissions' the court could as well have relied on the oral and medical evidence on record in respect of the age of the complainant.

21. On identification, reliance was placed on Donald Maiiwa Achilwa and & others v R (2009) eKLR as follows:

> " The law as it presently stands, is that the prosecution is obliged to call all witnesses necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality witnesses

to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution's case.

22. On the sentence's validity, it was submitted that the sentence imposed upon the Appellant was constitutional. The sentence was lawful as the trial court imposed the minimum sentence according to the law. He cited Supreme Court Pet, No. 18 of 2023- Republic v Joshua Gichuki Mwangi to support this submission.

Analysis

23. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own 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 held 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.

24. 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."

25. 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 duty of the prosecution 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."

26. 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. 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."

27. The legal burden is the burden of proof which remains constant throughout a trial. 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."

28. The standard of proof required in such cases was addressed by Brennan, J 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 stigmatised 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."

29. Section 8(1)(a) (1) and (3) of the *Sexual Offences Act* under which the Appellant was convicted 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) N/a
>
> (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.
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> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

30. 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."

31. The limitation on the powers of this court are found in Section 382 of the *Criminal Procedure Code* which provides as follows:

> " 382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

32. 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 serve life 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.

33. 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. 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. Though the court believed her evidence, she was not consistent. Such evidence does not count as truthful. It is surprising that given the lack of corroboration for the minor's evidence, the court did not find it prudent to analyze the effect of Section 124 of the *Evidence Act* on the case. The exceptions are set in Section 124 of the *Evidence Act*. The said section posits as follows:

    124. 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.

34. The later part, or the proviso is key, in that it requires that the following conditions be met:

    i. The matter is a sexual offence,

    ii. the only evidence is that of the alleged victim of the offence,

    iii. for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

35. That is why the truth should always be recorded and reasons for so believing. All the three conditions must be present for a conviction to occur. 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."

36. This was a sexual offence when the first condition was met. However, the second and third conditions were not met. The victim was not the only witness. There was medical evidence and there was circumstantial evidence that could be produced. In the absence of the production of circumstantial evidence available, then the court was wrong. Thirdly, and more crucially, there was no evidence and reasons recorded for believing the Complainant to be saying the truth.

37. I will set out in full the statement by the court regarding truthfulness:

The complainant gave evidence in court. She was put on cross-examination. Her evidence was watertight. She further gave evidence on oath. The court also had the opportunity to see the demeanour of the complainant when she was giving evidence. She was a truthful witness. The medical evidence also came out that the hymen of the complainant was broken. The court held itself, if relying on the evidence of the minor alone, but finds that the fact of penetration is proved by the prosecution.

The other issue is whether the accused is placed at the scene. The accused person avers that he was framed because he had caned the minor. However, the assertion only came during his defense. He never raised it

38. The court made conclusions that the evidence was watertight without making specific findings related to the discrepancies by the complainant that were apparent:

    i. The complainant had periods at the time of the alleged defilement.

    ii. The complainant placed the panties in a paper bag given by the sister, who was never called, and was taken to the elder, the stepmother.

    iii. The village elder did not see the stepmother or the luggage the complainant was carrying.

    iv. The panties were removed, and the investigating officer, gave the another one to wear.

    v. No one noticed that the underwear had menstrual blood at all.

    vi. Though examined immediately, the P3 was filled one year later.

    vii. The complainant failed to turn up for further cross-examination.

    viii. The grandmother was around in the home, but no one bothered to either call her as a witness or investigate what she heard or witnessed. The reason for not informing the very person next to the house where the offence was allegedly committed did not make sense.

    ix. The complainant indicated the offense occurred on Saturday, 13.3.2021, while the rest indicated 14.3.2021. This was a question that must be resolved one way or another.

39. The evidence was thus not water tight at all. The discrepancies left a possibility that the complainant was not telling the truth. The court dealt with the question of the Appellant being at the scene. This is cavalier and uncalled for. It must not be forgotten that the Appellant was a father who was at home. His defence was that he beat the complainant while the complainant posited that she was raped.

40. Therefore, being at home was not denied. The question was whether, the occurrence of the offence was proved. It is not lost on the court that the Appellant's sister, N and auntie were from the shamba at the same time. Their evidence was crucial. Given the discrepancies, it is important that they be called. It is true that the step mother could not be compelled as a spouse of the Appellant. However, it is only the complainant who places her in the scene and all the way to the clan elder's home. She was however, not seen by the clan elder. This raises doubt whether the incident occurred. The reporting was done on 14.3.2021, to the effect that the offence occurred on that day. The day is recorded as a Saturday.

41. Did the complainant wait until the following day to reconstruct a story? There is no reason why the witnesses will say that the report was done on 14.3.2021. The report was made on 14.3.2021 at 1756 hours. The court takes judicial notice that it is true that 13.3.2021 was a Saturday while 14. 3.2021 was a Sunday. The state waited until 3.3.2022, over a year later to report for P3 form. The report indicates that the incident occurred on 13.3.2021 but reported on 14.3.2021. The report was filled on 26.3.2022. It indicated that the defilement was done within hours.

42. Proof beyond reasonable doubt is not to be based on certainty or proof beyond a shadow of doubt. However, it should derive from evidence that 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. This was the finding of the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

> " 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 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.'"

43. The Appellant raised inconsistences and contradictions in the evidence proffered by the prosecution case and argued that the trial court failed in convicting him when the evidence tendered did not prove the offence against him to the required standard. On this, this court has to establish whether the alleged discrepancies and contradictions were fundamental as to cause prejudice to the Appellant. In Joseph Maina Mwangi vs. Republic *CA No. 73 of 1992* (Nairobi) Tunoi, Lakha & Bosire JJA held:

> " In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

44. The court found evidence that sends chills to a good mind. I have scrupulously perused the record of the trial court. The court below, however, did a disservice to the case. It failed to analyze the evidence before it and come to a conclusion of fact and law. Just stating that evidence is watertight is not enough but escapism. We need to see the water-tight evidence. On my part, I did not see any.

45. The minor does not appear to be a consistent and seasoned lair. She was an opportunistic one. Defilement, especially by the father, is heinous. It beats every tenet of responsibility placed on persons in loco parentis. The question was thus whether the offence was proved.

46. PW3 and PW4, maintain that the minor had menses. She was examined on the same day of the offense. This turned out to be 14.3.2021, which happens to be a Sunday. The minor indicated that the incident occurred on 13.3.2021. She is said to have told the stepmother, who took her to PW2. Further, the sister gave them a paper bag to place her panties. However, she did not go with any luggage to PW2. PW5, however, testified that she gave PW1 panties to change instead of the ones she was wearing. Ipso facto, there were no panties in the envelope. The sister N, could have shed light in this aspect.

47. The question of having menses was submitted to the court. The court was however, studiously silent on this aspect. The minor did not explain if the defilement occurred despite menses. The first medical report by the nurse, PRC, only had a broken hymen. There was neither discharge nor any inflammation showing sexual activities as per the medical records.

48. Unfortunately, the P3 form was useless to the case. It was filled on 26.4.2022. This was over one year and one month after the alleged offence. Nevertheless, it indicated the injuries were hours old.

The only finding was menstrual discharge. Medical evidence did not help place the Appellant as a perpetrator of the offense. The contradictions were not minor contradictions. They went to the root of the commission of the offence. In Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007, the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

49. In the totality, I find difficulty in finding the basis for which the trial court drew conclusions that the Appellant committed the offense. There are two unsettling facts, that is, the minor lied about her sister and her placing the panties in the bag. She further lied that the stepmother took her to the village elder. Secondly, the grandmother was in the neighbouring house. The minor did not find it necessary to scream or even tell her. It is not common to proceed directly to the clan elder instead of informing people around. The last unsettling issue was that the court ordered PW1 be recalled for further cross-examination. She was never brought, leaving her evidence inchoate.

50. The question of age is irrelevant in this matter. The Appellant was the father of the complaint. He knows the age of the minor, more than the minor. Section 111 of the *Evidence Act* places the burden of this specific factor on the Appellant. It states as follows:

111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall-

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

51. The question of age was not raised in cross-examination or at all. The issue of age, therefore, was proved from the circumstances of the case.

52. Equally, I do not find that the Respondent proved their case beyond reasonable doubt that the Appellant penetrated the minor with his penis. Besides finding that the hymen was old broken, the medical report and testimony indicated that external genitalia were normal. This was the case also for

the PRC. Evidence showed that the clinical officer was present in the station. Nevertheless, the nursing officer decided to fill out the PRC form.

53. Medical evidence is empirical and must be based on scientific findings that support a given conclusion about the offence. It appears that the trial court based the Appellant's conviction on the absence of the hymen. However, there is no nexus shown to exist between the broken hymen and the alleged offence. It was an old broken hymen while the test was carried out on the day of the alleged offense or a day after, as per witnesses. the court, Cherere J addressed the question of a broken hymen in the case of Titus Karani v Republic [2021] eKLR, as follows:

    11) The evidence on record reveals that the trial magistrate relied on medical evidence that the hymen was broken to conclude that it had been torn in a sexual encounter.

    12) The issue for determination is whether a broken hymen is prima facie evidence of penetration. In PKW versus Republic [2012] eKLR, the Court of Appeal observed that:

> " Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen."

54. From the foregoing, it is apparent that the evidence of missing hymen is not automatic proof of penetration through a sexual act. In this case, it was upon the prosecution to establish beyond reasonable doubt, that complainant's hymen was torn by an act of defilement by the Appellant.

55. The broken hymen must be linked to penetration by the Appellant to sustain a conviction. This is because scientific and medical evidence has proved that some girls are not even born with a hymen. For those who are, there are times when the hymen is broken by factors other than sexual intercourse. As appreciated by the Court of Appeal in P.K.W v Republic [2012] eKLR:

> " 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified" Is hymen only ruptured by sexual intercourse"
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> 16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in

vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769.

17. In this case the doctor who examined the complainant child was not asked whether or not the rupture of her hymen was as a result of sexual intercourse or any other factor. As we have pointed out the complainant child aged only six behaved normally after the alleged defilement. That together with her mother's behavior, issues that the two lower courts do not seem to have addressed their minds to, has raised doubt in our minds as to the guilt of the appellant. In other words the concurrent findings of the two lower courts are not fully supported by the evidence on record. Consequently we have no option but to give the appellant the benefit of doubt.

18. Taking all these factors into account, especially the fact that the Appellant had a sour relationship with the child's mother, we believe the evidence of DW2 that the child confessed she was cajoled by her mother to lie against the Appellant. We therefore allow this appeal, quash the conviction and set aside the sentence of life imprisonment. We direct that the Appellant be set free forthwith, unless otherwise lawfully held."

56. Penetration of the minor and recognition of the offender are ingredients that must be proved beyond reasonable doubt to warrant a conviction. Penetration must, with emphasis, be proved to have been committed by the accused person. I say so because in our justice system, victims of sexual offences would allege that the accused person defiled them and the court on easily establishing that the offence was committed and the victim clearly recognized the accused person, proceed to convict the accused person when the offence was committed by a different, and often unnamed person.

57. The medical evidence did not support her version of evidence. In Philip Nzaka Watu vs. Republic [2016] eKLR, the Court of Appeal held that:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

58. Consequently, it was the primary duty of the trial court, which it failed, to carefully analyze the contradictory evidence and determine which version of evidence, on the basis of judicial reason, it could prefer. In Erick Onyango Ondeng' vs. Republic [2014] eKLR, the Court of Appeal held that:

> "The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See OKENO VS REPUBLIC (1972) EA 32). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

59. The trial court failed in not holding that such magnitude of contractions, unless satisfactorily explained, will usually but not necessarily lead to the evidence of a witness being rejected. As was noted in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

60. Therefore, in my overall reevaluation of the evidence, I am unable to agree with the trial court that the prosecution proved penetration of the minor's vagina by the Appellant's penis beyond a reasonable doubt. There was indeed no evidence of penetration. It is unnecessary to go into who committed the offence, in the absence of the offence.

61. On the question of ignoring the defence evidence, the court stated, in a rather bizarre manner, that the question of being framed arose only in the defense. Where else does one raise a defence, if not at the defence hearing? In the case of Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR, the Court of Appeal posited as follows:

> So if at the beginning of the trial, *the Constitution* obliges everybody to assume that an accused person is innocent, what case is he to disclose in advance? Mr. Tobiko's position appears to be that if the accused person chooses to give evidence and call witnesses then he ought to be able to disclose his case to the prosecution. That contention, however, ignores one basic distinction. The privileges, if we may so designate them, of the accused person are conferred on him by *the Constitution*. As soon as he is arrested, he shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged. Nobody is ever likely to arrest the

Republic of Kenya and charge it with a criminal offence so that it would require it to be informed of the nature of the offence against it. The question of reciprocity is, therefore, misplaced. ...

That approach by the learned Judge creates the dangerous theory that what is convenient and would expedite the disposal of a matter is lawful. The proposition ignores the fact that the rights of an accused person are considered to be so important that they are protected under section 77 of *the Constitution*. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association. We know who is capable of locking up individual Kenyans in the Nyayo House Dungeons. We know who is capable of telling Kenyans: "If you rattle a snake you must be prepared to be bitten by it." ....

We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by *the Constitution*. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in *the Constitution* and it ought not to be allowed to claim the same privileges. We know the good Book says that in the end of times, the lion shall graze and lie peaceably together with the lamb. But our recent history is still too fresh in our mind and we in the courts must try to keep the lion away from the lamb. In other words there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state. No statute gives the state such privileges, and *the Constitution*, wisely in our view, does not give the prosecutors such powers.

62. The appellant was not under duty to disclose his defence before being put on the defence. In any case, he had requested to further cross-examine PW1. I find the order given, subjecting the availability of the witness for cross-examination, to be limiting the right to a fair trial. Nevertheless, the order for further cross-examination was never set aside. The application for cross-examination was allowed, but she was not availed. The court could thus not make adverse inferences for the defence.

63. In totality, the Respondent herein did not prove the offence of defilement against the Appellant beyond reasonable doubt, and the trial court erred in convicting the Appellant.

64. Having found that the conviction was improper, I do not think it will serve any purpose to delve into the issues in the sentence. I set the conviction and sentence aside.

Determination

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

    a. The appeal is allowed. The conviction and sentence in CMSO No. E016 of 2021 is set aside.

    b. The Appellant is set free unless otherwise lawfully held.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 6TH DAY OF MARCH, 2025.

Judgment delivered physically in court.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kimani for the State

Appellant in person

Court Assistant – Michael