Gichohi v Republic (Criminal Appeal E059 of 2024)
[2025] KEHC 8168 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8168 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E059 OF 2024

DKN MAGARE, J

JUNE 12, 2025

BETWEEN

FELIX MAHUGU GICHOHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the trial court judgment, conviction and sentence by Hon. Monica Munyendo (PM) given on 30.08.2024 in Othaya MCSO Case No. E009 of 2022. It is not correct to state that the sentence was meted out by her as the same was delivered by Hon. Sandra Ogot.)

JUDGMENT

1. This appeal arises from the trial court judgment, conviction and sentence by Hon. Monica Munyendo (PM) given on 30.08.2024 in Othaya MCSO Case No. E009 of 2022. It is not correct to state that the sentence was meted out by her as the same was delivered by Hon. Sandra Ogot.

2. The Appellant was charged with sexual assault contrary to section 5(1)(a)(i)(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offense were that the Appellant, on 30.10.2022 at around 2100 hours in Mahiga West Location, in Nyeri south sub-county within Nyeri County, unlawfully used his fingers to penetrate the vagina of AGM without her consent.

3. There was an alternative count of committing an indecent act with an adult contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offense were that the Appellant, on 30.10.2022 at around 2100 hours in Mahiga west location, in Nyeri South Sub-county within Nyeri County intentionally touched the vagina of AGM with his fingers against her will.

4. After trial the Appellant was convicted and sentenced to 10 years imprisonment. The appellant, aggrieved, lodged this appeal. The petition of appeal and the supplementary ground of appeal set out grounds as hereunder:

1. The learned magistrate erred in law and fact in failing to find that there was no sufficient reason or evidence showing the appellant to have committed the offence charged.

2. The learned trial magistrate erred in law and fact by holding that penetration had been proven contrary to the evidence on record.

3. The learned trial magistrate erred in law and fact by convicting the accused person when relying on the hearsay narration given on the P3 form.

4. The learned trial magistrate erred in law and fact and erroneously convicted the accused person by giving her own medical evidence which was not supported by any medical evidence in respect to hysteria which is not supported by any evidence on record.

5. The learned magistrate erred in law and fact by relying on inconsistent and controversial evidence tendered by the prosecution witnesses.

6. The learned magistrate erred in law and fact in ignoring or giving no consideration to the defence case and submissions made thereto therefore making biased and erroneous decision.

7. The trial court erred in law in handing a conviction against the accused person in a case where the prosecution failed to prove their case beyond a reasonable doubt.

5. The court gave directions on how to dispose of this matter through submissions, which were filed by each party. The Appellant field 2 supplementary ground of appeal, without leave of the court after directions were given. It is unnecessary to address them as it will soon appear apparent. however, the grounds were:

6. The appellant stated that in respect of grounds 1, 2 and 7 the court did not find the offence proved. They stated that the complainant alleged hysteria as a condition which was not reported elsewhere. The appellant stated that the conviction was based on hearsay. The court itself stated that there was no evidence of what transpired. The complainant did not witness what happened to her, further they stated that medical evidence did not support the allegations. According to the Appellant, PW5 stated that there was no physical bodily harm. The decision not to charge for rape according to PW7 was based on the absence of spermatozoa.

7. It is stated that the magistrate conceded that up to this time it is not so obvious that the bleeding was as a result of penetration or otherwise. They stated that it was preposterous for the court to state that, removing of a trouser is a pointer that something sinister must have happened to her.

Evidence and Proceedings

8. A total of 7 witnesses testified. I have added another, whose testimony cannot be said to be evidence since it was baseless evidence tendered by PC Njoroge but he was not cross examined. Though it was given on oath, he was not a witness. Whatever he said is of no relevancy to the case. I do not find it necessary to refer to such evidence. It is understood that it is entirely within the discretion of the court to recall witnesses as enshrined in Section 150 of the CPC which provide thus:

> A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.

9. The said Njoroge was not cross examined. It was thus not convenient to place evidence on oath without cross examination. This is important if the witness refers to matters where the court is entitled to make adverse inference. The complainant testified on 8.11.2022 and wished to withdrawal the complaint. The court declined to withdrawal of the complaint and asked for investigation into the raison d'etre for the withdrawal.

10. Later on 30.1.2023 the complainant testified that she was 24 years old. She was coming from Caro's place at 8.35 pm. Caro was a Secretary at the institute's Principal's Office.

11. She met the appellant coming from gate B. She had seen him visit a friend close to where she lived. He started wooing her and attempted to hug her but she refused. He requested the complainant they go watch a game which she refused. He went his way while the appellant went his way. The appellant came from behind and told her that he was attracted to her. She had requested the Appellant to be a guest at her catering studies. He wanted to touch her but she refused. She decided to go to R's house. The appellant came from behind and was smelling alcohol. It was the same alcohol she had smelled from the appellant earlier.

12. She stated that the Appellant pushed her. She had hysteria and was in shock. She lost consciousness and tried to bang A's door in vain. She did not come out. A was a neighbour. She saw the Appellant was half naked before she lost consciousness. There was blood in the private area and wetness on the bed.

13. When she woke up the appellant was there having arms akimbo. The appellant was unsure whether he wanted to leave or not. When she woke up, she was not wearing trousers and underpants that she had put on earlier. She saw a lot of blood. She wrote a message to R that she wanted to commit suicide. She stated that she knew the accused but did not know where he lived. Two students were called who eventually took G, M, A, R and the complainant to the appellant's house. The appellant refused to accept the incident. He was arrested and taken to the police station. Photos were taken and medical reports were filled.

14. On cross examination she stated that she knew the appellant well as he was seducing her. There were other students at the place where they talked for about one minute. She smelled alcohol from the Appellant. She did not report the incident but went to her house. She stated that she had hysteria and lost consciousness for 20 minutes. She stated that the appellant's penis was erect and there was no blood on his fingers. She stated that her hymen was old and broken. She stated she had not known any man before.

15. PW2 G A testified that he was a student. He testified that on 30.10.2022 at 10.30 am he was sleeping in his room. He stated that he knew the complainant. They were asked to help and went only to find the complainant in R's bed. The complainant described the incident and afterwards they called the school president. They proceeded with G, M, A, A and the complainant to the appellant's house. A identified the door of the perpetrator.

16. The witness proceeded that they interrogated the appellant who stated that he had only inserted fingers, not raped. They went and took bloodied tissues which he identified in court. He stated that he had not interacted with the appellant before then.

17. On cross examination he stated that he had been told by M that someone was raped in campus. The witness stated that the complainant did not disclose any medical condition she had.

18. PW3 was Thomas Mwangi, a Clinical Officer based in Othaya Sub-county Hospital. He had a diploma in Clinical Medicine and Surgery from, KMTC Thika. He had been working at the hospital since 2013. On examining the patient, she had no injuries on the neck, head, thorax, and abdomen. The probable weapon was unknown. She was given anti-fungal medicine and antibiotics. There was no presence of spermatozoa, there were yeast cells and leucocytes. There was a vaginal discharge. He could not tell whether she was on her periods as the complainant did not reveal her last menstrual period. The discharge was from the vaginal canal.

19. The appellant opposed the production of the P3 as it had self-incriminating information and there was no process said on how the information was obtained. Instead of the court giving directions regarding information covered under section 25A, the court simply stated that it is part of the normal process. The issues were to be dealt with in submissions. This left the objection standing without resolution, one way or another. This is crucial since only information obtained from the person being examined irrelevant.

20. On cross examination, the witness stated that during sexual intercourse, there must be rapture of veins, bruises or perforated hymen. None of these were seen in the instant case. The hymen was not broken in this incident. He stated that there was yeast in blood but the same had to have been in her for a long time. The examination of the Appellant did not yield any deposit of samples or blood stains.

21. PW4 Chief Inspector of the Kenya police, Stephen Natembeya produced photographic evidence of the scene. The photos were said to have been taken by PC Cecilia who was not gazetted.

22. PW5 Ken Njagi was a Clinical Officer who testified that the complainant came to the hospital on 31.10.22 at around 2.50 am. She was bleeding vaginally and found herself undressed. She lost consciousness. She did not know if the perpetrator penetrated.

23. He proceeded that there were no vaginal tears and lacerations. The hymen was broken and old. There were no spermatozoa, the anal canal was normal. Urine examination showed pus and yeast cells. The last menstruation was 8.10.2022. Her reproductive system was compromised. She indicated that she had an infection in her reproductive system.

24. On cross examination, she stated that she was unconscious and found herself naked and bleeding. She did not explain how she got unconscious. She did not indicate that she had hysteria. There were no physical injuries. Her cervix was open. Yeast incubates for 3 days and had an infection before the incident. She stated that the period could not stain tissue. The blood was from another source.

25. PW6, M testified that on 30.10.2022 at 10.57 he received a text from R that she had been raped. He went with G and found R with the complainant who explained what happened. They went to the house of the perpetrator. They found him and reported to the institution's security. Police were informed. They recorded their statements.

26. On cross examination, he stated that he did not have the SMS that he received from R. She stated that A did know why the complainant did not call any of her friends.

27. PW7 was PCW Cecilia Vyalu. She testified that she was the investigating officer. She tried contacting R but did not find her. She received a report on 31.10.2022 at 0130 hours from her OCS. She rushed to Mathenge Technical College where she went with PC Moses and Mathew, the driver. She received a complaint of rape. She stated that the complainant narrated the incident on how she was raped. She stated that the appellant was familiar with the complainant. She stated that the appellant was in the

house standing quietly. They took the duo to the police station. The accused said he used his fingers. He never presented an alibi.

28. The complainant reported that she was raped. It was concluded that it was sexual assault after investigations. She did not find the underlying reason why she was unconscious. The doctor confirmed the absence of spermatozoa.

29. The court found the appellant had a case to answer. He was placed on his defence and gave sworn evidence. He stated that they were talking to with the complainant. He was 19 years old while the complainant was 23 years old in third year. The appellant was a freshman. They watched football together where they went to clubs and drunk. On the material date, they watched a game which ended up at 8 pm. He took her to the house.

30. He continued that she insisted that they have sex. However, he refused stating that he was a freshman while she was a third year student. He rejected all her advances. He had been told by the mother not to have sex without protection. He rejected all advances and went directly to the house. She told him, as he was going, 'wewe umekataa utoana.'

31. Later there was a knock in his door at 10.00 pm. They started beating him and accusing him of rape. A watchman came to help and directed then to the security of Mathenge Institute. The police came and took them to Munyange Police Station. The complainant stated that he had drugged her but officers felt it did not make sense. He stated that he did not say anything to the doctor. There was an affidavit dated 8.11.2022 which was produced as exhibit 1. There was a second affidavit, exhibit 2. The complainant wanted to extort some money but was not paid.

32. On cross examination he stated that the complainant approached him when her aunts were there. They asked for money while the case was in court. The complainant and the appellant had been friends for over a month. He stated that he was in his house. He told the investigating officer of the threat but was not listened to. He stated that the people who came to his house assaulted him. He confirmed he had two silver plated teeth in the lower left jaw.

33. The next witness indicated as DW3 was Evans Irungu Kanyi. He worked with a security firm in Sagana. He used to work at Mathenge Technical Institute as a security guard. He knew both the appellant and complainant. The appellant had been a student for about 2 months. On 22.10.2022 he had seen the appellant and complainant in the school compound. They seemed to be friends. On 22.10.2022 they were at the 'Wi-fi' sitting area at between 7 pm and 8 pm. They were in the hall watching football. After the game was over, he opened the gates, all students left. At about 11 pm some students came and said they wanted to rescue another student living outside the gate.

34. He looked and saw students beating the appellant. He told them to stop and escalate the matter to the in-charge. He informed Evans the In-charge Security. The duo went to the police and hospital. On cross examination, he was asked only one question and said - I did not witness anything about the rape.

Submissions

35. The Appellant filed submissions dated 18.12.2024 by which it was submitted that the main ingredient of the offence the appellant was convicted for being penetration was never proven and hence the

prosecution failed to prove their case beyond a reasonable doubt. Reliance was among others placed on Michael Mugo Musyoka v Republic [2015] eKLR where the Court stated as follows:

> Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt.

36. It was also submitted for the Appellant that the learned magistrate was wrong to rely on the evidence of the complainant who kept changing her mind and story and could not explain how she suffered a medical condition that was not supported by any medical evidence. They cited Kiilu and Another vs Republic [2005] IKLR 174, as cited in Bosco Makaumbondo vs Republic 2014 CA as follows:

> The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore unreliable witness which makes it unsafe to accept his evidence?

37. The Respondent filed submissions dated 24.4.2025 by which it was submitted that the essential ingredients of the offence as charged were proved to the required standards. Reliance was placed on John Irungu v Republic (2016) as follows:

    l. Prove of penetration of victims genitals - this penetration can be by any part of the body of the accused.

    2. The penetration above has to be unlawful/without the consent of the victim

    3. Positive identification of the perpetrator.

38. On sentence, it was submitted for the Respondent that the trial Court properly directed itself and handed a sentence that was commensurate to the offence committed. They relied on the case of S vs. Malgas 2001 (1) SACR 469 (SCA) at para l2 where it was held that:

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".

Analysis

39. 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 stated 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 mAr 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 mAr and demeanor which may show whether a statement is credible or not which may warrant a court different.

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

41. Section 5 of the *Sexual Offences Act* under which the Appellant was convicted provides as follows:

(1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body; is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

42. The respondent was under duty to prove the guilt of the appellant beyond reasonable doubt. It is important to remember that 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."

43. The limitation on the powers of this court on appeal are found in Section 382 of the *Criminal Procedure Code*, which provide 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."

44. Courts in criminal cases should consider the standard of proof and the effect of a conviction on an accused person. In this case, the Appellant was to serve 10 years with a possibility of enhancement to 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 or such period as provided in law. 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.

45. 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. 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.'"

46. The Appellant alleged inconsistencies 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."

47. The court found evidence that sends chills to a good mind. I have to scrupulously peruse the record of the trial court. The court below, however, did a disservice to the case. It failed a simple test in a sexual assault case. The ingredients as per the charge sheet were:

    i. Penetration of the vagina

    ii. Penetration by the fingers

    iii. The appellant was the perpetrator

48. The evidence on record is that the complainant did not know whether she was penetrated. It was clear from the medical evidence that the blood coming from the vaginal canal was not caused by injuries, it was from other sources. The blood was not ruled out as period. Medical evidence was clear that there were no injuries, lacerations or evidence of assault. The weapon was unknown.

49. The investigating officer simply changed charges to assault when she could not find spermatozoa. There was no evidence that the fingers were used. The purported statement in a P3 do not amount to evidence of conviction as per Section 25(a) of the *Evidence Act*.

50. The investigating officer must know that absence of spermatozoa should have led her to consider other exculpatory evidence on record. It was instructive that the investigating officer ignored the evidence of the security officers who were in situ especially Evans, DW2.

51. The court failed to analyse the evidence and come to a conclusion both 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. It is crucial to note that Caro did not testify. In her place, DW2 testified that at that time, the complainant was with the Appellant watching football. This piece of defence evidence remained uncontroverted. It is strange that a smell of alcohol can be distinguished from another, for a person the complainant met earlier that day. The court is still digesting on when the Appellant was asked to be a guest. She eschewed the story she gave others that she had pretended to be on phone.

52. I have noted with concern that the courts have whittled down the presumption of innocence to an extent that bond terms are used as a punishment rather than a means of ensuring an accused person who has not been found guilty attends court. The accused person should and must at all times be presumed innocent until proved otherwise. The foregoing are not my musings but holding by the people of Kenya when they gave unto themselves *the constitution* and decided in Article 50(2) an and (c) as doth:

    2. Every accused person has the right to a fair trial, which includes the right—

        (a) to be presumed innocent until the contrary is proved;

        (c) to have adequate time and facilities to prepare a defence;

53. In the preamble the people of Kenya noted 4 salient aspects as they adopted, enacted and gave *the Constitution* to themselves and their future generations, as doth:

> Acknowledging the supremacy of the Almighty God of all creation:
>
> Honouring those who heroically struggled to bring freedom and justice to our land:
>
> Committed to nurturing and protecting the well-being of the individual, the family, communities and the
>
> Nation:
>
> Recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:

54. Justice is not served by presuming an accused person innocent. He remain a suspect and not a convict up to and until he has been found guilty. These rights are still respected up to the time he has exhausted all remedies.

55. Before I address the facts to the case it is important to address the standard of proof and the burden of proof in criminal cases. While handling civil cases, the test was succinctly laid down in a series of decisions handed down by superior courts. The standard in a civil case is that of balance of probabilities. The question as to what amounts to proof on a balance of probabilities in civil cases was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

56. The civil standard was well enunciated in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

57. Unfortunately, the courts have consistently started adopting this standard of proof in criminal cases. In criminal cases, the courts belief, conscience, gut feeling or fleeting emotional outbursts have no place whatsoever. The standard was well demonstrated in the words of attorney Johnnie L. Cochran, in the

O J Simpson trial, when he beseeched the jury, 'If it doesn't fit, you must acquit.' In that case, the gloves were too tight and could not fit into the accused's hand.

58. 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."

59. The accused enters these proceedings presumed to be innocent. 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."

60. 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. 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."

61. 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."

62. The trial court heard a total of 7 prosecution witnesses and the Appellant. The court found the Appellant guilty and sentenced him to 10 years imprisonment. Unfortunately, the file has two judgments. The first one is on conviction and the second one on sentence. The proper way is to have the second headed 'Sentence' as there can be no two judgments in the same file.

63. The first judgment was by Hon M.N. Munyendo given on 29.08.2024. The second one was meted out by Hon. Sandra Ogot. I have tried perusing the file to establish how the file came into her possession in vain. The matter was mentioned on 3.09.2024 before Wanja N.W. and was to be mentioned before Court 1, for sentencing. Sentencing was set for 25.09.2024. It was subsequently read on 30.09.2024. There was no compliance with Section 200 of the *Criminal Procedure Code*. The same provides as hereunder:

(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

64. The succeeding court must make a specific order that it is taking over from the preceding magistrate. This enables the court reviewing the evidence to understand the raison d'etre for another magistrate delivering a ruling and sentence in a matter essentially handled by another court. This was not done in this case.

65. The court was thus not relying on evidence but a hunch. In the case of Michael Mugo Musyoka v Republic [2015] KECA 955 (KLR), the Court of Appeal [Visram, Koome & Odek, JJ.A] held as follows:

> In Mary Wanjiku Gichira v R Criminal Appeal No. 17 of 1998, this Court held that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times his life. We are of the view that the evidence on record was not sufficient to sustain the appellant's conviction.

66. They questioned the identification of the appellant as he smelled alcohol. The appellant posited that lights were off. The appellant questioned the basis of his identification by the court. The appellant submitted that the complainant identified the assailant only through alcohol, not the light. The Appellant's case was that it was not understandable how the court established that the duration was sufficient to identify the accused in view of identification though alcohol. In the case of Macharia v Republic [2024] KEHC 8619 (KLR), Omido J posted as follows:

45. It is apparent, in the circumstances, in the absence of proper identification, that the Appellant was convicted on the basis of suspicion. How is suspicion to be treated? The Court of Appeal in the case of Sawe v Republic [2003] eKLR, observed thus:

> In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."

46. The court went on to state as follows:

> "The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira vs Republic (Criminal Appeal No. 17 of 1998 (unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.

67. The result of the foregoing is that the case against the Appellant was not proved to the required standard beyond reasonable doubt. There was no evidence of penetration of the complainant by the Appellant, whatsoever. The alleged security officers were not called. They were crucial witnesses. Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides as follows:-

> "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."

1. However, I am equally persuaded by the reasoning of Odunga, J as he then was in Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR where the learned judge stated as follows:

53. In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.

Determination

69. I therefore make the following orders: -

a. The appeal is merited and is allowed.

b. The conviction and sentence in Othaya MCSO Case No. E009 of 2022 is hereby set aside.

c. The Appellant is set free unless otherwise lawfully incarcerated.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12 TH DAY OF JUNE, 2025 .

KIZITO MAGARE

JUDGE

Judgment delivered physically in court.

In the presence of: -

Mr. Kimani for the State

Mrs. Machira for the Appellant

Court Assistant – Jedidah