



**Masia v Republic (Criminal Appeal E010 of 2024)
[2024] KEHC 12659 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12659 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E010 OF 2024
DKN MAGARE, J
OCTOBER 17, 2024**

BETWEEN

MUSA ELUPE MASIA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. E Kanyiri (PM)
in Karatina CMSO Case No. E017 of 2022 delivered on 8th November, 2023)*

JUDGMENT

1. This is an appeal from the conviction and sentence of Hon. E. Kanyiri (PM) in Karatina CMSO Case No. E017 of 2022 delivered on 8/11/2023. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act*.
2. The particulars being that on 10/10/2022 at Mathira sub county in Nyeri County he intentionally caused his penis to unlawfully penetrate the vagina of MGN, a child aged 12 years.
3. There was an alternative count of committing an indecent act with a minor. The particulars were that on 10/10/2022 at Sub-county in Nyeri County intentionally and unlawfully caused his fingers to unlawfully penetrate the vagina of MGN, a child aged 12 years.
4. The Appellant was arrested on 10/10/2022 and taken to court on 12/10/2022. He pleaded not guilty. The appellant was released on bond of Kshs. 70,000/- with a Kenyan Surety of a similar amount.
5. The matter was fully heard. The court convicted the Appellant on 12/10/2023. The court then proceeded for post judgment proceedings and sentenced him to 20 years-imprisonment on the main count on 12/11/2023. The Appellant appealed against both the conviction and sentence to this court and set forth the following concise grounds: -



1. That the learned trial magistrate erred in both law and fact in failing to appreciate the fact that the alleged victim in this case clearly demonstrated an incredibly doubtful integrity and whose evidence was and remains doubtful occasioning a serious prejudice.
 2. That the learned trial magistrate again erred in both law and fact in failing to appreciate that the critical elements in defilement were not proved to the required standard in law occasioning a serious miscarriage of justice.
 3. That the learned trial magistrate further erred in both law and fact in not considering that the whole prosecution case was riddled with material discrepancies which were capable of unsettling the verdict hence a prejudice.
 4. That the learned trial magistrate further erred in law and fact in failing to consider the plausible appellant's statement in defence which was not contested and or unproved by the prosecution hence still stands clearly demonstrating that the instant matter was a framed up one to curtail Appellant's success for envious reasons.
 5. That the instant matter's proof was below the required standard of proof and therefore capable of impeaching the whole substance of the matter.
 6. That the learned trial magistrate erred in law and fact by meting a minimum mandatory sentence hence a prejudice.
6. The Appellant filed what he calls amended grounds of appeal under section 350 (2) v of the Criminal Procedure Code. The section reads: -

“350. An appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against.

A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal:

(v)notice in writing of an application for leave to amend a petition of appeal shall be given to the Registrar of the High Court and to the (Director of Public Prosecutions) not less than three clear days, or such shorter period as the High Court may in any particular case allow, before the application is made; and an application for leave to amend a petition of appeal shall be made either at the hearing of the appeal or, if made previously, by way of motion in open court.”

7. The section requires the amendments be made on application. I have seen the Appellant made the amendments while filing their submissions. It does not help since it is necessary for leave to be granted and the court to be satisfied that the state has been served and not ambushed. This is in line with the doctrine of audi alterum partem. Nevertheless, for purposes of this appeal there is no practical difference in the grounds. The new grounds are as follows: -



- a. That, the learned trial court erred in law and fact to convict me while relying with contradictory evidence of witness without considering that the same was fully tainted with a lot of doubts.
- b. That, the trial magistrate erred in law and fact by basing my conviction on the medical evidence which was inconclusive.
- c. That, the learned trial magistrate erred in both matters of law and fact to base my conviction on contradicting and uncorroborated prosecution evidence.
- d. That, the trial magistrate erred in both law and fact to shift the burden of proof to the accused person and reject my defense without a cogent reason to do so.

Evidence

8. The first witness was Dr. Stephen Nderitu. He was stepped down after the Appellant objected to production of evidence on behalf of Dr. Grace Kagwai. The court shall revert to this part of the proceedings.
9. The next witness was the Complainant who testified as PW1. She stated that in October 2011, she was living with her father. On 10/10/2022 she was on holiday. The witness stated that on the said date at 7.00 am, she did not reach the toilet. The appellant threw the minor on the ground and asked her to remove her clothes. The Appellant finished and went to his plot. The witness used to live in their plot.
10. Pauline (PW2) saw the witness and asked where she had been. She said she was with Musa. She stated that the doctor saw nothing. She stated that she had another defilement case. On re-examination she stated that there are 2 other defilement cases. In re-examination she changed her story that she was defiled on grass. The witness did not address the proximity to the other offence by the other two persons.
11. PW2 stated that she was going to the toilet and saw Musa leave the bathroom. He went inside and closed. It is not indicated whether he went back to the bathroom or not. She went near the corridor and saw (them) [word not legible in the record] come out. People began to gather, and Musa came out saying it is not true [that he defiled the minor]. She called 'mum'. It is not clear who mum was.
12. The complainant was slapped and she started crying that Musa raped her. She said that she had known Musa for 3 years and the complainant for one year. They had a good relationship. I found the evidence of this witness rather strained. I shall comment on this at the tail end of this judgment.
13. On cross examination she stated that she saw Musa come into the bathroom and ran back into the same. In re-examination, the witness stated that the child went into the toilet then bathroom.
14. PW3 was the mother of the child. On 10/10/2012 (2022?) she was in their town plot. PW1 left the house and overstayed in the toilet. PW2 called her that she has found the Appellant and PW1 in the bathroom. She called the child and she said she was defiled. The doctor examined her and found that "ameshikwa shikwa." It was her further evidence that she had known the Appellant for months only. It was her case that the minor was born on 8/10/2022, making her 12 years.
15. PW4 testified. He had been stood down earlier as PW1. He produced documents he had been barred from producing on 7/12/2022. The proceedings leading to the disqualification was as hereunder: -

PW 1 –..... I Have 2 documents, that is PRC and P3 filled by doctor grace Kagwai who is in court due to doctor shortage.

Prosecutor – I pray to proceed with the doctor who examined the child.



Accused: I pray for the original doctor.

Court: application allowed.

16. He stated that the victim had no injuries and was escorted by the mother. There was no bleeding or spermatozoa. In cross examination he stated that the injuries were superficial and could not cause bleeding. This was a new invention. There were no injuries as per the original documents.
17. PW5 Geoffrey Mwatha was a Senior Assistant Chief. He was called by Ann and told someone was defiled. He found the Appellant had been arrested and people wanted to beat him.
18. PW6 Sgt. Catherine Mugambi was the investigating officer. She produced the birth certificate. On cross examination she stated that she took the child to hospital. She did not take the Appellant for cross examination as it was not a must.
19. On being put to his defence the appellant stated that he did not defile the minor. He had never met the minor before that date. He was on duty and on coming to his house he heard commotion outside. He denied the charges and went to his house. The chief came and told him to go to the police. He stated that he went to his house and never left. He stated that he did not know why they framed him as he was not in disagreement with her. He only suspects the wife.
20. The case was closed and a verdict given.

Analysis

21. 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.
22. This was aptly stated in the case of *Peters v Sunday Post Limited* [1958] EA 424 where, the court of Appeal therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
23. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not



which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

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. Most oft quoted English decision by Viscount Sankey L.C in the case of *H.L. (E) Woolmington v 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. In the case of *R v 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. 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. PW2’s evidence was contrary to the evidence by PW1 that she did not reach the toilet. Further, the evidence directly contradicts the minor’s evidence, that this was a single line event. Her evidence was simply not credible. Her reaction is contrary to what a normal person will do in such event. Why will an adult see people in the bathroom one of whom is a child and go away, as if everything was normal? Further, the minor stated that Musa used to live in their plot but was no longer staying there. To which house did he enter? Her evidence cannot be believed. The court was simply wrong to find such evidence credible. It was useless evidence. It does not accord to the natural cause of events.

30. PW3 denied framing the Appellant and other people. She said she did not see the Appellant that day. This contradicted her evidence in chief. She stated that mum saw Musa that day. It is not clear who mum was in this context. PW2 called only mum. However, PW3 stated that she was called by PW2. That person did not come to give evidence. Failure to call such a witness must be construed against the state.

31. PW4 testified. He had been stood down earlier as PW1. The objection was allowed and he could not testify. The court called him again. He wanted to produce evidence on behalf of Dr. Grace Kaluai. This application had been dealt with on 7/12/2022. The application to produce evidence on behalf of Dr. Grace Kaluai was disallowed. The import of such rejection is that the evidence could not be produced by PW4 without the High Court setting aside the order of 7/12/2022. Therefore, the regurgitation of such an application was not tenable. The evidence of PW4 is as such not admissible after having been disallowed. It is not that a doctor cannot produce evidence under Section 33 of the *Evidence Act*. It is that the application was dealt with conclusively. The lower court does not have the luxury of powers of review. In any case there was no attempt to review the said orders. The state ought to have moved this court on revision of its earlier decision. However, it is doubtful whether it could be allowed as this was an application by the state and supported by the Appellant.

32. Section 362 and 364 (1) (b) of the Criminal Procedure Code provide for revision as follows:-



S. 362 the High court may call for and examined the records of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.

S. 364(1) in the case of a proceeding in subordinate court the record of which has been called for or which has been reported for order or which otherwise comes to its knowledge, the High Court may

(b) in the case of any other order other than an order of acquittal alter or reverse the order.

33. PW4 was excluded by the court from giving evidence on 7/12/2022. The exclusion remains on record. This is useful in this particular case where medical evidence was inconclusive and testimony was shaky. The PRC form did not indicate any injuries. There were no tears or marks and no pain was elicited during examination.
34. The P3 showed no blood or discharge noted. The examination was conducted within hours of the alleged offence. There was no treatment given at all. The standard practice is to treat and prevent infection and pregnancy through post exposure prophylaxis for anyone who has been sexually assaulted or defiled.
35. There was normal labia minora and normal labia majora. Slight hyperemic area between 6 o'clock and 9 o'clock. The age of the person examined was changed from 50 years to 12 years. Only the examining doctor could have given this evidence. The medical report does not fall into the exception in Section 77 of the Evidence Act. It provides as follows: -
 1. In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
 2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
 3. When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.
36. In this case, the court had already ordered that the original doctor be summoned to produce the evidence. There was no basis laid under Section 33 of the Evidence Act for admission of the report. The said section provides as follows: -

“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases-

when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in



commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;

.....”

37. No basis was laid for production of Dr. Grace Kaluai’s report by PW4, after being jettisoned from the proceedings at the onset. The first time it was indicated that the doctor was unavailable due to pressure of work. PW4 could definitely stand in at the hospital to allow Dr. Grace Kaluai to produce her report, even if she testified virtually.
38. Though no treatment was carried out, there was examination showing epithelial cells, no pus cells and no spermatozoa. It is not clear why there was no preventive treatment given at all.
39. Further, even if the good doctor produced the report properly the same was to the effect that there was slight hyperemic area between 6 o’clock and 9 o’clock. There were no tears, hymen was not observed and no pain was elicited during examination. No injury was noted and no classification of injury was made. In other words, the medical evidence was unreliable as evidence of defilement.
40. In fact, no treatment was done or any blood or discharge noted. It is surprising that the doctors were interested in filling the P3 and not giving post rape treatment. The standard procedure is that the victims are usually treated for sexually transmitted diseases including HIV within 72 hours. This was not done. It is therefore clear that the person filling the P3 and PRC was well aware that there was no immediate danger. No wonder the prosecution was unable to call the examining doctor. The labia minora and labia majora were normal. There was no observation on the hymen.
41. The person initially examined was 50 years. This was changed to 12 years. In the circumstances I agree with the Appellant that the court erred in relying on the inconclusive medical evidence. Indeed, the prosecution failed to tender evidence of timelines of previous defilements to rule out that the slight hyperemic area between 6 o’clock and 9 o’clock was not from the other cases.
42. This therefore leaves the evidence of the minor and its corroboration. Section 124 of the [Evidence Act](#) provides as follows: -

“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.”

43. Therefore, the evidence of the minor must be corroborated in material particulars or the evidence of the victim be such that it is credible. The court did not record the reasons for believing the minor. The evidence of PW2 was bogus. She was not a witness any reasonable court can believe. The court below stated that she believed the minor and as corroborated by PW2. That does not meet the requirements of section 124. The operative words are, ‘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.’



44. The belief by the court is irrelevant. The court must be satisfied that the minor is telling the truth. That satisfaction must be for reasons recorded in writing. There are no reasons on record. The minor was unreliable. She was jumping from grass to the bathroom. The offence is said to have occurred in a bathroom used by many members of the community. Her story does not add up.
45. The brother who slapped her and forced her to say who the perpetrator was, was not called. The court found that the minor did not reach the toilet. However, PW2 states otherwise. The reaction by PW2 was not normal.
46. The court created its flow of evidence and not as testified. The Appellant was said by PW2 to have left the bathroom and immediately came back in. The witness did her business in an adjacent toilet while the duo continued with their escapades. Surely, if there were screams, PW2 could have heard. Instead, she decided to eavesdrop from a corridor.
47. The court relied on identification. However, the issue before the court was whether the Appellant was blamed. Why will someone commit defilement and come out to viscerously defend himself. The brother who was there, was not called. The witness, PW2, who strained to be an eye witness, in reexamination turns out that she did not see the Appellant. It is mum who saw. Whoever mum was, is still a mystery. Without evidence of mum, the benefit of doubt goes to the Appellant.
48. On the aspect of the defence, the court dismissed the same off hand. It is the duty of the court to analyze the alibi before dismissing the same. The court placed the burden of disproving the alibi on the Appellant. This was fatal. In *Karanja v Republic* [1983] eKLR, the Court of Appeal [Hancox JA, Chesoni & Platt Ag JJA] stated as follows: -

“There was no misdirection such as occurred in *Okethi Okalev Republic*(1965) EA, 558. *Kirenga V Uganda*[1969] EA, 562, where the trial judge talked of displacing the case built by the prosecution. As Goddard LJ said in *Mahon v Osborne* [1939] 1 All ER 535 at page 556:

“Has there ever been, I wonder, a summing up of a long and difficult cause, by ever one of the greatest masters of our law which does not contain some sentence, which, taken by itself, is open to criticism? The most that can be required is that the judge, in addition to stating the law correctly, shall give a fair summary of the evidence and of the contentions of either side”.

49. It is therefore not the duty of the court to brand every defence as an afterthought, without getting the original thought. In the case of *Victor Mwendwa Mulege v Republic* [2014] eKLR the court of appeal stated;-

“It is trite law that the burden of proving the falsity of all of an accused’s defence of alibi lies on the prosecution.”

50. The court of Appeal dealt with the issue of alibi in the locus classicus case of *Kiarie v R* {1984} KLR, stated as follows: -

“An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not



unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons."

51. The Appellant's defence was not considered. Had the court considered the defence, it could have noted that there was no medical evidence on record. The court had sat on appeal from her own decision. The witnesses were not credible. The court proceeded to find the alibi as an afterthought. She dealt with elements of defilement before dealing with the crucial issue of the alibi.
52. It is not the duty of the Appellant to state the time he arrived. He clearly gave an alibi that he was working and came in the morning. The prosecution had a chance to test the alibi and failed. No single question was put to him to test the alibi. The prosecution had a chance to call for rebuttal evidence and spurned it. The alibi defence, being an absolute defence remains intact and un-displaced.
53. The defence evidence was consistent. The complainant was beaten to say the name of the perpetrator. There was no threat when she was with her family. Why say the name only after being beaten? Is it possible that the Appellant was a soft target? Why would she not say who defiled her? In any case, why would the brother, be inquiring who the complainant was with, when PW2 could have easily stated the same?
54. It is possible that the alibi was bogus. However, it is the duty of the state to displace the same. They failed to do so. The brother of the complainant, who was in the proximity and was the first to be told, was not called. I am aware no particular number of witnesses is required to prove a case. However, where evidence is shaky, failure to produce a witness must be construed against the said party.
55. Section 143 of the [evidence Act](#) provides as follows: -

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

In this matter, I do not know whether grass was growing in the bathroom but the story by PW1 and 2 are diametrically opposed. The brother, who was placed in the chapter and the role he played in the implication of the Appellant was ignored. In *Donald Majiwa Achilwa and 2 other v R* [2009] eKLR the Court stated:

"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are 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 of 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 case. (See *Bukenya & Others v Uganda* [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

56. This was not those defilements where a minor is lured. It was said to be forceful. Why protect the perpetrator. Further, the complaint gave a different statement in the PRC form. She described a love related defilement. In this case, her evidence was forceful defilement. It was



said after a beating. The mum was told by the Appellant to take the complainant to hospital due to the beatings. The complainant changed her story of the event occurring in grass and not bathroom.

57. 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 stated 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.”

58. Turning to the case at hand the state had a duty to prove three ingredients of defilement, that is:

- a. Age.
- b. Penetration of the vagina of the complainant.
- c. The perpetrator.

59. In the case of *Joseph Kiet Seet v Republic* [2014] eKLR while discussing on the aspect of age, the court posited as thus:

“The age of a victim can be determined by medical evidence and other cogent evidence. In the case of *Francis Omuroni v Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus: In defilement case, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense...”

60. Proof of age can be through common sense, oral testimony that is credible and cogent, baptismal card – not recently obtained. In *Edwin Nyambaso Onsongo v Republic* [2016] eKLR the court stated as doth: -

“...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.”

“..we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

61. The age of the minor was not contested. It was proved to be 12 years. The birth certificate was produced to prove age. The birth certificate, however was recently obtained. However, there was no serious contest on the age of the minor.



62. The second aspect is penetration. Section 2 of the *Sexual Offences Act* defines penetration to mean:
- “The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
63. Section 2 of the *Sexual Offences Act* defines genital organs to include the whole or part of male or female genital organs and for purposes of this Act includes the anus; in this case there are two organs in issue, that is the Appellant’s penis and the victim’s vagina.
64. As regards penetration, the medical evidence was shaky. This was exacerbated by the evidence given and no objection tendered that there was prior penetration. This in itself does not connote wrong doing on part of the minor. However, medical evidence was inconclusive as regards penetration. The evidence was also useless having been rejected on 7/12/2022. The court cannot revise its own orders. The maker was to be called and was not called. The minor’s evidence did not help either. No reasonable tribunal can convict on the basis of contradictory evidence of the minor.
65. The requirements of section 33 of the *Evidence Act* were not met. There is no proof of the ability of PW4 to produce the impugned evidence. Being on leave is not a ground for revising an order. I shall disregard the evidence of PW4. The lower court did not have power to revisit its decision of 7/12/2022.
66. However, medical evidence is not the only evidence that can prove a sexual offence. In *AML v Republic* [2012] eKLR, the Court of Appeal stated that: -
- “It was submitted that there was no medical evidence to connect the appellant with the offence as no DNA test was conducted. The position of the law is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence.”
- The same court in *Kassim Ali Vs- Republic, Mombasa Criminal Appeal No.84 of 2005* stated that:
- “(The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence.”
- In the absence of medical evidence to support the offence, the question was whether there was sufficient oral or circumstantial evidence to prove penetration on the complainant.”
67. It was therefore incumbent upon the state to tender evidence that will show penetration by the Appellant. There was no evidence of penetration. Further, having not displaced the alibi, then, there was no evidence that the Appellant was involved. The crucial witnesses who allegedly saw were not called.
68. Further, other than direct evidence, the court may rely on circumstantial evidence. The facts must irresistibly point to the guilt of the Appellant. There are to be no co-existing circumstances that will show the Appellant’s innocence. In this case, the prosecution’s case is a sieve. The evidence shows more the lack of guilt than otherwise. In the case of *Ahamad*



Abolfathi Mohammed and Another v Republic [2018] eKLR, Court of Appeal had this to say on circumstantial evidence:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

69. There are a myriad contradictions as enunciated above. In Boaz Nyanoti Samwel v Republic [2022] eKLR, Justice Njagi stated as follows:

“The way to treat contradictions in a case was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic [2017] eKLR where the court cited with approval the Ugandan case of Twahangane Alfred v Uganda CR. Appeal No. 139 of 2002 [2003] UGCA,6 where it was held that:

“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”.

70. The Appellant is entitled to the benefit of doubt. From the totality of the evidence, even PW3 was not sure that the Appellant was the perpetrator. This was clearly a scheme orchestrated by PW2 for reasons known to herself. A perpetrator will have lied on the reasons for being framed. In this case the Appellant clearly stated that he did not know the reasons for being framed. He was firm even on cross examination. His defence theory has been the same all through the case. It is a believable defence.

71. In the circumstances, I set aside the conviction. It is unnecessary to look at the alternative count in view of the fact that I have found the defence of alibi not displaced.

72. It is unnecessary to go into sentence as the same is anchored on the guilty verdict. In the circumstances, I set aside both the conviction and sentence and set the Appellant free unless otherwise lawfully held.

Order

73. The consequence upon the foregoing is that I make the following orders:

- a. The appeal on conviction and sentence is allowed. The conviction and sentence is set aside. The Appellant shall be released forthwith unless otherwise lawfully held.
- b. The Appellant shall be removed from the register of convicted sexual offenders forthwith.



c. Right of appeal 14 days.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 17TH DAY OF OCTOBER, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mwakio for the State

Appellant in person

Court Assistant – Jedidah

