



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 96 OF 2017

MICHAEL MUMO NZIOKA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Mavoko SPM's Court Criminal Case (SO) No. 16 of 2015, P. O. Ooko, PM on 4th August, 2017)

REPUBLIC.....PROSECUTOR

VERSUS

MICHAEL MUMO NZIOKAACCUSED

JUDGEMENT

1. The appellant, **Michael Mumo Nzioka**, was charged before the Mavoko SPM's Court in Sexual Offences Case No. 16 of 2015 with the offence of defilement contrary to section 8(1) as read with section 8(3) of the ***Sexual Offences Act, No. 3 of 2006***. The particulars were that the appellant on the 24th day of July, 2015 at Kitengela Township within Kajiado County, intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of **LMM**, a child aged 14 years. Alternatively, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he intentionally and unlawfully committed an indecent act by allowing his male genital organ (penis) to come into contact with the female genital organ (vagina) of **LMM**, a child aged 14 years.

2. Upon being found guilty, the appellant was convicted of the alternative charge of committing an indecent act with a child and was sentenced to 20 years in prison. Being dissatisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

- 1) The trial court erred both in law and fact by convicting the Appellant when the case against him had not been proved beyond reasonable doubt.**
- 2) The trial court erred both in law and fact by convicting the Appellant in the absence of evidence to prove that the complainant was a minor.**
- 3) The trial court erred both in law and fact by conducting the trial in a manner which violated the Appellant's constitutional rights to a fair trial.**
- 4) The trial court erred in both law and fact by failing to find and hold that the prosecution's evidence was full of doubts which doubts ought to have been resolved in favour of the Appellant.**
- 5) The trial court erred in law by dismissing the Appellant's defence and shifting the burden of proof to the Appellant.**

6) The trial court erred both in law and fact by reaching conclusions based on his own opinions rather than on evidence.

7) The trial court erred in law and fact by failing to find and hold that the prosecution evidence did not support the charges facing the Appellant. The patent inconsistencies thereof created doubts which ought to have been resolved in favour of the Appellant.

3. In support of the prosecution's case the prosecution called 8 witnesses.

4. The first witness was the complainant in this case. After *voir dire* examination, she was sworn in and testified that she was 14 years old having been born on 17th December, 2000, and was in form 1. She was residing in Site Estate, Athi River and knew the appellant as a family friend.

5. Sometimes in December, 2014, a Sunday, the complainant was coming from church when she met the appellant at the parking yard of the church. The appellant called her and since she knew him, she went to him and the appellant offered her a lift in his car, a double cabin vehicle silver in colour, which she accepted and sat at the back seat. The appellant was accompanied by his three children C, S and B.

6. After boarding the vehicle, the appellant drove off and they stopped at Little Rock where the appellant sent all the children to go and buy chips. The appellant then asked the complainant whether she had a cell phone and whether her parents were scrolling her phone book to which she answered in the affirmative. He then asked for her phone number which the complainant disclosed to him at which point the appellant warned her against disclosing what had transpired to her parents, relatives and his wife. The appellant then removed a black short gun from the floor of his car which she identified in court.

7. Upon the return of the appellant's children they drove away to the appellant's residence and upon alighting from the appellant's vehicle, the complainant blacklisted his number that he had given to her. The following day the appellant attempted to call her but since she had blacklisted his number the call was rejected. The appellant then sent her a text message demanding that she calls him back. Two days later the appellant sent her a love message and promised to make her happy but she did not respond. Two weeks later, her mother bought for her a new cell phone in which she inserted her sim card but as the phone was re-serviced, it did not have the blacklist application and this enabled the appellant to call her sending her pornographic videos and even sent her Kshs 9,000/= which she reversed to him. On several occasions the appellant pestered her to meet him but she declined.

8. However sometimes in February, 2015 the complainant was at Equity Bank, Kitengela where she had gone to apply for bursary, in the company of one **A N** when they bumped into the appellant who inquired what they had gone to do and upon the complainant explaining to him, the appellant entered the bank as the complainant accompanied her cousin to go and photocopy some documents. Upon returning, she received a call from the appellant enquiring if they had left Kitengela and then directed them to meet him at Acacia Supermarket, where they found his car parked at the parking yard. The appellant then ushered them into the back seat and inquired from her which school she was meant to join at which point she disclosed the same.

9. The appellant then drove them to Pinto Restaurant within Kitengela and left them behind as he entered the said Restaurant. After one hour, he returned with chips and chicken which he gave to the complainant and her cousin and then drove off and left them at Kitengela Bus Stage. She then offered the complainant Kshs 2,000/= which the complainant declined to take and the appellant offered it to her cousin. Upon alighting they left the chips, chicken and the money inside the vehicle. Later the appellant sent her a message informing her that they had left the same inside the vehicle and inquired about the whereabouts of her friend.

10. Some times in March or April, 2015 after joining the school, a friend by the name **N** went to their house and requested her to accompany her to Eastmart Supermarket for some shopping. While there she sat outside as her friend entered after which they proceeded to Kenol Petrol Station to meet one of her said friend's friend. Upon arriving there they noticed the appellant's car parked inside at which point her said friend informed her that the friend they were to meet was inside the vehicle. However, they found the appellant inside the vehicle when the appellant opened the vehicle and pointed a gun at the complainant demanding that she enters the vehicle. The complainant obliged and the appellant demanded to know why the complainant was disturbing him. When she informed him that she did not have a cell phone the appellant wrote down his number and gave to her and informed her that he had several people spying on her and that if he wanted her dead, he would do so. By this time her friend **N** was seated on the seat. The appellant then informed **N** not to disclose what had transpired to anyone.

11. On 24th July, 2015 at 8.00pm the complainant was at her aunt, **C**'s place in Embakasi Estate, within Athi River Town, when the said aunt asked the complainant to accompany her to the shop to buy some goods. Upon reaching the gate they found the appellant's vehicle there. The said aunt then proceeded to the vehicle leaving the complainant behind and the two spoke for about half an hour after which the aunt told her to go with the appellant. When the complainant declined, the said aunt told her that if she refused she would not stay with her. When the complainant requested her aunt to allow her children accompany her, the aunt refused. The complainant then entered the vehicle and sat at the back and the appellant, who was alone, drove to Tuskeys Supermarket in Athi River where he alighted and left her behind, locking her inside the car.

12. After shopping the appellant returned and took off towards Kitengela direction and upon enquiring where they were going, the appellant informed the complainant that he was collecting some goods from Kitengela Town after which they would return back. The appellant then drove to an apartment where he talked to the guards manning the gate and entered leaving the complainant behind. The time was between 9 and 10pm. After half an hour he returned and directed the complainant to alight and assist him carry the luggage he had intended to collect. The complainant alighted and followed him inside the apartment where the appellant led her into a room on the second floor but the complainant did not see any luggage. Instead she saw a bed and a washroom. When she attempted to get out, the appellant pushed her inside, locked the door and pointed the gun at her while demanding that she undress. Before she could scream, he informed her that the gun had a silencer and so she should either undress or he would kill her. The complainant obliged, and removed her the jacket, trouser, blouse, bra and panties. The appellant then took a shower after which he threw her on the bed, opened her legs and forcefully had sex with her after undressing. When he was done the complainant felt a lot of pain in her vagina and abdomen and bled profusely. The appellant then forced

her to take a shower which she did and thereafter gave her two pills to swallow but when she resisted, he pointed a gun at her and she obliged. The appellant then warned her not to disclose to anybody what he had done to her, put on his clothes and drove her back towards her aunt's place. In the car, the appellant laughed and informed her that he had taken away her virginity. He however dropped her before reaching the place at Corner View, gave her the shopping together with 200/=. The complainant intended to go to her cousin's place but failed after which she returned to her aunt's. The said aunt simply laughed at her, enquiring whether she felt nice and directed her to take a shower which she did. After which she gave her some pads after enquiring whether she could wash for her clothes.

13. According to the complainant, her mother's friend went and enquired what she was doing there and she complained to her and in the evening she returned with her parents at which point the complainant disclosed to them what had happened and they took her to Athi River Police Station where the matter was reported. According to her, on that day she spent the night at the police station and by 2.00am she was summoned inside a room by a police officer where she found the appellant seated at which point the appellant demanded to know why she had disclosed what had happened and told her to record a false statement. The following day the children's officer took her to Nairobi Women's Hospital in Kitengela where she was treated as an in-patient for one week. While there the appellant through someone else tried to reach her. After recording her statement, she was issued with a p3 form which was duly filled in on 27/7/15. She identified the p3 form and her birth certificate.

14. In cross-examination, the complainant stated that she recorded statements twice concerning the matter the first dated 26/7/15. It was however her view that she only recorded one statement on 20/7/15. She confirmed having been treated as an inpatient for 10 days and was issued with a discharge summary though she did not have it in court. According to her, her sim card was registered for Mpesa services but in the name of her mother and that the messages which the appellant sent her had been deleted. According to her, in her statement she only gave out brief facts of the case. On the day she was staying at her aunt's she said she had been sent away from school as she did not have a pullover. According to her, due to threats from the appellant she had attended four different schools in form one. However, her parents were not aware of the threats till the time the matter was reported to the police. When she returned to her aunt's place after being defiled by the appellant, the said aunt forced her to take shower using hot, salty water. Prior to the incident, she used to visit her aunt regularly. According to her since it was at night she could not remember the lodging where the appellant had taken her and never took the police officers there. At the hospital, she was subjected to blood, urine and vaginal swab tests. According to her between July and September, 2015 she was bleeding.

15. In re-examination, she stated that when she was discharged, she was in the company of her mother and her aunt. It was her evidence that her statement was not self-recorded at the police station but was recorded on her behalf by the police officers and that she reported all the appellant's threats. According to her, she was not in her monthly periods when she was defiled and started bleeding after she was defiled.

16. PW2, **C N T**, testified that on the night of 23rd and 24th July, 2015, at around 8.00pm she was in her house with the complainant, her niece, when the appellant, whom she knew as a person with whom she used to fellowship at the same church, called her on her cell phone and informed her that he wanted to speak to the complainant. They then both went outside the gate where they found the appellant in his vehicle parked outside the gate and he demanded that he had to leave with the complainant after which the complainant boarded the vehicle and they left to an unknown destination while she went back inside the house. According to her the appellant threatened to shoot her with a gun. Later at midnight the complainant returned with bloodstained clothes and disclosed to her that she had been defiled by the appellant. At the same time, the appellant called her and demanded that she washes the complainant's clothes otherwise he would shoot her and directed her not to disclose what had happened. According to her, she complied with the appellant's directives and washed the said clothes and gave the complainant a white pant which she also identified.

17. It was her evidence that that day the complainant had school uniforms which she identified in court. After washing the clothes, she proceeded to her place of work and reported the incident to the complainant's mother as well as to Athi River Police Station. Upon making her report, she was locked up at the station and while there the appellant went, called the complainant and threatened to shoot her if she disclosed what had transpired between them. Later the appellant's wife went with his brother and told her not to record her statement. Prior to this, they had threatened PW2.

18. In cross-examination, PW2 stated that it was the complainant's mother who took her to the police station where she recorded her statement but the investigation officer, one **Mr Nyariki**, warned her not to record her statement. It was her evidence that on 24th July, 2015, at around 8.00 am she just found the complainant in her house. By then the complainant was not going to school. It was her evidence that the complainant used to visit her regularly and that her statement was recorded on her behalf by the said **PC Nyariki**. She stated that she recorded the said statement under threats from the appellant's wife and **PC Nyariki** and never went through it. According to her **PC Nyariki** refused to record most of her statements such as the threats. When the complainant returned, she had with her some shopping. It was her evidence that when the complainant's mother came, she beat her up accusing her of having allowed the complainant to go out with the appellant. It was her evidence that this was the first time the appellant went to her residential house.

19. PW3 was **Dr. Stephen G A Karanja**, attached to Nairobi Women Hospital, Kitengela. On 27th July, 2015, he filed the P3 form for the complainant and signed the same. It was his evidence that the complainant was treated at the said facility after having been defiled by a person known to her.

20. Upon examination, it was discovered that the complainant had changed clothes and even bathed. Her hymen was broken with blood at the upper end of the vagina and there were lacerations on the lower part of her vagina. He however noted no physical injuries on her. In his view, the approximate age of the injuries was 48 hours and the same had been occasioned by penal-vaginal penetration. At the time of his examination, the patient had not been treated and he classified the injuries as harm and termed the offence committed as rape. He also estimated the age of the complainant as 14years old. It was his opinion that the complainant had been penetrated by penis and he produced the p3 form as exhibit.

21. In cross-examination, he stated that he examined the complainant on 27/7/15 at noon in the presence of her relatives after which she was put on treatment. According to him the complainant had a broken hymen which was somehow old but there was blood which must have been occasioned by the lacerations which were less than 72 hours. He admitted that any trauma can cause the bruises noted. He was however of the view that the blood noted was different from normal monthly menses based on where it was. He however explained that the age indicated as 40 years was erroneous.

22. PW4, **F M M**, the mother of the complainant testified that the complainant was born on 17/12/00 and she produced her birth certificate as exhibit. On 25/7/15 at 6.30pm she received a call from one **W**, by which time she had reported that the complainant was lost on 23/7/15. On 25/7/15, the said **W** informed her that she had seen the complainant in a certain plot together with **M M**, her father. On that day, the complainant had gone to school and was staying with her aunt who inquired from her if the complainant had gone to the mother's place since she was not with the aunt. On 24/7/15, PW4 reported the loss of the complainant to the community policing. Upon receiving **W's** report she proceeded to Athi River Town arriving at 8.00pm and **W** took her right outside the house where they found the complainant who disclosed to them that she had been defiled by the appellant. They then proceeded to Athi River Police Station where they reported the matter and the complainant was locked up while PW4 was informed to return the following day to record her statement. Prior to this incident, PW4 knew the appellant very well as a neighbour and a fellow in the same church. She confirmed that though she had a sim card, she had given the same to the complainant to use in the house. She however learnt that the appellant sent some money to the complainant using the same sim card on 1/7/15 at 6.44 pm through the Mpesa statements. The complainant however reversed the said money back to the appellant the same day at 8.53pm. It was her evidence that since the appellant did not owe her any money she did not expect the same from him and that prior to this incident, she had never had any difference with the appellant. She identified the Mpesa Statement and the complainant's discharge summary.

23. In cross-examination, she stated that the complainant got lost while from school on 23/7/15 and she later learnt that she was at PW2's house where she was found when she disclosed that she had been defiled. According to PW4, she found her sleeping while PW2 was just seated and took her to Athi River Police Station to make a report. Upon inquiring from PW2 why the complainant was in her house, she just kept quiet prompting her to take her as well to the police station. At the police station, PW4 just dictated her statement which was recorded by the police officer. In the said statement, she recorded that the appellant used to have an affair with the complainant and that the complainant did not disclose to her where she was defiled.

24. PW5, **M M**, the complainant's father took the complainant to School on 21st July, 2015 but on 23rd July, 2015, he received a call from his sister, **N**, inquiring if the that complainant had gone back home from school and PW5 informed her that the complainant was not his house. The following day, PW4 reported the complainant's disappearance to the members of the community policing. On 25th July, 2015, at about 7.00pm when PW5 was at his workplace, he was called by PW4 who informed him that the complainant had been spotted at Embakasi Estate, within Athi River Town. He then proceeded there and PW4 entered the house and emerged with the complainant and PW2. When PW5 inquired from PW2 what the complainant was doing in her house, PW2 kept quiet. According to PW5, they recovered the complainant's school uniforms inside the house. He then took the two to Athi River Police Station, where the complainant disclosed that she had been defiled by the appellant who was a well-known neighbour to PW5. PW5 then left both the complainant and PW2 at the police station where they were locked up. He later recorded his statement at the police station. According to him, prior to this he had never had any differences with the appellant.

25. In cross examination, PW5 stated that the complainant was supposed to go to school from his sister, **N's** place but was informed that she left the said place on 23rd July, 2015 and did not return and the report about her disappearance was then made to members of community policing on 24th July, 2015. According to him, PW2 was a distant relative, an in law and that they never assaulted PW2.

26. PW6, **Cpl Faisal Jama**, was an officer seconded to Safaricom. Pursuant to the court order issued in Mavoko PM Cr. Application No. 50 of 2016, **PC Nyariki** requested for Mpesa statements for Account No. 0721217162, which from their records belonged to **Michael Nzioka**. From the said records, on 1st January, 2015, at about 1844 hours, there was a transfer of funds from the said account to account No. 0703589018 belonging to one **F M** in the sum of Kshs 9,000/= . On the same day at 18., the said funds were refunded back but declined. At 18.53 hrs, a sum of Kshs 8,800.00 was sent from account no. 0703589018 to account 0721217162. The witness produced the statements and certificate as exhibits. While he however confirmed that at times when is sent to other accounts by mistake and are returned, in this case, he did not know the circumstances under which the said money was returned to the sender.

27. PW7, **Ruth Lungete**, a clinical officer attached to Nairobi Women's Hospital, Kitengela, examined the complainant following a report that the latter had been defiled by a person known to her on 24th July, 2015. Upon examination, she noted no physical injuries on her external body. Her external genitalia was normal though there was blood at the opening of the genitalia. The hymen was torn/broken and there were also lacerations at six o'clock i.e. bruises around her genitalia. The anal region was normal. Urine analysis revealed several epithelial cells. Other tests were normal. The complainant was given some emergency pills to prevent pregnancy.

28. According to PW7, the injuries were less than 24 hours as at the time of the examination and as a result she concluded that the complainant had been defiled. She filled in the Post Rape Care Form which she signed on 26th July, 2015 and produced the same as exhibit. She also produced the discharge form signed by her colleague who had left the facility. From the discharge form the complainant was diagnosed with sexual assault.

29. In cross-examination, PW7 stated that she had not indicated the presence of blood in the vagina but stated that the blood was caused by the penal penetration of the vagina. According to her the complainant had never conceived and had last menstrual cycle on 26th June, 2015. It was her evidence that the complainant had never had any sexual intercourse prior to this incident and reported that she had an irregular menstrual cycle. The witness however denied that the blood observed in the complainant's vagina had been caused by the menstrual cycle since she even had fresh bruises and injuries less than 24 hours old at the time of the examination. It was her evidence that the broken hymen was fresh as it had blood and there were lacerations at 6.00 o'clock. The witness testified that the high vaginal swab did not reveal any spermatozoa apart from the epithelial cells.

30. **PC Daniel Nyariki**, the investigating officer testified that on 25th July, 2015, he was in the office by 9.00pm when he received two parents plus members of the public in the company of a juvenile and an adult woman. The complaint was that the juvenile, the complainant herein, was having an affair with the appellant and had refused to go to school. It was reported that the appellant had defiled her after going out with her at night. He recorded the statements and upon being informed that the appellant had been seen outside the police station, he went outside where he found the appellant with the complainant's father and ordered the appellant to alight and was positively identified by the complainant's father and the complainant herself at the crimes office. The appellant was then arrested and placed in custody but was later released on cash bail.

31. The complainant was then issued with a P3 form on 26th July, 2015 and her statement recorded as well as those of her parents and of another lady. The complainant was then referred to Kitengela Medical Hospital where she was treated and was furnished with treatment notes and post rape care form which showed that she had been defiled. After narrating what the complainant had disclosed to him, PW8 stated that upon conclusion of his investigations, he decided to prefer charges against the appellant. He also identified the pistol which the complainant alleged the appellant used to threaten her with and confirmed that the appellant was a licensed gun holder as from 15th October, 2010. The appellant surrendered the said firearm, 57 rounds of ammunition, two magazines and the firearm certificate which were produced as exhibits.

32. From the Mpesa statements, the witness confirmed that on 1st January, 2015, the complainant received Kshs 9,000.00 from the appellant through the cell phone registered in the name of her mother. The investigations also revealed that it was the appellant who took the complainant from her aunt's house on the material night. Upon interrogating the appellant, he denied having committed the offence and contended that the allegations were false.

33. In cross-examination, the witness stated that the first complainant was that of the complainant having refused to go to school owing to an affair with the appellant though this was not recorded in the OB. As per the OB, both the complainant and PW2 were booked as children in need of care and protection since by that time he did not know PW2's age. The two were brought to the station by their parents. However later at 2300 hours he booked the complaint as that of defilement against the appellant. It was his evidence that this complainant was lodged by the complainant herself while in custody of her parents. However, since the defilement took place at night and the complainant was unfamiliar with Kitengela Town, she was unable to identify the lodging where the incident occurred.

34. At the close of the prosecution case, the appellant was placed on his defence and he opted to give sworn evidence but had no witness to call. In his defence, the appellant stated that he was a businessman dealing in scrap construction metals resident in Ngei II Estate within Athi River and was married with two children with whom he stayed.

35. According to him, on 24th July, 2015, he was at his business place during the day and at 6.00pm a friend of his, **Daniel Wambua Musya**, went to his yard and requested him to accompany him to Inter Leisure Hotel, Makadara Area within Athi River Town. He obliged and drove his own vehicle Reg. No. KBL 897Z, to the said place which he used to frequent for meetings with his friends. According to him, they stayed for some hours. According to him, since that was the day the United States President, Barrack Obama, arrived in the country, he went there to watch his arrival on Television of the Hotel, which is a gated compound with guards. According to him, the Hotel also maintains a register of visitors and vehicles at the gate. The same was marked for identification. It was his evidence that the hotel captured his details and that of the vehicle at 6.39 pm and that he left at 12.39 am. According to him, he never left the hotel in between the said period. He accordingly produced his log book as exhibit.

36. On an adjourned hearing, the appellant testified that on the material day, he checked in at Inter Leisure Hotel by 6.00pm in the company of **Daniel Ikunzi**. According to him, from the time he arrived at the hotel at 6.00pm till he left at 12.39am he never left the place. Between the said period he was just with his friends drinking while watching the arrival of the said President on television. From the hotel he proceeded to his house where he slept. He therefore denied that he accompanied the complainant to Tuskeys Supermarket on that day at 8.00 pm for some shopping. According to him, he never met the complainant the whole of that day.

37. He testified that the following day proceeded to his place of work. While there, one **Simon Zanafi** called him to financially assist him sort out an issue in respect of scrap metal which he had in his vehicle in the company of police officers. They then proceeded to Athi River Police Station where upon arrival a police officer emerged and arrested him claiming that he had defiled the complainant. It was at this time that he saw the complainant's father who was known to him outside the station. He was then locked up in the cells and released on cash bail and was later charged with the offence herein.

38. According to the appellant, he never threatened the complainant with the gun and at no time did he give the complainant a lift in his car. He therefore denied having committed the offence.

39. In cross-examination the appellant admitted that at no point in the proceedings or in his statement did he disclose that he was at Inter Leisure Hotel as the information was only disclosed to his advocate who however never raised the same till the time he testified. According to him, on the material night he was in the company of **Daniel Mwambure Mwangaza** who however never recorded his statement with the police. He however requested the said person to be his witness after being placed on his defence. Similarly, one **Sobati Benson**, a waiter at the said hotel was only requested to be his witness after being placed on his defence. The same position applied to his friend, **Simon Ndolo Zangi** whom he had gone to bail out at Athi River Police Station when he was arrested with some scrap metal. He also recalled **Peter Mbito**, a friend who was with him at the said hotel. It was his evidence that **Douglas Oriko** was the guard manning the gate at the hotel on the material night. It was his evidence that he left the hotel in the company of Daniel, leaving **Peter Mbindyo** behind.

40. The appellant admitted that prior to the incident he knew the complainant who was a child to a family friend and he knew her since the time she was born but never had any relationship with her. He however did not know why he was framed up since there was no grudge between him and her family or any of the prosecution witnesses. He also admitted that both the gun and the safaricom line number were his though according to him, he mistakenly sent the money to the number belonging to the complainant's mother. He however never disclosed to the police his whereabouts that night as he was not asked to do so as he was never asked to record his statement.

41. The appellant called **Daniel Wambua Muasya** (DW2) as his witness. According to him, he was a long-time friend of the appellant for 15 years. On 24th July, 2015 he met the appellant having called him between 6-7pm. He then proceeded to the appellant's place of work and they proceeded to Inter Leisure Hotel in the appellant's vehicle. According to him, he left the hotel alone by midnight and walked to his house, adjacent to the hotel. According to him, the appellant never left the premises during that time. According to him they were with the appellant up to the gate.

42. In cross-examination DW2 stated that the appellant was a good friend of his and was his tenant. He however never recorded his statement with the police. According to him when they arrived at the hotel the gate was opened by a guard known as Douglas who was also

known to him and who recorded the registration details of the appellant's vehicle. When they were leaving he left on foot while the appellant was being opened for.

43. According to **Peter Mbiti**, DW3, a close friend of the appellant for 5 years, on 24th July, 2015, at 6,30pm he was at Inter Leisure Hotel having driven there in his vehicle KBF 678H whose particulars were captured in the register. According to the register he went to the hotel at 1855 hrs and left at 03.36 am. Inside the Hotel he was with the appellant and others watching the arrival of President Obama. It was his evidence that the appellant arrived earlier than him and left by midnight and during the said period he never left the hotel. He however did not record a statement with the police. According to him there were many people in the Hotel including DW2 but he was not aware when DW2 entered the Hotel though they sat in the same area. However, DW2 sat next to the appellant.

44. DW4, **Benson Sabati Ombiro**, a waiter at Inter Leisure Hotel, testified that on 24th July, 2015 he was in the place of his employment and the appellant was one of their clients. On that day the appellant checked in at the Hotel by 6.30pm and went to the members' lounge where he sat with other members including DW3. According to him, the first person to arrive was the accused followed by DW3, then the area MCA and lastly **Robert Mutuku**. According to him the Hotel usually maintains a register at the gate manned by a guard and on the said day the entries were made by **Douglas Oriko**. According to him, he is the one who served the appellant and during the entire time he was there he never saw the appellant leave till midnight.

45. According to him, he was on duty till 3.00 am though he did not have the register confirming that he was on duty that night. According to him, the person he served last was DW3. According to him the appellant arrived earlier with DW3 and DW2 also came almost at the same time with the appellant. He however did not know when DW2 left that night though they did not sit on the same table.

46. **Simon Ndolo Nzau** (DW5) testified that he supplied scrap metals and knew the appellant up to his rural home. On 25th July, 2015 at about 8.00pm his vehicle being driven by his driver and carrying scrap metals was arrested by police officers since he had not given his driver the necessary documents authorising him to ferry the said metals. He then proceeded to Athi River Police Station to deliver the same. While at the station, he called the appellant to bail him but by then his vehicle had been released. He was at the said station with PW5 but did not know what PW5 was doing there. However, when the appellant arrived, he was arrested and locked up.

47. **Douglas Oriko** (DW6), a security guard at Inter Leisure Hotel, testified that his work entailed opening and closing up the hotel gates. According to him, on 24th July, 2015 he was on duty by 6.00pm and the appellant reported thereat by 6.39am while driving motor vehicle KBN 897L. He however confirmed that there were some three cancellations on the entries made on 23rd July, 2015 by a black pen and he was not the one who made the same. According to him, his entries were made on 24th using a blue pen. In his evidence the cancellations were made on the assumption that they would have many clients. It was his evidence that the appellant never left the hotel in between. He accordingly produced the register as exhibit.

48. In cross examination, DW6 stated that on 24th July, 2015 he was the appellant with another visitor whom he had carried in motor vehicle reg. no. KBL 897L, Toyota Hilux. According to him, he only signed the register after the appellant left the hotel. However some of the entries of the same day had not been signed for. He also confirmed that some entries relating to the accused's vehicle showed some cancellations as far as the date was concerned though he was not the one who made the same. He admitted that he wrote the date on that of the cancelled date of 23rd July 2015 and that most of the cancellations were done by his colleague in his absence. He also confirmed having signed the register using a different signature to that in his identity card.

49. According to him, he was the one who opened the gate for the appellant when the appellant was leaving with his visitor aboard. In cross examination, he stated that he could not recollect off head the dates when the appellant visited the hotel. Referred to the entries made by himself on 3rd June, 2015, he confirmed that whereas the signature therein was similar to the one in his ID Card it was different from the one made on 24th July, 2015.

50. DW7, **Michael Kioko**, the proprietor of Inter Leisure Hotel only confirmed that DW4 was his employee.

51. In his judgement the Learned Trial Magistrate found that the complainant was aged 14 years at the time of the offence based on the evidence adduced before the court. As regards penetration, the learned trial magistrate found that based both on the oral evidence and the documentary evidence penetration was proved. As regards the identity of the appellant and the person who defiled the complainant, the learned trial magistrate found that the evidence of the complainant and the prosecution witnesses in particular, PW2 was consistent and was corroborated. He also found that the said evidence clearly displaced the alibi defence raised by the appellant which he found to have been an afterthought as it was full of inconsistencies. He therefore proceeded to convict the appellant of the offence of defilement. As regards the offence of threatening to kill, he found that the same had not been proved and proceeded to acquit the appellant. As stated above, the appellant was sentenced to twenty years' imprisonment.

52. On behalf of the appellant it was submitted through his learned counsel, **Mr Ngolya** that the Respondent failed to prove their case against the Appellant beyond reasonable doubt. According to him, the evidence tendered by the prosecution witnesses did not link the Appellant to the commission of the alleged offence as the said prosecution witnesses' evidence did not even place the Appellant at the scene of the alleged crime. It was submitted that although the complainant claimed that her interaction with the Appellant was a matter well known to her friends namely **A N** (presumably her cousin) and **N**, the Respondent did not bother to call the said **N** and **A N** to Court to testify with a view to shedding light on what they may have been aware of between the Appellant and PW1. It was therefore submitted that that failure by the Respondent to call the two alleged friends of PW 1 rendered PW 1's evidence doubtful and even exposed her (PW 1) as a liar.

53. It was submitted that the complainant's evidence as to what transpired on 24th July, 2015 was contradicted by the evidence of PW2. This contradiction exposes PW 1 as an untrustworthy and incredible witness. Her evidence that the Appellant defiled her is unbelievable, highly doubtful and suspicious and cannot form the basis of inferring guilt which must be proved beyond reasonable doubt. It was submitted that it is trite law that suspicion alone however strong cannot form the basis of a conviction. According to the appellant, the prosecution did not discharge their burden of proof in the circumstances of the Appellant's trial and further that the trial Court misdirected itself both in law and

fact for failing to resolve the doubts and inconsistencies in the prosecution's case in favour of the Appellant.

54. According to the appellant, the medical evidence adduced by PW3 was devoid of evidential value and in fact, confirmed that PW1 was an untrustworthy witness since PW3 and PW7 did not find any spermatozoa in the vagina of PW1. What PW3 noted was that PW1's hymen was broken and it had an old scar. However, PW3 omitted to include this clinical observation/evidence (old scar) in the P3 form (Exhibit 2). It was therefore submitted that there was no evidence of fresh penile penetration into the vagina of PW1 based on the fact that in Section C of the P3 form (Exhibit 2), PW3 talks about the offence of rape involving a patient aged 40 years which evidence was unrelated to the charge before Court and had no nexus with PW1. This P3 form goes a long way in reinforcing the Appellant's position that someone was out to maliciously destroy his life and disparage his character.

55. It was submitted that whereas PW1 claimed to be aged 14 years in the year 2015, the Certificate of Birth places the age of PW1 at 15 years in 2015. The P3 form says the patient examined by PW3 was aged 40 years. If that patient was PW1 (the Complainant) then it is obvious that prosecution did not prove the age component beyond reasonable doubt. It was therefore submitted that the trial Court erred both in law and fact for failing to find and hold that the Respondent had terribly failed to prove the age of the Complainant and reliance was placed on **Malindi Criminal Appeal No. 504 of 2010 - Kaingu Elias Kasomo –vs- Republic**.

56. As regards penetration, it was submitted that the same was not proved since none of the prosecution witnesses tendered evidence to prove the act of penetration. It was submitted that PW 1 did not at any one given time state that the penis of the Appellant was inserted into her vagina. Based on **Machakos Criminal Appeal No 60 of 2014 - Julius Kioko Kivuva vs. Republic**, it was submitted that evidence of sensory details, such as what a victim heard, saw, felt and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. In this case, however, PW1's testimony was not specific as to the act of penetration and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. On this point, it was submitted that the medical evidence adduced by PW 3 and PW 7 did not corroborate the evidence of PW 1 or PW2 as to the allegation of defilement.

57. In his Judgment, the trial Court dilly - dallied with the evidence on the element of penetration. The Court appeared to agree with the Defence that there was no evidence of penetration. Instead of approaching the said issue with care and/or doing a thorough evaluation and analysis of the same, the trial Court simply imported what it described as a "**humble opinion**" in the matter and reached a conclusion that PW1 was penetrated. It was therefore submitted that the trial Court erred in law by disregarding the Appellant's submissions on the element of penetration. In the appellant's view, it appears that the trial Court was determined to convict the Appellant despite the yawning gaps in the prosecution evidence.

58. According to the appellant, in his testimony, he raised the Defence of alibi and gave a graphic account of his itinerary on the 24th July, 2015. He supported his alibi by calling witnesses all of whom testified on oath. However, the trial Court dismissed the Appellant's alibi on very strange grounds. DW 6 did not disown his signatures in D Exhibit 5. He (DW 6) explained that he used different signatures and that there was nothing wrong with that. He did the clarification during re-examination. The trial Court assumed the duty of a Documents Examiner when it held that DW 6's signatures were not in tandem. It was submitted that the trial Court misdirected itself and fell into a grave error of law and fact. It is trite law that when an accused raises the Defence of alibi at whatever stage of the trial, he does not assume the burden of proving the alibi. The burden lies on the prosecution. It is for the prosecution to call evidence to displace the alibi even if the same is raised at the Defence stage. Reliance was placed on section 309 of the **Criminal Procedure Code**, which provides as follows: -

If the accused person adduces evidence in his Defence introducing new matter which the Advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the Court may allow the Advocate for the prosecution to adduce evidence in reply to rebut it.

59. According to the appellant though on 21st March, 2017, after the close of the defence case, the State Counsel sought leave to file an application to adduce further evidence to rebut the alibi Defence., no such application was filed. Similarly, on 11th April, 2017, the trial Court was informed that the prosecution was in possession of evidence which they intended to use to displace the Appellant's alibi. They however, did not tender it in Court. Upon realizing that the Appellant's alibi was strong and watertight, the prosecution withdrew their bid on 20th April, 2017 and instead of utilizing the opportunity granted by section 309 of the **Criminal Procedure Code**, the prosecution in their final submissions dated 13th June, 2017 started groaning under the weight of their self – inflicted distress. The prosecution claimed that it could not obtain phone records to enable them locate the witnesses on the material day and time.

60. It was the appellant's submission that the prosecution did not offer a plausible explanation on why it failed to call new evidence to attack the Appellant's alibi. It is quite clear that no evidence was produced by the prosecution to prove the allegation that the Appellant communicated with PW2 on 24th July, 2015. In the absence of such evidence, it was a serious misdirection on the part of the trial Court to have found and held, as it did, that the burden of proving the alibi lay on the Appellant as this was tantamount to asking the Appellant to prove his innocence which approach the criminal justice system does not support. It was therefore submitted that by shifting the burden of proof to the Appellant, the trial Court erred in law and the appellant relied on **Nairobi Criminal Appeal No 357 of 2012 - Victor Mwendwa Mulinge –vs- Republic**, **Embu Criminal Appeal No 1 of 2015 - Elias Kiamati Njeru –vs- Director of Public Prosecutions** and **Machakos Criminal Appeal No 217 of 2013 - Andrew Mulika Kithusi –vs- Republic**.

61. It was therefore argued that the Appellant's appeal herein is meritorious and this court ought to proceed to quash the conviction hereof and set aside the sentence.

62. On behalf of the Respondent it was submitted that the appeal ought to be conceded due to inconsistencies therein. It was therefore submitted that the evidence adduced by the prosecution was not sufficient to prove the offence beyond reasonable doubt.

Determination

63. Although the appeal was conceded to by the Respondent, it is not automatic that this court must in those circumstances allow the appeal since the court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565**, the court said:

“the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence.”

64. Therefore, this is a first appellate court, as expected, this court is obliged to analyse and evaluate afresh all the evidence adduced before the lower court and draw its my own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“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 vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424.”

65. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.

2. 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; 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.

66. Section 8 of the *Sexual Offences Act* provides as follows:

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

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

(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.

(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.

(5) It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children’s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

67. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant’s genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013**, where it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

68. In the case of Kaingu Elias Kasomo vs. Republic Malindi the Court of Appeal in criminal appeal No. 504 of 2010 stated as follows:

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

69. The importance of proving the age of the complainant in sexual offences was emphasized in Alfayo Gombe Okello vs. Republic (2010) eKLR where the Court stated that:

“In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)...proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars.”

70. In Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011 it was held that:

“...while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof.”

71. In this case, it is true that there were discrepancies between the birth certificate and the P3 form. However, from the birth certificate, it was clear that the complainant was born on 17th December, 2000. The discrepancy in the P3 form, that the complainant was 40 years old, was explained as having been due to inadvertence. In the case of Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000, it was observed as follows:

“In defilement cases, 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...”

72. In Chipala vs. Rep. [1993] 16 (2) MLR 498 the Malawian High Court held at 499 that:

"It seems to me that other than a certificate of a medical practitioner, or his oral testimony, to the effect that, in his opinion, such a person has or has not attained a specified age, or other documentary proof, or the testimony of a person who has personal knowledge gained at the time of such person's birth, such as parents, no other evidence is receivable as proof of the age of such a person."

73. In my view it was clear from the evidence that the complainant was 14 years as at the time of the commission of the offence.

74. As regards penetration, section 2 of the *Sexual Offences Act* defines “penetration” as:

the partial or complete insertion of the genital organs of a person into the genital organs of another person.

75. Therefore, for the offence of defilement to be proved evidence must show that the appellant inserted his penis into the vagina of the complainant. It is not sufficient that the said organs came into contact. However partial insertion suffices for the purposes of penetration as the said insertion need not be complete.

76. In this case, the complainant testified that the appellant threw her on the bed, opened her legs and forcefully had sex with her after undressing. When he was done the complainant felt a lot of pain in her vagina and abdomen and bled profusely. According to PW3, the complainant’s hymen was broken with blood at the upper end of the vagina and there were lacerations on the lower part of her vagina. In his view, the approximate age of the injuries was 48 hours and the same had been occasioned by peno-vaginal penetration. It was his opinion that the complainant had been penetrated by penis. However, in cross-examination, he stated that the complainant had a broken hymen which was somehow old but there was blood which must have been occasioned by the lacerations which were less than 72 hours. It was therefore clear from the evidence of PW3 that the broken hymen was not fresh. However, there was blood at the upper end of the vagina and there were lacerations on the lower part of her vagina. Here I must say that the mere fact that the hymen of a victim is found to have been broken before the incident does not necessarily mean that defilement cannot be proved to have occurred. Defilement does not apply only to those whose hymens are not broken. That is not a condition precedent to the proof of penetration. If there is other credible evidence independent of the fresh tear of the hymen, the court may perfectly find that penetration is proved.

77. PW3’s evidence was corroborated with the evidence of PW7 in Material respect. According to PW7, the complainant’s external genitalia was normal though there was blood at the opening. The hymen was torn/broken and there were also lacerations at six o’clock i.e. bruises around her genitalia.

78. In George Owiti Raya vs. Republic [2013] eKLR it was noted that:-

“There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be

penetration without going past the hymen membrane...It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration."

79. Therefore, lacerations of the genitalia can be proof of penetration even where the hymen is not broken. In fact, the mere fact that no spermatozoa is found does not necessarily mean that there was no penetration though its presence may well prove that there was penetration, though again that is not conclusive proof. In Mwangi vs. Republic [1984] KLR 595 at 603, the Court rendered itself thus:

"The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape."

80. Having considered the evidence adduced herein I have no doubt that the Respondent did prove that there was penetration of the complainant's genital organs.

81. That now leads me to the issue whether the penetration was by the appellant. There is no doubt at all that the complainant and the appellant knew each other very well. According to the complainant, the appellant on several occasions made sexual gestures to her. The appellant not only sent her a love message and promised to make her happy, but also sent her pornographic videos. He also enticed her by sending her Kshs 9,000/= which she reversed to him. On several occasions the appellant pestered her to meet him but she declined. On his part apart from denying that he gave the complainant a lift, the appellant did not deal with the graphic incidences narrated by the complainant. While admitting that he sent the said sum of Kshs 9,000.00, he explained that the same was sent by mistake. These incidences as narrated by the complainant and not specifically rebutted by the appellant, in my view clearly points out the appellant's intentions towards the complainant. He was a person who was sexually obsessed by the complainant.

82. That leads to the issue whether he was the one who defiled the complainant on 24th July, 2015. According to the complainant on that day at 8.00pm she was in her aunt, PW2's house in Embakasi Estate, within Athi River Town, when the said aunt asked her to accompany her to the shop to buy some goods. At the gate, they found the appellant's vehicle parked there. After some conversation between the complainant and PW2, PW2 insisted that the complainant should go with the appellant and even declined to have them accompanied by PW2's children. PW2 even threatened the complainant that she would not stay with her if the complainant declined to do so. PW2 did not deny this but said that she was threatened by the appellant that the appellant would shoot her. The appellant then left with the complainant and after leaving the supermarket took her to an apartment/lodging where the appellant defiled her.

83. The trial court appreciated that there were contradictions and inconsistencies regarding the evidence of PW2 vis-à-vis that of the complainant. The general rule as regards the effect the discrepancies in the evidence of witnesses have in discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling, substantial or deliberate. See *Law of Evidence (10th Ed) Vol. 1 at 46*. 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."

84. 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."

85. As was stated in John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:

"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."

86. Where there are differences in the narration of events by prosecution witnesses, especially as to recounting or recollecting the dates of the events, which are mere discrepancies that would not avail the accused person, because some of such discrepancies are expected as being natural (The State vs. Sunday Dio Dogo (Alias Sunday Idogo) HSO/3C/2012, Oboh J in the High Court of Nigeria). It was therefore held in Njuki vs. Rep 2002 1 KLR 77, that:

"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused... however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused".

87. It therefore follows that each case must be considered on its own peculiar circumstances. There are cases where the inconsistency is so

minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. (**Nyakisia v. R.** E. A. C. A. Crim. App. 35-D-71; -/5/71; Duffus P., **Spry v. P. & Lutta J. A.**, in the East African Court of Appeal). As was appreciated by the Court of Appeal in **Philip Nzaka Watu vs. Republic [2016] eKLR**:

“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.”

88. The manner of dealing with discrepancies and inconsistencies was stated in **Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007** where the Court of Appeal of Tanzania concluded that:

“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.”

89. In this case, there was a contradiction as regards the clothing which the complainant was wearing. While PW2 stated that she had her school uniform, the complainant’s evidence was that she had a jacket, trouser, blouse, bra and panties. Where the contradictions, for example relate to the exact colour of the clothing, one may excuse the same. However, that may not be so where one says that the complainant had a short trouser while the other says she had a long trouser. In this case the evidence as regards the nature as opposed to the colour of the attire the complainant had was clearly and materially inconsistent. Again, the conduct of the witnesses may also determine whether the inconsistency was innocent or was deliberate. In this case the conduct of PW2 was clearly wanting. From the evidence of the complainant, it seems that she had knowledge of the intended action and seems to have had something to do with it. Just like the trial court, I am unable to believe the evidence of PW2 that the complainant had school uniforms. The totality of the evidence adduced shows that the complainant could not have been having her uniform when she was not going to school especially on that day at night. In this respect, I agree with the learned trial magistrate that the evidence of PW2 was not wholly reliable. It seems that it was tailored towards warding off any suspicion towards her direction regarding her role in the said incident. It is therefore clear that by design on the part of PW2, the clothes which the complainant was wearing at the time of the ordeal were never produced in court and those that were produced were of no use in proving the commission of the offence.

90. In this case I must agree with the learned trial magistrate that the conduct of PW2 in this matter was far from that of a truthful and reliable witness. PW2, according to the complainant, had a lengthy conversation before she literally pushed the complainant into boarding the appellant’s vehicle. She then ensured that the complainant was with the appellant without any third person being involved since she even declined to allow her children accompany the complainant. When the complainant returned and informed her of her ordeal she simply laughed it off while teasing the complainant and proceeded to erase any evidence of the defilement. When confronted by the complainant’s parents she declined to divulge any information until she was incarcerated in police custody. Her evidence regarding the attire that the complainant had on the material night was meant to throw the investigations off the track while concealing the actual attire which the complainant had.

91. Had the evidence of PW2 been wholly believable, it would have strengthened the prosecution case since it would have shown that before the complainant was defiled, the last person to have been seen with the complainant was the appellant. Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of **Moses Jua vs. The State (2007) LPELR-CA/IL/42/2006**. That court, while considering the ‘*last seen alive with*’ doctrine held:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

92. In yet another Nigerian case the court considering the same doctrine, in the case of **Stephen Haruna vs. The Attorney-General of the Federation (2010) 1 iLAW/CA/A/86/C/2009** opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

93. Quoting from another jurisdiction, to be specific India, the courts there have developed that doctrine further. In the case of **Ramreddy Rajeshkhanna Reddy & Anr. vs. State of Andhra Pradesh, JT 2006 (4) SC 16** the court held:

“that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

94. Lesiit, J in Republic vs. E K K [2018] eKLR held that:

“The prosecution has adduced evidence which establishes that the deceased was last seen alive in the company of the deceased. That was in the evidence of PW5. Time was 9.30 a.m. Her evidence was not corroborated by any other witness. The accused has denied that and has countered the evidence of PW5 by stating that in fact, it was PW5 he saw with the deceased last. Given that the evidence is the word of the accused against that of PW5, the court has to look for corroboration or other evidence implicating the accused. I am persuaded by the Indian case that even where evidence establishes that an accused was last seen with the deceased before she met her death, it is advisable to exercise caution and look for some other corroboration.”

95. The question that arises is whether the evidence of PW2 is believable. In this case, going by PW2’s conduct based on the complainant’s evidence and her own evidence of what she did after the incident, one is left with no doubt that PW2 ought to have been treated as an accomplice since her conduct places her in the category of an accessory. In Watete vs. Uganda, [2000] 2 EA 559 (SCU), it was stated that:

“...In a criminal trial a witness is said to be an accomplice if, inter alia, participated as a principal or an accessory in the commission of the offence, the subject of the trial.”

96. In those circumstances, the evidence of PW2, if credible, required corroboration. I am saying if credible because in Nguku vs. Republic [1985] eKLR, the Court of Appeal expressed itself as follows:

“We therefore turn to ground 4 and 7 of the appeal, which were argued together, Mr Menezes’ submission here was that the trial magistrate had ignored the first duty of a court dealing with accomplice evidence, which is that the court must first decide whether the accomplice, in this case the complainant, is a credible witness and then ascertain if there is any evidence corroborative of it before the accomplice’s evidence can be accepted. This proposition receives support from the passage which Mr Menezes cited from Republic v Ndara Kuruki [1945] 12 EACA,84, which was a case mainly concerned with the extent to which an accused’s statement can be used against his co-accused, and in which the court said, as regards accomplices, at page 86:

“A point which is sometimes lost sight of in considering accomplice evidence is that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence, feels that it cannot believe the accomplice it must reject his evidence, and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If, however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affect the accused by connecting or tending to connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case the court should record in its judgment whether or not it regards the accomplice as worthy of belief.”

It is also supported by the following extract from Lord Hailsham’s speech in Director of Public Prosecution v Kilbourne [1973] 1 AER, 440, a case concerning the corroboration by one group of young boys of the evidence of another group of young boys in relation to indecent assaults committed on them, in which he said at page 452

“In addition to the valuable direction to the jury, this summing-up appears to contain a proposition which is central to the nature of corroboration, but which does not appear to date to have been emphasized in any reported English decision until the opinion delivered in Director of Public Prosecutions v Hester by Lord Morris of Borth-y- Gest although it is implicit in them all. Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness’s testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witnesses’s testimony falls of its own inanity the question of his needing, or being capable of giving, corroboration does not arise.”

In the case of Director of Public Prosecutions v Hester [1972] 3 AER 1056, at page 1065, a case of an indecent assault on a girl, Lord Morris gave a similar direction as follows:-

“One of the elements supplied by corroborative evidence is that there are two witnesses rather than one. The weight of the evidence is for the jury. It is for the jury to decide whether witnesses are creditworthy. If a witness is not, then the testimony of the witness must be rejected. The essence of corroborative evidence is that one credit worthy witness confirms what another credit worthy witness has said.”

97. In Karanja & another vs. Republic [1990]KLR the Court of Appeal held that:

“On our consideration of the evidence of these 5 witnesses, we have no hesitation in arriving at the inescapable conclusion that the two pointsmen were accomplices. If they knew nothing about the conspiracy why did they go to Hillary Mungai’s house later in the evening to receive large sums of money" Their story that they did not know why they were paid and that

they did not ask any questions was so utterly incredible as to be totally unworthy of belief. They were originally charged jointly with these appellants and they were clearly let off in return for their agreeing to give evidence against the appellants. In our judgment, no reasonable tribunal directing its mind properly on this evidence could come to any other conclusion than that the two pointsmen were accomplices. The finding by the trial and first appellate courts that they were not is clearly erroneous and not sustainable on the evidence of the two pointsmen. Although there may be cases of an exceptional character in which an accomplice's evidence alone convinces the court of the facts required to be proved, the uncorroborated evidence of such a witness should generally be held to be untrustworthy for three reasons. The accomplice is likely to swear falsely in order to shift the guilt from himself. As a participator in the crime, he is an immoral person who is likely to disregard the sanctity of an oath. He gives his evidence either under a promise of a pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution – see *Asumani Logoni s/o Muza v Rex* (1943) 10 EACA 92. An accomplice is of course a competent witness but corroboration should be found for his evidence before a conviction can be based upon it. The corroboration which should be looked for is, as laid down in the case of *R v Baskerville* [1916] 2 KB 658, some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. It must be independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. It is of course not necessary to have confirmation of all the circumstances of the crime. Corroboration of some material particular tending to implicate the accused is enough and while the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime. It is plain to us beyond a peradventure that the evidence in this case did not pass the acid test in *Baskerville's* case. The appellants were clearly convicted on uncorroborated evidence of accomplices. We consider that their conviction was unsafe and cannot be allowed to stand. Consequently we allow their appeals, quash the convictions, set aside the sentences and order that they be released forthwith from prison unless otherwise lawfully held.”

98. In this case the reason given by PW2 for cleaning the complainant's blood stained clothes was due to alleged threats from the appellant. However apart from stating that she was fellowshipping with the appellant, she did not explain where the appellant obtained her phone number. In my view, if PW2's evidence is anything to go by, it would simply amount to evidence of a person who together with the appellant hatched a plot to inflict injury on the complainant. Since hers was evidence of an accomplice, requiring corroboration, it could not therefore corroborate the complainant's evidence.

99. However, corroboration was not required in this case since under the Children Act “child of tender years” means a child under the age of ten years. In any case section 124 of the *Evidence Act* makes this quite clear:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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.

100. Therefore, the evidence of the complainant if truthful could properly be a basis upon which a conviction could be founded even if she was a child of tender years, which she was not.

101. In this case, the appellant's defence was that of an alibi. According to him, on 24th July, 2015, he was at his business place during the day and at 6.00pm a friend of his, **Daniel Wambua Musya**, went to his yard and requested him to accompany him to Inter Leisure Hotel, Makadara Area within Athi River Town. He obliged and drove his own vehicle Reg. No. KBL 897Z, to the said place where he, in the company of his other friends viewed the arrival of the United States President, **Barrack Obama**, in the country, on Television and stayed at the Hotel from 6.39 pm till 12.39 am. According to him, he never left the hotel in between the said period. He also called the people with whom he allegedly was, as his witness whose substance of the evidence was that since his arrival and departure from the hotel, the appellant never left the premises. Apart from his drinking friends, the appellant also called the security guard at the gate as well as the waiter who served them whose evidence was similarly geared towards showing that since his arrival at the hotel, he never left till his eventual departure. Of course there was variations and inconsistencies in the evidence of the said witnesses. However, it is trite that the onus is on the prosecution to displace the defence of alibi after the defence raises it at the trial since as was held by the Court of Appeal in **Victor Mwendwa Mulinge vs. Republic** [2014] eKLR:

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

102. The Court of Appeal in the case of **Wangombe vs. Republic** [1980] KLR 149 held *inter alia* as follows:

“...in *Ssentale vs. Uganda* [1968] EA 365, 368 [Sir Udo Udoma CJ]...said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion...The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible.”

103. In my view there is no particular formula for raising the defence as long as the prosecution and the investigators are put on notice that the defence is likely to be raised so that they can investigate the matter further. The learned trial magistrate termed the alibi a concoction of lies due to the fact that it was not raised earlier but failed to reconcile this finding with the appellant's evidence that his statement was never recorded.

104. What then is the option available to the prosecution where, as was in this case, the defence calls witnesses in support of his alibi defence? section 309 of the *Criminal Procedure Code* states as follows:

If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.

105. In the case of *Adedeji vs. The State* {1971} 1 All N.L.R 75 it was held that:

“failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed.”

106. In this case the prosecution, at the close of the defence case, and rightly so in my respectful view, applied for time to enable it make a formal application to be allowed to adduce further evidence in order to rebut the alibi defence evidence. That line, which in my view would have been the most appropriate step to take in the circumstances of this case was abandoned without any reason. To my find further evidence, particularly, placing the appellant at a place other than at the Hotel between the period he was supposedly in the said Hotel would have cast serious doubts as regards his evidence in totality and his alibi defence in particular, since as was stated in the court of appeal case of *Ernest Abanga Alias Onyango vs. Republic CA No.32 of 1990.*

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial Evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that: The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”. This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But it’s a basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available.”

107. In this case the investigative agencies either by design or deliberately lost an opportunity to conclusively rebut the appellant’s alibi defence. By for example producing the CCTV footage from the supermarket, assuming that they were available, the prosecution could have easily reduced the appellant’s defence into smithereens. As I have held before the objective of the investigators and prosecutors is not to obtain conviction at all costs. They are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. They must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. Neglect to make a reasonable use of the sources of information available or failure to take the necessary steps to secure evidence which ought to have been secured may well amount to abuse of discretion and power. This court, in the exercise of its judicial mandate is under a duty to point out slips on the part of the investigative agencies. Having so stated, it is not for the court to prop up cases which fail to achieve the threshold for conviction in criminal cases, - proof beyond reasonable doubt. Having so pointed out the gaps in the investigations, the only option for the court is to acquit since the court ought not to base its decision on speculations and conjectures. In the case of *Michael Mugo Musyoka vs. Republic* [2015] eKLR it was observed by the Court of Appeal that:

Without the evidence of the said or eye witness we find that the prosecution did not prove that the appellant had intentionally and unlawfully indecently touched the child...we find that the case against the appellant was based on a mere suspicion. In *Mary Wanjiku Gichira v Republic*, 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 life”.

108. The same Court in *Joan Chebichii Sawe vs. Republic* [2003] eKLR expressed itself 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.”

109. I also associate myself with the position adopted by the Supreme Court of Indian in the case of *State of Punjab vs. Jagir Singh* [1974] 3 SCC 277 that: -

“A criminal trial is not like a fairy tale wherein one is free to give flight to one’s imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged...In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts...”

110. Therefore, in acquitting the accused, the court does not necessarily make a definite finding that the accused is factually innocent of the offence with which he is charged. It simply makes a finding that the prosecution has failed to prove his guilt and he is therefore constitutionally deemed to be innocent. That is what our law provides. While some people may be unhappy with the presumption of innocence, it is a time tested principle in all jurisdictions which apply democratic principles and unless we opt to go the dictatorship way, we have no option but to endure it.

111. Since the Constitution of Kenya prescribes the rule of law as a binding national value, then the law is paramount and as was appreciated in Dr. Christopher Ndarathi Murungaru vs. AG and another, Civil Application No. Nai. 43 of 2006 (24/2006), at page 12:

“... the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public...We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy: our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In dictatorship, we could simply round up all these persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court’s decision.”

112. I associate myself with Bagmall, J in Crowcher vs. Crowcher [1972] 1 WLR 425, 430 that:

“the only justice that can be attained by mortals, who are fallible and are not omniscient is justice according to the law: the justice that flows from the application of sure and settled principles to proved or admitted facts.”

113. Where, as in this case the prosecution had within its powers the opportunity to gather evidence that would either have rebutted the appellant’s alibi or confirmed it but failed to do so, the benefit of the prosecution’s failure to present that evidence must benefit the accused, the appellant in this case. In my view, it is the duty of the prosecution to direct the investigators properly. Where the investigations do not measure up to the required standards, it behoves the prosecution to point out the same and give appropriate directions particularly in a matter such as this where there may be a need to call for rebuttal evidence.

114. It therefore follows that the mere fact that the prosecution is believable does not amount to a rejection of the alibi defence. The South African case of Ricky Ganda vs. The State, [2012] ZAFSHC 59, Free State High Court, Bloemfontein provides useful guidance. In the said case it was held: -

“The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt.”

115. In this case a reading of the trial court’s judgement seems to show that the court arrived at its conclusion regarding the fact of defilement of the complainant by the appellant before even considering the appellant’s alibi defence. In Nguku vs. Republic [1985] eKLR, it was held by the Court of Appeal that:

“Quite obviously when analyzing the facts and the opposing evidence in a trial the individual facts and the assessment of the relative credibility of the witness thereon come first. It is incumbent on the trial magistrate or judge to consider the evidence in its respective stages and then arrive at a general conclusion on the totality of the evidence after doing so. In this case Mr Menezes’ contention regarding the second ground is borne out by the record of the judgment, which shows that the general conclusion was arrived at in advance of the individual analysis of the facts. We do not think that this point was fully appreciated by the learned judges of the High Court on the first appeal for after reciting ground two of the memorandum, which is similar to ground two in the one to this court, they said simply that on their own reading of the file and the judgment they took the view that the allegation was unjust in relation to it. If the course taken in this case is followed the point is almost bound to be taken on an appeal that the directions of this court’s predecessor in Okethi Okale v Republic [1965] EA 558 at page 559, which was cited to us by Menezes and which we now set out,

‘He submitted that the passage suggests that the learned judge first accepted the case for the prosecution and then cast upon the appellants the burden of disproving it or raising doubts about it. We think with respect that the learned judge’s approach to the onus of proof was clearly wrong, and in Ndege Maragwa v Republic (10), where the trial judge had used similar expressions this court said:-

“... We find it impossible to avoid the conclusion that the learned judge has, in effect, provisionally accepted the prosecution case and then cast on the defence an onus of rebutting or casting doubt on that case. We think that is an essentially wrong approach: apart from certain limited exceptions, the burden of proof in criminal proceedings is throughout on the prosecution.

Moreover, we think the learned judge fell into error in looking separately at the case for the prosecution and the case for the defence. In our view, it is the duty of the trial judge, both when he sums up to the assessors and when he gives judgment, to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think no single piece of evidence should be weighed except in relation to all the rest of the evidence. (These remarks do not, or course, apply to the consideration whether or not there is a case to answer, when the attitude of the court is necessarily and essentially different).”

We think that the observations of this court in that case apply with equal force to the present appeal' have not been complied with.

It is true that in that case there had been an acceptance of the prosecution case followed by an indication that the burden was cast on the appellant to rebut it, which is not the complaint here, but we nevertheless think that the direction given in that case should always be observed."

116. There are certain troubling findings made by the learned trial magistrate. He for example was of the view that if the defence needed to challenge the medical findings tendered by PW3 and PW7, confirming that the complainant was penetrated, then the appellant ought to have sought for second medical opinion to challenge the said evidence in order to rule out his speculative opinion. In my respectful view, the burden of proof is always on the prosecution and never shifts to the defence at any stage of the proceedings. Therefore, even where the accused decides to maintain silence and say nothing, that does not lessen the burden placed upon the prosecution to prove his guilt beyond reasonable doubt. In other words, the accused's conduct at the trial does not necessarily corroborate the prosecution's case. I therefore agree with Lesiit and Ochieng', JJ in Karanja vs. Republic [2005] eKLR that:

"the learned trial magistrate misdirected herself by indicating that the Appellant had an obligation to call witnesses to prove his defence. We agree with the Appellant that by adopting that stance, the learned trial magistrate seems to have convicted him on the basis of a weakness in the defence case, as opposed to the affirmative proof of the prosecution case. It must always be borne in mind that an accused person has no obligation at all to prove his innocence. He may well choose to say absolutely nothing, by way of his defence. That notwithstanding, the trial court could not convict him unless the Prosecution proved its case beyond reasonable doubt."

117. In JOO vs. Republic [2015] eKLR, Mrima, J held that:

"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."

118. In Elizabeth Waithieni Gatimu vs. Republic [2015] eKLR it was held by Mativo, J that:

"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

119. Therefore, as a result of the failure by the prosecution to sufficiently rebut the alibi defence, I agree with the concession of the appeal by the Respondent and find that the appellant's conviction was for that reason unsafe and cannot be sustained.

120. In the premises this appeal succeeds, the conviction of the appellant is hereby set aside and his sentence quashed. He is set at liberty unless otherwise lawfully held.

121. It is so ordered.

122. Right of appeal 14 days.

Judgement read, signed and delivered in open court at Machakos this 12th day of March, 2019.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngolya for the Appellant

Miss Mogoi for the Respondent

Ms Mweke for the Victim

CA Geoffrey