Kaguri alias Guka v Republic (Criminal Appeal E047 of 2024)
[2025] KEHC 13297 (KLR) (29 September 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E047 OF 2024

DKN MAGARE, J

SEPTEMBER 29, 2025

BETWEEN

SAMSON MAINA KAGURI ALIAS GUKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate's Court at Mukurweini Sexual Offence Case No. E004 of 2023 by Hon. D.N. Bosibori (SRM) on 09/07/2024)

JUDGMENT

Background

1. The appeal is from a judgment of Mukurweini Principal Magistrate's Court by Hon. D.N. Bosibori (SRM) delivered on 09/7/2024 in Sexual Offence Case No. E004 of 2023. The Appellant was the Accused whereas the Respondent was the Prosecution in the said suit.

2. Samson Maina Kaguri the Appellant herein was charged in two counts of Sexual Assault contrary to Section 5(1)(a) as read with Section 5(2) the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between 11/03/2023 and 16/03/2023 at Gachiriro village in Muhito location of Mukurweini sub-county within Nyeri County, he intentionally and unlawfully used his fingers to penetrate the vagina of PJBW, a child aged 7 years.

3. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006 in that on diverse dates between 11/03/2023 and 16/03/2023 at Gachiriro village in Muhito location of Mukurweini sub-county within Nyeri county, intentionally and unlawfully touched the vagina of PJBW, a child aged 7 years with his fingers.

4. The second count was that the Appellant was charged with the offence of Sexual Assault Contrary to Section 5(1)(a) as read with Section 5(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were

that on diverse dates between 26/11/2022 and 11/03/2023 at Gachiriro village in Muhito location of Mukurweini sub-county within Nyeri County, he intentionally and unlawfully used his fingers to penetrate the vagina of PW, a child aged 8 years.

5. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006 in that on diverse dates between 11/03/2023 and 16/03/2023 at Gachiriro village in Muhito location of Mukurweini sub-county within Nyeri county, he intentionally and unlawfully touched the vagina of PW a child aged 8 years with his fingers.

6. The Appellant pleaded not guilty to all counts and their alternatives. Upon trial, he was convicted of sexual assault. He was sentenced to 10 years' imprisonment on each count and to be served consecutively. Aggrieved by both his conviction and sentence, he preferred the instant appeal.

7. He filed a Petition of Appeal on 19/07/2024 where he raised (6) grounds of appeal as follows:

    a. That the trial magistrate erred in both matters of law and fact by failing to prove that there was a grudge between the Appellant and his neighbour who framed him.

    b. That the trial magistrate erred in law and fact by failing to prove that no proper investigation was done.

    c. That the trial magistrate erred in law and fact by failing to prove that there was no sexual assault but there was a love affair between Mama D and the Appellant.

    d. That the trial magistrate erred in law and fact by failing to consider that the prosecution tendered contradictory and uncorroborated evidence.

    e. That the trial magistrate erred in law and fact by rejecting his sworn evidence which was not challenged by the prosecution without cogent reasons to do so.

Evidence

8. The prosecution called a total of six (6) witnesses. The court conducted a voire-dire on PW1, JBW and noted she understood what was happening but did not understand the meaning of oath taking.

9. PW1, JBW stated that she was born on 8/6/2015 and that she was 7 years old. She stated that she knew the accused Samson Maina and was a neighbour. She stated that they stopped being neighbours as the Appellant used to insert his fingers inside their 'kasusu' on 16th and 11th /03/2023. She stated that on 11/3/2023 while with her friend P on their way to play the accused invited them to his home for eggs and that when they sat on the sofa he inserted his hand inside P's kasusu. She stated that he sat between them. She stated that he first inserted into P kasusu who was then wearing a trouser and a jacket and used his middle and index fingers. She stated that kasusu is used for short call. She stated that he afterward inserted his fingers into her kasusu while she had worn a trouser. She stated that she felt pain and that they ran away to their play mate's home D and played until night but did not inform their parents.

10. In cross-examination, she stated that she knew the accused as Guka. She stated that she tells her mother on happenings in her life and school. She stated that she did not tell mother about it as she forgot. She stated that they fled on the 1st incident as they were not happy and did not want him fingering them again. She stated that accused lived 40 metre from them. She stated that other people live there but could not recall if anyone saw them get into his house and that they did not meet anyone along the way as they got in or out. She stated that 11/3/2023 was not the first time she visited Guka. She stated that they agreed to go on 11/03/2023 to test what he would do so that they would stop going there. She stated that he had fingered them before 11/3/2023.

11. PW1 stated that she sat next to the accused who was seated in between them. She stated that she did not flee as she did not know they were next. She stated that she felt pain but did not tell anyone. She stated that on 16/03/2023 as she was going to P house the accused lured her with eggs, fingered her as she ate to which she fled. PW1 stated that the accused did these on two other occasions. She stated that she did not tell anyone about the incidences and did not tell M, the accused's grandson. She stated that she told D who alerted her mother over the incident. She stated that she and P told D that Guka had been inserting fingers into their vaginas. PW1 stated that D teaches alongside her mother. She stated that she chose to report to D as she is her mother's friend.

12. PW2, PW stated that she is 7 years old, born on 01/03/2015. She stated that she knew the accused Samson Maina and knew him in 2021 when she went to play at M's home. PW2 stated that she lived 40-50 metres from the accused's house and moved due to his arrest. PW2 stated that she was in court to report the accused for putting fingers in her when she was with J and K. PW2 identified that J was PW1. PW2 stated that the accused fingered her in 2021 and in March 2023. PW2 stated that in November 2022 over the holidays the accused fingered her as well as K. PW2 stated that this happened when they sought out one M, a playmate and grandson of the accused when the accused called them to eat eggs at his wooden house. PW2 stated that the accused gave them eggs when he inserted his fingers into her vagina as he sat on the sofa.

13. PW2 stated that the accused sat between them and that he inserted his fingers into her vagina and then into K's vagina. She stated that as he fingered K she stepped out and waited for her as she got fingered to which she called her out and that K left the Accused's house. PW2 stated that they then left for D' home. She stated that on 11/3/2023 she went to play at D' home and found him playing with M PW2 stated that she was in the company of J/PW1 and at M's home, D left to go get toys and she remained with PW1 when the accused invited her for eggs and that the accused made them seat on the sofa when he first fingered her (PW2) and then PW1. PW2 stated that she was fingered for about two minutes and felt pain. PW2 sated the accused did the same to PW1.

14. In cross-examination she stated that the accused is Samson Maina and that they knew each other when the accused would frequent her mother's shop as their homes were close about 50 meters apart. She stated that she called the accused Babu or Guka. PW2 stated that the Accused lived alone. PW2 stated that on 11/3/2023 PW1 came to her house to then proceed to play at D' home. PW2 stated that on 11/03/2023 the accused was on his doorstep when they decided to go there to see what he would do so that they would stop going there but they did not eat or drink this time around. She stated that on 11/3/2023 the accused fingered them one after the other beginning with PW1 then her.

15. PW2 stated that PW1 was the only one who got fingered on 16/3/2021 and that they knew the actions of the accused were wrong. She stated that PW1 returned there alone PW2 stated that her mother is unemployed and is named H. She stated that they talk about all issues but she forgot to tell her mother of these incidences. PW2 stated that she told M about the incidences as well on 17/03/2023. PW2 stated that D and the accused knew each other well. PW2 stated that her mother and the accused had never fallen out before.

16. The court conducted a site visit on 6/6/2023 and conducted hearing wherein PW1 was recalled. On cross examination upon recall, PW1 stated that she used to stay at the story building next to the scene from 201 and that they moved out. She stated that where they were was the Accused's place. She stated that the PW2 stayed across the road. She stated that the D' home is down the path and that D was staying in the same flat as she was. She stated that they passed through the path outside the Accused's house from which he used to call them into his house to eat eggs she stated that the furniture in the accused's house was 2 sofa sets and another small one and maroon and white in color.

17. PW2, on cross-examination stated that the alternative route to PW1's house was near the plantation. She stated that the Accused was at the shamba and that they alerted him that they would report him to her mother. She stated that there was no reason why they did not report him before.

18. PW3, ENG stated that at the material time she was staying on the 3rd floor of an apartment next to the scene. She stated that she lived with PW1 her child and that PW2 was her child's friend (P) and that they stayed at the house with an annexed shop. She stated that the Accused is Samson by name and that she would see him from her apartment. She stated that on 17/3/ 2023 PW1 and PW2 and D knocked on her door and informed her that they had something to inform her. She stated that PW1(J) told her that the Accused used to insert his fingers in their private parts and She asked P (PW2) who confirmed the incident and that she then suggested to alert Mama P at her shop and when they shop they asked the children to repeat the incident.

19. She stated that she asked PW1 when was the last incident and that it was on 16/03/2023 and when she asked her why she did not inform her she stated that she played and forgot. She stated that they moved in 2022. She stated that he would lure them with eggs, have them sit down and finger them. That they then reported to the village head who advised to report to the police and that on 17/3/2023 they went to the police where officer Lucy recorded their complaints.

20. In cross examination she stated that her child is called PJBW. She stated that her witness statement indicates that her name is PJBWW. She stated that she handed her birth certificate to the police and that her birth date is 8/6/2015 and that in 2021 she was 6 years old. She stated that at times she would feel pain in her private parts and did not want to bathe her as they would be tender/red. She assumed that she had a UTI due to public toilet use at school which she treated with antibiotics. She stated that PW1 did not report any sexual assault to her. She stated that they were friends. She stated that she never revealed to her about the incidents until 17/3/2023. She stated that she had never heard of the accused harassing children before. She stated that they all the children went to D to report and could not tell why they did not come to her. She surmised that it was because D played with them and the found it easier to open up to her. She stated that she could not tell if the accused and D had a grudge and that she did not have a grudge against him. She stated that PW1 explained to the police in her presence what transpired. She stated that J's/PW1 p3 form indicates 11/3/2023 to 17/3/2023. She stated that PW1 could not recall 2021 incidents and therefore the police focused on 2023 incidents which happened on 11th and 16th March 2023. She stated that PW1 and PW2 were together on the 11th but PW1 was alone on the 16th. She stated that due to the layout of the home it was possible for the children not to be seen at the Accused's house. She stated that the Accused was the culprit as he was identified by the children and that he used to lure them with eggs. She stated that she was not told this by D but by the children. She stated that D had lodged another case and did not want to be involved in another.

21. PW4,HWM stated that at the material time she was residing at the shop next to the road with her house behind it. She stated that she has since relocated. She stated that PW1, P is her daughter. She stated that they her birth certificate 1/3/2015 is her date of birth. She stated that her name in the birth certificate is PWW. She stated that JB is P's friend who they used to play together. She stated that JB is P friend whom she played with. She stated that J would call P's from the house and go play with M, the accused's grandson. She stated that EN is JB's mother who lived on the 3rd floor. She stated that she knew them when the 2 girls started playing together. She stated that she lived there from 2017 and moved in 2023 after they reported this case and after receiving threats. She stated that the accused's grandchildren harassed them and blamed them for the arrest of the accused, Samson Maina K. She stated that she knew the Accused's sons M (Baba M and K and his daughter S.

22. In cross-examination she stated that her child's name is PW born on 1/2/2015. She stated that in 2022 her child was 7 years old. She stated that she knew Mama J alias EN and that she knew her well in 2022. She stated that she moved there in 2017. She stated that she used to own a general shop and knew the general area of the place. She stated that the scene was the Accused's rental houses. She stated that she knew the tenants who resided there during the material time. She stated that P had not told her about sexual harassment before though they had talked about academic performance. She stated that she knew of the incidents on 17/3/2023 and ordinarily children would confide with their mother. She stated that she used to feel pain when showering. She stated that she escorted her to the hospital in December 2022 where she was diagnosed with amoeba at Tumutumu Hospital. She stated that on 17/3/2023 she had an infection in her private parts but did not interrogate her as she was not expecting her to be sexually harassed.

23. PW5, 245382 PC Lucy Ngare the investigating officer stated that on 17/3/2023 at around 2 pm she was at Mukurweini station when 2 children PJBW and PW were accompanied by EN and HW. Their respective mothers. She stated that they reported a sexual incident and that PJBW was 7 years old while PW was 8 years old. She stated that she recorded their complaint in the O.B. she then stated that in the presence of PC Mwikali she escorted the minors to the Mukurweini Hospital in the company of their mothers where they were physically examined and subjected to laboratory tests and medical reports were prepared. She stated that she later recorded statements for the minors and their witnesses. She stated that she visited the scene on 18/3/203 before recording the Prosecution Witness Statements.

24. She stated that PW2/PW told her that on 11/3/2023 at around noon she had her friend PJBW and they were playing at M's. that on this date the accused who stays in the same homestead as M stood near cowshed and called PJBW/PW1 and PW/PW2 to his house give them eggs and led them to a sofa set within his living room where he inserted his finger in their vaginas. She stated that he warned them against reporting him. PW/PW2 informed her that on 17/3/2023 at around 9 am she was with PJBW/PW1 heading to D alias D, their friend whose house to get at had to pass through Accused's compound to D. She stated that the girls found the Accused standing at the door to his living room and called them for cooked eggs as was his habit and they fled.

25. In cross examination PW5 stated that the Accused has an outdoor kitchen and a main house. She stated that the Accused has other houses within his compound which are above and below his. The houses are within the same compound. She stated that M's house which belongs to his son is about 20 meters from accused. She stated that the Accused has rental houses at the entrance to his compound about 20 meters about his house. She stated his grand children were in his house when she arrested him. She stated that the Accused stayed alone in his house. She stated that PW1 was first sexually assaulted in November, 2022 and that none of the girls had reported the incidents to the parents.

26. PW5 stated that the investigations showed that the Accused used to give the minors fried chicken eggs. PW5 stated that she conducted sufficient investigations. PW5 stated that she did not investigate if D had a subsisting romantic relationship with the accused. PW5 stated that the minors' mothers confirmed the incident from the minors after D informed the mothers. PW5 stated that their relationship has no bearing on the incident herein.

27. PW6 Julius Mwendia Mukono. A clinical officer from Mukurweini hospital presented two P3 forms for 2 patients and PRC forms and clinical reports. PW6 stated that the documents were prepared by Simon Kungu, his colleague and produced the same on his behalf. In regards to PW1, JBs, PRC form was prepared on 17/3/2023 and which indicates that the patient was penetrated in her vagina using a finger on 16/3/2023. He stated that there was no abnormality was detected. PW6 stated that the hymen was already broken. The clothes were intact and not torn. He indicated that high vaginal swap

pregnancy tests, revealed no abnormalities. PW6 further stated that PW1 was given antibiotics. PW6 further stated that he for PW1 there was no discharge.

28. In cross examination PW6 stated that he was in the position to answer technical questions. He stated that the hymen can be broken by sexual intercourse, exercise, etc. Riding a bicycle can break the hymen, a foreign object can also break the hymen. PEXh- 1(c) - PRC form indicates that no lacerations in bruises were noted. PEXh-1 (a), p3 form indicates no abnormality was detected. Everything was normal during examination. He stated that PWl's vagina was normal but here hymen was broken. A broken hymen can be normal as hymen being broken is not abnormal. He stated that the P3 from indicated the approximate age of the injury is 5 days old. The hymen was broken about 5 days before. He stated that the hymen takes days to heal after it is broken. It may take up to 7 days to heal. He stated that he could tell how his colleague arrived on the 5 days. PW6 stated that the degree is classified as harm based on the definition given in the P3 form.

29. DW1, the Accused stated that his name is Samson Maina Kagiri aged 75 years old and that he used to stay with his son and grandchildren. DW1 stated that he separated with his wife and that he raised his 4 children alone. DW1 stated that he knew D since August, 2022. He stated that Mama JB and D used to collect milk from his homestead. He stated that D and himself were lovers. He stated that his children got to know of the relationship but they wanted their mother and him to reunite. He stated that he did not finger PW1 and PW2 on 11/3/2023 as alleged. He stated that he knew the 2 children but did not commit the offences. DW1 stated that on 11/3/2023 he attended a meeting with his children and elders over reuniting with his former wife.

30. DW1 stated that his children visited on 10/3/2023 and on 11/3/2023 they held a meeting to go pick his wife from Kiriaini area. He stated that Baba M, an elder, chaired the meeting and that his daughters too were present. He stated that they agreed to pick his wife on 16/3/2023 at around 9 am and that when they got to Kiriaini area to his wife, she agreed to return after a month. DW1 stated that on 23/3/2023, at around 8 pm, he was watching TV with his grandchildren including female grandchildren, when a knock at his door led to his arrest when he opened to find out who was at the door. DW1 stated that he was fixed over fingering the minors. He stated that D was alerted that his wife was coming back. DW1 stated that D told him that he would regret as she knew of the meeting on 11/3/2023. He stated that he has raised female children and grandchildren and there had been no complaints. DW1 stated that he was fixed, that he loved children and would not harm them. DW1 pleaded that he is saved.

31. In cross examination he stated that he separated with his wife since 1995. He stated that on 11/3/2023, he held a meeting at his home with elders over reconciling with his wife. He stated that his children wanted them to reunite with him and that ordinarily children do not decide on behalf of parents. DW1 stated that on 16/3/2023, they visited Kiriani area. DW1 stated that his being in jail deprived him of the ability to know whether his wife returned or not. DW1 stated that D fixed him and that she had not testified. DW1 stated that the complainants are the 2 children and their parents, with whom he had good relations.

32. In cross-examination he stated that he has been in remand since 23/3/2023. DW1 stated that his children told him that his wife returned home though he was yet to see her.

33. DW2 - EKM stated that the Accused is his Father whom he has stayed with since birth. He stated that before 23/3/2023, his wife would cook for himself and the accused. DW2 stated that his wife is called AW or mama M. DW2 stated that he has 3 siblings; 2 are female, and that the Accused raised them all. DW2 stated that DW1 did not assault his sisters. DW2 stated that he knew D who used to collect milk and eggs from DW1 and would at times visit father's house all day and even cook for DW1. DW2 stated that DW1 intended that D be their step mom which he did not find right prompting him to

alert his siblings. They agreed to visit home. DW2 stated his siblings visited on 10/3/2023 and they spent the night at home having deliberated all day.

34. DW2 stated that he once spoke to D where she threatened DW1 to which DW2 asked D not to visit DW1's home again. DW2 stated that on 11/3/2023, DW1 called a village elder, baba M and they agreed to pick DW1's wife on 10 26/3/2023 as his sister was engaged elsewhere before 26/3/2023. DW2 stated that his mother works in a school as a cook and would only be available on 26/3/2023 for mid-term. On that date DW1's wife agreed to come back after a month but DW1 was arrested on 23/3/2023 and his wife returned shortly thereafter.

35. DW2 stated that DW1 was accused of fingering 2 female children. DW2 stated that the Accused was friendly to many children, including females. DW2 stated that his nieces visit DW1 over the holidays. DW2 stated that the neighborhood children would call DW1 "Guka" which shows he is friendly with children. DW2 stated that D fixed the accused and informed DW2 that she must inherit DW1's shamba as his mother was way.

36. In cross-examination DW2 stated that DW1 is his father. DW2 stated that on 11/3/2023, they held a family meeting which lasted until 4 pm. DW2 stated that he did not live in the same house as DW1. He stated that on 11/3/2023 he visited DW1's home at 6 am, until 4 pm. DW2 stated that DW1 was fixed by D. DW2 stated that the minors and DW1 got along.

37. DW3 was LM. He stated that he knew the Accused as a village elder and also that he grew up with him. He is my neighbour. DW3 stated that the Accused has been well behaved and he stayed with his wife but later separated. DW3 stated that DW1 called him in March, 2023 on 11/3/2023 asking him to escort him to Kiriai-ini, to pick his wife. DW3 stated that DW1 wanted them to visit on 16/03/2023 which they did. DW3 stated that the wife to DW1 asked for a month-before she returned which she has.

38. In cross-examination DW3 stated that the accused is his childhood friend. DW3 stated that DW1 separated with his wife for a long period of time. DW3 stated that he had not seen him for about 20 years or so. DW3 stated that DW1 called him on 11/3/2023 to pick his wife. He met at around 11am.and left after about two hours. He stated that he was not at DW1's home before 11 am and that he left after 2 hours. DW3 stated that he could cannot tell what DW1 did in my absence. DW3 stated that One of his sons MME and one of his daughters are the only ones who were present.

39. DW4- SWM stated that the Accused is her father and that he did not sexually assault her or her elder sister as he raised them. DW4 stated that they had never heard of sexual allegations before. DW4 stated that DW1, their father has female grandchildren and that there have been no complaints about father. DW4 stated that DW2 informed her that D was in a relationship with DW1, and that she was collecting milk and eggs from father. DW4 stated that she at one point found D in the house having visited DW1 at night. DW4 stated her brother had a problem with the relationship and that he once confronted D as she spoke to DW1.

40. In cross-examination DW4 stated that the Accused is her father. DW4 stated that she could not tell everything DW1 does when she is away. DW4 stated that DW1 her and her sister without sexually exploiting them us. DW4 stated that D is not the complainant herein nor is she in court today. The minors and the parents complained herein. She stated that D complained to the police but had no O.B number. She stated that on 11/3/2023, DW2 visited alongside DW3 an elder. DW4 stated that on 11/3/2023, she was with DW1 from the morning until evening. DW4 stated that the elder including DW3 visited at 10 am. DW4 stated that they agreed to pick her on 11/3/2023.DW4 stated that on 16/3/2023 they visited mother's ancestral home.

Analysis

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

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

42. On a first appeal, the appellant is entitled to a fresh and exhaustive re-evaluation of the evidence on record, with the appellate court drawing its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses. In the case of Okeno v Republic [1972] EA 32 at 36, the East Africa Court of Appeal stated on the duty of the court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

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

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

44. The legal burden is the burden of proof, which remains constant throughout a trial. According to established principles, it rests upon the prosecution to prove the guilt of an accused person beyond

reasonable doubt. This burden does not shift to the accused, save in a few exceptional statutory instances where the law expressly provides otherwise. according to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

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

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

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

46. Section 5 (1) of the *Sexual Offences Act* provides that, any person who unlawfully-

a. Penetrates any genital organs of another person with –

i. Any part of the body of another or that person; or

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

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

47. This offence involves unlawful penetration of a genital organ by the perpetrator using an object or any part of his body or of another, other than the defined genital organs.

48. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. Lord Denning in Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372 had this to say:-

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

49. The powers of this Court are circumscribed by Section 382 of the Criminal Procedure Code, which permits a first appellate court to confirm, reverse, or vary any finding, sentence, or order of the trial court. Within these limits, the court is duty-bound to subject the evidence to a fresh and exhaustive examination, reassess the credibility of witnesses, and weigh conflicting testimony to draw its own independent conclusions. Throughout this process, the legal burden of proof remains constant, resting squarely on the prosecution to establish the appellant's guilt beyond reasonable doubt. It is only by carefully scrutinizing the evidence in its entirety, while remaining faithful to the statutory framework, that the court can ensure the appellant receives a full and fair re-evaluation of the case. The section reads as follows:

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

50. Courts in criminal cases should consider the standard of proof and the effect of a conviction on the accused person. In this case, while dealing with the issue of sentences, the Court issued 10 years on the first count and 10 years on the second count of sexual assault and ordered that the sentences to run consecutively. In effect, the accused was sentenced to 20 years. This must be a serious offense that requires the clearest view of the evidence to justify keeping the Appellant behind bars for a large part of his life. Proof beyond reasonable doubt was the standard, also based on the nature of criminal offences, whose punishment went beyond the effect on the individual to the state. Conviction and sentence as a sexual offender were a badge that a convict could only deserve based on undoubted evidence.

51. Notwithstanding, under Section 5 (2) of the *Sexual Offences Act*, a person convicted for the offence of sexual assault is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life. In the case of K v Republic (NBI) Criminal Appeal No.248 of 2014(C.A) (2015) eKLR, the Court of Appeal had the opportunity to interpret S.20(1) of the *Sexual Offences Act*.. The court stated as follows:-

> ...The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life. What does "shall be liable" mean in law". The court of Appeal for East Africa in the case of Opoya v Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or imprisonment.

52. The sentence ought to have been granted to run concurrently but depending on whether the conviction stands, the issue of sentence will be subject to determination herein.

53. The prosecution relied on PW2's and PW1's testimony who both stated that the accused used two fingers to penetrate their kasusu. The mother of PW2 produced her birth certificate as PMFI(4). The

said birth certificate confirmed that the victim was born 1.3.2015 and she was therefore seven (8) years old as at the time of the offence

54. 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 organ of another person.' In this case, the complainants PW1 and PW2 narrated how the ordeal unfolded. Both contended that the Accused lured them with eggs into his house where he then seat in between them and used two of his fingers and insert them into their vaginas. The complainants in court indicated the peace sign indicative of the number of fingers that the accused used to penetrate their vaginas. The complainants in trial stated that the Accused inserted his fingers into their kasusu.

55. On the element of penetration, the courts have relied on the evidence of the complainant corroborated by medical evidence to prove penetration as was the case in Dominic Kibet Mwareng vs. Republic (2013] eKLR.

56. In John Mutua Munyoki vs. Republic [2017] eKLR, the Court of Appeal in this regard held that:

> From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to — - confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief....
>
> 25. The key evidence relied by the courts in rape cases and defilement in order to prove penetration Is the complainant own testimony which is usua lly corroborated by the medical report presented by the medical officer. [emphasis my own]

57. In his evidence, PW6, the clinical officer testified that PW1's and PW2's hymens were broken and that the age of the injuries on both complainants was days old. PW1 had developed an infection and was treated with antibiotics due to the presence of pus cells, as a swab test showed both red blood and pus cells. According to the evidence of PW2, she stated that they were treated and given medication and that PW1 was not given medication. PW1 in her first examination in chief did not mention being treated. Upon being recalled and giving evidence again PW1 did not mention being given medication for infection.

58. On the other hand, the defence evidence was that he was called to the roadside and arrested. There was said to be a prior case which led to suspicions. It is also the evidence of prior differences. Was it not proper to call the arresting persons, to shed more light? Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides as follows:

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

59. The threshold as stated in R vs Kipkering Arap Koske [1949] 16 EACA 135 is that such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In Sawe vs Rep [2003] KLR 364, the Court of Appeal expressed that:

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.

60. The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case, even where some of those witnesses may give evidence adverse to the prosecution's case. This obligation ensures that the trial is conducted fairly and that the court is placed in a position to consider all relevant facts before reaching a conclusion. Failure to call material witnesses may result in an incomplete picture of the events, potentially undermining the prosecution's case and affecting the court's assessment of the evidence as a whole. In Donald Majiwa Achilwa and 2 other v R (2009) eKLR the Court stated:

> " The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

61. The court had also discussed the question in Keter v Republic [2007] 1 EA 135 where the court held inter alia:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

62. In this case PW1 and PW2 gave the evidence on penetration. PW1 and PW2 stated that the Appellant defiled them on two occasions. According to them, he lured them into his house, gave them eggs and as they sat on the couch, he would insert his fingers into their genital organs. In the opinion of the trial court, the minors were consistent, confident and audible. The court invoked Section 124 of the *Evidence Act*. The court, in my view wrongly proceeded as if, the said section overrides Article 50 of *the Constitution*. Section 124 is a rule of evidence and not a rule on the standard of proof. It is not automatic that the court must just believe the complainant. The rule is the exceptions are set in section 124 of the *evidence act*. The said section posits as follows:

> 124. Notwithstanding the provisions of section 19 of the *oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

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

a. The matter is a sexual offence,

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

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

64. That is why the truth should always be recorded and reasons for so believing. All the three conditions must be present for a conviction to occur. In the case of Tekerali s/o Korongozi & 4 Others –vs- Rep (1952) 19 EACA 259 the importance of the first report was appreciated, where the court posited as follows:

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

65. In this case, the minors were not the only witness. There was medical evidence and there was circumstantial evidence that could be produced. In the absence of the production of circumstantial evidence available, then the court was wrong. There were also no evidence and reasons recorded for believing the minors to be saying the truth. The neutral witness was the clinical officer. He found no hymen. He indicated the approximate age of injuries to be days without stating the actual number of days. There was whitish discharge from the vagina. This would be caused by an infection. There was no evidence from the medical aspect that there was penetration using a finger. Without penetration, the offence fails.

66. In my view, the circumstances surrounding the appellant's arrest warranted careful scrutiny, and a failure to properly consider these circumstances rendered the trial unsafe. The court's oversight in this regard raises serious questions about the fairness of the proceedings and the reliability of the conclusions reached.

67. The question was whether, the occurrence of the offence was proved. It is not lost on the court that the PW1 stated that she told D who alerted her mother over the incident. She stated that she and P told D that Guka had been inserting fingers into their vaginas. PW1 stated that D teaches alongside her mother. She stated that she chose to report to D as she is her mother's friend. The police did not bother to have D be witness. The court can only infer, that should they have testified, their evidence could have been adverse to the prosecution. In the case of Awii V Republic [2025] KEHC 5626 (KLR), Wakiaga J, underscored the question of adverse inference as follows:

> 33. I have also noted that one very important witness was not called to testify leading to an adverse inference that had he been called it would have adverse to the prosecution case this being John kilonzi who was on duty with the appellant and the complainant and whom the complainant first made a report to.

34. In convicting the appellant, the trail court based the same on speculation which was not supported with evidence. There was no attempt to have D testify or even record a statement.

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

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

68. The appellant in my view gave a rock-solid evidence. The appellant was simply suspected. The court forgot that, suspicion cannot be evidence. In the case of Faith Lucas V Republic [2008] KECA 267 (KLR), the court of appeal, stated as follows:

> It has not been shown that the appellant's explanation was not plausible. There was evidence of bad blood between the appellant's family and Konde's family. It is to be observed that indeed Konde and his sons were arrested and charged (jointly with the appellant) in respect of the death of the deceased. It would appear that the appellant was arrested, charged, convicted and sentenced purely on mere suspicion. We must point out that suspicion, however strong, cannot be used as evidence in a criminal case of this nature. It was upon the prosecution to prove its case against the appellant beyond reasonable doubt. In this case, the members of Konde family and or their agents are not excluded from being persons who might have been involved in the death of the deceased.
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> In Sawe V. Republic [2003] KLR 364 at pp. 375-6 this Court said:-
>
> > "In this state of the evidence, the two watchmen are not excluded from being persons who might have started the fire or for that matter any intruder might have done so. If that be the case, then the evidence does not irresistibly point to the appellant to the exclusion of all others within the meaning of R v Kipkering arap Koske & Another 16 EACA 135 where it held, inter alia, that;
> >
> > > 'In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt'.
> > >
> > > In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court

made clear in the case of Mary Wanjiku v Republic (Criminal Appeal No. 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge's view that the prosecution had proved its case against the appellant beyond any reasonable doubt.

69. The case was based on suspicions arising from prior suspected crime. When faced with a case where there is bad blood, the prosecution had a duty to produce evidence and not suspicion. In the case of Republic v Denis Wamaye Kimemia & another [2019] KEHC 11092 (KLR), Wakiaga J, posited as follows:

> Whereas there is strong suspicion that the accused persons were involved in the unlawful killing of the deceased, the said suspicion is based on hearsay evidence which is uncorroborated and the court has said over and over again that mere suspicion however strong cannot be a ground for sustaining a conviction in a criminal case as was Stated by the Court of Appeal in Mary Wanjiku V Republic, Criminal appeal no 17 OF 1988 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 evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused freedom and at times life."

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

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

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

> "The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the

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

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

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

73. Therefore, in my overall reevaluation of the evidence, I am unable to agree with the trial court that the prosecution proved its case beyond reasonable doubt. There was indeed no evidence of penetration.

74. Having found that the conviction was improper, I do not think it will serve any purpose to delve into the issues in the sentence. I find and hold that the prosecution case was not proved beyond reasonable doubt and therefore allow the appeal and set aside the conviction and sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

Determination

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

    a. The appeal on conviction and sentence is merited and is allowed.

    b. The conviction and sentence is set aside.

    c. The Appellant shall be set free forthwith unless otherwise lawfully held.

    d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF SEPTEMBER, 2025. JUDGMENT DELIVERED PHYSICALLY IN COURT.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Naulekha for the State

Appellant in person

Court Assistant – Michael