Ondimu v Republic (Criminal Appeal E019 of 2024) [2025] KEHC 13586 (KLR) (29 September 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL E019 OF 2024

DKN MAGARE, J

SEPTEMBER 29, 2025

BETWEEN

DENNIS ONDIMU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the trial court, Hon. W. Kugwa (RM) given on 7.11.2023 in Kisii CMSO No. E018 of 2022. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006.
2. The particulars of the offense were that the Appellant, on 22.03.2022 at [Particulars Withheld] in Kisii central sub-county within Kisii County intentionally caused his genital organs namely a penis to penetrate the genital organs, namely a vagina of LKO, a girl aged 15 years.
3. There was an alternative count of committing an indecent act with a minor contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offense were that the Appellant, on 22.03.2022 at [Particulars Withheld] in Kisii central sub-county within Kisii County intentionally touched the anus of LKO, a girl aged 15 years.
4. The Appellant was arraigned, and he denied the charges. A plea of not guilty was consequently recorded. He was not granted bond. The court's mind was unnecessarily poisoned by allegations of another case, wherein he had not been convicted. The court in denying the appellant bond believed the occurrence of this matter as a fact thus violating the sanctity of the principle that no one should be condemned unheard. The Appellant enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence

put before it satisfied you beyond a reasonable doubt that an accused is guilty. In the case of *R vs. Lifchus* {1997}3 SCR 320, the Supreme court of Canada explained the standard of proof as doth:-

> "The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

5. The trial court heard a total of 4 prosecution witnesses and the Appellant. The court considered the evidence and rendered judgment, where she found the Appellant guilty and sentenced him to 10 years imprisonment. The Appellant, aggrieved, lodged this appeal. The Petition of Appeal raised the following grounds:

    a. That the trial magistrate erred in both matters of law and fact sentencing the appellant to 10 years imprisonment when the offence of defilement was not proved beyond reasonable doubt as required by law.

    b. That the trial magistrate erred in both matters of law and fact by convicting the appellant to 10 years imprisonment without considering that the investigation conducted in this case was scanty and shady which could not be used to secure conviction.

    c. That for sure the medical report tendered before the trial court was malice which was only generated in order to fix this young and peasant boy into this heinous act.

    d. That the trial learned magistrate erred in law and facts by convicting the appellant to serve ten years imprisonment without considering the complainant's age and the circumstances of the offence.

    e. That the learned magistrate further erred in both law and facts by convicting the appellant to ten years imprisonment despite the glaring contradictions.

6. The net effect of the appellant's appeal was that that the trial magistrate erred in law and fact by sentencing the appellant to ten years' imprisonment despite the offence of defilement not having been proved beyond reasonable doubt. It was further argued that the conviction was improper, as it was based on scanty and questionable investigations that could not sustain a conviction. Though indicated as an appeal touching on sentence, it is fully an appeal on conviction only.

7. The court directed that the matter be disposed of by way of written submissions, which were duly filed by both parties. The prosecution filed a notice of enhancement of sentence together with their submissions. However, the same was not brought to the attention of the appellant.

Evidence

8. PW1, the complainant, testified that she was born on 19.03.2007. She stated that on 22.03.2022, she left her home and went to the appellant's residence, which she knew. She said she took a motorbike to the said place. It was her testimony that she went there with the intention of engaging in sexual intercourse with the appellant, which she alleged they did. She further stated that at about 2:00 p.m., the appellant was recalled to work at Mashauri area but returned at 3:00 p.m., when they allegedly engaged in sexual intercourse again. According to her, they later went out to buy food, returned at about 7:00 p.m., and thereafter spent the night together until the following morning. This last part is crucial for the determination of the appeal.

9. On the following day, at about 11:00 a.m., the complainant's father, accompanied by other persons, went to the appellant's house. Upon their arrival, the complainant concealed herself under the bed while the appellant hid beneath the couch. The group opened the door and found the complainant hiding under the bed. Her evidence was that this was not the only occasion on which she had engaged in sexual intercourse with the appellant.

10. The complainant was thereafter escorted to Kisii Teaching and Referral Hospital for examination and subsequently taken to the police station. In cross examination, she stated that she had gone to the appellant's house on 22.03.2022, after he had informed her of his residence the previous day. She further indicated that there were neighbours present at the appellant's house. Both the complainant and the appellant were eventually apprehended by her father together with the unknown persons who accompanied the father.

11. PW2 was the complainant's father who worked at Kisii County as occupational safety and health officer. On 22.03,2022, he received a call from their little daughter, MA that her sister, the complainant herein was not in the house from 10.00 am. He stated that given they had another defilement case, she must be with the appellant. They did investigations with Marienga who called the appellant's employer. They proceeded to the appellant's house and found it locked. He asked the landlady to allow the break the same. They found them hiding; the appellant was behind sofa while the complainant was in the bedroom. They were taken with the policing community to the police station. The appellant was charged and the complaint taken to Kisii Teaching and Referral Hospital.

12. On cross-examination, he stated that they came with 2 community police who did not make a statement. One Farah was directed to the appellant's place by the Appellant's employer. He stated that the landlady gave permission to break into the house.

13. On cross-examination, he stated that he was accompanied by two community policing members who, however, did not record any statement. He added that one Farah was directed to the appellant's residence by the appellant's employer, and further stated that the landlady gave permission for the appellant's house to be broken into. There was no indication on the role of Farah and the statement by the alleged landlady. It was also not clear the raison d'être for not involving the police to maintain the chain of custody of the appellant and recovery of any evidence at the scene. It appears the witness preferred gangland style of arrest. This will however, have profound effect on the decision.

14. PW3, the clinical officer, Stanley Matinda from KTRH, testified that he examined the complainant on 5.09.2023. He stated that the complainant reported that the appellant had allegedly defiled her on 22.03.2022. Upon examination, he observed the presence of pus cells but found no evidence of penetration. PW3 was not cross-examined.

15. PW4 was CPL Reina Magoma of Kisii Police Station. She stated that on 23.03.2022 a case of defilement was reported by the complainant's father. The complainant was reported missing on 22.03.2022, that she had gone to spend the night at the appellant's house. On cross examination, she stated that she did not visit the scene of crime and the complainant and the appellant were brought to the station.

16. The court, upon considering the evidence on record, found the appellant to have a case to answer. Section 211 of *Criminal Procedure Code* was complied with. The appellant opted to give sworn evidence.

17. The Appellant gave sworn evidence. He stated that on 22.03.2022 he was at work at Menyinkwa at around 1500 hours. He worked until the next day 23.03.2022 when for him at work. This was the complainant's father and two other people. He was asked to accompany them to a parked car. They arrested him and took him to the police station. The two people identified themselves as community policing officers. He was taken to court the following day. He denied the charges. He stated that the complainant stated that he was at his house in Menyinkwa, but his house is at Riverside.

18. The Appellant further stated that he had another case involving the same complainant. He denied being found in a house at Menyinkwa and asserted instead that his residence was at Riverside near Kisii University. He complained that the two people who arrested him were never called as witnesses during the trial. His testimony was not subjected to cross-examination. The court shall revert on this shortly.

Submissions

19. The Respondent filed submissions dated 1.09.2024 that the conviction was safe as all ingredients were proved. They did not even submit on the notice of enhancement they had filed.

20. They submitted that the age of the complainant was proved to be 15 years. They stated that the child was the only witness to the offence hence section 124 applied. This was not factually correct, but it was their submissions. Reliance was placed in the case of Kassim Ali v republic.

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

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

Analysis

22. 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.

23. 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.

24. The issue in this case is whether the prosecution proved its case to the required standard. The most oft quoted English decision of 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."

25. 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."

26. 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 stigmatized 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.”

27. Section 8(1)(a) (1) and (3) of the *Sexual Offences Act* under which the Appellant was convicted provides as follows:

8.

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

(2) N/a

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(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.

28. 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.”

29. 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."

30. Courts in criminal cases should consider the standard of proof and the effect of a conviction on the accused person. I n this case, the Appellant was up to 20 years in prison or even 15 years depending on the age the court found the complainant to be. 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.

31. The appellant maintained that he was framed. There are witnesses who were mentioned and had no horse in the race. The father was said to be with two men. These men were never called. The appellant stated that he was at work. The complainant strained to place him in the house outcome. The arresting persons were said to be community policing officers. They were known. Could there have been reasons they were not called?

32. Secondly, the appellant gave evidence of an alibi as the evidence for part of the time. The rest of the time he was at home. There was alleged to be a landlady who broke down the door. This evidence was not even corroborated by the complainant. The complaint tendered evidence that the father and the unknown persons opened the door. This is major contradiction. The alleged storming in the appellant's residence was through the help of the employer to trace the appellant. The landlady who allegedly gave consent was not also called. In other words, none of the independent witnesses were called.

33. 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."

34. 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."

35. The court had also discussed the question *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."

36. In this case there were two witnesses who gave the evidence on penetration. They were the medical officer and the minor. The minor alleged that she went for sex in the appellant's house. The appellant denied this. This is where 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 as 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.

37. The evidence of the minor was contradicted by medical evidence. Pus could not have formed when examination was on the same day. The medical evidence directly contradicted the minor's evidence. The evidence also differed with the account given by the appellant. That account was not contradicted. The same with the medical evidence. The two pieces of evidence render the account by PW1 and PW2 false. When the medical evidence shows prior infection and no evidence of penetration, then the court must proceed with facts as established. The evidence from the prosecution witness three, was clear that there was no penetration. The defence evidence was to the same effect. The prosecution believed the truth of that evidence and no attempt was made to cross examine the appellant.

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

    i. The matter is a sexual offence,

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

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

39. 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."

40. This was a sexual offence when the first condition was met. However, the second and third conditions were not met. The victim was not the only witness. There was medical evidence and there was circumstantial evidence that could be produced. In the absence of the production of circumstantial evidence available, then the court was wrong. Thirdly, and more crucially, there was no evidence and reasons recorded for believing the Complainant to be saying the truth. PW1 and PW2 Differed on fundamental aspects. Was there an opening of the house or a break in. The only neutral witness was the clinical officer. He found no evidence of penetration. The element of penetration was lost. This was not evidence of partial penetration. It is that there was no evidence of penetration at all. The complainant was taken to the hospital immediately. It is not possible to have pus cells result from intercourse on the same day. It is expected that was to be inflammation.

41. There was no evidence from the medical aspect that there was penetration. Without penetration, the offence fails.

42. The evidence from the complainant was that the appellant was at work at 3 pm. She alleged the arrest was on the following day. On the other hand, the father's evidence leads to an arrest the same day. PW2 was definitely lying. He had suspicions and ensured that they materialized. However, the prosecution did not call the people who arrested the appellant. 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.I n convicting the appellant, the trail court based the same on speculation which was not supported with evidence on record to wit that the accused had not envisaged that any other person would be within the compound whereas the evidence on record was that there was on going construction and that there were three guards on duty in the compound all the time.

43. Further, it must be remembered that, in view of the past case between the parties, the court ought to have treated the witnesses' evidence with circumspection. In particular, 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.

44. Therefore, being at home was not denied. The question was whether, the occurrence of the offence was proved. It is not lost on the court that the complainant testified that the appellant's neighbours were in the house. The police did not bother to have any of them be a witness. These were people whom the complainant saw in the house, if she was there. Further, the first report was made to PW3 by CA, a sister to PW1.

45. There was no attempt to have her testify or even record a statement. The community policing officers were neither named nor called. To make matters worse, the record shows the raison d'etre for the arrest. The appellant had been released on bond for a prior offence. Upon arrest, the appellant was denied bond on the grounds that he breached the bond terms. This was neither investigated nor basis laid. The main purpose for the arrest appears to deny the appellant freedom. No reason is given for arrest of a person after medical report clearly showed there was no evidence of penetration.

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

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

47. The appellant 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.

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.

48. 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 produced 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."

49. How then did the accused find himself in court? PW1 and PW2 did not produce any evidence on how the appellant ended up being arrested when the father clearly did not know where the appellant stayed. The complainant stated that she knew the home the previous day. Who then brought PW2 to that home, if indeed he did? There was thus a break in the chain of information, by omitting critical witnesses. The investigating officer did not even go to the scene to even confirm that the door was broken. The landlady, who was there when giving permissions, if PW2 is to be believed, was not called. All these people were not called as they did not witness. This is the only inference.

50. The one issue that the court failed to do was to consider the defence. The appellant was not cross-examined on his evidence. It means that his evidence was unrebutted. It is true that in certain cases, there is a need to set out an alibi early enough. However, the duty to prove falsity of an alibi still remained with the prosecution. The appellant as an accused has no duty to help the state carry out its case.

51. If evidence was tendered that was surprising to the state, they had a chance under Section 212 of the Criminal Procedure Code to call for rebuttal evidence. The section provides as follows:

> If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

52. The question of the rights of the prosecution to receive in advance defence evidence was addressed in the case of *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] KECA 319 (KLR). The court of appeal [R.S.C. Omolo, E. O. O'Kubasu and J. W. Onyango Otieno] posited as follows:

> So, if at the beginning of the trial, the *Constitution* obliges everybody to assume that an accused person is innocent, what case is he to disclose in advance? Mr. Tobiko's position appears to be that if the accused person chooses to give evidence and call witnesses then he

ought to be able to disclose his case to the prosecution. That contention, however, ignores one basic distinction. The privileges, if we may so designate them, of the accused person are conferred on him by the *Constitution*. As soon as he is arrested, he shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged. Nobody is ever likely to arrest the Republic of Kenya and charge it with a criminal offence so that it would require it to be informed of the nature of the offence against it. The question of reciprocity is, therefore, misplaced. ...

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

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

They cannot be given through the inherent power of the court. Even in civil matters, there is a specific provision in the *Civil Procedure Act*, Chapter 21 Laws of Kenya, recognizing the existence of the inherent power of the court:

> " To make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." – see section 3A.

There is no similar provision in the *Criminal Procedure Code*, Cap 75 Laws of Kenya and we think the omission is deliberate. But even if there was such a power with regard to criminal matters, we do not accept that a judge would be entitled to create non-existent rights and confer them upon a party as the learned Judge purported to do here.

53. The appellant was not under duty to disclose his defence before being put on the defence. In any case, the state has a chance to call rebuttal witnesses. The case for the appellant from the cross examination was that he was not there. It used to be the position that alibi had to be disclosed in advance. However, non-disclosure is not fatal.

54. Not calling of the appellant's employer who allegedly gave up his position was fatal. The said employer was not named. He was not called. It even became more crucial when defence evidence was given. There was no attempt to even challenge that evidence even by cross examination. Failure to cross examine, ipso facto, means that the evidence is unrebutted. The court had no way of dismissing the evidence which was not challenged. In the case of [*Wachera v Republic*] [2025] KEHC 11843 (KLR), this court posited as follows:

> 43. The court was wrong in blaming the appellant on having the alibi at the tail end. However, the court was correct in finding that these questions were not put to the witnesses. This is important since the offence occurred at home.
>
> 44. The court found that the appellant and the minor lived in the same house. The appellant was the perpetrator. In this case, there are no doubts on who the perpetrator was. It was the Appellant. The appellant raised a defense of alibi. His defence was supported by witnesses. The state had an opportunity to call rebuttal evidence which they did not call. With reference to alibi evidence, the court of appeal in *Erick Otieno Meda vs. Republic* [2019] eKLR stated thus:
>
> "In considering an alibi, we observe that: a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view. b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial. c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court. d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.
>
> 45. The first aspect was the alibi defence set out. The state did not find it fit to challenge any of the statements made by the Appellant in relation to the alibi. The state, in its cross examination confirmed the consistence of the defence evidence. The appellant was in their home from 5 pm up to 10 pm when the parties took dinner. This piece of evidence was not impeached at all. The Appellant's evidence remained unrebutted. In the case of *Erick Otieno Meda v Republic* [2019] eKLR, the Court of Appeal [Asike Makhandia, Kiage & Otieno-Odek JJA] posited as follows regarding an alibi: -In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of *Kiarie – v- Republic* [1984] KLR, this Court stated:"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable......"
>
> 46. In the South African case of *S -v- Malefo en andere* 1998 (1) SACR 127 (W) at 158 a - e the court set out five principles with respect to the assessment of alibi evidence: i. There is no burden of proof on the accused to prove his alibi. ii. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. iii. An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word." iv. If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar"). v. The ultimate test is whether the

prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.

47. The burden of proving the falsity of an alibi was addressed in case of *Victor Mwendwa Mulinge –v- R*, [2014] eKLR as follows: -"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution…."

48. In another persuasive South African case of *R - v - Biya* 1952 (4) SA 514 (A) at 521C - D Greenberg JA said:'If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.

55. Why will the state fail to cross examine if they wish to rely on the answers in rebuttal. While addressing the question of failure to cross examine, the court of appeal had the following to say in the case of *John Gitonga V Republic* [2013] KECA 367 (KLR):

> That failure to allow the appellant cross-examine PW4 a crucial witness was prejudicial to the appellant's case considering, that production of an O.B. which allegedly had gone to show that the complainant named the appellant in his report to the police at the earliest opportunity was said by the said PW4 that it had nothing of material importance to the case. It is therefore the appellant's contention that failure to allow cross-examination of PW4 locked out material evidence as to what PW4 meant by saying that there was nothing material in the O.B. in so far as the appellants case was concerned.

56. What was the court of appeal then saying? If cross examination is denied then it renders evidence not credible. However, on the other hand, if there is no cross examination, that evidence remains unrebutted. A party cannot rely on the submissions to rebut evidence. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in *Ngang'a & Another vs. Owiti & Another* [2008] 1KLR (EP) 749, where the Court held that:

> As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome.

57. The next question is whether the surrounding circumstances show that the offence was proved. For circumstantial evidence to work, it must be inconsistent with the accused's innocence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, [P. Kihara Kariuki, Pca, M'inoti & Murgor, JJ.A] had this to say on circumstantial evidence:

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

evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

58. The threshold had also been set out in the case of *R vs Kipkering Arap Koske* [1949] 16 EACA 135, 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.

59. The next limb is the age of the complainant. The evidence on the record shows that the alleged offence took place after the 16th birthday of the complainant. The complainant was said to be 16 years. Charging was related to a 15-year-old. There is not harm if the court finds that the minor was 16, not 15. However, the court gave 10 years. This was erroneous as the sentence provided for 15-year-old complainants was 20 years while 16 years was 15 years. The court gave 10 years. The sentence was thus illegal. The court ought to have given a sentence of 15 years. The question of age was not raised in cross-examination or at all. The issue of age, therefore, was proved from the circumstances of the case. However, given that the offence was not proved, the sentence is set aside.

60. The Respondent did not prove its case beyond reasonable doubt that the Appellant penetrated the minor with his penis. The medical evidence was to the effect that there was no evidence of penetration. The medical evidence did not support the version of evidence tendered by PW1 and PW2. Secondly, the appellant's evidence remained unchallenged and unrebutted. There was no basis for convicting the Appellant. In the case of *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."

61. 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."

62. 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."

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

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

65. Having found that the conviction was improper, the sentence disappears with the same. I find and hold that the prosecution case was not proved beyond reasonable doubt and therefore allow the appeal set aside the conviction and sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

66. Before departing, I need to address a question of profound interest to administration of justice. The right to bail is sacrosanct. It cannot by fiat or arbitrarily be taken away. The court fell far short of the required glory when it received evidence of pending defilement as 'breach of bond terms'. This is not only cavalier but surrender of the right to bond to skullduggery, machinations, and subterfuge of

complainants. The investigating officers must also investigate and not to churn falsehoods to the courts without triangulation to establish the truth.

Determination

67. 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 in Kisii CMSO No. E018 of 2022 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 THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Komen for the State

Appellant in person

Court Assistant – Michael