Mwangi v Republic (Criminal Appeal E018 of 2025)
[2025] KEHC 13690 (KLR) (1 October 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E018 OF 2025

DKN MAGARE, J

OCTOBER 1, 2025

BETWEEN

PATRICK KAIRU MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the judgment of the trial court, Hon. T. Kanyiri (PM) given on 21.2.2023 in Karatina PMCSO No.22 of 2018.)

JUDGMENT

1. This appeal arises from the judgment of the trial court, Hon. T. Kanyiri (PM) given on 21.2.2023 in Karatina PMCSO No.22 of 2018. The Appellant was charged with sexual assault contrary to Section 5(1)(i) (2) 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 1.7.2018 at PCEA Church (particulars withheld) area in, (particulars withheld) subcounty within Nyeri County he unlawfully used his fingers to penetrate the anus of DM, a boy aged 13 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 1.7.2018 at PCEA Church (particulars withheld) area in (particulars withheld) subcounty within Nyeri County touched the anus of DM, a boy aged 13 years.

4. The trial court heard the evidence of a total of five prosecution witnesses. Thereafter, the appellant tendered sworn evidence in his defence. The court found the Appellant guilty and sentenced him to 20 years imprisonment. The Appellant, aggrieved, lodged this appeal on the ground that the trial court erred in law and fact in convicting him and sentencing him when the prosecution failed to prove the case against him beyond reasonable doubt.

5. The net effect of the appellant's case was that the trial magistrate erred in law and fact by sentencing the appellant to 20 years' imprisonment despite the offence of defilement not having been proved beyond reasonable doubt. This was not the offence the Appellant was charged with. It was further argued that the conviction was improper, as it was based on discrepancies that could not sustain a conviction. The major discrepancy the court notes is that the appellant was charged with sexual assault and convicted with defilement.

The law

6. The law in which the appellant was charged is provided under Section 5(1) of the *Sexual Offences Act* as hereunder:

    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.

7. On the other hand Section 11 of the *Sexual Offences Act* provides as follows:

    (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

    (2) It is a defence to a charge under subsection (1) if it is proved that such child deceived the accused person into believing that such child was over the age of eighteen years at the time of the alleged commission of the offence, and the accused person reasonably believed that the child was over the age of eighteen years.

    (3) The belief referred to in subsection (2) is to be determined having regard to all the circumstances, including the steps the accused person took to ascertain the age of the complainant.

    (4) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (Cap. 92) and the Children's Act (Cap. 141)

    (5) The provisions of subsection (2) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

Evidence

7. PW1 was Dr. Stephen Kairu Mwangi. He relied on the PRC Form and the P3 Form. They were filled by Dr. Ichayai who was then on study leave and could not attend court. He testified on cross examination that no injuries were noted on examination and so there was no need for treatment.

8. PW2 was the minor. According to him, he was at PCEA (particulars withheld) with his fellow brigadiers on 1.7.2018. The Appellant then told other brigadiers to go home leaving PW2. The Appellant asked him to go upstairs and asked him upon arrival to hold the pillars.

9. The Appellant then approached from behind him and removed his trouser and boxer and inserted his finger twice in his anus and left. He went home at 7.00 p.m and did not tell his father but then in the morning while at school he realized blood when he went for long call and wiped himself. He then informed his teachers who called his father and they went to report to Karatina Police Station. On cross examination, PW2 testified that they finished the brigade at 11.00 am and he stayed behind because the Appellant asked him to go see the church.

10. PW3 was AW. She was the head teacher of (particulars withheld) Primary. She asked the children who went with PW2 to (particulars withheld) PCEA for brigade and one Ephantus and Mugo told her that the Appellant had a bad habit of calling them to the church under construction. The patron later told her that the Appellant had been arrested about this behavior on PW2.

11. PW4 was Mary Wambui. She was the brigade officer and elder of church. She was informed by PW3 that PW2 complained of pain in the anus. She called the brigadier children who told her they had left PW2. The children said they quit brigade because of the Appellant's behavior towards them.

12. PW5 was PC Reina Martin Odera. On 22.03.2022 a case of defilement was reported by the complainant's father. He testified that he investigated the matter. According to him, investigations led to the Appellant as the suspect and they arrested and charged him with the offence.

13. The Appellant also testified in court as DW1. He had been employed at (particulars withheld) for 4 years. In July 2018, he was out of the county in Kirinyaga. There were elections in (particulars withheld) Church and he was called and informed that he was needed back. He knew nothing about the offence. Most elders had said that he be seconded as a leader and he believed that is why he was being fixed. In cross examination, it was his case that PW2's father is the one who subsequently won the elections.

Submissions

14. The Appellant filed submissions on 26.3.2025. It was submitted that the charge sheet was not clear and so was defective. The manner in which this was true was not submitted.

15. The appellant also submitted that there were discrepancies in the testimony of the expert medical reports raising credibility issues. Dr. Ichayai found no injuries and Dr. Nderitu affirmed no injuries. He cited Mutonyi v Republic (1982) KLR 203.

16. He also submitted that time spent in custody was not considered which was 1 year and one month. He cited Kiptai v Republic (2024) eKLR.

17. The Respondent filed submissions dated 7.8.2025. It was submitted that the prosecution established all the key ingredients to be established for the offence of Sexual Assault under Section 5 (1)which are:

    a. proof of penetration of genital organs of another,

    b. Any part of the body of another or that person; or an object manipulated by another or that person

    c. proof of age of the victim,

    d. identity of the perpetrator

Analysis

18. The tragedy with this matter, is that whether or not the appellant succeeds, he will have to be acquitted. He was charged with sexual assault but convicted with defilement. This will be a tragedy of cataclysmic

proportions if the appellant was guilty. The court has no power to convict a person of a different major offence than the appellant was charged. The court did not make any finding regarding sexual assault that the appellant was charged with.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. Courts in criminal cases should consider the standard of proof and the effect of a conviction on the accused person. In this case, the Appellant would serve 20 years in prison for an offence he was not charged with. This must be a serious offense that required the clearest view of the evidence to justify keeping the Appellant behind bars for a large part of his life.

27. 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. the offence for which the appellant was charged, for which there was no conviction attracts a sentence of not less than 10 years.

28. The Appellant contended that the allegations against him were fabricated with the sole intention of disqualifying him from vying for an elective position within the (particulars withheld) PCEA Church. He pointed out that certain witnesses who were mentioned during the trial, and who bore no allegiance in the church rivalry, were never called to testify. Notably, E and M were said to have been with PW2 when the Appellant allegedly directed them to leave before proceeding upstairs with PW2. Their absence as witnesses left a critical gap in the prosecution's case.

29. Further, the Appellant maintained that he was in Kirinyaga in July 2018, at the material time, and thus could not have committed the alleged acts. PW4, a Church Elder, testified that the elders summoned the Appellant regarding the allegations, but he categorically denied them. The failure to call material witnesses, coupled with the Appellant's unrebutted alibi, cast serious doubt on the credibility of the prosecution's case.

30. The appellant gave an alibi as the evidence. No witness testified on how and where the Appellant was arrested. Per the charged sheet, he was arrested on 4.7.2018. There were said to be two more witnesses who were never called. The court is unable to tell whether either or both could be the arresting officers.

31. The Appellant relied on an alibi as his defence. Notably, no witness testified as to how or where the Appellant was arrested. According to the charge sheet, he was arrested on 4.07.2018, yet the circumstances of his arrest remain unclear. The prosecution had indicated that there were two additional witnesses who were never called to testify. In the absence of their evidence, the Court is left unable to determine whether either, or both, were the arresting officers. This omission left a material gap in the prosecution's case, further weakening the credibility of the charges.

32. On the other hand, there was said to be church elections prior to the arrest of the Appellant following which PW2's father won the election and that there were prior differences. In my view, it was proper to call the arresting persons, to shed more light on the circumstances under which the Appellant was arrested. This will have displaced the alibi.

33. 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.

34. The court had also discussed the question of 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.

35. Crucial witness must be called to prove a fact especially since the presumption of innocence favors the accused person. 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.

36. In this case only the minor, PW2 gave the evidence on the penetration using fingers. The medical report and PW1 found no evidence of injuries. This was inconsistent with the allegation that PW2 saw blood on long call. The court ought to have directed its mind to the fact that blood from the anus or blood on stool was not necessarily as a result of penetrative injury and in this case by the Appellant. The medics did not find the injuries.

37. I note there is over reliance on section 124 of the *Evidence Act* in submissions. This is a rule of evidence and not a standard of proof. It is not automatic that the court must just believe the complainant. In this case the court did not rely on section 124 but stated that there was positive identification. The case in this matter was not on identification but recognition. The only element that was missing was penetration by a finger.

38. The medical report had evidence to the contrary. It is important to note that there are 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.

39. The later 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.

40. 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.

41. This being a sexual offence, the first and cardinal ingredient to be proved was penetration. In the present case, that element was not established. The complainant was not the sole witness; medical and circumstantial evidence was adduced, but it contradicted the testimony of PW 2. In the absence of consistent circumstantial evidence, the trial court erred in its findings. Further, the court did not record any cogent reasons for believing the complainant's testimony to be truthful. The only neutral witness was the clinical officer, who found no evidence of penetration. Accordingly, the crucial element of penetration was lacking.

42. This was not a case of partial penetration, nor of an indecent act involving touching of the complainant's anus; rather, there was no evidence of penetration whatsoever. The story of having ben injured is not corroborated by medical evidence. Given that the complainant was examined immediately after the alleged incident, one would reasonably have expected to find inflammation or other physical signs. Without proof of penetration, the offence charged could not stand. To make matters worse, the appellant was charged with a wrong offence. There was no evidence of penile penetration.

43. 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. defilement cannot include penetration of the genital organ by an object. when such happens, it is known as sexual assault. in the case of Kefa Mose Momanyi v Republic [2020] KECA 514 (KLR), the court of appeal [Karanja, Kiage & Sichale, JJ.A] stated as follows:

> We think that the state of the evidence was questionable and barely adequate without the testimony of Joseph. Both the trial magistrate and the learned Judge ought to have drawn the inescapable inference that the prosecution failed to call Joseph because, had they called him, his evidence would have been adverse to their case. See Bukenya Vs. Uganda [1972] EA 549.
>
> We have said enough to show that the evidence adduced, did not prove the case against the appellant beyond reasonable doubt and his conviction was unsafe. We accordingly allow this appeal, quash the conviction and set aside the sentence.

44. The court also notes that PW2's father was curiously not called in evidence. His evidence was crucial since he was first called to the school before the arrest of the Appellant. His evidence with that of the minor must have led to the arrest of the Appellant. As earlier observed, the prosecution did not also 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. In 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.

45. Further, it must be borne in mind that, in view of the alleged rivalry surrounding church elections between the parties, the evidence of the prosecution witnesses ought to have been treated with great circumspection. It is suspicious that PW4, a Church Elder, who testified that the appellant was a Sunday School teacher, did not make any effort to interrogate the appellant in detail but instead rushed to the conclusion that he was guilty.

46. The appellant's evidence, which remained unrebutted. the Appellant served at PCEA (particulars withheld) Church for a period of four years. However, the circumstances surrounding the appellant's arrest called for careful judicial scrutiny. The trial court's failure to address these circumstances adequately rendered the trial unsafe, raising grave concerns about the fairness of the proceedings and the reliability of the conclusions ultimately reached.

47. These inconsistences as to the lack of injuries and therefore absence of any treatment was fatal to the prosecution case. 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.

48. it is noteworthy 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.

49. Suspicion cannot be and must never be the basis of conviction. In the case of Sawe v Republic [supra] the court of appeal addressed the question of suspicion as follows:

> ... The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku 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.

50. The case was based on suspicions but the trial court erroneously based it finding on the sole evidence of PW2 which was said to be corroborated by other witnesses. The other witnesses did not give cogent evidence of the occurrence. The court did not discount the medical evidence that exonerated the Appellant 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.

51. The one issue that the court failed to do was to critically consider the defence evidence. The court found that the Appellant came when he was summoned and so must have been within and dismissed the defence of alibi. It is true that in certain cases, there is a need to set out an alibi early enough. However, the duty to proof 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 as he remained innocent until proven otherwise. The accused person was arraigned, and he denied the charges. A plea of not guilty was consequently recorded. 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.

52. 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 matte

53. The question of the rights of the prosecution to receive in advance defence evidence as 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. ...

54. 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. Section 212 of the Criminal Procedure Code 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.

55. The prosecution had a golden chance to displace an alibi evidence by calling the two boys who were with PW2. further, PW2's father and the arresting officers also not called. this was fatal to the case. It even became more crucial when defence evidence was given. It became clear that there was a rivalry in the church leadership and the Appellant and PW2's father were at the centre of the rivalry and that PW2's father eventually clinched the leadership position that the Appellant was also a contestant. The Appellant's defence was in my view not an afterthought. In the case of Wachera v Republic [2025] KEHC 11843 (KLR), the high 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.

56. The Court of Appeal [Asike Makhandia, Kiage & Otieno-Odek JJA] in Erick Otieno Meda vs. Republic [2019] eKLR while considering an alibi, observe that:

> 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.

57. 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:

a. There is no burden of proof on the accused to prove his alibi

b. 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

c. An alibi must be judged on the basis of the totality of the evidence and the court's impression of the witnesses.(in Afrikaner).

d. 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).

e. 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.

58. 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....

59. Therefore, I do not find that the Respondent proved their case beyond reasonable doubt that the Appellant penetrated the minor's anus using his finger. The medical evidence did not support the 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.

60. 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.

61. 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.

62. Therefore, in my overall reevaluation of the evidence, I am unable to agree with the trial court that the prosecution proved the offence 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.

63. 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.

64. Having found that the conviction was improper, I do not think it will serve any purpose to delve into the issues in the sentence. in any case had conviction on the charge preferred been proven, then ten years minimum sentence will have sufficed. there were no reasons assigned on the undue cruelty, not being a first offender to enhance the sentence. the victims refused to attend. I find and hold that the prosecution case was not proved beyond reasonable doubt and allow the appeal.

65. Before I pen off, I also note an error on the part of the trial court in relation to meting a sentence based on the wrong section of the law. Whereas the Appellant was charged with the offence of Sexual Assault

Contrary to Section 5 (1) (a)(i) 2 of the *Sexual Offences Act* no 3 of 2006, the court proceeded in the Judgment as though the Appellant was convicted of

The offence of Defilement Contrary to Section 8 (1) as read with 8 (3) of the *Sexual Offences Act*. It is not clear whether the court misapprehended the total tenure of the offence that was before court and delved into the offense that the Complainant was not charged with including meting a sentence based on the wrong section of the law. The sentence was thus unlawful and for that reason it would still be set aside.

66. I have said enough to demonstrate that the impugned judgement is for setting aside.

Determination

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

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

b. The Conviction and sentence in Karatina PMSO No. 22 of 2018 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 1ST DAY OF OCTOBER, 2025.

JUDGMENT DELIVERED PHYSICALLY IN COURT.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr Kimani for the State

Appellant in person

Court Assistant – Michael