



**Republic v Kimeu (Sexual Offence E052 of 2023)  
[2025] KEMC 88 (KLR) (8 May 2025) (Judgment)**

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**REPUBLIC OF KENYA  
IN THE MAKINDU LAW COURTS  
SEXUAL OFFENCE E052 OF 2023  
YA SHIKANDA, SPM  
MAY 8, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**DANIEL MUTUA KIMEU ..... ACCUSED**

**JUDGMENT**

“By denying individuals with intellectual disability the opportunity to learn about their sexuality and develop social relationships with others, society has denied them the right to self-fulfilment.” (Swango-Wilson, 2008)

**Introduction**

1. May is Mental Health Awareness Month, an annual observance founded by Mental Health America in 1949 to highlight the importance of mental wellbeing, educate the public, reduce stigma and promote support for those affected by mental health conditions. Each year, individuals and organizations come together to raise awareness and advocate for better mental health care and resources. I am glad that this Judgment is being delivered during the Mental Health Month. Sexuality is a key part of human nature and sexual intercourse is a prominent aspect of the human experience. From childhood, we are promised that one day we will find a partner of our choosing, possibly have children with that person, and live “happily ever after.” In school, children learn about sexual health and wellness and there is a presumption that eventually all persons will be able to experience this most private form of intimacy and connection. Movies, television shows, books, magazines, and even news sources further perpetuate the idea that sexual activity is a part of what it means to be fundamentally human; that it is something everyone is thinking about and wants to experience with another person or persons.
2. Gillian Eastgate, MBBS, FRACGP a Senior Lecturer, Queensland Centre for Intellectual and Developmental Disability, University of Queensland, Australia in the article titled, Sexual health for



people with intellectual disability, observes that people with intellectual disability experience the same range of sexual needs and desires as other people. That they may not be able to communicate or act on these desires, and may struggle with learning appropriate sexual behaviour. They may also be hampered by the attitudes of other people. Beliefs persist in the community that people with intellectual disability are either childlike or asexual, or 'oversexed' and likely to become sex offenders. Both males and females with intellectual disability are at higher risk of sexual abuse than other people in the community. This abuse may come from family members, neighbours or even strangers. People with intellectual disability often lack knowledge about what behaviour is appropriate, and may lack the communication skills to report abuse.

3. There is debate on whether persons and in particular adults, with intellectual disability have the capacity to consent and can actually consent to sexual activity. The general belief is that a person with intellectual disability should not have sexual relationships or engage in sexual activity. The main difficulty for a person with intellectual disability is determining whether the person has the capacity to consent to a sexual relationship and if so, whether the person is consenting to a particular relationship. This case involves an allegation of a sexual offence committed against a person (adult) said to have mental disability. The alleged victim is an adult who appears to have been married and has children. The record also indicates that the husband or father to the children of the alleged victim also suffers from mental disability.

### **The Charge**

4. Daniel Mutua Kimeu, the accused person herein is charged with the offence of Rape as well as an alternative count of committing an indecent act with an adult. In the main count, the accused person is charged with the offence of Rape contrary to section 3(1) (a) as read with 3(1) (b) of the *Sexual Offences Act*. The particulars of the offence are that on 24/6/2023 at Kathome village in Nzau Sub-county within Makueni County, the accused person intentionally and unlawfully caused his penis to penetrate the vagina of RNM, a person with mental disability, without her consent. The particulars of the alternative charge are that on the same day and at the same place, the accused person intentionally and unlawfully touched the vagina of RNM, a person with mental disability, using his penis and against her will. When the plea was taken, the accused person pleaded not guilty to both counts. The matter was then set down for hearing.

### **The Evidence**

#### **The Prosecution Case**

5. The prosecution evidence was substantially taken by another Magistrate who was subsequently transferred. When I took over the matter, directions were taken under section 200(3) of the *Criminal Procedure Code* whereupon it was directed that the matter proceeds from where it had reached. I only took the evidence of the last prosecution witness. The prosecution called a total of seven (7) witnesses in a bid to prove its case against the accused person. PW 1 RN (hereinafter referred to as the complainant) appears to have had some difficulties in giving her testimony in the first instance. She was however able to state her name and where she lived. From the record, her testimony was that the accused person raped her where after she got pregnant.
6. That the accused person raped her at his home and that she has a child born out of the ordeal. The complainant stated that the accused person was a neighbour. That she was going to the market when the accused person took her to his house. The accused person removed her panty then raped her on his bed. It was the evidence of the complainant that people, including her daughter went to the accused person's house and found her inside. The complainant testified that the accused person asked to have



sex with her. She stated that the accused person was the father to her child. That the accused person gagged her mouth during the rape and as such, she could not scream. She was later taken to Makindu hospital. She identified the accused person in court.

7. PW 2 FN (name withheld) testified that the complainant was her mother. That on a date that was not disclosed at about 7:00 pm PW 2 was at her work place when her siblings appeared and informed her that their mother was not home. The mother had just left PW 2's shop. PW 2 followed some foot tracks which led her to a neighbour's house. She heard people talking inside the house and suspected that her mother was inside. PW 2 called some neighbours whereupon they called out the owner of the house. The door to the house was opened. Upon the neighbours entering the house, they found the complainant seated on the bed. That the complainant alleged that the accused person had raped her. The complainant was taken to hospital.
8. PW 3 MW (name withheld), a minor testified that the complainant was his mother. That they found out at night that their mother was not home. They informed PW 2 and on looking around, they found the complainant at the accused person's house. PW 4 Daniel Kioko testified that on 24/6/2023 at about 7:30 pm he received a call from PW 2 asking him to go to the accused person's house as there was a problem. PW 4 proceeded to the accused person's house and saw the accused person going to his kitchen. He asked the accused person what the problem was but the accused person asked PW 4 to leave or else he would cut him using a machete. PW 2 then informed PW 4 that her mother was inside the accused person's house. The complainant was found inside the house. According to PW 4, the complainant stated that the accused person had sexual intercourse with her.
9. PW 5 Miriam Nyakio testified that she was a clinical officer at Emali Sub-county hospital. The witness testified that she attended to the complainant on 25/6/2023 while working at Makindu Sub-county hospital. PW 5 stated that medical examination revealed that the complainant was 24 weeks pregnant. She produced the medical documents in evidence. PW 6 Police Constable Salome Nnazi testified that the incident was reported at Emali Police station on 28/6/2023. The witness recorded statements from witnesses and issued a P3 form then took the complainant to hospital. P3 and PRC forms were filled. The accused person was arrested and later charged. PW 7 Mwidadi Omar testified that he was a Government Analyst working with the Government Chemist in Mombasa. His evidence was that he conducted a DNA test from blood samples that were received at the Government Chemist and confirmed that there were 99.99% chances that the accused person was the father to the child born of the complainant. He produced the report in evidence.

### **The Defence Case**

10. Upon closure of the prosecution case, the court found that the accused person had a case to answer and proceeded to place him on his defence. The accused person opted to give an unsworn statement without calling any witness. The accused person stated that on 17/6/2023 he was at his house at about 6:30 pm when he heard a knock at the door. He did not open the door and moments later, he heard the door being opened forcefully. He went to check and found six people who included the complainant's husband, children and others. The accused person stated that he did not know that the complainant was in his house. That she must have entered while the accused person was in the kitchen.
11. The accused person pushed the people outside the house. The people went and stood outside the gate. Later, members of community policing arrived. The complainant's family joined them. The people then left. That on 24/6/2023 at about 10:00 am the accused person was at his home when three people appeared and apprehended him. He was taken to the market then later in the evening he was taken to Emali Police station and later to court.



### **Facts Not In Dispute**

12. Having considered the entire evidence on record as well as the accused person's statement, I find that the following facts are not in dispute:
  - a. That the complainant and the accused person were well known to each other;
  - b. That the complainant and the accused person were neighbours;
  - c. That one day, the complainant was found in the accused person's house.

### **Main Issues For Determination**

13. Having considered the nature of the charges and the evidence on record, I find that the main issues for determination are as follows:
  - a. Whether the complainant is a person with mental disability as envisaged by the [Sexual Offences Act](#);
  - b. Whether the complainant was raped on 24/6/2023 or at all;
  - c. If so, whether it was the accused person who raped the complainant;
  - d. If not, whether an indecent act was committed against the complainant on 24/6/2023;
  - e. If so, whether such indecent act was committed by the accused person;
  - f. Whether the prosecution has proven its case against the accused person to the required standard.

### **Analysis And Determination**

14. I have carefully considered the evidence on record as well as the law applicable. Before delving further into the main issues for determination, I wish to address the legal position with regard to sexual abuse of persons with mental disabilities. The [Sexual Offences Act](#) does not expressly proscribe the offence of defilement or rape of a person with mental disability. The only offences that touch on a person with mental disability are contained in section 7 and 19 of the [Sexual Offences Act](#). Section 7 thereof relates to the offence of rape or indecent act committed within the view of a person with mental disability whereas section 19 relates to prostitution of persons with mental disabilities. Many a time, suspects have wrongly been charged under section 7 of the [Sexual Offences Act](#) when it is suspected that they had sexual intercourse with persons suffering from mental disabilities. The Superior courts have affirmed that section 7 applies where the impugned act is committed within the view of a person with mental disability and not when the person with mental disability is the direct victim of the sexual act.
15. Owing to the lacuna in the [Sexual Offences Act](#) with regard to sexual abuse of persons with mental disabilities, there have been divergent views, particularly in the High court on how such cases ought to be treated. One school of thought is of the view that since a person with mental disability is not capable of giving consent, any sexual violation of such a person implies that they did not consent. That inability to consent means lack of consent. The other school of thought is of the view that consent only applies to persons who are capable of giving consent. That since a person with mental disability is not capable of granting consent, the offence of rape cannot apply. That perpetrators of sexual violence against adults with mental disabilities involving penetration of sexual organs ought to be charged with the offence of defilement of a person suffering from mental illness under section 146 of the [Penal Code](#). I will highlight some of the authorities for illustration.



16. In the case of *Gideon Musyoka Muthui v Republic* [2022] KEHC 2147 (KLR), Limo J was of the view that the offence of rape of a person with mental disability is fully covered under section 3(1) of the *Sexual Offences Act* as read with section 43(4)(e) thereof. The good Judge opines that since a person with mental disability is incapable of giving consent, penetration or carnal knowledge of an adult with mental disability is intentional and unlawful as defined under section 43 of the *Sexual Offences Act* and when read together with section 3 of the Act, it amounts to rape. In *Tarus v Republic* [2023] KEHC 1315 (KLR), the appellant was convicted and sentenced to 10 years' imprisonment for the rape of a person with mental disabilities, contrary to section 3(1)(a) and (c) of the *Sexual Offences Act*, with an alternative charge of committing an indecent act.
17. The High Court (F. Mugambi J) affirmed the conviction and sentence and observed that the court had on its own assessment found the victim to be a credible witness with a clear grasp of what had happened to her and there was no evidence that she was being delusional. That evidence on her lucidity was corroborated her employer of 7 years who stated that she was able to take care of the children. The court further observed that under the circumstances, the victim would not fall under the definition of an imbecile or person with mental disability as anticipated for purposes of section 7 of the *Sexual Offences Act* or section 146 of the *Penal Code* and that the charge of rape was proper. I wish to point out that section 146 of the Penal code has since been amended to do away with the words "idiot" and "imbecile" and instead, the offence reads, "Defilement of person suffering from mental illness."
17. In the authority of *JA v Republic* [2020] KEHC 4119 (KLR), the Appellant was charged, inter alia, with the offence of Rape of a person with mental disability under section 3(1) (a) and (b) as read with 3(3) of the *Sexual Offences Act*. Njoki Mwangi J, observed as follows:

"This court's finding is that the omission by the prosecution to include the words "without her consent" was not fatal to the prosecution case and was curable under the provisions of Section 382 of the *Criminal Procedure Code*. Due to her mental disability, which was proved by production of a medical assessment report dated 23rd November, 2010, PW1 lacked capacity to give consent to the appellant for sexual intercourse to take place. This court is thereof of the finding that the appellant raped her."
18. In a nutshell, the good Judge was of the view that incapacity to consent is tantamount to lack of consent.
19. A similar position prevailed in the authority of *Mwikya Masave v Republic* [2019] KEHC 5623 (KLR) in which the appellant was charged with the offence of rape of a person with mental disabilities. Kariuki J while analyzing sections 3 and 43 of the *Sexual Offences Act* held:

"The report of Dr. Munga Edgar dated 16th May 2016 confirmed that the complainant in this matter had a mental disability. That being the case, the implication of section 43 is that a mentally challenged person cannot consent or appreciate the nature of an act that causes an offence under the Act. Evidently, the law acknowledges that persons with mental disabilities can also be victims of rape and has accordingly put safeguards against the vice. Section 3 of the Act cannot be read in isolation as the appellant purports to do. There was therefore nothing defective about the charge sheet. That ground of appeal has no merit and should fail." (Emphasis supplied)
20. I have only highlighted a few authorities but there are several Judges of the High court who ascribe to the view that lack of capacity to consent implies absence of consent and that as such, persons with mental disabilities can also be victims of rape.



21. I now move to the alternative school of thought. In the authority of *Orina v Republic* [2024] KEHC 1974 (KLR), the appellant was charged with the offence of rape of a person with mental disability, albeit under a wrong provision of law. On appeal, Ong’udi J held that the offence of rape under section 3 of the *Sexual Offences Act* concerns two adults with sound mind. That what must be proved is the lack of consent and that there is no element of disability involved in the said section. The court further held that it was therefore an error for the learned trial magistrate to use section 184 of the *Criminal Procedure Code* to substitute the charge. According to Ong’udi J, the offence of rape of a person with a mental disability is not under the *Sexual Offences Act*. The court was of the view that such an offence exists under section 146 of the Penal code which relates to defilement of persons with mental illness (formerly referred to as idiots or imbeciles). The same Honourable Judge made a similar finding in the case of *John Maundu Mutetei v Republic* [2020] KEHC 4694 (KLR).
22. Honourable Lady Justice Ong’udi is not alone. In the case of *Edwin Odingo Aol v Republic* [2021] KEHC 2732 (KLR), the appellant was charged with the offence of rape of a person with mental disability. The offered was brought under the wrong provision of law. Aburili J had this to say:
- “The Section 7 of the *Sexual Offences Act* offence is not an offence for the rape of a person with mental disabilities. The latter is the subject of an offence under section 146 of the *Penal Code*. Section 7 of the *Sexual Offences Act* proscribes the rape or committing an indecent act with another within the view of a family member, a child or a person with mental disability. In the section 7 of the SOA offence, the person with mental disability is the spectator while in section 146 of the *Penal Code* offence, the person with mental disability, therein called an idiot or imbecile, is the victim. It therefore follows that the appellant was charged with an offence that falls under a different statute-the *Penal Code* instead of under the *Sexual Offences Act*.”
23. However, it appears that two years later in the case of *Winga v Republic* [2023] KEHC 185 (KLR) Aburili J changed tune and agreed that a person with mental disability could be a victim of rape as envisaged by law. The Learned Judge upheld a conviction and sentence on a charge of rape of a person with mental disability contrary to section 3(1) (a) and (b) as read with subsection (3) of the *Sexual Offences Act*. The charge had been substituted with that of Defilement of a person with mental illness under section 146 of the Penal code. In *Njoroge Mungai v Republic* [2017] KEHC 2075 (KLR), Muriithi J was of the opinion that rape of a person with mental disabilities, is the subject of an offence under section 146 of the *Penal Code*.
24. The foregoing implies that the law is not settled on the issue of sexual intercourse with a person of mental disability. The doctrine of precedent (*stare decisis*) dictates that the decisions of higher courts bind the courts below. I am faced with a situation where there are conflicting decisions of the High court on the same issue. Which decision should I follow? In the case of *Justice Jeanne W Gacheche & 5 others v Judges and Magistrates Vetting Board & 2 others* [2015] eKLR, a five Judge bench of the High Court held as follows:
- “The circumstances in which a Court may decline to follow a decision which would otherwise be binding on it are:
- (a) where there are conflicting previous decisions of the court; or
  - (b) the previous decision is inconsistent with a decision of another court binding on the court; or



- (c) the previous decision was given per incuriam.

As a general rule though not exhaustive, the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness or some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong."

25. Being guided by the above authority, it follows that there being conflicting decisions by the same court, I will be entitled to choose which decision to follow. In my view, the choice should be made judiciously and in the interest of justice. The decision on which authority to follow should not be based on guess work or personal liking for a particular Judge. I am of the further view that reasons should be given as to why a particular authority should be preferred over the other. Consent or lack of it is a key ingredient of the offence of rape. Section 2 of the [Sexual Offences Act](#) provides that "consent" has the meaning assigned to it under the Act. I have perused the [Sexual Offences Act](#) with a view to understanding the concept of consent. Section 42 of the [Sexual Offences Act](#) provides:

"For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice."

26. The million-dollar question is; does a person with mental disability have the freedom and capacity to make a choice? In a bid address the question, I'll take you to section 43(1)(c) of the [Sexual Offences Act](#). The same provides that an act is intentional and unlawful if it is committed in respect of a person who is incapable of appreciating the nature of an act which causes the offence. Section 43(4)(e) of the [Sexual Offences Act](#) provides that the circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act mentally impaired. The import of section 43 of the [Sexual Offences Act](#) in relation to persons with mental disabilities is that it is prohibited to commit a sexual act against a person who is mentally impaired, as such person is incapable in law of appreciating the nature of the act.

What is the law with regard to consent of a person with mental disability? This will take us to section 44 of the [Sexual Offences Act](#). Sub-section (1) thereof provides:

"If in proceedings for an offence under this Act, it is proved—

- (a) that any of the circumstances specified in subsection (2) existed; and
- (b) that the accused person knew that those circumstances existed, the complainant is to be taken not to have consented to the act unless sufficient evidence is adduced to raise an issue as to whether he or she consented, and the accused is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he or she reasonably believed it." (Emphasis supplied)
27. Which are these circumstances? The answer is to be found in section 44(2) of the same Act. The circumstances include, inter alia, owing to the complainant's disability, the complainant would not have been able at the time of the commission of the act to communicate to the accused whether the complainant consented. The disability referred to in section 44(2)(e) of the Act has not been specified. In my view, this would include mental disability. My interpretation would be that section 43 of the [Sexual Offences Act](#) makes it unlawful to commit a sexual act against a person with mental disability and according to section 44 of the Act, where it is proved that owing to the complainant's mental disability,



- the complainant would not have been able at the time of the commission of the act to communicate to the accused person whether the complainant consented, and that the accused person knew that those circumstances existed, there is a rebuttable presumption that the complainant did not consent to the act. It is further presumed that the accused person did not reasonably believe that the complainant had consented.
28. This presumption can only be rebutted by sufficient evidence to show that the complainant consented and that the accused person reasonably believed that the said complainant had consented. However, I doubt that the presumption can be dislodged where it is proved that the alleged victim had a mental disability and was incapable of appreciating the nature of the sexual act committed against them. According to section 45 of the *Sexual Offences Act*, if it is proved that the accused person committed any offence and that he intentionally deceived the complainant as to the nature or purpose of the act complained of or the accused person intentionally induced the complainant to consent to the act complained of by impersonating a person known personally to the complainant, it is to be conclusively presumed that the complainant did not consent to the commission of that act and that the accused person did not believe that the complainant consented to the act being complained of.
  29. To answer the question that I posed hereinabove, I do not think, in as far as the Kenyan law (*Sexual Offences Act*) is concerned, that a person with mental disabilities, who is incapable of appreciating the nature of a sexual act has the freedom and capacity to make a choice. Nonetheless, the law as depicted under sections 43 and 44 of the *Sexual Offences Act* is that where a sexual act is committed against such a person, there is a rebuttable presumption that they did not consent to the act. If a person with mental disability has no capacity to consent to sexual activity, why would there be the question of whether or not they consented? Why would the presumption that they did not consent be rebuttable? I could be wrong but I think the law is quite confusing and Parliament needs to provide clarity on this.
  30. While grappling with the question of which decision to follow, I came across two Court of Appeal authorities. In the authority of *David Ndumba v Republic* [2013] KECA 233 (KLR), the appellant was charged with the offence of rape of a person with mental disability under section 3(1) (a) and (c) of the *Sexual Offences Act*. The trial court convicted the appellant and on appeal to the High court, the conviction was affirmed. The Court of Appeal also affirmed the conviction on 3/10/2013. There was no indication that the victim being a person with mental disability, the charge ought to have been preferred under section 146 of the Penal code. Similarly, in the case of *Kinyua v Republic* [2024] KECA 252 (KLR), the appellant was charged and convicted of rape of a person with mental disability contrary to sections 3(1) and 3(3) of the *Sexual Offences Act*. The conviction was upheld on appeal at the High Court. On 8/3/2024, the Court of Appeal upheld the conviction.
  31. Although the Court of Appeal appears not to have expressly and authoritatively held that the offence of rape under section 3 of the *Sexual Offences Act* applies to persons with mental disabilities, affirming convictions for such offences implies that the provision could also apply to persons with mental disabilities. In view of the Court of Appeal decisions, I am bound to abide by the position that a person with mental disability can be a victim of rape as envisaged by section 3 of the *Sexual Offences Act*. I have alluded to the fact that there is need for amendment of the *Sexual Offences Act* to provide clear and unambiguous provisions with regard to sexual acts committed against persons with mental disabilities. The shuttling between the *Sexual Offences Act* and section 146 of the Penal code is not healthy and breeds confusion.
  32. Furthermore, I do not think that given the fact that there is no clear provision in the *Sexual Offences Act* that specifically criminalizes commission of a sexual act against or sexual intercourse with an adult



with mental disability, it automatically follows that the offence ought to be preferred under section 146 of the Penal code. I will explain my position. Section 146 of the Penal code provides that:

“Any person who, knowing a person to be a person suffering from mental illness, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was a person suffering from mental illness, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.”

33. In my view, the ingredients of the offence under section 146 of the Penal code are:
- a. The accused person must have known, at the time of commission of the offence, that the alleged victim was suffering from mental illness;
  - b. The accused person had or attempted to have unlawful carnal connection with the alleged victim;
  - c. The circumstances of the accused person’s act did not amount to rape.
34. The Penal code does not define the term, mental illness or person suffering from mental illness. Section 2 of the *Mental Health Act* defines the phrase “person with mental illness” to mean a person diagnosed by a qualified mental health practitioner to be suffering from mental illness, and includes—
- a. a person diagnosed with alcohol or substance use disorder; and
  - b. a person with suicidal ideation or behaviour.
35. The above definition is vague. It uses the phrase “mental illness” to define what mental illness is. My opinion is that a charge under section 146 of the Penal code will depend upon the facts and circumstances of the individual case. For instance, if the accused person forcefully had carnal knowledge of an adult victim without knowing the mental status of such victim, he ought not to be charged under section 146 of the Penal code, notwithstanding the fact that the victim was a person with mental disability or mental illness.
36. The offence of rape basically revolves around the issue of consent of the victim or lack of it. On the other hand, the offence under section 146 of the Penal code is not concerned with the consent (or lack of it) of the victim. This implies that section 146 of the Penal code cannot be invoked merely because the alleged victim is said to be suffering from mental illness or disability. As already indicated, the decision on which charge to prefer and under which law, will depend on the circumstances of the particular case. Moreover, it is not clear whether the terms “mental illness” and “mental disability” have the same legal meaning and can be used interchangeably. In Kenya, statutes touching on mental disability or mental illness either fail to define the phrase or are unduly vague in their definition of disability, and as a result, either over- or under-emphasize disability.
37. I have shown that the definition of “person with mental illness” as defined under the *Mental Health Act* is ambiguous. The Black’s Law Dictionary, 10<sup>th</sup> Edition defines Mental illness as follows:
- “1. A disorder in thought or mood so substantial that it impairs judgment, behavior, perceptions of reality, or the ability to cope with the ordinary demands of life- also termed mental disorder, mental dysfunction.



2. Mental disease that is sever enough to necessitate care and treatment for the afflicted person’s own welfare or the welfare of others in the community- also termed mental disease.”

Section 2 of the *Sexual Offences Act* provides in part that:

“Person with mental disabilities means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, and for purposes of this Act includes a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- a. unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act;
- b. able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation;
- c. unable to resist the commission of any such act; or
- d. unable to communicate his or her unwillingness to participate in any such act.”

38. The definition under the *Sexual Offences Act* appears to be restrictive or specific to the purposes of the Act. There has been debate on whether persons with mental disabilities are totally devoid of free will in all aspects of their lives. The UN Convention on the Rights of Persons with Disabilities (UNCRPD) was ratified by Kenya in 2008. Pursuant to Article 2(6) of *the Constitution* of Kenya, the Convention forms part of the law of Kenya. Article 2 of the Convention defines “Discrimination on the basis of disability” to mean any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

Article 12 of the Convention provides:

“Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be



proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.”

39. The UNCRPD approach is about recognizing that not everyone starts from the same baseline and that persons with mental disabilities may need support in order for them to exercise their legal capacity. This approach of supporting adults to make their own decisions rather than pursuing substitute decision making (such as guardianship), provides for rights-based decision making to enable the adult to maximize their involvement in their own life choices, despite their disability.

40. Article 27 of *the Constitution* of Kenya provides in part that:

“(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”

41. Article 32(1) of *the Constitution* of Kenya provides that every person has the right to freedom of conscience, religion, thought, belief and opinion. The provisions of Articles 27 and 32 of *the Constitution* of Kenya apply to every person, including those with disabilities. The Convention aforementioned does not define the term disability. Article 260 of *the Constitution* of Kenya defines disability to include any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities.

42. In my view, the starting point as per *the Constitution* of Kenya is that a person suffering from mental disability should not be discriminated because of their disability or health status and that such a person has the right to freedom of conscience, thought, belief and opinion. The prohibition on discrimination is not limited to conduct. It extends to legal and policy considerations, among others. Article 12 of the UN Convention on the Rights of Persons with disabilities stipulates that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. A similar provision is contained in section 3K of the *Mental Health Act* of Kenya. Legal capacity means the capability and power under law of a person to occupy a particular status or relationship with another or to engage in a particular undertaking or transaction. This has a bearing on the freedom to make choices.

43. The law surrounding the capacity of people with mental disabilities to consent to sexual activity is characterized by an inherent desire to protect these individuals from harm. As a society, we seek to protect vulnerable populations from abuse and in doing so, we enact laws offering additional protections for those most susceptible to harm and least equipped to defend themselves from it. In addition, persons with disabilities have a constitutional right to protection from harm. However, it may be argued that people with mental disabilities have the same sexual abilities and desires as those without. The sexuality of people with mental disabilities and their right to engage in sexual behavior



are phenomena that are frequently ignored or overlooked when enacting laws that are meant to protect such persons.

44. Statutes intended to protect these individuals, in some cases, restrict them from engaging in any sexual activities at all. It may be argued that denying the sexuality of the mentally challenged community significantly inhibits their autonomy and prevents them from enjoying fundamental human experiences. Navigating the line between protecting the freedoms of persons with mental disabilities and protecting them from harm is quite challenging. The foregoing raises important questions on the issue of sexual consent for persons with mental disabilities. Is it prudent for the law to provide for a blanket presumption that adult persons with mental disabilities are incapable of consenting to sexual activity? Does this presumption inhibit the autonomy of persons with mental disabilities? Are persons with mental disabilities incapable of engaging in romantic and sexual relationships?
45. Should there be legal and evidential standards for determining capacity for persons with mental disabilities to consent to sexual activity? It may be argued that it is paradoxical to believe that a mentally incompetent person could have the capacity to make a reasoned and informed decision on sexual issues. The New York Court of Appeals observed in *Rivers v Katz*, 67 N.Y. 2d 485 (Ct. App., 1986) that a finding of mental incompetence does not necessarily apply to every aspect of a person's life. That under some state laws, individuals may be found incapacitated in some areas but still retain the capacity to make decisions concerning their own bodies. If a person with mental disability is found incapable of consenting to sexual activity, the risk is that the person will have been condemned to an asexual existence.
46. If they are found capable of consenting to sexual activity, cases of sexual abuse of such persons will be rendered harder to prosecute and the risk is that sexual predators will go free if the prosecution is not able to show lack of consent through other evidence. In the case of *People v Thompson* (142 Cal. App. 2006), a Court in the State of California, USA observed:

“Obviously, it is the proper business of the state to stop sexual predators from taking advantage of developmentally disabled people. Less obviously, however, in doing so, the state has restricted the ability of developmentally disabled people to have consensual sex.”
47. The World Health Organization holds that there are many different types of mental disorders. The Disorders are categorized as follows:
  - a. Anxiety disorders: These are characterized by excessive fear and worry and related behavioural disturbances. Symptoms are severe enough to result in significant distress or significant impairment in functioning. There are several different kinds of anxiety disorders, such as: generalized anxiety disorder (characterized by excessive worry), panic disorder (characterized by panic attacks), social anxiety disorder (characterized by excessive fear and worry in social situations), separation anxiety disorder (characterized by excessive fear or anxiety about separation from those individuals to whom the person has a deep emotional bond), and others;
  - b. Depression: This is different from usual mood fluctuations and short-lived emotional responses to challenges in everyday life. During a depressive episode, the person experiences depressed mood (feeling sad, irritable, and empty) or a loss of pleasure or interest in activities, for most of the day, nearly every day, for at least two weeks. Several other symptoms are also present, which may include poor concentration, feelings of excessive guilt or low self-worth, hopelessness about the future, thoughts about dying or suicide, disrupted sleep, changes in



appetite or weight, and feeling especially tired or low in energy. People with depression are at an increased risk of suicide;

- c. Bipolar disorder: People with bipolar disorder experience alternating depressive episodes with periods of manic symptoms. During a depressive episode, the person experiences depressed mood (feeling sad, irritable, and empty) or a loss of pleasure or interest in activities, for most of the day, nearly every day. Manic symptoms may include euphoria or irritability, increased activity or energy, and other symptoms such as increased talkativeness, racing thoughts, increased self-esteem, decreased need for sleep, distractibility, and impulsive reckless behaviour. People with bipolar disorder are at an increased risk of suicide;
  - d. Post-Traumatic Stress Disorder (PTSD): This may develop following exposure to an extremely threatening or horrific event or series of events. It is characterized by all of the following: re-experiencing the traumatic event or events in the present (intrusive memories, flashbacks, or nightmares); avoidance of thoughts and memories of the event(s), or avoidance of activities, situations, or people reminiscent of the event(s); and persistent perceptions of heightened current threat. These symptoms persist for at least several weeks and cause significant impairment in functioning;
  - e. Schizophrenia: This is characterized by significant impairments in perception and changes in behaviour. Symptoms may include persistent delusions, hallucinations, disorganized thinking, highly disorganized behaviour, or extreme agitation. People with schizophrenia may experience persistent difficulties with their cognitive functioning;
  - f. Disruptive behaviour and dissocial disorders: This disorder, also known as conduct disorder, is one of two disruptive behaviour and dissocial disorders, the other is oppositional defiant disorder. Disruptive behaviour and dissocial disorders are characterized by persistent behaviour problems such as persistently defiant or disobedient to behaviour that persistently violate the basic rights of others or major age-appropriate societal norms, rules, or laws. Onset of disruptive and dissocial disorders, is commonly, though not always, during childhood;
  - g. Neurodevelopmental disorders: Neurodevelopmental disorders are behavioural and cognitive disorders that arise during the developmental period, and involve significant difficulties in the acquisition and execution of specific intellectual, motor, language, or social functions. Neurodevelopmental disorders include disorders of intellectual development, autism spectrum disorder, and attention deficit hyperactivity disorder (ADHD) amongst others. ADHD is characterized by a persistent pattern of inattention and/or hyperactivity-impulsivity that has a direct negative impact on academic, occupational, or social functioning. Disorders of intellectual development are characterized by significant limitations in intellectual functioning and adaptive behaviour, which refers to difficulties with everyday conceptual, social, and practical skills that are performed in daily life. Autism spectrum disorder (ASD) constitutes a diverse group of conditions characterized by some degree of difficulty with social communication and reciprocal social interaction, as well as persistent restricted, repetitive, and inflexible patterns of behaviour, interests, or activities.
48. With the above categorization, I do not think that it would be prudent for the courts to treat persons with mental disabilities in the same manner or place them in one general category when considering the issue of their capacity to consent to sexual activity. My view is that where the prosecution relies on the fact that the complainant lacked capacity to consent owing to his/her mental disability, they should adduce medical evidence to prove that indeed, the health condition of the complainant rendered them incapable of consenting to sexual activity. It would be prudent for the prosecution to call medical



experts to testify rather than producing their reports through the investigating officers or other medical practitioners not qualified in the relevant field. Such expert evidence will guide the court in resolving the issue of capacity to consent. It should be remembered that persons with mental disability do not lose their fundamental rights merely because of their disability. The degree and extent of disability can never be the same for all persons.

49. Having analyzed Kenyan case law as well as the *Sexual Offences Act*, I am of the considered view that before the court accepts the assertion that the alleged victim is a person of mental disability, the court must satisfy itself that indeed, the person concerned suffered from mental disability. The mental disability relates to the time of commission of the alleged offence. My view is that in order to benefit from the presumption under section 44 of the *Sexual Offences Act*, the Prosecution must prove the following:

- i. That the complainant herein was, at the time of commission of the offence, suffering from a mental disability to the extent that she was unable or incapable of communicating to the accused whether she consented to the sexual act;
- ii. That the accused person knew of the complainant's mental disability and inability to communicate whether she had consented to the sexual act.

50. Once the prosecution proves the above, the burden shifts to the accused person to adduce sufficient evidence to show that the complainant had capacity to communicate her consent and did consent or that the accused person reasonably believed that consent had been given. In the American case of *Commonwealth v Burke* (1983) 390 Mass. 480, 484, it was held that in order to give consent, a person must have the capacity to do so. Section 3 of the *Sexual Offences Act* provides as follows:

- “(1) A person commits the offence termed rape if—
- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
  - (b) the other person does not consent to the penetration; or
  - (c) the consent is obtained by force or by means of threats or intimidation of any kind.”

51. Section 2 of the *Sexual Offences Act* defines the term “penetration” as the partial or complete insertion of the genital organs of a person into the genital organs of another person. From the above provisions, I gather that the key ingredients of the offence of rape are as follows:

1. The accused person must have committed an act which causes the partial or complete insertion of his or another person's genital organ into the genital organ of another person or the accused person's genital organ. My understanding of the law is that it does not matter who inserts, what matters is who causes the insertion. For instance, a woman who causes a man to insert his penis into her vagina under the circumstances referred to in section 3 above may be guilty of rape. In a nutshell, the prosecution must prove penetration;
2. The penetration must have been made without the consent of the victim or the victim must have consented owing to force, intimidation or threats;
3. Positive identification of the accused person. The evidence of the prosecution must show that the accused person was positively identified as the person who committed the impugned act against the complainant or victim.



Although the mental capacity or condition of the victim in a case of rape is not an ingredient of the offence, it is important to address the issue of whether or not the complainant was a person with mental disability at the time of offence. I say so because the prosecution relies on the fact of mental disability to show that there was no consent by the complainant to the impugned sexual activity. To this end, the prosecution was bound to prove that:

- a. The complainant was suffering from a mental disability at the time of the incident complained of;
- b. Owing to the mental disability, the complainant was unable to appreciate the nature and reasonably foreseeable consequences of the sexual activity done against her; or
- c. The complainant was able to appreciate the nature and reasonably foreseeable consequences of the sexual act but was unable to act in accordance with that appreciation;
- d. Owing to the mental disability, the complainant was unable to resist the commission of the sexual act; or
- e. Owing to the mental disability, the complainant was unable to communicate her unwillingness to participate in the sexual activity complained of.

52. Mental disability must be proved by medical evidence and not mere oral testimony. The prosecution produced in evidence a mental state assessment report prepared by one Dr. J.M. Masila. The report is dated 31/7/2023. The assessment was done slightly over one month from the date of the alleged incident. According to the report, the appearance and behaviour, mood, thoughts, orientation, speech, perceptions, concentration, judgment and insight of the complainant were all normal. The only abnormality indicated was her memory. The doctor indicated that the complainant had suffered mental illness since the year 2020. The doctor concluded that the complainant had mental illness and that she had reduced testamentary capacity owing to the illness. The doctor further stated that at the time of incident, the complainant was having an acute episode. It is not clear how that was established.

53. According to the Black's Law dictionary, 10<sup>th</sup> edition, testamentary capacity means the mental ability to prepare a will. It is described as the ability to recognize the natural objects of one's bounty, the nature and extent of one's estate and the fact that one is making a plan to dispose of the estate after death. It is also described as someone's ability to do a thing; the ability or power to do or experience something. Quite unfortunately, the doctor who examined and assessed the complainant was not called to testify. It is therefore not clear what the good doctor meant by reduced testamentary capacity. The doctor would have shed light on whether or not the complainant was in a position to appreciate the nature and consequences of the sexual act.

54. Section 125 of the [Evidence Act](#) provides:

“All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether body or mind) or any similar cause.

- 2) A person suffering from mental illness is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.”



55. The above provision calls for a *voire dire* examination by the court to determine the competence of a witness, and in this case, one with mental disability, to testify. From the record, it appears that the court that took the complainant's testimony did not conduct a *voire dire* examination. In the authority of David Ndumba (*supra*), the Court of Appeal observed that failure to conduct a *voire dire* examination was not fatal. As already indicated, I did not take the testimony of the complainant. The record indicates that when the complainant stated her name and where she stayed, the prosecution counsel informed the court that the complainant had difficulties in expressing herself. No observations were made by the court concerning the complainant's behaviour and speech. The complainant then gave her testimony.
56. I have considered the complainant's testimony. I note the following:
1. The complainant knew her name and where she stayed;
  2. The complainant knew the accused person even by name. She also knew that the accused person was her neighbour;
  3. The complainant was able to give a clear account of what happened to her;
  4. The complainant was able to appreciate the fact that the accused person had sexual intercourse with her on the material day;
  5. The complainant was able to appreciate the fact that sexual intercourse leads to pregnancy. She was able to state that as a result of the accused person's sexual activity against her, she was able to get pregnant;
  6. The complainant was able to understand the questions that were put to her in both examination in-chief and in cross-examination and was able to give rational answers.
57. Based on the record, I find that the complainant was a competent witness. She was able to appreciate the nature and consequences of the sexual act against her. The complainant testified that she could not scream because the accused person had covered her mouth. I find that the complainant was able to act in accordance with the appreciation of the sexual act but was prevented from doing so by the accused person. She stated that the accused person used force to have sexual intercourse with her. There is no indication that the complainant's mental disability prevented her from resisting the commission of the act or made her unable to communicate her unwillingness to participate in the act.
58. From the evidence on record, the complainant was able to report to her children and neighbours that she had been raped. This was when she was found in the accused person's house. The complainant testified after five months from the date of the incident but was still able to narrate what happened to her. She narrated to the police and hospital staff what happened to her. She was even able to recall that the accused person was the father to one of her children. The complainant does not strike me as a person with a serious memory problem as depicted in the mental assessment report. From my assessment of the complainant based on the evidence on record, I do not think that she fits the threshold of a person with mental disability for purposes of the *Sexual Offences Act*.
59. The complainant might have been suffering from mental illness but the circumstances of the case show that the illness did not affect her judgment and thoughts. The complainant had the knowledge of the nature and consequences of sexual act that was committed against her. Her level of intelligence was adequate for acceptance of her evidence. She was able to narrate rationally, what happened to her. By stating that the accused person covered her mouth thereby preventing her from screaming and that he forcefully had sexual intercourse with her, the complainant was communicating that she did not voluntarily participate in the sexual activity. Judging from the totality of the circumstances, I find that



the complainant had capacity to consent but did not do so. I find that the accused person was properly charged with the offence of rape. I will proceed to determine whether the ingredients of the offence of rape have been satisfied by the prosecution.

### **Penetration**

60. The only direct evidence in respect of the offence is that of the complainant herself. In *Bassita Hussein v Uganda*, Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda held as follows:
61. The Act of sexual Intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence must always be adduced in every case of Defilement to prove sexual intercourse or penetration. Whatever evidence the Prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt".
62. In most cases, penetration is proved by testimony which may be corroborated by medical evidence. However, absence of medical evidence does not ipso facto mean that there was no penetration-See the case of *Fappyton Mutuku Ngui v Republic* [2014] eKLR. I did not take the evidence of the complainant. The record indicates that the complainant is a person of mental disability. A report on her mental assessment dated 31/7/2023 from Makueni County Referral Hospital confirms that the complainant has had mental illness since 2020 and has reduced testamentary capacity. However, the record shows that the complainant was able to narrate what happened to her. She did not state the exact date(s) but was clear that the accused person raped her and that she got pregnant. She was able to express herself to the best of her ability.
63. The complainant was clear that she was going to the market when the accused person took her to his home, removed her clothes, removed her panty, removed his trouser then raped her. I am not sure whether the complainant used the word "rape" in her testimony but that is what is on record. The complainant's further testimony indicates that the accused person forced her to have sex with him. That she got pregnant and gave birth on 17/10/2023 and that the accused person was the father to her child. The accused person did not challenge the complainant's testimony on the issue of penetration. PW 2, PW 3 and PW 4 all testified that the complainant was found in the accused person's house on the material night. The accused person admitted that the complainant was found in his house but stated that it was on 17/6/2023. The Clinical officer testified that when the complainant was examined on 25/6/2023, she was found to be 24 weeks pregnant. This translates to 6 months pregnant.
64. It is evident that the pregnancy could not have been as a result of the complained act of 24/6/2023. The pregnancy must have been as a result of possible sexual intercourse that occurred sometime in January, 2023. The DNA report produced in evidence confirms that the accused person is the father to the child born of the complainant. It can therefore be safely inferred that the accused person had sexual intercourse with the complainant sometime in January, 2023. The complainant did not state in her testimony that the accused person had done the same act to her on previous occasions but from the patient card produced in evidence, there is an indication that the same perpetrator had "raped" the complainant on several occasions.
65. In his unsworn defence, the accused person neither denied nor admitted that he had sexual intercourse with the complainant on the material day. The accused person did not deny that he was the father to the complainant's child. He did not dispute the DNA results at all. The accused person however admitted that the complainant was found in his house although he mentioned a different date. For proof of penetration, the testimony of the alleged victim is the most important. As already pointed out, the complainant was mentally impaired, although she was able to recall what had happened to



her. The record indicates that the complainant expressly stated that the accused person raped her. She could not state the date when it occurred, perhaps owing to her mental condition but was categorical that she got pregnant and that the accused person was the father to her child. As already indicated, this was proved by the DNA report produced in evidence.

66. I have considered the evidence of the complainant with great caution bearing in mind her level of intelligence. Her statement on what transpired was consistent throughout. There is undisputed evidence that the complainant was found in the accused person's house on the material night. She explained to the people who found her in the house what the accused person had done to her. She was able to state the same thing in court after a period of five months from the date of the incident, despite her mental condition. The complainant's testimony was not shaken in cross-examination and the accused person did not even rebut it when he gave his defence.
67. It is also not in dispute that the accused person is the father to the complainant's child. As already indicated, medical evidence is merely corroborative. I am not surprised that the complainant's genitalia was found to be normal upon examination. The complainant has children and she was pregnant at the material time. It is obvious that sexual intercourse was not a new thing to her. In the circumstances, the fact that no injuries were found on her genitalia does not mean that there was no sexual abuse. The complainant narrated the same story to family and members of public, hospital staff, the police and the court. The complainant testified in court after a period of about five months from the date of the incident but her story did not change, notwithstanding her mental impairment. There is nothing on record to impeach her credibility. I do not see a reason as to why the complainant would concoct such a story. In view of the foregoing, I am convinced that there was penetration of the complainant's vagina by a penis.

### **Consent**

68. Consent or lack of it can be inferred from the witness testimony and other evidence. The evidence of the complainant was that the accused person forced her to have sex with him. That he covered her mouth so that she could not scream. The accused person did not challenge the complainant's testimony on the fact that he used force to penetrate her, by way of cross-examination or otherwise. In his defence, the accused person did not allege that the complainant consented to the act of sexual intercourse. Therefore, the only evidence on the issue of consent is that of the complainant. Going by the complainant's evidence, I have no reason to doubt that the penetration was without the complainant's consent.

### **Identification of assailant**

69. The complainant and the accused person were well known to each other. The evidence from both parties indicates that they were neighbours. The evidence from the prosecution and the accused person's statement in defence indicates that the complainant was found in the accused person's house. The complainant knew the accused person by name. She mentioned the name to her family, the police when she reported the incident and in court when she testified. This was identification by recognition. There is no allegation or evidence of any bad blood between the complainant or her family and the accused person. As already indicated, the accused person neither denied nor admitted having committed the offence. I find that the accused person was positively identified by the complainant as the person who did the heinous act to her.



## Proof

70. In *Philip Nzaka Watu v Republic* [2006] eKLR, it was held that to find a conviction in a Criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic* [2014] eKLR:
71. It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP v Woolmington*, [1935] UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa v R*, [2013] eKLR."
72. In the famous case of *Miller v Ministry of Pensions* [1947] 2 All ER 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:
73. 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."
74. In *Bakare v State* [1987] 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability." (Emphasis mine)
75. I have considered the accused person's defence. I am aware that an accused person is under no duty to prove his/her innocence. The onus is on the Prosecution to prove its case against the accused person beyond reasonable doubt. The standard of proof "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see *Clarence Victor, Petitioner 92-8894 v. Nebraska*, 511 U.S. 1 [1994]; *Rex v. Summers*, [1952] 36 Cr App R 14; *Rex v. Kritz*, [1949] 33 Cr App R 169, [1950] 1 KB 82 and *R. v. Hepworth*, *R. v. Feamley*, [1955] 2 All E.R. 918). Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged.
76. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear



conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt. The accused person gave an unsworn statement. What is the probative value of an unsworn statement by an accused person? In the case of *Mercy Kajuju & 4 Others v Republic* [2009] eKLR, Emukule J (as he then was) held as follows:

77. I will commence with the unsworn statement of all the accused persons. Although it is an accused person's right to remain silent, or not to give a statement, or evidence on oath, but whenever an accused person elects to make an unsworn statement he gains one major advantage over the prosecution, his statement cannot be tested as to its veracity or truthfulness by way of cross examination whose purpose is directed-
- (1) to test the credibility of the witness;
  - (2) to the facts to which he has deposed in-chief including the cross-examiner's version thereof, and
  - (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose,
  - (4) failure to cross examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.
78. In addition, the estimation of the value of evidence in ordinary cases, the testimony of a witness who swears positively to a fact may receive credit in preference to one who testifies to the negative. For instance, evidence as to what has not been seen would not carry the same weight as evidence as to what has been seen. Little weight will consequently be given to an unsworn statement. That is the disadvantage in an accused person electing to make an unsworn statement."
79. In *May v Republic* [1979] eKLR, the Court of Appeal observed that:
- "The appellant did not give evidence on oath in her defence or call any witnesses. She contented herself with making a short unsworn statement to which reference will be made later. No adverse inference can be drawn against the appellant for electing to make an unsworn statement. She was exercising a right conferred upon her by statute (Section 211(1) of the *Criminal Procedure Code*); see also *Wiston s/o Mbaza v Republic* [1961] EA 274. No such adverse inference was in fact drawn by either court below.....From all this, we are satisfied that an unsworn statement is not evidence as that expression is generally understood. It has no probative value, but should be taken into consideration in relation to the whole of the evidence."
80. Having taken into consideration the prosecution evidence as well as the accused person's defence, I find that no reasonable doubt exists against the contention that the accused person committed the offence on 24/6/2023. There is also evidence to show that he committed the sexual act on a previous occasion(s) thereby putting the complainant in the family way. For reasons already stated herein above, I am satisfied that the complainant told the truth.

## Disposition

81. In view of the foregoing, I find that the prosecution has proven its case against the accused person beyond reasonable doubt. Consequently, I hereby find the accused person GUILTY of the offence of Rape contrary to section 3(1) (a) and (b) as read with section 3(3) of the *Sexual Offences Act*. As the glove fits, I must, as I hereby do, Convict the accused person accordingly. Having convicted the accused person on the main count of Rape, I make no finding on the alternative charge of committing an indecent act with an adult contrary to section 11(A) of the *Sexual Offences Act*. It is so decreed.



**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 8<sup>TH</sup> DAY OF MAY, 2025.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**

**HON Y.A. SHIKANDA**

