Republic v Lilya (Sexual Offence E105 of 2021)
[2025] KEMC 179 (KLR) (5 June 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

SEXUAL OFFENCE E105 OF 2021

YA SHIKANDA, SPM

JUNE 5, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

SHADRACK MUTINDA LILYA ..... ACCUSED

JUDGMENT

1. Shadrack Mutinda Lilya (hereinafter referred to as the accused person) is charged with the offence of defilement as well as an alternative charge of committing an indecent act with a child. In the main count, the accused person is charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars of the offence are that on 1/11/2021 in Mulangoni [Particulars Withheld], Nzaui Sub-county within Makueni County, the accused person intentionally caused his penis to penetrate the vagina of ANP, a child aged 9 years. The accused person is alternatively charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence are that on the same day and at the same area, the accused person intentionally touched the vagina of ANP aged 9 years using his penis. 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

2. The prosecution case was wholly heard by another Magistrate who was subsequently transferred. Upon taking directions under section 200(3) of the *Criminal Procedure Code*, the matter proceeded from where it had reached. The prosecution called a total of four (4) witnesses in a bid to prove its case against the accused person. PW 1 ANP (hereinafter referred to as the complainant) testified that one day when she was on her way home from school, she found a man hiding. The man called her and asked

her to go for a sweet. The complainant declined and ran away. The man pursued her. He carried the complainant to the bushes and removed the complainant's skin tight and panty then did bad manners to her. That the man then told the complainant that he had infected her with a bad disease.

3. The complainant stated that she was able to recognise the assailant. That the assailant used to graze cattle at the complainant's home and that she had seen him on several occasions. The complainant went home and reported to her father, uncle and grandmother. The matter was reported to the police and the complainant was taken to hospital. The complainant identified the accused person as the person who had done the act to her. PW 2 ENM testified that the complainant was her granddaughter. That on 1/11/2021 the complainant arrived home at about 6:00 pm and when PW 2 inquired from her why she had gone home late, the complainant narrated what had happened to her. PW 2 took the child to hospital and was informed that the child had been defiled.

4. PW 2 stated that the complainant reported that the person who had done the act to her used to graze cattle at their home. That when the accused person and his family members went to the complainant's home, the complainant positively identified the accused person as the one who had defiled her. The accused person was taken to the police station. PW 3 Naomi Wanzia Mutua testified that she was a Clinical officer at Matiliku Sub-county hospital. That on 2/11/2021 she examined the complainant after it was alleged that she had been defiled. The witness concluded that the child had been defiled. She produced the PRC and P3 forms which she filled in respect of the complainant. PW 4 Police Constable Joseph Nzuki testified that he took over the matter from the initial investigating officer who had been transferred. The witness confirmed that the matter had been reported at the police station and investigations were done, where after the accused person was arrested and charged.

The Defence Case

5. When the accused person was placed on his defence, he opted to give a sworn testimony and called three other witnesses. The accused person testified that he used to work at the homestead where the complainant herein stayed. That while on his duties in the morning, the complainant's father called him and stated that the complainant's grandfather wanted to see the accused person. At the house, the complainant's grandfather claimed that it was the accused person who had committed the act against the complainant. He asked the accused person to admit but the latter declined. Members of the accused person's family appeared. The complainant also appeared and was asked whether she knew the accused person's family. She stated that she did not know them.

6. The grandfather asked her whether she knew the accused person and she stated that she used to see the accused person on the road with cattle. She was asked twice whether it was the accused person who had committed the act against her but she did not respond. The complainant's grandfather then stated that it was the accused person who had committed the act. The accused person denied having committed the act and stated that he had been framed up. DW 2 Douglas Alii Lilya testified that the accused person was his younger brother. That on 4/11/2021 he was informed that the accused person was seen with the complainant's father. DW 2 went to the complainant's home and found people in a meeting.

7. The accused person was also present. DW 2 heard the complainant's grandfather state that the accused person had defiled his granddaughter. DW2 called his mother and siblings. That the complainant's grandfather took the accused person to the police post. DW 3 Sammy Lilya Nzuma testified that the accused person was his younger brother. That he was informed that the accused person had been apprehended on allegations that he had defiled the complainant herein. DW 3 proceeded to the complainant's home but arrived while the accused person was being taken to the police post. DW 4 Anna Lilya Nzuma testified that she was the accused person's mother. Her evidence was brief. That the accused person did not defile the child and that he was framed up out of hatred.

Main Issues for Determination

8. 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 was defiled on 1/11/2021;

    b. . If so, whether it was the accused person who defiled the complainant;

    c. If not, whether an indecent act was committed against the complainant on the aforementioned date;

    d. If so, whether such indecent act was committed by the accused person;

    e. Whether the prosecution has proven its case against the accused person to the required standard.

Analysis and Determination

9. I have carefully considered the evidence on record as well as the law applicable. Section 8 (1) of the *Sexual Offences Act* provides as follows:

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".

10. 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. The same section refers to the definition of a child as provided for under the *Children Act*. Section 2 of the *Children Act* defines a child as an individual who has not attained the age of eighteen years. From the above provisions, I gather that the key ingredients of the offence of defilement 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 male child to insert his penis into her vagina may be guilty of defilement if all the key ingredients are satisfied. In a nutshell, the prosecution must prove penetration;

    2. The alleged victim must be below the age of eighteen years. The prosecution must prove that the alleged victim was below the age of eighteen years at the time of incident, that is, proof of age;

    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 child.

11. My view is buttressed by the authority of Dominic Kibet Mwareng v Republic [2013] eKLR where the High Court observed thus:

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

12. Similarly, in the case of C.W.K v Republic [2015] eKLR, Kimaru J (as he then was) held that for the prosecution to sustain the charge of defilement, the prosecution must establish penetration, the perpetrator of the offence and the age of the victim.

Age

13. The particulars of the offence indicate that the complainant was aged nine (9) years old at the time of incident. In the case of Moses Nato Raphael v Republic [2015] eKLR, the Court of Appeal pronounced itself thus:

> " On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability".

14. In Francis Omuroni v Uganda, Criminal Appeal No. 2 of 2000, it was held that:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense".

15. In view of the foregoing, it cannot be said that age for purposes of sexual offences can only be proved by documentary or medical evidence. Nonetheless, the prosecution produced in evidence a copy of the complainant's certificate of birth which indicates that the complainant was born on 20/04/2012. This implies that as at 1/11/2021 when the offence is said to have been committed, the complainant was aged slightly above 9 years and six months. In cases of defilement, as far as age is concerned, all that the prosecution needs to prove is that the alleged victim was below the age of eighteen years at the time of offence. However, proof of age must be beyond reasonable doubt since age is a key ingredient of the offence. In the case of Kaingu Elias Kasono v Republic Criminal Appeal No. 54 of 2010, the Court of Appeal sitting at Malindi held as follows

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

16. I have no doubt that the complainant was a minor at the material time.

Penetration

17. The only direct evidence in respect of the offence is that of the complainant herself. The complainant testified on 24/8/2022 at the age of about 10 years and 4 months. According to the record, she gave evidence on affirmation after the court conducted a voire dire examination and was convinced that the complainant understood the importance of telling the truth. From the voire dire examination, it

would appear that no effort was made to ascertain whether the complainant was possessed of adequate intelligence for acceptance of her evidence and whether she understood the meaning and sanctity of an oath. It would appear that the trial court was only concerned with the issue of whether she understood the "importance" of telling the truth.

18. It is also not clear why the trial court opted for affirmation instead of oath. An oath and an affirmation are both solemn pledges made to ensure the truthfulness of a statement or promise, but they differ in their invocation of a higher power. An oath is a pledge made with reference to God or a Supreme Being whereas an affirmation is a pledge made without any such reference, relying on the individual's personal honour or conscience. Despite the difference, both are legally equivalent and carry the same weight.

19. Section 124 of the *Evidence Act* provides as follows:

> " 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."

20. Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath, but that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth.

21. The question of who is a child of tender years for purposes of evidence was settled by the Court of Appeal. In the case of Maripett Loonkomok v Republic [2016] eKLR, the Court of Appeal held as follows:

> " The question therefore is, who is a child of tender years? The *Sexual Offences Act* and the *Oaths and Statutory Declarations Act* are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R,Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination."

22. The complainant herein gave testimony upon affirmation. Her evidence does not therefore fall under the ambit of section 124 of the *Evidence Act*. This implies that the requirement of corroboration or giving reasons as to why the trial court is satisfied that the minor is telling the truth does not arise. I

am guided by the authority of Johnson Muiruri v Republic [1983] KLR 445, in which the Court of Appeal held that:

> " In our view corroboration of evidence of a child of tender years is only necessary where such a child gives unsworn evidence".

23. The court however added that in such circumstances, the trial court should warn itself that it would be unsafe to convict without corroboration. Similarly, in the case of Kibageny Arap Kolil v R [1959] EA 82, the Court of Appeal for Eastern Africa held that

> " But even where the evidence of a child of tender years is sworn (affirmed) then although there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it if uncorroborated without warning itself and the assessors if any of the danger of doing so.....In short we are of the view that, in law, evidence of a child of tender years given on oath after voire-dire examination requires no corroboration but the court must warn itself that it should in practice not base a conviction on it without looking for and finding corroboration for it."

24. The proviso to section 124 of the *Evidence Act* makes an exception for the requirement of corroboration of unsworn testimony of a child of tender years in criminal proceedings involving sexual offences where the only evidence is that of the alleged victim. The provision empowers the court to convict an accused person if, for reasons to be recorded, the court is satisfied that the alleged victim is telling the truth. In my considered view, one of the main reasons as to why a court would be satisfied that the alleged victim is telling the truth is the presence of corroborative evidence. Whether the testimony of the alleged victim of tender years is given on oath or not, the court must of necessity exercise great caution before convicting an accused person. The question as to whether there is corroborative evidence becomes paramount. I say so because, in criminal proceedings, it is the duty of the prosecution to prove its case against the accused person beyond reasonable doubt. In view of the foregoing, I hereby warn myself that although the complainant herein gave evidence on affirmation, it would be unsafe to convict the accused in the absence of corroborative evidence. I will seek to be satisfied that indeed, the complainant told the truth.

25. The complainant testified that she was on her way home from school when she saw a man hiding. The man called her for a sweet but the complainant ran away. That the man pursued her and when he caught up with her, he carried her to the bushes, removed her inner clothes and did "bad manners" to her. The record indicates that the complainant pointed at her 'private part" while narrating what had happened to her. It is not clear what "private part" meant in that context. That when the person was done, he told the complainant that he had infected her with a bad disease. The complainant further testified that when the person did the act to her, the place she uses for urinating was paining. That the doctor examined that part when she was taken to hospital.

26. As already indicated, the only eye-witness who was called to testify was the complainant. Indeed, majority of sexual offences are usually committed in secrecy and as such, it would be difficult to get an eye witness apart from the alleged victim. In Bassita Hussein v Uganda, Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda held as follows:

> " 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".

27. 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. The medical evidence on record indicates that the complainant was first examined on 2/11/2021. That was the following day following the alleged incident. Upon examination, it was found that the vagina was reddish and bruised. The medical examiner indicated that the hymen was "not intact." I wish the clinical officer who examined the complainant would have been clearer instead of indicating not intact. Nevertheless, this would mean that the hymen was interfered with. Given the complainant's testimony coupled with the medical evidence, I am satisfied that there was penetration of the complainant's vagina.

28. What may not be clear from the evidence is what was used to penetrate the complainant's vagina. In the authority of Muganga Chilejo Saha v Republic [2017] KECA 359 (KLR), the Court of Appeal held:

> " Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M M v R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her."

29. Similarly, in Daniel Arasa v Republic [2014] KEHC 3074 (KLR), the High court observed:

> " It is common knowledge in this country and the court may thus take judicial notice that the words "Tabia Mbaya" i.e. bad manners coming from a young girl who has been a victim of sexual violence connotes nothing but sexual intercourse. Children in particular would always refer to sexual intercourse as "Tabia Mbaya" perhaps due to shyness or they may not know what description to give to such act. Suffice to hold that "Tabia Mbaya" is euphemism for sexual intercourse in sexual offences."

30. In view of the foregoing, I find that penetration was by a penis.

Identification of the assailant

31. It is not in doubt that the complainant and the accused person were neighbours. The accused person alleged that he used to work at the complainant's home or rather, where the complainant stayed. From

the circumstances of the case, it is only the complainant that could positively identify her assailant. In her evidence in-chief as appears on the record, the complainant stated as follows:

> " I identified the person, he was grazing at our home. He had asked me for drinking water and I knew you (sic). He was grazing at the back of my father's house. I had seen him many other times. I can see him in court."

32. The testimony of PW 2 was that when the complainant returned home, she narrated that a man had held her, taken her to the bush and done bad manners to her. That the man who defiled her used to graze at her parent's land. According to PW 2, the complainant stated that it was the accused person. That the complainant was called from school whereupon she positively identified the accused person as the one who had committed the act. The testimony of PW 4 was that the incident was reported to the police on 2/1//2021. That the complainant reported that she had been defiled by a stranger. This implies that the identity of the assailant in whatever form was not given to the police at the time the matter was reported.

33. The matter was reported to the police on 2/11/2021, and the medical documents filled on the same day. The accused person is said to be a neighbour to the complainant's family and according to him, he used to work there. He cannot therefore be said to be a stranger to the family. If the complainant and her family reported that the complainant was defiled by a stranger, it simply means that they were not sure of who had committed the act. It was not until 4/11/2021 that the accused person was apprehended by the complainant's family and taken to the police station. If the police had information on the identity of the assailant who was said to be the complainant's neighbour, why did they not arrest him when they had all the information and documentary evidence by 2/11/2021? My analysis of the evidence on record reveals that between the time of the impugned act and the apprehension of the accused person, the complainant and her family were not aware of who had defiled the child.

34. The accused person was not arrested by the police. There is no evidence to show that upon his arrest, the complainant confirmed to the police that it was the accused person who had committed the act. I doubt that the complainant had given the description of her assailant to the police the way she did in court. Had she done that, the accused person would have been arrested on 2/11/2021 by the police. There is no evidence to show that it was the accused person alone who grazed cattle on the land belonging to the complainant's family. The police officer who investigated the matter was not called to testify. It is therefore not clear how he was convinced that it was the accused person who committed the act yet the family had reported that the complainant had been defiled by a stranger.

35. PW 2 testified that the accused person and his family went to the complainant's home and asked who had defiled the complainant. That the complainant was called from school whereupon she positively identified the accused person. This piece of evidence on identification of the accused person was not mentioned by the complainant. On the other hand, the accused person stated that he was called by the complainant's father and taken to the complainant's home and later, the complainant appeared. That the complainant was not able to identify the accused person as the perpetrator. There is no evidence to show that the complainant told the police that she knew the person who had committed the act.

36. Furthermore, the PRC form indicates that when the complainant was taken to hospital, the history given was that the alleged perpetrator was unknown. That she was defiled by a person who "forcefully caught her." This history was given at the hospital after the matter had been reported to the police. Similarly, Part I of the P3 form, usually filled by the police indicates that the complainant reported to have been defiled by a person not known to her. The same P3 form indicates that the complainant informed the clinical officer that she did not know the perpetrator well. How then did the complainant suddenly know the perpetrator after a few days? In Mwenda v Republic [1989] KLR 464, the Court

of Appeal held that whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, special need for caution before convicting in reliance on the correctness of the identification is necessary.

37. The Court of Appeal in the case of Marube & Another v Republic [1986] KLR 356 observed that in the evaluation of the evidence of the identifying witness, the court must ensure beyond all reasonable doubt that the witnesses were honest and unmistaken about their identification. In Kiarie v Republic [1984] KLR 739, the Court of Appeal was of the opinion that where the evidence relied upon to implicate an accused is entirely of identification, that evidence should be watertight to justify a conviction. A similar observation was made by the Court of Appeal in the case of Wamunga v Republic [1989] KLR 424 where the court held as follows:

> " Where the evidence against an accused is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction ".

38. Further, in the case of Simiyu & Another v Republic [2005] I KLR 192 at page 195 the Court of Appeal observed:-

> " In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought to be given first of all by person or persons who gave the description and purported to identify the accused and then by the persons or person to whom the description was given. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity."

39. Similarly, in the case of Francis Kariuki Njiru & 7 others v Republic [2001] eKLR, the same court held:

> " The law on identification is well settled as this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witnesses gave a description of his or her attacker or attackers to the police at the earliest opportunity." (Emphasis mine)

40. In Maitanyi v Republic [1986] KECA 39 (KLR), the Court of Appeal held as follows:

    1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult;

    2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description;

    3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before decision is made;

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

41. Being guided by the above authority, I hereby warn myself of the danger of relying on the evidence of a single identifying witness. Unfortunately, no inquiry was made by the then trial court into the circumstances under which the complainant was able to identify her assailant. With the pitfalls in the prosecution evidence, I am not convinced that the complainant positively identified the accused person as her assailant.

Whether the prosecution has proven its case

42. I have considered the accused person's defence bearing in mind that he shoulders no duty to prove his innocence. The gist of the accused person's defence is that he was framed up. It is the word of the complainant against that of the accused person, bearing in mind that the burden is on the prosecution to prove the allegation against the accused person beyond reasonable doubt. 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:

> 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."

43. 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:

> 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."

44. 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)

45. 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.

46. 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. I cannot state with certainty that the complainant lied to court when she mentioned the accused person as her assailant. However, I am equally not certain that she told the truth. As already indicated, there is a reasonable possibility that she could have been mistaken as to the identity of the assailant. I cannot rule out the fact that she could have been defiled by another person other than the accused.

47. In as much as I may want to believe the complainant's testimony, I find difficulties in dismissing the accused person's defence. Having analysed the entire evidence on record, I tend to feel that the accused person could be innocent, but I am just gambling on probabilities. I may be wrong. I may be trying to return a guilty man to the community. The accused person's defence is not far-fetched. I have a reasonable doubt, and this is a safeguard that has enormous value in our system. I cannot declare that the accused person is innocent, but I have reason to believe that he may not be guilty. Alan Dershowitz, an American Lawyer and former Law Professor once said that Scientists search for truth, Philosophers search for morality and a criminal trial searches for only one result: proof beyond a reasonable doubt. Has this proof been established? I think not.

48. It is possible that the complainant could have been defiled by the accused person on the material day but with the kind of evidence on record, that remains a mere suspicion which cannot form the basis for a conviction. In the words of the Court of Appeal in the case of Joan Chebichii Sawe v Republic [2003] eKLR, suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. The prosecution must prove the case against the accused person beyond any reasonable doubt. The accused person is not under duty to prove his innocence. He may as well remain silent in defence. For avoidance of doubt, it is my finding that the prosecution has failed to prove its case against the accused person to the required standard.

Disposition

49. In view of the foregoing, I find that the prosecution has failed to prove its case against the accused person beyond reasonable doubt. Consequently, I hereby find the accused person not guilty and proceed to acquit him of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, pursuant to the provisions of section 215 of the *Criminal Procedure Code*. Having acquitted the accused person on the main count of defilement, it follows that the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* suffers the same fate for the same reasons. For avoidance of doubt, the accused person is equally acquitted of the alternative charge. It is so decreed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 5TH DAY OF JUNE, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.