**Director of Public Prosecutions v Mrabu (Sexual Offence E069 of 2021) [2022] KEMC 40 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEMC 40 (KLR)

**REPUBLIC OF KENYA**

**IN THE KWALE LAW COURTS**

**SEXUAL OFFENCE E069 OF 2021**

**ZK KAGENYO, RM**

**MAY 26, 2022**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... REPUBLIC**

**AND**

**BARAKA NDEGWA MRABU ..... ACCUSED**

## JUDGMENT

### Introduction

1. The accused person was arraigned on the 2nd day of December 2021 with an indictment of Defilement contrary to section 8(1) as read with 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 20th day of November 2021, at [Particulars Withheld] within Kwale county in Coast region, unlawfully and intentionally caused his penis to penetrate the vagina of B.O.O a girl aged 14 years old.

2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 20th day of November 2021, at [Particulars Withheld] of Kwale county in Coast region, intentionally and unlawfully touched the vagina of B.O.O a girl aged 14 years with his penis.

3. The accused denied the charges and a trial ensued.

4. The DPP's case was conducted by learned prosecution counsel Ms. Luseno. The accused person was represented by the firm of Chimera Advocates and substantively by learned counsel Ms. Shauri Fadhila from the said firm of advocates. At all times, the accused person was present in court. The matter was conducted in Kiswahili Language, the language of choice by the accused.

### DPP'S Case

5. The DPP, to discharge their duty under section 107 of the *Evidence Act* called a total of 4 witnesses.

6. PW 1 was B.O a girl aged 15 years, who is the complainant. The court having satisfied itself that she was not of tender age, she was sworn and she gave her evidence that her age is 15 years which could be verified through her certificate of birth which indicated her date of birth as 15th February 2007 which she identified as P. MFI 1. She stated that she lives with her parents and she knew the accused very well. PW 1 stated that on 20th November, 2021 she was at home with her mother since the schools were on half term break. At around 1200 noon, she went to buy potatoes at the kibanda which is about 100 Metres from her home. However, she did not get to the kibanda but instead she decided to go get a book from the accused person's aunt home where the accused person frequented and she knew was there, a plot that was just 2 houses away.

7. PW 1 stated that when she got to the plot, she found her friend Susan, who lives with her parents, and the accused person outside the house. PW 1 saluted Susan and then she told the accused that she had come for the book. It was her evidence that the accused on hearing that PW 1 had come for the book, the accused told her that the book was not at his aunt's house but in his house which is still within that area, where he lived with a friend unknown to PW 1. The accused and PW 1 proceeded to that house where they found no one else in the house. as per their stated purpose, the accused gave PW 1 the book and soon thereafter they started going through the accused's past papers which they did for a long time as they did chat other stories.

8. PW 1 stated that she spent that night at the accused person's house, in the same bed with the accused and in the night, they did sex which according to her, she used her vagina while the accused person used his anus. Whereas the accused left at 0400 hours, PW 1 woke up at 0600 hours on 21st November, 2021 and walked out where she was found by the accused's aunt in that house. The said aunt interrogated her on when and why she had gone into the accused's house and afterwards the said aunt left only to come back with PW 1's mother and brother who took her to Diani Police Station. The following day, she was made to record her statement and was taken to hospital where she was examined and treated and was able to identify her medical records in court. She stated that she doesn't know how the accused was arrested and she only saw him at the police station. She confirmed that Baraka the accused is the one before court.

9. On cross examination, PW 1 said that, the accused and herself were in a boyfriend-girlfriend relationship before this fateful day/night even though they had never been in a secluded place by themselves only, before then. She reiterated that she had gone to collect a book and indeed they did revision during daytime and night time when she spent the night there, in addition to chatting.

10. It was her evidence that on that evening when she went home from the collection of the book from Baraka, she found her mother furious who ordered her to go where she had been. She stated that she knew very well the temperament of her mother and if she dared staying any longer near her, there would be an undesired ending between the two of them. According to her, in that state, she would only think of Baraka's place as the safe haven for her to retire to spend the rest of the evening and the night that was nigh which she did after a warm welcome by Baraka after she explained to him the ordeal with her mother.

11. Asked on what transpired during the night, it was her evidence that they "we did sex" and asked what body parts they used, she said that she used her vagina as Baraka used his anus, an experience she never shared with anyone until she was taken at Diani Police Station, detained for the night and interrogated the following day when she recorded her statement.

12. At the end of her evidence, her mother Scolastica Achieng' Otieno, PW 2 took on the witness box and gave her evidence.

13. It was her evidence that on the 20th day of November 2021, she directed her children to prepare lunch for the family. The complainant decided to go and buy some potatoes but when she took too long, her 3rd born daughter came complaining that the complainant had taken too long to return home. PW 2 on being notified this, she proceeded to the point that she knew there was sale of potatoes all in search of the complainant but her efforts were in vain and she went back home and ordered her two daughters to go search for her but their two-hour search was equally futile.

14. At around 1700 hours on that day, the complainant appeared and her mother, PW 2, asked her to get into the house and narrate to her on her past whereabouts. PW 2 stated that PW 1 defied her directives and on noticing that she had defied, she did not utter any other word to her but went back to her activities.

15. PW 2 would later at 1900 hours notice the absence of PW 1 and as the parent she was, she went out looking for her, she looked for her for 2 hours into the night but bore no fruits and went back to her house devastated.

16. The following day, she commenced the search of her missing daughter, PW 1, where by chance she met a lady that she knew was a chapati vendor by the name Janet whom she asked whether she had seen PW 1 and Janet responded that she knew where she was and that for clarity, she disclosed to her that PW 1 was with a certain boy, well known to Janet.

17. On learning this, she called PW 1's father and brother namely M and apprised them on this new development. As PW 1's father was far, he directed her to proceed to the said place in the company of M and J t which she did.

18. Janet, Mathew and PW 2, proceeded to the said house, Janet leading the way. On arrival, J identified the room for them, Mathew knocked the door and PW 1 opened it. Inside there, they found PW 1 alone, she was frightened and noticing this, Mathew was gentle on her. The 4 of them then walked out of that house and PW 2 and her children proceeded to Diani Police Station, where worried of the condition of her daughter, she reported the matter and they were directed to go to the hospital. She identified the medical documents for PW 1 that they obtained at the hospital. PW 2 stated that Janet informed them that the room they found PW 1 belonged to the accused person herein.

19. As she concluded her examination in chief, she said that she did not know the accused before this date neither did she know how he was arrested.

20. On cross examination, it emerged that it was not normal for PW 1 to go missing for that long. Further, she stated that she did not beat PW 1 on the evening of 20th November 2021 after she returned home. She could not confirm whether PW 1 entered into the house or not after she ordered her to. She said that she did not know of any relationship between the accused and PW 1 and for she had done wrong by spending the night outside their house without her authority, she had her detained at Diani Police Station that Sunday. Even though she claimed not being harsh to PW 1, she described herself as a strict disciplinarian.

21. Clinical Officer Rukia Abdalla of Diani Health Clinic was PW 3. She informed the Court that she is the one who attended to PW 1 when she went to their facility complaining of defilement by a person well known to her. According to her, when PW 1 appeared in their hospital, she was of fair general condition and on vaginal examination and tests, she detailed how she established that there was penetration. She stated that she gave her emergency pills both against pregnancy and HIV. She produced the documents that she had prepared being the Post Rape Care Form dated 22nd November 2021 as P. Exh 2, a Medical

Examination Report form, Form P3, dated 22nd November 2021 as P. Exh 3 and the Patient's Record Book dated 22nd November 2021 as P. Exh 4.

22. At the tail end of her examination-in-chief, she added that she observed that PW 1 had some tenderness on her wrist and some markings. after attending to PW 1, she recommended counselling as she observed her to be traumatized. Also, she noted that girl was in the company of her mother who she observed to be harsh on her.

23. On cross examination, she stated that hymen can be lost through other means such as vigorous activity but to make her inference, she reads evidence as a whole, harmonizing the history by the patient and the collected evidence. This was the same reasoning she yielded to when asked on the causes of the foul smell the patient had from her genitals and the markings observed on her hands. In her conclusion, she stood firm that although penetration could be caused by other things such as by use of sex toys, having related the history and the evidence as a whole, it was highly probable that the penetration was by penis.

24. PW 4, the investigating officer, NPS Service No. 254326 PC (W) Maureen Flowce of Diani Police Station was the last prosecution witness. It was her evidence that as PW 1 narrated to her, at noon of 20th November 2021, she had gone out to buy some viazi karai when along the way she met with the accused. She borrowed a book from the him and the accused told her that the book is in his house and he insisted on the 2 going to his house to collect the said book.

25. On arrival at his house, the accused took advantage and closed the door. PW 1 protested and the accused went to a bag which was nearby and got a rope from in there which he used to tie her and laid her on his bed. He defiled her and after he was done, he untied her and ordered her to leave. PW 1 left as ordered and proceeded to her home where she found her angry mother who ordered her to go back to the accused's house. PW 1 went back to the accused's house where she spent the night whereby the two had sex at that night. PW 4's evidence from this juncture tallied with the evidence of PW 1 and PW 2 on how PW 1 was taken from the accused's house to the police station. PW 4 produced the certificate of birth for the complainant as P. Exh 1.

26. On cross examination PW 4 stated that she did not visit the accused's house as the accused refused such visit. She did not have the rope she said was used to tie PW 1 by the accused. She ended up by saying that PW 1 was not coerced to record her statement.

27. After the end of the evidence by PW 4, the DPP closed her case. The court invited both the DPP and the Defence to make their respective closing submissions or arguments but they opted to rely on the record in the file and invited the court to give the ruling under section 210 of the *Criminal Procedure Code*.

28. The accused person was placed on his defence and section 211 of the *Criminal Procedure Code* and Article 50 (2) (i) having been explained to the accused person, he, in person, elected to defend himself by way of tendering sworn evidence. The Defence told the court that they will be calling 2 witnesses. A defence hearing was scheduled.

29. DW 1 was the accused who informed this court that his name is BNM. After the charges were read over to him, both the main and alternative count, he told this court that he maintained his innocence and that on 20th November 2021 at around 1540 hours, he was at his aunt's house, one JN, where there came a girl namely BO who borrowed a Chemistry book from him. They left together to his house to collect the said book from his house. on arrival, DW 1 gave PW 1 the said book and he went back to his aunt's place as the lady went to their home. DW 1 stated that he stayed at her aunt's place until 2100 when he proceeded to his house after taking dinner which was his routine.

30. When he got to his house, DW 1 stated that he found his door locked from inside. He did not know who was inside but when he knocked, PW 1 responded. DW 1 testified that he asked PW 1 what she was doing at his place where she told him that she had been chased away by her mother, and ordered to go back to where she had come from and if she dared to go back to their house, her mother had threatened to kill her.

31. When he heard this, DW 1 informed the court that his next step was to call his mother who lives in Kinango and explained to her that PW 1 had refused to get out of his house and his mother advised him to go back to his aunt's place and explain to her. He said that he went to her aunt's house but he did not find her there and when she came, he explained to her what he had found in his house and his aunt advised him not to go back into his house but instead spend the night at her place which he did.

32. The following day his aunt gave him fare to Kinango to visit his parents as there were such prior arrangements earlier that his aunt would facilitate him to go see his parents once the schools close. He left under the assurance by his aunt that she would deal with PW 1.

33. DW 1 testified that on 30th November 2021, he came back from Kinango, and accompanied by his mother and aunt he was taken to school. He said that this company was necessary as firstly, he had school fees balance and secondly, this time round, he was late to report to school even though he said that he was late to report, firstly due to the said fees balance and secondly due to challenges getting fare from Kinango to Diani.

34. At the school principal's office, he explained what had transpired in his room regarding PW 1 and the school principal dialed the police who came and arrested him. He stated that there was nothing beyond his friendship with PW 1.

35. On cross examination it emerged that DW 1 had known PW 1 for long, and that this was the first time PW 1 had visited him. he stated that he was living alone in his rented room. He said that the following day, he left his aunt's place at 0800 hours to Kinango, and when he came back, he found his house well locked by use of a padlock which he had the keys to.

36. JN was the DW 2, related with the accused by virtue of the accused being her sister's son. She testified that on 20th November 2021, at around 1540 hours there came a girl at her house, who happens to be PW 1, who on her arrival, she borrowed a Chemistry book. The said girl and the accused left and 15 minutes later, the accused retreated alone. At around 2100 hours of the same day, DW 1 received a call from her sister, the accused's mother, telling her that there was a girl at the accused's house. On hearing this, DW 2 left her house to the accused's house but she did not find him in his house but instead, she found a girl.

37. It was her evidence that when she knocked the door for the girl to open, the girl told her that she would not open and if DW 2 insisted, she would take a step that DW 2 should not blame her of. At this juncture, she went back to her house whereupon she found the accused in her house and the he briefed on what had transpired. DW 2 advised the accused that he should spend the night in her house which he did.

38. The following day, DW 2 gave the accused fare to go and see his parents as she had promised him that over that short term holiday, she would facilitate the accused to go and check on his parents at Vivurugani where they live. At around 1000 hours of the following day, she decided to go and check on the status at the accused's house and he found the girl still locked in the house and she decided to report the issue to the village elder but on her way, she met with a woman who was complaining that her daughter had gone missing. On hearing this, she told this woman to accompany her to the accused's house to confirm whether the girl locked inside there is her missing daughter. They proceeded to the

accused's house, in the company of the said woman and her son and upon the door being opened, she identified the girl inside there as hers. She was PW 1. He detailed how the accused person was arrested when the school principal called the police, after informing the accused, her mother and DW 2 that the police had been looking for the accused herein.

39. On cross examination, it emerged that DW 1's house and the accused's house are about 80 metres apart and that she knew PW 1 before that date and where she lived even though she said that PW 1 had never gone to her house before.

40. After the testimony of DW 2, the Defence closed its case.

41. The Court invited the parties to put in their closing arguments but none opted to put in any, relying on the record in the court file.

42. Having heard both parties at their full lengths, the court retired to make its decision.

**Analysis And Determination**

43. The accused person has been charged with the offence of defilement of a child aged 14 years which is proscribed by section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*. In the alternative count he is charged with the offence of committing an indecent act with a child which is proscribed by section 11 (1) of the Sexual Offences.

44. Section 107 of the *Evidence Act* places the burden of proof of all the accusations against the accused person on the DPP. This burden hardly shifts to the accused who on the other hand is to be presumed innocent until the contrary is proven.

45. The standard to which the DPP is to discharge the burden of proof is beyond reasonable doubt as was restated in Joan Chebichii Sawe -v- Republic [2003] eKLR, that the prosecution must prove the guilt of the accused person beyond reasonable doubt. This Court however reminds itself that beyond reasonable doubt does not mean that the DPP must proof every single element or accusation to perfection beyond a shadow of doubt. In his undoubted wisdom, Lord Denning shed light in this in the case of Miller -v- Minister of Pensions [1947] 2 ALL ER 372 where he held that;

> 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 shadow of 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.

46. Section 8 (1) of the *Sexual Offences Act* provides the key elements of the offence of defilement. The said elements were also stated in the case of George Opondo Olunga -v- Republic [2016] eKLR where the court held thus; the critical ingredients forming the offence of defilement are;

    a. Age of the complainant;

    b. Prove of penetration; and

    c. Positive identity of the assailant.

47. These elements were said that the prosecution must proof each of them beyond reasonable doubt by the Court of Appeal in John Mutua Munyoki -v- Republic [2017] eKLR.

**Age of the victim**

48. Rule 4 of the Sexual Offences Rules of Court, 2014 states that;

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

49. In this case, the DPP produced a Certificate of Birth which was not contested. it was for the complainant herein. It was indicating her date of birth as 1st May, 2007. The charges herein were that on 20th day of November 2021, the accused herein defiled the complainant. As at 20th November, 2021, the complainant herein must have been 14 years and 10 days shy to 6 months, old and hence a child as defined in section 2 of the *Children Act*, 2001.

**Penetration**

50. The DPP adduced evidence by way of medical evidence to proof the element of penetration. It was the DPP's case that the medical tests conducted on the 22nd November 2021 demonstrated that the hymen of the complainant had been broken and going by the history and this medical evidence collected, it demonstrated that there was penetration.

51. The main contention by the Defence was what had caused the penetration and whether it could be authoritatively be said that it was human penis and rule out any other manner of penetration such as the sex toys. On this one, the medical practitioner maintained that she was lead by the evidence collected and the history to infer that it was a human penis that had penetrated.

52. With this evidence, the DPP had proven beyond reasonable doubt that indeed there was penetration into the vagina of the complainant and I therefore find that the DPP proved the element of penetration as per the required standards.

**Positive identification of the assailant**

53. The last element the DPP was called upon to prove was the person who penetrated the vagina of the complainant. In her evidence, the complainant testified that she had sex with the accused person. She described her sex experience with the accused person as by use of the vagina on her part and the anus on his part.

54. This Court was at a loss trying to understand how this happened as it is apparent that the court is behind times in terms of modern-day ways of doing things. I say this taking notice of the ordinary course of nature and the ordinary meaning of English words. In the same breadth, the court takes notice that the anus cannot penetrate the vagina and the much it could do was to touch it.

55. It is therefore the finding by this court that even though there is evidence beyond reasonable doubt that there was penetration, it cannot be said that it is the accused person who penetrated the vagina of the complainant without reasonable doubt. Even though the two spent the night together and they had sex in the description of the complainant and hence it is reasonable to suspect that they had penetrative sex, this court reminds itself as was held in the Sawe (supra) case that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

56. The court observed the demeanor of PW 1 as she testified. She was credible witness but seemed to be withholding information in order to protect either the accused person or herself from some insinuations. This was made more apparent to the court when she had become reluctant to testify until

the court read to her the provisions of section 152 of the *Criminal Procedure Code*. The evidence that came out is that the anus of the accused touched the vagina of the complainant.

57. With these established facts, the court considered the defence relied upon by the accused who denied being in the locus in quo at all material times save us for that fleeting moment of handing over the Chemistry book which lasted a few minutes. In Kiarie-v-Republic [1984] KLR, the Court of Appeal guided this Court on how to take and treat the defence of alibi once raised by holding that;

> An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.....

58. The accused person, even though he did not have to prove his alibi beyond reasonable doubt he was duty bound to bring forth material that was sufficient to make the court believe that it was more probable than not that indeed the accused person was not at the scene. He opted to do so by his own sworn statement and that of DW 2.

59. In Erick Otieno Meda v Republic [2019] eKLR, the Court of appeal held that

> In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. (underline mine)
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> This finding was restated in Victor Mwendwa Mulinge –v- R, [2014] eKLR by providing that the burden of proving the truthfulness of the defence laid on the prosecution by stating that,
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> It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution....

60. Often is when this defence is raised during the defence case hearing stage long after the prosecution has closed their case and the investigating officer has technically closed his investigations even though fact finding never comes to an end. Indeed, noting that the accused person does not have any obligation of disclosure, the Court of Appeal in Erick Otieno Meda case (supra) observed that;

> The law prior to the repeal of Section 235 of the *Criminal Procedure Code* required that an accused who wished to rely upon the defence of an alibi, had to give the particulars of the place where he was, and the particulars of the persons with whom he was. The law today is that it is up to the prosecution to displace any defence of an alibi and show that the accused was present at the place, and at the time the offence was committed by the accused or his accomplices.

61. This must be such a task on the prosecution at times and in particular when the matter has taken too long before it got to the defence stage but nonetheless, it is a duty and the legal prescription of executing this duty must be followed to the letter. This challenge to the prosecution being ambushed at the tail end, having closed its case was equally lamented in the Ugandan case of Festo Androa ASenua

vs Uganda, Cr. App. No. 1 of 1998, that was cited with approval in Paul Kabiru Muriithi v Republic [2019] eKLR the Court made the following observation:

> We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence. (underline mine)

62. Having this in mind, once this defence of alibi was raised by the accused person, the prosecution ought to have sought leave under section 212 of the *Criminal Procedure Code* to adduce evidence to dislodge the same if they believed that there was evidence that would discredit the said defence. However, having not done so and without such evidence, how does this court deal with such a defence? The court relied on the finding in Republic vs Geoffrey Wambua Musau [2017] eKLR where the Court held that

> As a general it is not all alibi defence further evidence must be adduced by the prosecution to disapprove the alibi. If the prosecution adduces sufficient evidence to diminish the alibi defence then there is no more burden to prove an established fact. I wish to point out that this case falls under the category where the prosecution never sought leave to investigate the alibi by the accused. The question is, can this court find evidence from the case for the prosecution to destroy the alibi put forth that the accused was elsewhere away from the murder scene.

63. From the above case, the take home by this court is an inference that the superior court is advising it to analyse the evidence in its entirety to find whether the defence of alibi can be reliable for the accused or there is evidence readily on record destroying it.

64. In so doing, this Court considered the instance of the raising of this defence and the defence as a whole. The court placed its reliance on R-v-Sukha Singh S/O Wazir Singh & Others (1939) 6EACA 145 which was cited with approval by the Court of Appeal in Athuman Salim Athuman v Republic [2016] eKLR thus if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there's naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.

> Which similar inference appears to be drawn in by the Court of Appeal in Victor Mwendwa Mulinge vs Republic when it rendered itself thus,
>
> It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution. See Karanja v Republic [1983] KLR 501. This court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought."

65. Based on the foregoing and on the principles set by the Court of Appeal in Erick Otieno case (supra) that;

a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view;

b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial;

c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court; and

d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.,

The court found the belated alibi defence of the accused not credible when weighed against the unshaken testimony of PW 1 and PW 2.

66. In so doing, the court considered the credibility of DW 2 and placed her against the scale set in Joseph Ndungu Kimanyi v Republic [1979] eKLR thus,

> In our opinion the evidence of the complainant does not come up to the minimum standard which we require before upholding a conviction in a criminal case. We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

67. From the evidence of PW 2 and DW 2, it is evident that DW 2 is the Janet that PW 2 was talking about in her evidence. When PW 2 met with DW 2, DW 2 told her that she knew where PW 1 was and indeed she knew that she was with a particular boy. This revelation gave PW 2 the confidence of calling her son and husband and then they proceeded to DW 1's house. during cross examination, this line of evidence was not challenged and therefore I would be inclined to believe her more than DW 2 who states that she told PW2 to follow her and check if the lady she was talking of was her daughter.

68. On the part of PW 1 she stated that she spent the night with DW 1 but DW 1 left at 0400 hours. During her cross examination this line of evidence was not challenged and the contention by the DW 1 that he did not spend the night there way much later to me is an afterthought.

69. PW 1 stated that the following day, she woke up at 0600 hours where DW 2 came and found her in DW 1's house and she interrogated her. On her part, PW 2 stated that she started the search of PW 1 the following day early in the morning and she met with DW 2 who disclosed to her where PW 1 was. Based on the evidence of the two prosecution witnesses, which during the cross examination was not challenged about this 0600 hours meet-up, I am persuaded not to believe DW 2 who said that she went to look at the status of the DW 1's room, for the first time that day, at 1000 hours. The effect of this is that the credibility of DW 2 stands poked and the court would rely on her evidence with caution. Having been convinced that DW 2 indeed went at DW 1's room at 0600 hours the following morning, and going by the defence evidence that DW 1 left for Kinango at 0800 hours, two hours after, the court found that the only inference that could be drawn was that DW 2 was in a mission to make right the wrongs of the accused and with this knowledge that is why indeed they proceeded to school a few days later to the school's principal in the company of DW 1 and his mother.

70. Lastly and to demonstrate how the credibility of the defence witnesses was displaced, PW 1 stated that she went to DW 1 at 1200 noon. DW 1 and DW 2 stated that she went there at 1540 hours. PW 2 did not state the time PW 1 left her house but taking her account of events backwards it falls at uttermost 1400 hours. This time was so crucial at the time of cross examination of PW 1 and PW 2 but it came out as an undisputed issue as it was not raised by the Defence. I find the claim that she went briefly at 1540 hours as an afterthought and as a way of getting off the hook at all cost. The effect is tearing down the credibility of DW 1 and DW 2.

71. Having found so, the Court is convinced that the night of 20th November 2021 ushering in the morning of 21st November 2021, the accused herein spent it at his house in the same bed with the complainant herein and the accused allowed his anus to touch the vagina of the complainant.

72. The accused was charged with an alternative count of indecent act with a child where it was alleged that he allowed his penis to touch the vagina of the complainant. The DPP have not proven that this happened but evidence was adduced that the anus and not the penis touched the vagina.

73. Section 2 of the *Sexual Offences Act* defines indecent act as,

any unlawful intentional act which causes-

a. any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;

b. exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration;

74. This definition, even though short of a conjunction, "or" or "and", between the two sets above, a holistic reading of the same gives this court an impression that it is a disjunctive definition and an offence under (a) above is a complete offence by itself.

75. This Court is convinced that the DPP presented evidence beyond reasonable doubt that an offence of indecent act was committed where the accused allowed his buttocks to touch the vagina of the complainant who is a child and hence an unlawful act. He was not charged with that offence in terms of the particulars.

76. However, section 179 (2) of the *Criminal Procedure Code* says that,

> When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.
>
> In this case, the accused was charged with the offence of defilement and an alternative of indecent act but the evidence lead by the DPP disagreed with the particulars which the accused was defending himself from. If the accused had not been charged with the alternative count of indecent act, this court would convict him of the same as the evidence demonstrated. The court cannot substitute the offence of indecent act as charged, the organ being the penis, to fit it with the evidence adduced, the organ being buttocks, as he is already charged with that particular offence and such substitution cannot be said to be leading to a minor offence although he was not charged with it even though it is a cognate offence. The much the DPP could have done was to amend the charges under section 214 of the *Criminal Procedure Code*.

77. On the other hand, section 186 of the same *Criminal Procedure Code* states that,

> When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the *Sexual Offences Act*, he may be convicted of that offence although he was not charged with it.

78. It is the understanding of this Court that this provision gives this Court the power to convict with any other offence as long, firstly, the accused has been charged of defilement of a child below 14 years and that there is an offence established under the *Sexual Offences Act*. What that means to me, having in mind the case at hand, as long as the accused was charged with defilement, it does not matter if he was charged with the alternative of indecent act and evidence proved otherwise, but the court could convict him of the same offence but in accordance with the evidence as led even without the amendment of the charges by the DPP.

79. However, section 186 of the CPC has a proviso with it that the child must be below 14 years which to me it means that that child is just a second shy to 14 years and after the lapse of that second she doesn't fall under section 186 CPC any longer and can only revert to section 179 (2) CPC. In this case, the accused was charged with the offence of defilement of the girl of 14 years and 5 months and 20 days and hence a conviction cannot be gotten under section 186 of the *Criminal Procedure Code* even though the DPP proved beyond reasonable doubt that the accused allowed his buttocks to touch the vagina of the complainant.

80. The proposition of use of violence on PW 1 by the accused by tying at her hands using a rope as suggested by PW 3 and PW 4 was not supported by evidence of PW 1 and hence rejected.

**Disposition**

81. Having found so, this court hereby dismisses the case against the accused person and forthwith acquits him under Section 215 of the *Criminal Procedure Code* for the main count of defilement of a child aged 14 years which is proscribed by section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* and the alternative count of the offence of committing an indecent act with a child which is proscribed by section 11 (1) of the *Sexual Offences Act*. The accused person who is on bond is together with his surety discharged forthwith. The security documents shall be returned to the surety.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 26TH DAY OF MAY 2022.**

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

In the presence of :

Mr. Felix- Court Assistant.

Ms. Faith Luseno, for the DPP.

Ms. Fadhila Shauri, Counsel for the Accused.

BNM-Accused.