Nyakundi v Republic (Criminal Appeal E135 of 2024)
[2025] KEHC 15034 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15034 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL E135 OF 2024

DKN MAGARE, J

OCTOBER 23, 2025

BETWEEN

JONNES NYAKUNDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the trial court, Hon. P.K Mutai (PM) given on 19.12.2024 in Kisii MCSO No. E072 of 2023.)

JUDGMENT

1. This appeal arises from the judgment of the trial court, Hon. P.K Mutai (PM) given on 19.12.2024 in Kisii MCSO No. E072 of 2023.

2. The Appellant was charged with defilement contrary to Section 8(1) & (4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that the Appellant, on 14.7.20223 in Marani sub-county within Kisii County, intentionally and unlawfully caused his penis to penetrate the vagina of FC, a child aged 16 years.

3. The appellant was charged with alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006. The particulars of the offence were that the Appellant, on 14.7.20223 in Marani sub-county within Kisii County, intentionally and unlawfully committed an indecent act by rubbing his penis against the vagina of FC, a girl aged 16 years.

4. The trial court heard a total of 5 prosecution witnesses. The defence gave sworn evidence and denied the offence. The language he was proceeding in is not indicated. The court found the Appellant guilty and having convicted him, sentenced him to serve 15 years imprisonment. Aggrieved, the Appellant lodged a Petition of Appeal dated 30.12.2024 raising grounds of appeal as follows:

a. The learned trial magistrate erred both in fact and law by failing to properly evaluate and analyse the evidence on record thus arriving at erroneous decision of convicting the appellant on a case whose evidence did not meet the legal threshold of "proof beyond reasonable doubt" as required in law.

b. The learned trial magistrate erred in law and in fact by holding that the appellant committed the offence yet the medical evidence, oral evidence was at variance and glaringly contradictory with the particulars of the offence as contained in the charge sheet used against the appellant in the trial court.

c. The learned trial magistrate erred in law and in fact by convicting the appellant for the offence of defilement based on oral evidence by the prosecution witnesses that the complainant and the accused were merely cohabiting as husband and wife.

d. The learned trial magistrate erred in law and in fact by convicting the appellant for offence of defilement based on ambiguous statement/oral evidence by the complainiant that she lived as husband and wife and wrongly equated the same to mean defilement hence wrongfully holding that the appellant indeed committed the offence.

e. The learned trial magistrate erred in law and in fact by holding that the appellant had committed the offence of defilement yet the complainant testified that she engaged in sexual act which was not descriptive and evidence of the act of penetration as defined under section 2 of the *Sexual Offences Act*, No. 3 of 2006.

f. The learned trial magistrate erred in law and in fact by ignoring the evidence of the complainant that she was not with the appellant in Kisii on the 14th day of July, 2023 when the offence was allegedly committed.

g. The learned trial magistrate erred in law and in fact by convicting the appellant on insufficient and uncorroborated evidence.

h. The learned trial magistrate erred in law and in fact by failing to consider and evaluate the medical expert's evidence.

i. The learned trial magistrate erred in law and in fact by holding that there was evidence of penetration based on a broken hymen but omitted to state that the same was not fresh and there was no abrasions.

j. The learned trial magistrate erred in law and in fact by holding that appellant failed to defend himself by resorting to mitigation, contrary to evidence on record.

5. In effect, the appellant contended that the trial magistrate erred by convicting him despite the prosecution's failure to prove the case to the required standard of proof. This was due to the medical evidence being contradictory and inconsistent with the charge. Further, all the elements of the charge like penetration was not proved. This was due to the fact that the alleged injury was found to be about six months old, long before the alleged offence. He lamented that the court improperly shifted the burden of proof to him.

Evidence

6. PW1 was the minor. The complainant testified that she was 16 years old. Her mother could not afford to take her to school. She was born in 2006. On 15.10.2022 she was at home in Narok. She went to Narok to work and stayed with her sister. Her sister forced her to stay with the Appellant. She went to

the Appellant in Kisii. The Appellant married her. They engaged in sexual act staying together for two months. She told the Appellant that she was underage.

7. On cross examination, it was her case that she left school in class six and she was born in 2006. Her mother was in Narok, knew where she was but never came to see her.

8. PW2 was Alex Bosire. He testified that he was the Chief of Kegosi location. He received news that PW1 was married and he called the Appellant to his office. The Appellant came with PW1. He established that PW1 was a minor. He handed the matter to the police station for further investigations. According to him, they were living as husband and wife and had cohabited for 3 months.

9. PW3 was George Lawrence Masiega. He was the Senior Assistant Chief from Kegoge. He knew the Appellant. On 11.9.2023, he received information that the Appellant was cohabiting with PW1. He handed the Appellant to the police.

10. PW4 was No. 12xxx PC Abdi Galgalo based at Kegoge Police Station. On 11.9.2023, PW2 handed over the Appellant to him and the Appellant was later charged with defilement. He produced age assessment report which showed that PW1 was 17 years old. On cross examination, it was his case that he relied on the medical evidence and evidence of witnesses to charge the Appellant. PW1 and the Appellant cohabited.

11. PW5 was the clinical officer, Moses Keumbu. On 11.09.2023 he examined PW1. He relied on the P3 Form and PRC filed in court. According to him, the genitalia was normal. The hymen was broken and no lacerations were noted. There was evidence of penetration. On cross examination it was his case that the age of injuries was 6 months indicating there was defilement from March to September. The examination was on 11.09.2023. He stated that the hymen was broken during intercourse. The charge showed the offence as at 14th July 2023. On re-examination he stated that a non-freshly broken hymen showed continuous sexual act.

12. The Appellant testified as DW1. He testified that he did not commit the offence. He prayed for forgiveness if found guilty.

Analysis

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 held as follows:-

> On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

14. On a first appeal, the appellant is entitled to a fresh and exhaustive re-evaluation of the evidence on record, with the appellate court drawing its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses. In the case of Okeno v Republic [1972] EA 32 at 36, the East Africa Court of Appeal stated as follows on the duty of the court on a first appeal:

> An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.

15. The issue in this case is whether the prosecution proved its case to the required standard. The most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

16. The accused enters these proceedings clothed with the presumption of innocence. That presumption endures throughout the trial and can only be displaced if, and when, the prosecution, on the strength of the evidence presented, satisfies the court beyond reasonable doubt that the accused is guilty of the offence charged. In the case of R vs. Lifchus {1997}3 SCR 320, the Supreme Court of Canada explained the standard of proof as doth:

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

> proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.

17. The legal burden is the burden of proof, which remains constant throughout a trial. According to established principles, it rests upon the prosecution to prove the guilt of an accused person beyond reasonable doubt. This burden does not shift to the accused, save in a few exceptional statutory instances where the law expressly provides otherwise. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

18. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 that:

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

19. The appellant was charged under sections 8(1)(a) (1) and (3) of the *Sexual Offences Act* under which the Appellant was convicted. It provides as follows:

> 8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) ...
>
> (3) ....
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

20. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail in its duty to protect society if it allowed fanciful or speculative possibilities to deflect the course of justice. Lord Denning in Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372 had this to say:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible,

but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.

21. The powers of this Court are circumscribed by Section 382 of the Criminal Procedure Code, which permits a first appellate court to confirm, reverse, or vary any finding, sentence, or order of the trial court. Within these limits, the court is duty-bound to subject the evidence to a fresh and exhaustive examination, reassess the credibility of witnesses, and weigh conflicting testimony to draw its own independent conclusions.

22. Throughout this process, the legal burden of proof remains constant, resting squarely on the prosecution to establish the appellant's guilt beyond reasonable doubt. It is only by carefully scrutinizing the evidence in its entirety, while remaining faithful to the statutory framework, that the court can ensure the appellant receives a full and fair re-evaluation of the case. The section reads as follows:

> 382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

23. In criminal cases, courts must always bear in mind the standard of proof and the grave consequences that a conviction may have on an accused person. In the present case, the Appellant faced a possible sentence of up to fifteen years depending on if the appellant's age is proved to be 16 or 17 years. Such a serious offence demands the clearest and most convincing view of the evidence before depriving a person of liberty for a significant portion of their life. Proof beyond reasonable doubt is the governing standard, particularly in criminal offences whose punishment affects not only the individual but also implicates the wider interests of the state. A conviction and sentence as a sexual offender is a grave stigma that should only attach where the evidence is clear, cogent, and leaves no room for reasonable doubt.

24. The Appellant maintained his innocence. The evidence on record also revealed that there were witnesses mentioned who appeared to have no vested interest in the outcome of the case. PW1's sister, who was said to be living with PW1, was one such witness. The court further notes that PW1's mother, who allegedly was involved with PW1's unnamed sister, in sending PW1 to be married to the Appellant, were neither named nor called to testify. Her absence from the witness list remains unexplained. Section 143 of the *Evidence Act* (Cap. 80, Laws of Kenya) provides as follows:

> No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.

25. The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case, even where some of those witnesses may give evidence adverse to the prosecution's case. This obligation ensures that the trial is conducted fairly and that the court is placed in a position to consider all relevant facts before reaching a conclusion. Failure to call material witnesses may result in an incomplete picture of the events, potentially undermining the prosecution's case and

affecting the court's assessment of the evidence as a whole. In the case of Donald Majiwa Achilwa and 2 other v R (2009) eKLR, the Court stated:

> The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference.

26. The court had also discussed the question of Keter v Republic [2007] 1 EA 135 where it held inter alia that:

> The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.

27. The court must infer that should they have testified, their evidence could have been adverse to the prosecution. In the case of Awii V Republic [2025] KEHC 5626 (KLR), Wakiaga J, underscored the question of adverse inference as follows:

> 33. I have also noted that one very important witness was not called to testify leading to an adverse inference that had he been called it would have adverse to the prosecution case this being John kilonzi who was on duty with the appellant and the complainant and whom the complainant first made a report to.
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> 34. In convicting the appellant, the trail court based the same on speculation which was not supported with evidence on record to wit that the accused had not envisaged that any other person would be within the compound whereas the evidence on record was that there was ongoing construction and that there were three guards on duty in the compound all the time.

28. There was no attempt to have PW1's sister or mother testify or even record a statement. PW2 and PW3 appeared to be the complainants who summoned PW1 and the Appellant and handed them to the police station.

29. In this case the only witness who gave the evidence of penetration was PW1 and the medical report. The minor alleged that she went to the appellant for marriage after her sister and mother ejected her. The appellant was not cross examined on this aspect. The lower court proceeded based on the evidence of the medical report that the hymen was broken, to find penetration by the Appellant.

30. However, the penetration was in March up to September. If there was continuous penetration, who did the penetration? The charge related to an offence on one date, 14.07.2023. No evidence was led to the effect that any offence occurred on this date. The alleged injuries were 6 months old in September. There was thus no stretch of extrapolation of evidence that will make an offence allegedly committed in July 2023 to result in injury in March 2023. All witnesses placed the alleged cohabitation to two to three months. This rules out March 2023 by all standards. Had the prosecution wished to charge the appellant with a period named, they ought to have done so.

31. Further, the complainant alleged to be a minor only when dealing with the chief. She does not appear to have told the appellant any time. More poignantly, the date of 14.07.2023 was abstract. It never came out of any witness. The date of arrest was 11.09.2023. This is the time the chief came and arrested the

appellant. There is no nexus between the arrest and 14.07.2023. Indeed the complainant stated that on 14.07.2023 she was with her sister at her place of work, she was not in Kisii. There is no magic by which the offence could have occurred in Nyakora area in Marani sub-county within Kisii County, when the appellant was in Kisii and the complainant in Narok.

32. The court unfairly admitted evidence of what the accused is alleged to have said to the chief contrary to section 25A of the *Evidence Act* which provides as follows:

    (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.

    (2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

33. It was also succinct that the minor allegedly came from Masai land and had no evidence of age. To make matters worse, other than there being no evidence and or possibility of penetration by the appellant in the place named, the next issue is the evidence of age of the complainant. There was no birth certificate, skeletal and dental examination, in terms of forensic anthropology to confirm age.

34. What was produced was a piece of paper filled in by an unknown person without any scientific examination in terms of bone and tooth development, examining epigenetic changes in DNA, physiological and biochemical markers in a true sense of the scientific evidence of the formular for age assessment. Having not been done, and without the qualification of the person who filled the form, the court is unable to find that the document qualified as age assessment. At the very least, qualification of a person who examines is important.

35. Age assessment is a scientific method that must meet parameters for examination. A piece of paper that cannot be triangulated is not worth the paper it is written on. There was thus no evidence of the age of the complainant. In the case of Dominic Kibet Mwareng v Republic [2013] KEHC 1353 (KLR), the court held as follows:

> The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant. Mr. Chebii, Counsel for the Appellant submitted that none of these ingredients was established. On the age of the Complainant, he submitted that failure to conduct an age assessment on the Complainant was fatal to the Complainant's case. He referred the Court to the case of Hilary Nyongesa Vs Republic (Eldoret Criminal Appeal No 123 of 2009) where Mwilu J (as she then was) stated that:
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> Age is such a critical aspect in Sexual Offences that it has to be conclusively proved....And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim.
>
> I agree and add that while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the Prosecution and a simple statement by the Complainant as to their age does not in my view, constitute such proof.

36. It is not enough to throw to the court a paper without showing the expertise. The expert report must come from an expert and be treated in tandem with other evidence. This Court appreciates that courts

have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in Shah and Another vs. Shah and Others [2003] 1 EA 290:

> The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so.

37. Further, the Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

> ... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.

38. Courts must give proper respect to the opinions of experts. Such opinions are not, as it were, binding on the courts and the courts must accept them as stated in Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, that:

> It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
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> The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- Because this is the evidence of an expert, I believe it.

39. There was no evidence that the purported letter came from an expert and methods the person who filled used. This is more crucial where the age is borderline. There is no reason the birth certificate could no t be produced. It must be inferred that had the birth certificate been produced, it could have been adverse to the prosecution. This is coupled by the failure to call other crucial witnesses, like the sister with whom she was staying. An attempt ought to have been made to call her and even her name be given. Howe could the appellant which person the complaint was referring to, in order to cross examine or even call her in evidence. Failure even to name the mother and the sister is clear evidence that the complainant did not want the people who know her age to be called.

40. The reality is that, had such persons existed, their names would have been provided. This omission is significant because, had the court observed that the complainant was untruthful, had the court been keen, it would not have placed the Appellant on his defence. The evidence was as follows:

> I was at home in Narok. I went to Narok for work. I joined my sister. Jones started talking to my sister. She was quarreling me and forced me to stay with Jones. I came with my sister. I joined Jones in Kisii. Jones had married me.

41. First, she alleged that her unnamed sister was the one who initially spoke to Jones, only for both of them to later join him in Kisii, where she claimed to have been married to him. This account, however, is inconsistent. It does not add up that they allegedly joined Jones in Kisii while, according to her own testimony, she was in Narok on 14th July 2023. In that regard, she stated as follows:

> I cannot recall when I met the accused... On 14.07.2023, I was with my sister at her place of work. I was not in Kisii.

42. The foregoing circumstantial and direct evidence irresistibly points to one conclusion, the innocence of the Appellant. For circumstantial evidence to sustain a conviction, it must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. In the present case, however, the evidence falls short of that threshold. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, [P. Kihara Kariuki, PCA, M'inoti & Murgor, JJ.A] Court had this to say on circumstantial evidence:

> However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.

43. The totality of the evidence leads this court to the inescapable conclusion that the offence was not committed by the Appellant. The medical evidence equally weakens the prosecution's case, and all parameters considered, point away from the Appellant's culpability.

44. The court appeared to make heavy weather of the Appellant's mitigation at the defence stage. It is important to note that the Appellant was represented by counsel up to the point at which the court found that a prima facie case had been established. Thereafter, the court proceeded without making any inquiry as to the whereabouts of the defence counsel. This omission was fatal to the Appellant's case, as the record demonstrates that he appeared unable to fully comprehend the proceedings. While he offered mitigation, it is apparent that he had limited understanding of its import. The court ought not to have ignored the absence of the Appellant's counsel at such a crucial stage of the trial.

45. I concur with the appellant that the court shifted the burden of proof to the appellant. In the case of R vs. Lifchus {1997}3 SCR 320, the Supreme court of Canada explained the standard of proof as doth:-

> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient.

> In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.

46. There was no issue raised on the question where the appellant stated he did not commit the offence. The appellant's defence was concluded by the complainant who confirmed that she was not in Kisii. Let me use the words of the charge sheet, "On 14.7.2023 at Nyakora area in Marani subcounty within Kisii County." She was in Narok, away from the locus in quo. This piece of evidence was not shaken. The state having proved in its evidence that the offence did not occur on the day indicated in the charge sheet, then the charges fall.

47. The medical report was at variance with the charge sheet and the testimony of PW1 did little to support the charge sheet on penetration. In my view, the prosecution had the burden of proving not just penetration, but penetration by the Appellant. According to the medical report, there were no laceration injuries and the hymen was broken 6 months ago. Per the particulars of the offence, the Appellant committed the offence on 14.7.2023 and was arrested on 11.9.2023. The evidence adduced did not prove the particulars of the offence much as it was inconsistent with the charge sheet.

48. On this, this court has to establish whether the alleged discrepancies and contradictions were fundamental as to cause prejudice to the Appellant. In Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held:

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

49. The appellant was suspected as having committed the offence simply because he was perceived to have cohabited with PW1. This was in error for such suspicion if found without basis would mean that the Appellant would erroneously be denied liberty for up to 15 years in prison. The court was to have the clearest of mind and certainty that the Respondent had proved its case to beyond reasonable doubt before denying the Appellant liberty for such an elongated time of 15 years. The court forgot that, suspicion cannot be evidence. In the case of Faith Lucas V Republic [2008] KECA 267 (KLR), the court of appeal stated as follows:

It has not been shown that the appellant's explanation was not plausible.

50. Circumstantial evidence was addressed in the case of Sawe V. Republic [2003] KLR 364 at pp. 375-6 where this Court said:-

> If that be the case, then the evidence does not irresistibly point to the appellant to the exclusion of all others within the meaning of R v Kipkering arap Koske & Another 16 EACA 135 where it held, inter alia, that;
>
> 'In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt'.

51. The case was based on suspicions arising from apparent cohabitation between the Appellant and PW1 who were perceived to be a husband and wife respectively. I note that the PRC Form referred to the Appellant as husband of PW1. The case of PW2 and PW4 respectively, as well as Chief and Assistant Chief was equally emphatic that the Appellant and PW1 were cohabiting as husband and wife. The prosecution had a duty to produced evidence of penetration and not evidence of cohabitation or mere suspicion of penetration based on cohabitation. In the case of Republic v Denis Wamaye Kimemia & another [2019] KEHC 11092 (KLR), Wakiaga J, posited as follows:

> Whereas there is strong suspicion that the accused persons were involved in the unlawful killing of the deceased, the said suspicion is based on hearsay evidence which is uncorroborated and the court has said over and over again that mere suspicion however strong cannot be a ground for sustaining a conviction in a criminal case as was Stated by the Court of Appeal in Mary Wanjiku V Republic, Criminal appeal no 17 OF 1988 that:
>
> Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused freedom and at times life.

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

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

53. The Appellant's defence was a categorical denial of the offence. He maintained that he did not commit the act in question. Notably, his testimony was not subjected to cross-examination, and as such, his evidence remains unchallenged and unrebutted. The prosecution did little to dislodge the Appellant's version or to bridge the gaps apparent in its own case. The complainant scored an own goal by removing herself from the locus in quo.

54. The next limb is the age of the complainant. The evidence on the record shows that the alleged offence took place after the 14.7.2023. PW1 was said to be 16 years and there was an age assessment report dated 14.9.2023 which stated that she was 17 years. The sentence was related to a 17-year-old. There is no harm if the court finds that the minor was 16 or 17. But the criterion upon which the age was determined as 17 years and not 16 years was not adduced in court. The sentence was premised on the finding that she was 16 years old. In my view, there would be no material difference whether the complainant was 16 or 17 years of age. However, the basis of assessment was not disclosed. The court was therefore left without any evidentiary foundation for the exact determination of age. In the case of Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the court emphasized that age assessment must be supported by clear, credible, and verifiable medical or documentary evidence.

Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It

is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.

55. The court had no reason and indeed did not interrogate the purported age assessment. There is no way of believing the evidence of the age assessor for two reasons: he did not testify in court to be cross examined on his report, and he did not lay down the procedure he used to give the result that PW1 was 17 years. As expert opinion is merely persuasive to this court, I am not persuaded that the age assessment report properly proved the age of the minor herein and I fault the trial court for relying on it.

56. Equally, I do not find that the Respondent proved its case beyond reasonable doubt that the Appellant penetrated the minor with his penis as alleged in the charge sheet. Apart from the finding that the hymen was broken and appeared to have been so for about six months, the medical report and testimony indicated that the external genitalia were normal. The same observation was reflected in the Post Rape Care (PRC) form.

57. In my overall re-evaluation of the evidence, I am unable to agree with the trial court's finding that the prosecution proved penetration of PW1's vagina by the Appellant's penis beyond reasonable doubt. There was, in fact, no cogent or credible evidence of penetration. It would therefore be unnecessary to delve into the question of who committed the offence, where the foundational element of the offence itself has not been established. The Court is not persuaded that the conviction was founded on firm evidentiary ground. The inconsistencies in the complainant's testimony, the lack of corroborative evidence, and the apparent investigative lapses all point to a case that was not proved beyond reasonable doubt. The trial court ought to have given the Appellant the benefit of that doubt. Consequently, this Court finds that the conviction was unsafe and cannot be allowed to stand. The conviction is hereby quashed and the sentence set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

58. In totality, the Respondent herein did not prove the offence of defilement against the Appellant beyond reasonable doubt, and the trial court erred in convicting the Appellant. Having found that the conviction was improper, it will serve no useful purpose to delve into the issues in the sentence. I find and hold that the prosecution case was not proved beyond reasonable doubt and therefore allow the appeal and set aside the conviction and sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

Determination

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

    a. The appeal on conviction and sentence in Kisii CMSO No. E072 of 2023 is merited and allowed. The appellant shall be set free forthwith unless otherwise lawfully held.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF OCTOBER, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Koima for the Respondent

Appellant – present

Court Assistant – Michael