Aika alias Jirani v Republic (Criminal Appeal E018 of 2024)
[2025] KEHC 16621 (KLR) (13 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16621 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL E018 OF 2024

DKN MAGARE, J

NOVEMBER 13, 2025

BETWEEN

JAMES OSORO AIKA ALIAS JIRANI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the trial court, Hon. P.K Mutai (PM) given on 12.9.2023 in Kisii CMSO E008 of 2023.

2. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006.

3. The particulars of the offence were that the Appellant, in November 2022 at unknown date in Keumbu Centre of Riondonga sub-location in Kisii Central sub-county within Kisii County, he intentionally caused his genital organs namely a penis to penetrate the genital organs, namely a vagina of V.O, a girl aged 15 years.

4. There was an alternative count of committing an indecent act with a minor contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offense were that on November 2022 at unknown date in Keumbu Centre of Riondonga sub-location in Kisii central sub-county within Kisii County, the Appellant intentionally touched the vagina of V.O, a girl aged 15 years.

5. The accused person was arraigned, and he denied the charges. A plea of not guilty was consequently recorded. The court proceeded to hear and determine the matter and rendered its judgment by which the Appellant was convicted. He was sentenced to serve 15 years imprisonment. The Appellant, aggrieved, lodged this appeal. The Petition of Appeal raised repetitive and winding grounds of appeal

stated as 8 grounds with a further supplementary 7 grounds of appeal. The material grounds appear as follows:

a. That the trial magistrate erred in both matters of law and fact by sentencing the appellant to 15 years imprisonment when the offence of defilement was not proved beyond reasonable doubt as required by law.

b. That the trial magistrate erred in both matters of law and fact by convicting the appellant to 15 years imprisonment without considering that the investigation conducted in this case was scanty and shady which could not be used to secure conviction.

c. That the trial magistrate erred in both matters of law and fact by conducting the proceedings in cumbersome legal procedures and not indicating the language used in to swear witnesses against Article 49 and 50 of *the Constitution*.

d. That the trial magistrate erred in both matters of law and fact by convicting the appellant on a defective charge sheet.

e. That the trial magistrate erred in both matters of law and fact by convicting the appellant when he was not brought to court within 24 hours of arrest.

f. That the trial magistrate erred in both matters of law and fact by failing to appreciate that there was no identification parade to recognize him as offender.

g. That the trial magistrate erred in both matters of law and fact by dismissing the Appellant's defence.

h. That the trial magistrate erred in both matters of law and fact by not considering the time spent in custody.

Evidence

6. PW1 was the complainant who stated that she was 15 years. It was her testimony that in November 2022, she met the Appellant standing on the road and the Appellant seduced her but she declined. The following day, she wanted to repair shoes and the Appellant offered to repair the shoes for her. He took her to his house. He prepared tea for her and repairing the shoes. He then started touching her breasts and talking about sex. She was reluctant but he forced and had sex with her. She was with her friend Kerubo in the Appellant's house and Kerubo saw what happened. On cross examination, she testified that she brought shoes around 1.00 pm and she was with Kerubo.

7. On cross examination, she stated that she was arrested at Kitunguru and she was with Mildred when she was arrested. She stated that there was blood at the time of the act but the same is not indicated in the PRC form. She stated that she walked to the appellant's house.

8. PW2 was Number 246687 PC Tabitha Ojwang. On 31.12.2022, she was at her work station when the area chief brought six juveniles Faith Moraa, Vivian Ogoti, Mildred, Mitchel Obonyo, Agnes and Elizabeth Kemunto. They were brought as children in need of protection. They took the children to Keumbu Hospital for medical examination. It was her testimony that on investigation, PW1 told her that the Appellant was a cobbler. He rented a premise at Keumbu. PW1 had a torn shoe and the Appellant undertook to repair it. He took PW1 to his house and prepared tea. She undressed and he touched her breasts and had sex with her. She stayed overnight and went home the next day. This is contrary to the allegation by the complainant. On cross examination, it was her case that she did not visit the scene. The children were reported missing. Investigations revealed the Appellant as suspect and he was arrested and charged with the offence before court.

9. PW3 was the clinical officer, Erick Abisi from Keumbu Sub-county Hospital. According to his testimony, the P3 form was filled on 3.1.2023. The examination revealed that the external genitalia were normal, and the victim's clothes were stained with mud. It is definitely not relevant that the clothes were stained with mud, two months after event. The hymen was not intact, though there was no discharge and no spermatozoa were observed. Epithelial cells were present, indicating signs of penetration. This was certainly recent penetration and not penetration in November 2022. He stated that the complainant did not remember the exact date but knew the month. He stated that falling from a tree or riding a motor bike can break a hymen.

10. DW1 was the Appellant. He stated that he was a tenant at a premise. Most of the tenants were police officers. One PC Kibet called him. PC Kibet slapped him. He handcuffed him and told him that he was pretending to the landlord. He was taken to the police station for 2 days. The charges about defilement, according to him were false allegations. The chief and PW1's parents did not testify. He stated that he did not defile the complainant.

11. On conviction, the appellant in mitigation stated that he had a diabetic wife and children, one of whom was disabled. He lamented that they had 8 graves in their compound and he could not commit the offence. The last part was to the effect that he did not want his wife to suffer.

Submissions

12. The Appellant filed submissions on 12.8.2025 and submitted that the critical elements of the crime were not proved beyond reasonable doubt.

13. It was submitted that the rights to fair hearing of the Appellant were breached as the language of proceedings was not stated. He cited section 89 of the Criminal Procedure Code. The Appellant also submitted that the charge sheet was defective as no specific time and date of the event was recorded.

14. It was further submitted that the testimonies of the witnesses were contradictory. He cited Richard Aspella v Republic App No. 45 of 1981 to support contradictions as basis for acquittal. Therefore, it was submitted that the prosecution witnesses' testimony and evidence lacked credibility.

15. On sentencing, he submitted that time spent in custody was not considered and relied on section 333(2) of the Criminal Procedure Code.

16. The Respondent filed submissions dated 10.9.2025. It was submitted that the prosecution proved the 3 ingredients of the offence of defilement as required under the law. It was also submitted that age was proved and reliance placed inter alia on John Mutua Musyoki v Republic (2017) eKLR.

17. It was the submission of the respondent that the sentence was lenient and abrogated section 8(3) of the *Sexual Offences Act*. That the sentence was illegal. Reliance was placed on Republic v Evans Nyamari Ayako SC Petition No. E002 of 2024.

Analysis

18. 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 -v- 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.

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

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

20. The issue in this case is whether the prosecution proved its case to the required standard. The most oft quoted English decision by Viscount Sankey L.C in the case of H.L. (E) Woolmington v. 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."

21. 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."

22. 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 stigmatised 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."

23. Section 8(1)(a) (1) and (3) of the *Sexual Offences Act* under which the Appellant was convicted 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) N/a

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(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.

24. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 had this to say:-

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

25. The powers of this court are circumscribed by Section 382 of the Criminal Procedure Code, which permits a first appellate court to confirm, reverse, or vary any finding, sentence, or order of the trial court. Within these limits, the court is duty-bound to subject the evidence to a fresh and exhaustive examination, reassess the credibility of witnesses, and weigh conflicting testimony to draw its own independent conclusions. Throughout this process, the legal burden of proof remains constant, resting squarely on the prosecution to establish the appellant's guilt beyond reasonable doubt. It is only by carefully scrutinizing the evidence in its entirety, while remaining faithful to the statutory framework, that the court can ensure the appellant receives a full and fair re-evaluation of the case. The section reads as follows:

> " 382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on

account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

26. Courts in criminal cases should consider the standard of proof and the effect of a conviction on the accused person. In this case, the Appellant could serve up to 20 years in prison though was given 15 years imprisonment depending on the age the court found the complainant to be, which was 15 years old. This must be a serious offense that requires the clearest view of the evidence to justify keeping the Appellant behind bars for a large part of his life. Proof beyond reasonable doubt was the standard, also based on the nature of criminal offences, whose punishment went beyond the effect on the individual to the state. Conviction and sentence as a sexual offender were a badge that a convict could only deserve based on undoubted evidence.

27. The appellant maintained that he was not guilty. There are witnesses who were mentioned and had no horse in the race. Kerubo was said to be with PW1 during the alleged defilement in the Appellant's house. The area chief who arrested and took PW1 with other children to the police station was also a crucial witness who was not called to testify in court on what transpired and why he arrested the girls including PW1.

28. Therefore, the evidence of PW1 on penetration was not corroborated. PW2, the investigations officer and a person of authority testified that PW1 told her that she had spent a night at the Appellant's house. This is major contradiction. 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."

29. The Appellant was thus convicted on circumstantial evidence. The threshold as stated in R v Kipkering Arap Koske [1949] 16 EACA 135 is that such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In Sawe v Rep [2003] KLR 364, the Court of Appeal expressed that:

> "In order to justify on circumstantial evidence, 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. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

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

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

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

31. The court had also discussed the question of in Keter v Republic [2007] 1 EA 135 and held inter alia:

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

32. In this case the two witnesses who gave the evidence on penetration were the medical officer and the complainant. The medical report used was fictitious in three aspects. The first being that vide Kenya Gazette supplement No. 47, the Kenya police service promulgated amendments to the police standing orders by deleting the P3 form pursuant to appendix 70 (c) and substituted with a new form. The form is more detailed and the only legal one. Having been deleted on 31.3.2021, there is no authority in Kenya to use P3 forms filled outside the new form.

33. The second aspect is that there was a presence of epithelial cells in December 2022. This could not and cannot be said to originate from November. It is utter disgusting that professionals who should assist in helping the court in arriving at the truth could not explain the effect of epithelial cells. It cannot be true that epithelial cells are evidence of sex. A small amount is expected, in a normal human being while a higher number can be due to natural shedding, increased shedding from physical irritation, or contamination. It is cavalier to allege that presence is evidence of sex. It is evidence of irritation. The same cannot by any stretch of imagination relate to alleged sex in November.

34. The complainant alleged that she went and had sex in the appellant's house. She resisted but the Appellant forced her and warned her not to shout. She was with Kerubo at the moment. PW1 appeared unable to tell the truth. She lied to the court and the investigating officer. It is not possible that she could forget a simple fact there was blood after the sex. Secondly, she was arrested after disappearing from home. It appears that the poor cobbler was the most convenient escape. She did not tell the police the persons she was having sex with when epithelial cells were found. She was covered in mud, meaning that whatever she was doing, she was doing so on the ground and not in bed. It is not expected, in any case, that the mud from two months earlier could be found on her. She lied that she spent overnight while at the same time testified that she left at 6 pm the same day.

35. Her evidence was marred with half-truths and the information she gave to PW2 was different from her own testimony. With such evidence on record, the court erred even on placing the appellant on his defence.

36. The appellant denied the allegations. This is where the court invoked section 124 of the *Evidence Act*. The court, in my view wrongly proceeded as if, the said section overrides Article 50 of *the Constitution*. Section 124 is a rule of evidence and not a rule on the standard of proof. It is not automatic that the court must just believe the complainant. The rule is the exceptions as set in section 124 of the *Evidence Act*. The said section posits as follows:

124. Notwithstanding the provisions of section 19 of the *oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

37. The later part, or the proviso is key, in that it requires that the following conditions be met:

i. The matter is a sexual offence,

ii. The only evidence is that of the alleged victim of the offence,

iii. For reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

38. That is why the truth should always be recorded and reasons for so believing. All the three conditions must be present for a conviction to occur. In the case of Tekerali s/o Korongozi & 4 Others –v- Rep (1952) 19 EACA 259 the importance of the first report was appreciated, where the court posited as follows:

> " Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."

39. PW3 testified and asserted that there was evidence of penetration as demonstrated by the presence of epithelial cells. However, the issue was whether penetration was by the Appellant. PW1 was not the only witness. There was medical evidence and there was circumstantial evidence that could be produced. In the absence of the production of circumstantial evidence available, then the court was wrong. There was also Kerubo, who was allegedly watching. Thirdly, and more crucially, there was no evidence and reasons recorded for believing the complainant to be saying the truth. PW1 and PW2 differed on fundamental aspects. The element of penetration by the Appellant was lost.

40. The prosecution did not call the chief who was said to have arrested PW1 and Kerubo was allegedly with PW1 in the house of the Appellant and saw the Appellant commit the offence. The court can only infer, that could the chief and Kerubo have testified, the 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 SUBPARA Inference that had he been called it would have adverse to the prosecution case this being John kilonzi who was on duty with the appellant and the complainant and whom the complainant first made a report to.

34. In convicting the appellant, the trail court based the same on speculation which was not supported with evidence on record to wit that the accused had not envisaged that any other

person would be within the compound whereas the evidence on record was that there was ongoing construction and that there were three guards on duty in the compound all the time.

41. The Appellant was correct in his submission that the prosecution's case raised inconsistencies and contradictions in the evidence proffered by the prosecution case and argued that the trial court failed in convicting him when the evidence tendered did not prove the offence against him to the required standard. On this, this court has to establish whether the alleged discrepancies and contradictions were fundamental as to cause prejudice to the Appellant. In Joseph Maina Mwangi v. 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."

42. The appellant gave a rock-solid evidence. The appellant was simply suspected. 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. There was evidence of bad blood between the appellant's family and Konde's family. It is to be observed that indeed Konde and his sons were arrested and charged (jointly with the appellant) in respect of the death of the deceased. It would appear that the appellant was arrested, charged, convicted and sentenced purely on mere suspicion. We must point out that suspicion, however strong, cannot be used as evidence in a criminal case of this nature. It was upon the prosecution to prove its case against the appellant beyond reasonable doubt. In this case, the members of Konde family and or their agents are not excluded from being persons who might have been involved in the death of the deceased.

In SAWE V. REPUBLIC [2003] KLR 364 at pp. 375-6 this Court said:-

"In this state of the evidence, the two watchmen are not excluded from being persons who might have started the fire or for that matter any intruder might have done so. 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'.

In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku v Republic (Criminal Appeal No. 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge's view that the prosecution had proved its case against the appellant beyond any reasonable doubt.

43. The case was based on suspicions arising from the fact that PW1 pointed at the Appellant as offender. The prosecution had a duty to produce evidence and not suspicion. In the case of Republic v Denis Wamaye Kimemia & another [2019] KEHC 11092 (KLR), Wakiaga J, posited as follows:

Whereas there is strong suspicion that the accused persons were involved in the unlawful killing of the deceased, the said suspicion is based on hearsay evidence which is uncorroborated and the court has said over and over again that mere suspicion however strong cannot be a ground for sustaining a conviction in a criminal case as was Stated by the Court of Appeal in Mary Wanjiku V Republic, Criminal appeal no 17 of 1988 that:-

"Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused freedom and at times life."

44. How then did the accused find himself in court? PW1 and PW2 did not produce any evidence on how the appellant ended up being arrested. There was a break in the chain of information, by omitting critical witnesses. The investigating officer did not even go to the scene to even confirm that the Appellant's house had a cobbler machine as testified PW1. One Kerubo, who was there during defilement, if PW1 is to be believed, was not called. All these people were not called as they did not witness. This is the only inference. It is doubtful that the said Kerubo will watch the defilement and just sit there and make no noise or scream.

45. The one issue that the court failed to do was to consider the defence. The appellant testified that he had wrangles with PC Kibet who arrested him. The wrangles were about payment of rent over the premises and PC Kibet accused him of pretending to be the landlord of the premises. This, according to the Appellant is what caused his arrest. The appellant as an accused has no duty to help the state investigate its case.

46. If evidence was tendered that was surprising to the state, they had a chance under section 212 of the Criminal Procedure Code to call for rebuttal evidence by calling the said PC Kibet as witness. The section provides as follows:

If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

47. In regard to the question of the rights of the prosecution to receive in advance defence evidence as addressed in the case of Thomas Patrick Gilbert Cholmondeley v Republic [2008] KECA 319 (KLR), the court of appeal [R.S.C. Omolo, E. O. O'Kubasu and J. W. Onyango Otieno] posited as follows:

So, if at the beginning of the trial, *the Constitution* obliges everybody to assume that an accused person is innocent, what case is he to disclose in advance? Mr. Tobiko's position appears to be that if the accused person chooses to give evidence and call witnesses then he ought to be able to disclose his case to the prosecution. That contention, however, ignores one basic distinction. The privileges, if we may so designate them, of the accused person are conferred on him by *the Constitution*. As soon as he is arrested, he shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged. Nobody is ever likely to arrest the Republic of Kenya and charge it with a criminal offence so that it would require it to be informed of the nature of the offence against it. The question of reciprocity is, therefore, misplaced. ...

That approach by the learned Judge creates the dangerous theory that what is convenient and would expedite the disposal of a matter is lawful. The proposition ignores the fact that the rights of an accused person are considered to be so important that they are protected under section 77 of *the Constitution*. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual

Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association. We know who is capable of locking up individual Kenyans in the Nyayo House Dungeons. We know who is capable of telling Kenyans: "If you rattle a snake, you must be prepared to be bitten by it." ....

We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by *the Constitution*. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in *the Constitution* and it ought not to be allowed to claim the same privileges. We know the good Book says that in the end of times, the lion shall graze and lie peaceably together with the lamb. But our recent history is still too fresh in our mind and we in the courts must try to keep the lion away from the lamb. In other words, there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state. No statute gives the state such privileges, and *the Constitution*, wisely in our view, does not give the prosecutors such powers.

They cannot be given through the inherent power of the court. Even in civil matters, there is a specific provision in the *Civil Procedure Act*, Chapter 21 Laws of Kenya, recognizing the existence of the inherent power of the court:

> " to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." – see section 3A.

There is no similar provision in the Criminal Procedure Code, Cap 75 Laws of Kenya and we think the omission is deliberate. But even if there was such a power with regard to criminal matters, we do not accept that a judge would be entitled to create non-existent rights and confer them upon a party as the learned Judge purported to do here.

48. The appellant was not under duty to disclose his defence before being put on the defence. In any case, the state has a chance to call rebuttal witnesses. The case for the appellant from the cross examination was that he was not the one who committed the offence. It is not necessary to deal with sentence as the conviction has been set aside. I do not find the basis for which the court found proof beyond reasonable doubt that the appellant penetrated the complainant with his penis. Besides finding that the hymen was old broken, the medical report and testimony indicated that external genitalia were normal. This was the case also for the PRC.

49. Therefore, in my overall reevaluation of the evidence, I am unable to agree with the trial court that the prosecution proved penetration of the complainant's vagina by the appellant's penis beyond a reasonable doubt. 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.

50. Having found that the conviction was improper, I do not think it will serve any 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

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

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

b. The conviction and sentence in Kisii CMCSO No. E008 of 2023 is set aside and the Appellant shall be set free forthwith unless otherwise lawfully held.

c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 13TH DAY OF NOVEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Njeru for the State

Appellant person

SSgt. Maina at Kisii Main Prison

Court Assistant – Michael

M. D. KIZITO, J.