Republic v Mweni (Sexual Offence E038 of 2022)
[2025] KEMC 277 (KLR) (20 November 2025) (Judgment)

Neutral citation: [2025] KEMC 277 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

SEXUAL OFFENCE E038 OF 2022

YA SHIKANDA, SPM

NOVEMBER 20, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

STEPHEN KIOKO MWENI ..... ACCUSED

JUDGMENT

The Charge

1. SKM (hereinafter referred to as the accused person) is charged with the offence of defilement as well as an alternative charge of committing an indecent act with a child. In the main count, the accused person is charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars of the offence are that on 11/5/2022 at Kitengei Sub-location, Kibwezi East Sub-county within Makueni County, the accused person intentionally and unlawfully caused his penis to penetrate the vagina of FM (name withheld), a child aged 4 years. The accused person is alternatively charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence are that on the same day and at the same area, the accused person intentionally and unlawfully touched the vagina of FM aged 4 years using his penis. When the plea was taken, the accused person pleaded not guilty to both counts. The matter was then set down for hearing.

The Evidence

The Prosecution Case

2. The prosecution case was substantially heard by another Magistrate who was subsequently transferred. Upon taking directions under section 200(3) of the Criminal Procedure Code, the matter proceeded from where it had reached. The prosecution called a total of five (5) witnesses in a bid to prove its case

against the accused person. PW 1 MK (name withheld) testified that the child herein was her daughter. That on 3/5/2022 (this was later corrected to 11/5/2022) the witness took the child to a day care centre then proceeded to work. When she returned, she found the child seated with other children outside the house. The witness took the child to the house in order to bathe her. When the witness tried to wash the child's private part, the child jumped. Upon inquiry, the child stated that one Khad done bad manners to her.

3. PW 1 examined the child's vagina and noted that there was an injury thereon. She took the child to K's mother who owned the day care and reported to her what the child had stated. The witness later reported to the area Assistant Chief who advised her to report to the police. The following day, PW 1 reported to the police. She took the child to hospital where she was examined and treated. That the child told her that Khad removed her trouser then used his penis to defile her. PW 1 testified that the child was 3½ years old at the time of incident. That Kwas later arrested and charged. PW 2 FM (hereinafter referred to as the complainant) attended court to testify. The record does not show that any voire dire examination was conducted but the court observed that the child was too young to understand the meaning of an oath.

4. It would appear that the complainant gave an unsworn testimony. The complainant testified that she knew the accused person as K. That the accused person did something bad to her. The record indicates that the complainant pointed at her genital area. That Kdid the act at his house and that the complainant felt pain and cried. The complainant testified that Kremoved her trouser then did the act to her. She confirmed that she reported to her mother what had happened. The record indicates that the witness who testified as PW 3 was one Kevin Sanya Ouma, a clinical officer. However, his testimony was not completed as the defence objected to the witness producing medical documents not prepared by him. The witness was then stood down.

5. From the record, the next witness was identified as PW 3. This was KM (name withheld), who stated that the complainant was her child. His evidence was that on 4/5/2022 PW 1 called him and stated that she was taking the complainant to hospital as the complainant had been defiled. The witness went to Kambu and met the complainant, her mother and a police officer. That the complainant informed him that Khad defiled her inside his house. PW 4 (who was initially called as PW 3) Kenvin Sanya Ouma testified that he was a Clinical officer. The witness produced the P3 and PRC forms in respect of the complainant. PW 5 Police Constable Kassim Owangu testified that he took over the matter from the initial investigating officer who was transferred. The witness did not conduct any investigations in the matter. He produced the complainant's health card in evidence.

The Defence Case

6. When the accused person was placed on his defence, he opted to give a sworn testimony and called one other witness. The accused person testified that he did not defile the complainant. That on 11/5/2022 he was at work at Subati area. That he reported to work at 8:00 am and left at 4:00 pm. The accused person stated that he heard rumours that a child had been defiled by an unknown person. It was the testimony of the accused person that he had a medical condition which affects his kidneys and makes him weak in body. That he has had the condition since 2019 and is on constant medication. The accused person stated that he cannot even erect. That he saw the complainant for the first time in court.

7. DW 2 JM testified that the accused person was her child. That the accused person has been unwell since the year 2019 and has been using a Catheter since then. The witness stated that she did not know the complainant nor her mother but used to see them pass by. That on 11/5/2022 the accused person was at work. DW 2 stated that the allegations against the accused person were false.

Main Issues for Determination

8. Having considered the nature of the charges and the evidence on record, I find that the main issues for determination are as follows:

    a. Whether the complainant was defiled on 11/5/2022;

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

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

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

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

Analysis and Determination

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

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

10. Section 2 of the *Sexual Offences Act* defines the term "penetration" as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The same section refers to the definition of a child as provided for under the *Children Act*. Section 2 of the *Children Act* defines a child as an individual who has not attained the age of eighteen years. From the above provisions, I gather that the key ingredients of the offence of defilement are as follows:

    1. The accused person must have committed an act which causes the partial or complete insertion of his or another person's genital organ into the genital organ of another person or the accused person's genital organ. My understanding of the law is that it does not matter who inserts, what matters is who causes the insertion. For instance, a woman who causes a male child to insert his penis into her vagina may be guilty of defilement if all the key ingredients are satisfied. In a nutshell, the prosecution must prove penetration;

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

    3. Positive identification of the accused person. The evidence of the prosecution must show that the accused person was positively identified as the person who committed the impugned act against the child.

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

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

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

Age

13. The particulars of the offence indicate that the complainant was aged four (4) years old at the time of incident. In the case of Moses Nato Raphael v Republic [2015] eKLR, the Court of Appeal pronounced itself thus:

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

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

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

15. In view of the foregoing, it cannot be said that age for purposes of sexual offences can only be proved by documentary or medical evidence. Nonetheless, the prosecution produced in evidence a copy of the complainant's health card which indicates that the complainant was born on 14/10/2018. This implies that as at 11/5/2022 when the offence is said to have been committed, the complainant was aged 3 years and seven months. In cases of defilement, as far as age is concerned, all that the prosecution needs to prove is that the alleged victim was below the age of eighteen years at the time of offence. However, proof of age must be beyond reasonable doubt since age is a key ingredient of the offence. In the case of Kaingu Elias Kasono v Republic Criminal Appeal No. 54 of 2010, the Court of Appeal sitting at Malindi held as follows

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

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

Penetration

17. The only direct evidence in respect of the offence is that of the complainant herself. The complainant testified on 8/11/2023 at the age of slightly above 5 years. According to the record, she gave an unsworn testimony. Section 124 of the *Evidence Act* provides as follows:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> > " Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

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

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

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

20. The complainant herein gave unsworn testimony. The record indicates that no voire dire examination was conducted. The trial court (as it then was) made the opinion that the complainant was too young to understand an oath, without subjecting her to any examination. No examination was done for the court to satisfy itself that the child was possessed of sufficient intelligence to justify the reception of the evidence and also, if the child understood the duty of speaking the truth. In the authority of Fransisio Matovu v Republic [1961] E.A 260, it was held, inter alia that:

> " (I) the trial magistrate should question the child to ascertain whether the child understands the oath and;

(2) If the court does not allow it and not to be sworn, it should record whether or not in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth."

21. However, in the authority of Maripett Loonkomok (supra), the Court of Appeal held that mere failure to conduct a voire dire examination does not vitiate the trial. Since the minor gave unsworn testimony, her evidence falls under the ambit of section 124 of the *Evidence Act*. The proviso to section 124 of the *Evidence Act* makes an exception for the requirement of corroboration of unsworn testimony of a child of tender years in criminal proceedings involving sexual offences where the only evidence is that of the alleged victim. The provision empowers the court to convict an accused person if, for reasons to be recorded, the court is satisfied that the alleged victim is telling the truth. In my considered view, one of the main reasons as to why a court would be satisfied that the alleged victim is telling the truth is the presence of sufficient and corroborative evidence. Whether the testimony of the alleged victim of tender years is given on oath or not, the court must of necessity exercise great caution before convicting an accused person. The question as to whether there is corroborative evidence becomes paramount. I say so because, in criminal proceedings, it is the duty of the prosecution to prove its case against the accused person beyond reasonable doubt. I will seek to be satisfied that indeed, the complainant told the truth.

22. I did not take the testimony of the complainant. The record indicates that the complainant stated that she knew the accused person. She even mentioned his name as Kand pointed him out to court. The complainant testified in part s follows:

> "....K he did bad to me here (she points at her vagina area). He did it at Subati. He did it inside their house, he was alone. I felt pain and I cried, he went to their house and I went to our house.....I had a trouser. K removed my trouser. He did bad to me here (she points to the accused person)".

23. From the testimony of the complainant, it would appear that she was at the accused person's house and that the accused person removed her trouser then did something bad to her. That whatever was done to her caused her pain. The record indicates that the complainant used the word, "alinishika." This is a Kiswahili word that means, "He touched me." I am aware that in ordinary parlance, the word has different meanings and in the Kamba community, it could mean having sexual intercourse, depending on the context. In Daniel Arasa v Republic [2014] KEHC 3074 (KLR), the High court observed:

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

24. Similarly, in the case of Muganga Chilejo Saha v Republic [2017] KECA 359 (KLR), the Court of Appeal held:

> "Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like,

> "alinifanyia tabia mbaya", (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M M v R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her".

25. The above authority has been quoted with approval in subsequent authorities of the Court of Appeal-see JE v Republic [2023] KECA 1614 (KLR) and Muhendu v Republic [2024] KECA 322 (KLR). Given the age of the complainant, it was not expected that she would give a graphic account of what happened to her on the material day. The testimony of the complainant in cross-examination was that she knew the accused person and that whenever her mother went to work, she used to leave the complainant at the accused person's home. The complainant also testified that she reported to her mother what the accused person had done to her. The testimony of the complainant was corroborated by her mother who testified that she left the complainant with the accused person's mother. That the accused person's mother operated a daycare. The complainant's mother also confirmed that the complainant reported to her what the accused person had done.

26. The complainant's mother testified that she examined her child's vagina and was able to see injuries on the vagina. The complainant's father also stated that the child informed him of what the accused person had done. As already indicated, the only eye-witness who was called to testify was the complainant. Indeed, majority of sexual offences are usually committed in secrecy and as such, it would be difficult to get an eye witness apart from the alleged victim. In Bassita Hussein v Uganda, Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda held as follows:

> " The Act of sexual Intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence must always be adduced in every case of Defilement to prove sexual intercourse or penetration. Whatever evidence the Prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt".

27. In most cases, penetration is proved by testimony which may be corroborated by medical evidence. However, absence of medical evidence does not ipso facto mean that there was no penetration-See the case of Fappyton Mutuku Ngui v Republic [2014] eKLR. The medical evidence indicates that the complainant was examined on 12/5/2022. Upon examination, it was found that there were lacerations on the labia manora, a foul smelling vaginal discharge and that the hymen was perforated. Given the complainant's testimony coupled with the medical evidence, I am satisfied that there was penetration of the complainant's vagina. What may not be clear from the evidence is what was used to penetrate the complainant's vagina.

28. The testimony of the complainant merely indicates that the accused person removed her trouser then did something bad to her vagina. It is not clear what the accused person used to do the bad thing. In as much as care should be taken when examining a child, particularly of tender age, so as not to re-traumatize them, the prosecution must make efforts to ensure that they get the best evidence out of the

child witness. In cases of defilement, the testimony of the alleged victim ought to show that a penis was used to penetrate the vagina or other sexual organ. The prosecution should not leave it at "tabia mbaya". They should go further to enable the alleged victim state what was used to do the "tabia mbaya".

29. I say so because the aspect of penetration in defilement cases refers to the partial or complete insertion of a genital organ into another genital organ. It is not enough to show that there was penetration in the ordinary sense. The evidence must show that penetration was by use of a sexual organ. As already indicated, given the age of the complainant, it was not expected that she would give a graphic account. However, the account ought to have satisfied the ingredients of the offence of defilement. To this end, the testimony of the minor ought to be examined alongside other evidence on record. The totality of the evidence on record comprising of the testimonies of the complainant, her parents and the medical evidence, leaves no room for doubt that the complainant was defiled. I have no reason to doubt that the injuries on the complainant's genitalia were caused by an act of sexual penetration.

Identification of the assailant

30. The record indicates that the complainant mentioned the accused person by name and stated that she knew him. She stated that it was the accused person who did something bad to her. The complainant further stated that the incident occurred in the accused person's house. The complainant further stated that she informed her mother that it was the accused person who had done the bad act to her. In cross-examination by counsel for the accused person, the complainant maintained that she knew the accused person as well as his mother. The complainant further stated that whenever her mother went to work, she used to leave the complainant at the accused person's home. The complainant also stated that she used to see the accused person at Subati area.

31. The testimony of the complainant's mother was that on the material day, she left the complainant at a day care owned by the accused person's mother. The mother confirmed that the complainant had mentioned the accused person as the one who had violated her. It was the testimony of the complainant's mother that she went to the accused person's mother and reported to her what the complainant had stated. That the accused person's mother stated that she had told the accused person to take the complainant to the place where the other children at the day care were. The complainant's father also stated that the complainant mentioned that it was the accused person. The report made to the hospital and police was that the complainant had been sexually abused by a known person.

32. It was on the basis of the report that the accused person was arrested. In Mwenda v Republic [1989] KLR 464, the Court of Appeal held that whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, special need for caution before convicting in reliance on the correctness of the identification is necessary. The Court of Appeal in the case of Marube & Another v Republic [1986] KLR 356 observed that in the evaluation of the evidence of the identifying witness, the court must ensure beyond all reasonable doubt that the witnesses were honest and unmistaken about their identification. In Kiarie v Republic [1984] KLR 739, the Court of Appeal was of the opinion that where the evidence relied upon to implicate an accused is entirely of identification, that evidence should be watertight to justify a conviction.

33. A similar observation was made by the Court of Appeal in the case of Wamunga v Republic [1989] KLR 424 where the court held as follows:

> "Where the evidence against an accused is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the

circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction ".

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

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

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

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

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

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

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

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

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

37. Being guided by the above authority, I hereby warn myself of the danger of relying on the evidence of a single identifying witness. Unfortunately, no inquiry was made by the then trial court into the circumstances under which the complainant was able to identify her assailant. The police officer who investigated the matter was not called to testify. It is not known whether the complainant or her mother mentioned the name of the accused person to the police at the time of making the report. The circumstances under which the accused person was arrested are not clear. The complainant's mother stated that she reported to the area Assistant Chief before reporting to the police. The area Assistant Chief was not called to testify so as to support the notion that the accused person was identified as the perpetrator.

38. The complainant testified on 8/11/2023 at the age of five (5) years. This was after a period of over one year from the date of the incident. The complainant's testimony does not appear to have changed. Whatever she stated in court was similar to what she reported to her parents. Her evidence was consistent in material particulars. She was categorical that it was K who had did the bad thing to her. It would appear that the memory of what happened to her on the dreadful day was still fresh in her mind. I do not see anything that would suggest that the complainant was not sure of who had sexually abused her on the material day. It is agreed by both parties that the complainant and the accused person stayed in the same neighbourhood. Both parties agree that prior to the arrest of the accused person, there was the allegation that he had defiled the complainant.

39. The evidence of the complainant's mother indicates that the complainant was left under the care of the accused person's mother. The accused person's mother stated that she only used to see the complainant and her mother but did not really know them. However, she did not deny the fact that she operated a day care and that the child used to be left at the day care. Although the accused person's mother claimed not to have known the complainant and her mother, she admitted that she had a discussion with the complainant's mother over the issue. She also stated that she asked the accused person about the allegations. The accused person's mother later admitted in cross-examination that she knew the complainant's parents.

40. The gist of the accused person's defence is two-fold:

    SUBPARA 1.

    He was elsewhere at work when the incident happened. The accused person basically raised the defence of an alibi;

    SUBPARA 2.

    He has a medical condition that adversely affects his sexual life. That he cannot even erect.

41. I will begin by addressing the medical condition of the accused person. It is not in dispute that the accused person has a medical condition and uses a Catheter. A catheter is a thin, hollow tube used to drain fluid from the body, most commonly to drain urine from the bladder. It can also be used for other medical purposes, such as administering fluids or medicines. Catheters are used for various reasons, including urinary incontinence, bladder or prostate surgery, spinal cord injuries, and other medical conditions. The accused person explained that he uses a Catheter because his kidney retains urine. This implies that the accused person suffers from chronic urinary retention. He uses a Catheter all the time.

42. No medical evidence was tendered by the accused person to show that his condition adversely affects his sexual life. I have done some research into the medical field. What I have found is that a male person with chronic urinary retention can have sexual intercourse, but there are factors that determine comfort, safety, and performance. Chronic urinary retention does not automatically prevent erections, ejaculation, or sexual desire. Most men remain sexually active unless there is severe pain or there is nerve damage affecting bladder and erectile function, or there are complications such as infections. If a person uses intermittent catheterization, they can usually can have sex normally if they empty the bladder beforehand. For an indwelling catheter (Foley), such as the one being used by the accused person, sexual intercourse is possible, but the catheter is often taped to the abdomen or temporarily removed by a clinician.

43. In view of the foregoing, it is clear to me that the mere fact that the accused person suffers from chronic urinary retention and that he uses a catheter, does not imply that he is incapable of erecting and committing an act of sexual intercourse. Section 111 of the *Evidence Act* provides that:

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
>
> > Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity". (Emphasis supplied)

44. In my view, the accused person having alleged that his medical condition rendered him incapable of erecting or engaging in an act of sexual intercourse, the burden was upon him under section 111 of the *Evidence Act* to prove the allegation. This is because such fact was within his peculiar knowledge. No medical evidence was tendered to prove the fact, and as such, the defence is hereby dismissed.

45. I now move to address the defence of alibi. In the case of Chabah & Another v Republic [1988] KLR 1, the Court of Appeal held that the onus is on the prosecution to displace the alibi after the defence raises it. In Wong'oribe v R [1980] KLR 149 Madan JA (as he then was) in delivering the judgment of the court at page 151 letter G & H stated:

> The defence of alibi was put forward for the first time some months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. .....Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it."

46. In Kiarie v Republic [1984] KLR 739, the Court of Appeal held thus:

> An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him 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".

47. In the case of Karanja v Republic [1983] KLR 501, the Court of Appeal had this to say:

> Nevertheless, we agree with the observations of the Court of Appeal for Eastern Africa in R v Ahmed Bin Abdul Hafid (1934) 1 EACA 76, and with those of the former Court of Criminal Appeal in R v Little boy, [1934] 2 KB 413, that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought".

48. In the case of Kossam Ukiru v R [2014] eKLR, the Court of Appeal held that the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and where, when weighed against all the other evidence, it is established that the accused person's guilt has been established. The court observed thus:

> We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same (see Karanja vs Republic [1983] KLR 501). In this case, however, the two courts below rejected the appellant's alibi defence on the basis first, that it had not been raised at the earliest opportunity in the proceedings and second, that weighing the defence with all the other evidence adduced, the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it."

49. It is not clear whether the police recorded any statement from the accused person and whether the accused person raised the alibi at the time of his arrest. As already indicated, the police officer who investigated the matter was not called to testify. As far as the proceedings are concerned, the defence of alibi was raised for the first time during defence hearing. As already stated, where an accused person raises the defence of an alibi, the prosecution has the duty to place the accused person at the scene of crime. Even assuming that the defence was raised for the first time during defence hearing, the prosecution have a remedy under the provisions of section 212 of the Criminal Procedure Code which provide 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".

50. My view is buttressed by the authority of John Odero Omenda & another v Republic [2014] eKLR, in which Majanja J held as follows:

> The defences raised by the appellants were plausible and although they were raised for the first time during the defence, the duty of displacing or rebutting that defence lay on the prosecution. Indeed, the law affords the prosecution such an opportunity in section 212 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)..... While the evidence of identification of the appellants by PW 1 and PW 2 may have sufficed, I am cautious to find that the prosecution satisfied the standard of proof in light of the appellant's defence which the trial court, respectfully, did not exhaustively weigh against the prosecution evidence to make a finding that it was displaced by it".

51. Similarly, the Court of Appeal in the case of Victor Mwendwa Mulinge v Republic [2014] eKLR observed as follows:

> But even assuming that the appellant raised the defence of alibi for the first time while in court, as rightly submitted by Mr. Oguk, pursuant to the provisions of Section 309 of the Criminal Procedure Code the prosecution could have sought leave to adduce further evidence in reply to rebut the appellant's defence".

52. The provisions of section 309 of the Criminal Procedure Code are similar to those of section 212 save that the former applies to proceedings in the High court whereas the latter applies to proceedings in the Subordinate courts. The accused person does not have to establish that his alibi is reasonably true. All that he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin, an alibi which is not particularly strong may very well raise doubts- see Uganda v Sebyala & Others [1969] EA 204.

53. As already observed, the investigating officer was not called to testify. With the kind of evidence on record, I find that the testimony of the investigating officer was key. It was thus not known why the investigating officer believed the complainant and not the accused person. Given the circumstances of the case, there was need for an explanation, particularly from the investigating officer, indicating that the accused person was at the scene at the material time and that he had the opportunity to commit the offence. Having charged the accused person, the prosecution had a duty to show that the accused person's defence was not plausible. That could only be done by proper investigations and evidence of the same to be tendered in court.

54. For instance, there was an allegation that the accused person's mother operated a day care business and that it was at that day care that the complainant was left in the care of the accused person's mother. Although the accused person's mother did not say anything concerning that, the accused person denied the fact that his mother operated a day care. The accused person testified that he did not know the complainant but worked with her mother at a horticulture company. The accused person's mother stated that she only used to see the complainant and her mother pass by. These are issues that the investigating officer ought to have gathered evidence on and tendered the same in court. In my view, the issue of the day care is critical and crucial as that is what appears to have given the accused person the opportunity to commit the crime, as far as the prosecution evidence is concerned. Furthermore, the prosecution had a duty to disprove the fact that the accused person was at work on the material day and that he was at the scene.

55. Having analysed the evidence on record, I find that there is reasonable doubt as to whether the accused person was at the scene on the material day. It is possible that the accused person was at the scene but the prosecution evidence is not sufficient to rebut his allegation that he was elsewhere. The prosecution ought to have invoked the provisions of section 212 of the Criminal Procedure Code and adduced evidence rebutting the accused person's defence or allegations and placing him at the scene. With the totality of the evidence on record, I find it difficult to disregard the defence evidence on what transpired on the material day. It cannot be ruled out that the accused person was not at home at the material time. His defence is probable.

Whether the prosecution has proven its case

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

Republic [2006] eKLR, it was held that to find a conviction in a Criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in Stephen Nguli Mulili v Republic [2014] eKLR:

> It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V Woolmington, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See Festus Mukati Murwa v R, [2013] eKLR."

57. In the famous case of Miller v Ministry of Pensions [1947] 2 All ER 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

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

58. In Bakare v State (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

> Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability." (Emphasis mine)

59. The standard of proof "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see Clarence Victor, Petitioner 92-8894 v. Nebraska, 511 U.S. 1 (1994); Rex v. Summers, (1952) 36 Cr App R 14; Rex v. Kritz, (1949) 33 Cr App R 169, [1950] 1 KB 82 and R. v. Hepworth, R. v. Feamley, [1955] 2 All E.R. 918). Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged.

60. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt. I cannot state with certainty that the complainant lied to court when she mentioned the accused person as her assailant. However, I am equally not certain that she positively

identified the accused person as her assailant. There is a reasonable possibility that she could have been mistaken as to the identity of the assailant. I cannot rule out the fact that she could have been defiled by another person other than the accused.

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

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

Disposition

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

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 20TH DAY OF NOVEMBER, 2025.

Y.A. SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.