



**Machuki alias 'Pastor' v Republic (Criminal Appeal E040 of 2024)  
[2025] KEHC 18739 (KLR) (18 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18739 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL APPEAL E040 OF 2024  
DKN MAGARE, J  
DECEMBER 18, 2025**

**BETWEEN**

**STEPHEN MANASE MACHUKI ALIAS 'PASTOR' ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. This appeal arises from the judgment of the trial court, Hon. P C Biwott, SPM, in Ogembo CMCSO No. E003 of 2023, given on 19.09.2023, filed out of time with leave granted vide Misc. Application E104 of 2023.
2. The Appellant was charged with defilement contrary to Section 8(1) & (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that the Appellant, on diverse dates between 3.12.2022 and 29.12.2022 at Nyabisia sublocation in Nyamache subcounty, within Kisii county, intentionally caused his penis to penetrate the vagina of S.K.O, a child aged 15 years.
3. 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. The particulars of the offence were that the Appellant, on diverse dates between 3.12.2022 and 29.12.2022 at Nyabisia sublocation in Nyamache subcounty, intentionally touched the vagina of S.K.O, a child aged 15 years, with his penis.
4. The Appellant was arraigned in court on 04.01.2023 and denied the charges. A plea of not guilty was consequently recorded. He was admitted to Ksh 200,000/= bond. The court indicated that the appellant was informed of his right to legal representation and supply of witness statements.
5. The trial court conducted what he called voir dire. It does not appear to have been voir dire. In any case the complainant indicated that she was 16 years and the court did not need the charade of voir dire, which is limited to children of tender years and persons with severe mental disability. Section 221 (1)



of the Children's Act places the age of criminal responsibility at above 12 years, and it can be taken that children below 12 years are children of tender years. The section provides as follows:

- (1) A person under the age of twelve years shall not be criminally responsible for any act or omission.
6. In the repealed Children's Act, 2001, a child of tender years was described under section 2 of the Children's Act as a child under the age of 10 years. Whichever one looks at it, 15/16 years are not children of tender years.
7. The court heard sworn testimony from a total of five prosecution witnesses and the Appellant. The court considered the evidence and rendered the Judgement. The Court found the Appellant guilty and sentenced them to 10 years' imprisonment, with the sentence to run from the date of arrest. He was informed of the right of appeal.
8. The Appellant, aggrieved, lodged this Appeal vide a petition of Appeal dated 20<sup>th</sup> February, 2024 and raised the following Grounds:
  - a. That the learned trial magistrate erred in law and fact in convicting the appellant without observing the offence of defilement was not proved beyond reasonable doubt.
  - b. That the learned trial magistrate acted in wrong principles in convicting the appellant on grounds that he was a pastor thus making the conviction unsound.
  - c. The appellant was not accorded a fair trial thus infringing on his right to a fair hearing under article 50(2) of *the constitution*.
  - d. The appellant was not given the relevant documents by the prosecution side such documents including a charge sheet, PRC and a p3 form.
  - e. That the learned trial magistrate erred in law and fact in convicting the appellant without despite glaring contradictions in medical examinations thus making his conviction unsafe.
9. In essence, the appellant complained that the conviction was unsafe, having been reached without proof beyond reasonable doubt, through the application of improper considerations, and in disregard of material inconsistencies in the evidence. He further asserts that the trial process was fundamentally unfair, as he was denied access to crucial prosecution documents, thereby infringing his constitutional right to a fair hearing.
10. The appeal is basically on conviction only, though the prosecution filed a notice of enhancement of sentence. The court did not find it necessary to warn the appellant since the tenets governing mandatory sentences in sexual offences are now settled. The question of such sentences was addressed in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR), where the Supreme Court, [MK Koome, CJ, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ] posited as follows:
  11. Mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, the USA, Australia, and South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed



12. Before Kenyan courts could determine whether or not the prevailing trends and decisions were persuasive, there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. That was the Supreme Court’s approach and direction in *Muruatetu*, which had to remain binding to all courts below.
  13. The Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. That approach was problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.
11. Further, the same position was reiterated by the supreme court in its decision in *Republic v Manyeso* [2025] KESC 16 (KLR), where is stated as follows:

Paragraph 11 to 14 of the *Muruatetu* directions are very clear that the decision in the *Muruatetu* case did not invalidate mandatory sentences or minimum sentences in the Penal Code, *Sexual Offences Act* or any other statute. Further, that the *Muruatetu* case cannot be said to be the authority for stating that all provisions of the law prescribing minimum sentences are inconsistent with *the Constitution*. Paragraphs 93 to 97 of the *Muruatetu* decision are also explicit that it is not for the court to define what constitutes a life sentence. While we appreciated that a life sentence could mean a certain minimum or maximum time to be set by a judicial officer, this court made the following recommendations to the Attorney General to develop legislation on what constitutes a life sentence:

- “94. We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in *Jackson Wangui*, *supra*, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.
95. We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.
96. We therefore recommend that the Attorney General and Parliament commence an enquiry and develop legislation on the definition of ‘what constitutes a life sentence’; this may include a minimum number of years to be



served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing.

65. From the above paragraphs of the Muruatetu case any reading of that decision ought to lead to the conclusion that it is upon the Legislature to enact legislation on what constitutes a life sentence and not the courts.

## Submissions

12. The respondent maintained that the appellant was correctly convicted. However, they lamented that the sentence was too lenient, since the mandatory minimum is 20 years. The respondent invited the court to rely on the case of *Okeno v Republic* [1972] EA 32 at 36 for guidance on the court's duty in a first appeal.
13. It was the State's submission that it had discharged the burden of proof by establishing the three elements it was required to prove. Accordingly, the Respondent addressed the Court on three elements, namely:
  - a. Penetration.
  - b. Age of the victim.
  - c. Appropriate sentence.
14. The foregoing clearly introduces a new and unfamiliar standard. Notably, the issue of the appellant as the possible perpetrator was entirely omitted. Secondly, the question of which organ was penetrated was not addressed. Lastly, the nature of the object alleged to have caused the penetration did not appear to attract any attention from the prosecution counsel.
15. On the issue of proof of defilement, the State submitted that the minor stated she left home on 11.09.2022 for the appellant's church, where she stayed for one week. It was further submitted that her mother later picked her up for a week to enable her to sit for examinations. According to the prosecution, the two allegedly engaged in sexual intercourse and were arrested on 29.12.2022 and taken to Omosaria Police Post.
16. The State contended that it relied on the P3 form, which allegedly indicated an old hymen described as having "broken margins hymen." The Court, however, is still encountering new terminology. These submissions were neither factual nor grounded in the evidence on record. They appear to have been lifted on wholesale, without proper reference to or alignment with the facts of the case.
17. They also addressed sentence, which the court does not wish to address at this juncture. They submitted that the sentence was sufficient. Nevertheless, they sought enhancement.
18. The appellant indicated to the court that he filed submissions physically, although the same could not be traced on the court record. I had to adjourn the matter from yesterday to today, to ensure the submissions are considered.

## The law

19. The law under which the appellant was charged is provided under Section 8 of the [\*Sexual Offences Act\*](#) as hereunder:

" 8.



- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
- (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.
- (5) It is a defence to a charge under this section if -
  - (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
  - (b) the accused reasonably believed that the child was over the age of eighteen years.
- (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.
- (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the Children's Act.
- (8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity."

20. On the other hand, Section 11 of the *Sexual Offences Act* provides as follows:

- (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.
- (2) It is a defence to a charge under subsection (1) if it is proved that such child deceived the accused person into believing that such child was over the age of eighteen years at the time of the alleged commission of the offence, and the accused person reasonably believed that the child was over the age of eighteen years.
- (3) The belief referred to in subsection (2) is to be determined having regard to all the circumstances, including the steps the accused person took to ascertain the age of the complainant.



- (4) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (Cap. 92) and the Children's Act (Cap. 141)
- (5) The provisions of subsection (2) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.
21. In the case of *Charles Wamukoya Karani v. Republic*, Criminal Appeal No. 72 of 2013, it was held that the essential elements constituting the offence of defilement are the age of the complainant, proof of penetration, and positive identification of the assailant. These key ingredients of the offence of defilement, were similarly elucidated in the case of *George Opondo Olunga v Republic* [2016] eKLR are;
- a. Proof of the age of the complainant,
  - b. Proof of penetration and
  - c. Proof that the appellant was the perpetrator of the offence.
  - d. and {I must add that the penetration is of a sexual organ,[of the vagina or anus] by a sexual organ}
22. The first element, age, is a bit relaxed, especially for children of tender years. It can be proved, though, by a birth certificate, baptism card, or by oral evidence of the child if the child is sufficiently intelligent, or by the evidence of the parents or guardian, or medical evidence, among other credible forms of proof. The key element in proof of age is credibility. In more grown-up children, the difference between young adults and children is razor sharp. The court must be vigilant to prevent adults masquerading as children. The Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016)eKLR stated as follows in respect of proving the age of a victim in cases of defilement:
- “... The question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.
23. While addressing the question of age of the victims in *sexual offences act*, the court in *Kaingu Elias Kasomo vs. Republic, Malindi*, the Court of Appeal in Criminal Appeal No. 504 of 2010 stated 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 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.”
24. When the evidence is of doubtful origin, only a doctor can determine the age scientifically. In the case of *Francis Omuroni Vs Uganda* Court of Appeal No. 2/2000, the court held that:
- In defilement cases, medical evidence is paramount in determining the age of the victim. The doctor is the only person who could professionally determined 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.

## Analysis

25. 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.

26. 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* [supra], 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.

27. 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.

28. Brennan addressed the standard of proof required in such cases, 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.

29. 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 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.

30. 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. 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.

31. Within these boundaries, the Court is obliged to conduct a fresh and thorough examination of the evidence, reassess the credibility of witnesses, and evaluate any conflicting testimony to reach its own independent conclusions. Throughout this exercise, the legal burden of proof remains unchanged, resting entirely on the prosecution to establish the appellant's guilt beyond reasonable doubt. Only by meticulously scrutinizing all the evidence, while adhering strictly to the statutory framework, can the Court ensure that the appellant is afforded a full and fair re-evaluation of the case.

32. Courts dealing with criminal matters must always remain mindful of the high standard of proof required and the serious consequences that a conviction imposes on an accused. In the present case, the appellant faced a lengthy sentence, which effectively was a significant portion of his natural life, for the offence with which he was charged. The gravity of such a penalty underscores the necessity for the



most precise and compelling evaluation of the evidence before depriving an individual of so substantial a part of their life.

33. The standard of proof beyond reasonable doubt applies, particularly given the nature of criminal offences, whose consequences extend beyond the individual to society at large. A conviction and sentence as a sexual offender carry a lifelong stigma and can only be justified based on indisputable evidence.
34. The appellant testified that he served as a pastor to both the minor and her mother. In contrast, the prosecution's case revolved around the claim that the minor was "married" to the appellant. It was further stated that the mother went to collect the minor from the appellant's home so that the minor could sit for her examinations, which were said to have occurred in September 2022. However, the alleged offence is said to have taken place between 3.12.2022 and 29.12.2022, meaning this evidence does not align with the timeline of the alleged offence.
35. Secondly, the prosecution claimed that sexual activity occurred daily until the appellant and the minor were arrested. Yet, this should have been reflected in the medical evidence. The P3 form, however, showed no injury, no discharge, and nothing to indicate sexual activity and was consistent with normal anatomy. Accordingly, the P3 does not substantiate any claims of sexual intercourse or penetration, undermining the allegations.
36. The medical evidence indicated no injury. Exhibit 2 showed that the hymen was intact, with no bleeding or ulceration. Despite this, the prosecution concluded that defilement had occurred. There was, however, no medical basis to support that conclusion.
37. There was no PRC form recorded, and all the medical evidence indicated that no penetration had occurred. This Court recognizes that while courts have consistently emphasized the value of expert opinions in judicial proceedings, such evidence is not necessarily conclusive or 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.”

38. 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.”

39. 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, it was held 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:-

"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."

40. PW3 indicated that there were epithelial cells in urine. However, that does not in any way show sexual activity. The presence of epithelial cells in urine is normal in small amounts, as they naturally slough off from the surfaces of the urinary tract. However, elevated levels may indicate an underlying problem such as a urinary tract infection, inflammation, kidney disease, liver disorders, or contamination due to poor hygiene. They must be investigated before relating them to sexual activity. There was no evidence of inflammation in the vagina or any discharge or presence of spermatozoa.
41. The central issue is whether penetration occurred. No credible medical evidence was presented. PW3 proved to be an unreliable witness, failing to establish that he personally examined the minor. Merely stating that a colleague conducted the examination carries no probative value. His qualifications were not given any prominence, and as far as the record is concerned, he could as well have been a quack. An expert witness, before testifying, must prove his expertise.
42. PW3 cannot introduce hearsay in court without complying with sections 33 and 77 of the [Evidence Act](#), particularly when attempting to offer parole evidence that contradicts a document, he did not author. He was a gun-for-hire whose evidence did not meet the basic tenets for admission. The court did not ensure that the evidence that was tendered by persons who are not makers met the required standards.
43. Accordingly, I find as a fact that no one penetrated the minor. The medical evidence conclusively rules out penetration.
44. Secondly, the minor was not candid on where she was between 3.12.2022 and 29.12.2022. The only person who explained to the appellant that the minor broke into his home as a church member. He stayed with his pastor until they were arrested. This is somehow, in an uncanny way, corroborated by the father's evidence. He heard that the daughter had gone to a pastor's place, but did nothing for a whole month. The appellant's version of events is corroborated by medical evidence.
45. The other disturbing aspect is that the minor's mother had been in the picture, but was not called to give evidence. She is the one who allegedly took her from the appellant's house to sit for examinations. This was in September, before the alleged offence. The said person, who was at the centre of the alleged offence was not called as a witness. It is also imperative that the minor was beaten when she was removed from the appellant's home. This could elicit any evidence. 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."

46. 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.”

64. this was buttressed in the case of *Keter v Republic* [2007] 1 EA 135, where the court 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.

47. In this case, the evidence was not enough. Failure to call such a crucial witness as the mother, who knew what kind of prayers the appellant was involved in, raises an inference that, had she testified, her evidence could have been adverse to the prosecution.

48. The other issue is circumstantial evidence. For circumstantial evidence to work, it must be inconsistent with the accused’s innocence. 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.’”

49. There was a dispute whether the minor went to the appellant’s home for prayer or for sex. The mother picked her in September, long before the alleged offence. The pastor gave cogent evidence on blackmail from the three persons, who were not called to tender evidence. Medical evidence shows no penetration. The question then is whether, in the circumstances, the burden of proof was discharged. The mere presence of a girl in a home does not make the male resident therein a perpetrator. In the absence of medical evidence, the court is to consider the surrounding circumstances. The threshold as stated in *R vs 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 vs 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.



50. There are only two plausible explanations for the events in question: prayer or sexual activity. No evidence was presented to support the claim of sexual activity. The only person who could have explained why the daughter was sent to the appellant's home, the mother, who did not testify. The only reasonable inference is that the mother and the appellant were engaged in prayer without the father's knowledge, and subsequently they attempted to extort a mere Ksh. 10,000/=. There is no other inference to draw except the appellant's lack of guilt.
51. The final aspect concerns the age of the minor. It is alleged that she dropped out of school in Standard 8 and was born in 2007. However, the birth certificate presented was registered only recently, less than one year before the alleged incident. The Court takes judicial notice that, since 2003, birth registration has been mandatory, for enrolment. Since 2009, it has been compulsory for students to be included in the National Education Management Information System (NEMIS). No explanation has been provided as to why the original birth certificate, which the complainant presumably used previously, was not produced. Failure to produce a previously used birth certificate leads the court to infer that the current one was prepared for the case. This was not a replacement certificate but a new registration in 2021.
52. The court notes that the court did not find it necessary to invoke 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.
53. The latter part, or the proviso, is key in that it requires that the following conditions be met:
- The matter is a sexual offence,
  - The only evidence is that of the alleged victim of the offence,
  - For reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.
54. That is why the truth should always be recorded and the 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 -vs- 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.
55. The court did not record that it had any reasons for accepting the complainant's testimony. It did not engage in an analysis of the credibility of her evidence. In the absence of reliance on section 124 of



the *evidence act*, the complainant's evidence must be corroborated. As a matter of fact, it is difficult to accept the complainant's account. The medical evidence shows that the hymen was intact. She left home in September 2022, and there is no evidence indicating that anyone observed her living in the appellant's house as a wife.

56. Before addressing the final aspect, I was concerned by the cavalier manner in which the court treated the defence evidence. An accused person enters the trial arena with the presumption that the evidence is in their favour. They are also entitled to every benefit of doubt. Where witnesses who could shed light on the matter are absent, it is the appellant who is entitled to the benefit of the adverse inference. The most oft quoted English decision 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.

57. Once the medical evidence removed penetration, evidence that they were in the same house is irrelevant. It was clear that the mother had been taking the complainant for some kind of prayer. It is no wonder that she did not testify. She had a perfect opportunity to rebut defence evidence that they were blackmailing the appellant but the state chose not to. This must be where an adverse inference must be made and the benefit reaped by the appellant, as an accused.

58. The appellant raised a question of not being supplied with documents that the prosecution was relying on. This was a question of a fundamentally unfair system, arising from the denial of access to crucial prosecution documents, as seen through cross-examination. There is no mention of documents supplied to the accused. The court was under a duty to ensure that an accused is in receipt of supporting documents. The state did not contest the failure to provide documents. This made the hearing trial by ambush, hence infringing the appellant's constitutional right to a fair trial. In the case of Thomas Patrick Gilbert Cholmondeley v Republic [2008] KECA 319 (KLR), the court of appeal addressed the question of trial by ambush as follows:

Of course, in some cases, the prosecution may claim public interest immunity and the courts in Kenya will have to consider the provisions of the newly enacted *Witness Protection Act*, No. 16 of 2006. In certain circumstances, the courts in Kenya may well hold that it would not be in the interest of justice to disclose the names, address and occupation of a particular witness or witnesses. But their evidence would have to be disclosed for we cannot imagine a situation in which an accused person can be ambushed with totally new evidence and convicted thereon.

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.

59. In the above case, the court continued to elucidate on the protection of fundamental rights as follows:

We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified.”

60. The right to a fair trial cannot be curtailed. While speed and alacrity in judicial proceedings are important, the court must ensure that individual freedoms remain protected, particularly the right to a fair trial. In the case of *Richard Munene v Republic* [2018] KECA 186 (KLR), the court of appeal [Ouko, (P), Sichale & Kantai, JJ.A] stated as follows:

Dealing with the right to a fair trial under Article 50(2) (c) and (j) this Court said in *Simon Githaka Malombe V R*, Criminal Appeal No. 314 of 2010 that;

“... Indeed, the availability of witnesses' statements to the defense has always been a fundamental facet of this guarantee and avoids the spectre of trial by ambush, especially in a criminal case. The High Court, sitting as a Constitutional Court had in the case of *JUMA –VS- REPUBLIC* [2007] EA 461 reasoned as follows, and we agree;

‘We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence...’”

The trial court record for 10th January, 2013, in so far as it relates to this question, is to the effect that the prosecution was ordered to furnish the appellant with the charge sheet and witness statements.

61. There is no record of the court indicating that all documents had been supplied. They were ordered to be provided at the outset, but nothing showed completeness. The last infringement on fair trial is the right to cross-examine. There is no record showing the appellant declining to cross-examine PW1. The court must record such a decline. I have noted in not so few matters, where the court labours under the impression that children should not be cross-examined.

62. The appellant raised issues regarding discrepancies and inconsistencies, which must relate to material matters. The court is therefore required to determine whether the alleged discrepancies and contradictions were fundamental and whether they prejudiced the appellant. In the case of *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, to wit, whether such



discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.

63. The appellant raised that the medical evidence, particularly the examination notes, showed an intact hymen, yet PW3 contradicted this despite not being the examining or treating doctor. Similarly, there was a lack of a genuine birth certificate and a contradiction over whether the complainant had been in school up to Standard 8. It is not possible to be registered in school without a birth certificate.
64. In such circumstances, the court must determine whether the alleged discrepancies and contradictions were of such a fundamental nature as to have prejudiced the appellant's defence. It is well established that not every inconsistency or discrepancy in evidence will vitiate a conviction; what matters is whether the inconsistency goes to the root of the case and undermines the prosecution's proof beyond reasonable doubt. In *Joseph Maina Mwangi v Republic*, the High Court emphasized that appellate courts must be guided by section 382 of the Criminal Procedure Code in determining whether recorded discrepancies are so fundamental as to have occasioned a failure of justice, and only then can they prejudice an appellant's right to a fair trial.
65. Additionally, in appeals dealing with defilement and sexual offences, courts have reiterated that proof of age is a critical ingredient that the prosecution must establish beyond reasonable doubt, and credible documentary evidence like a birth certificate is a recognised mode of proof; mere inconsistencies or absence of a birth certificate do not automatically invalidate such proof unless substantial doubt is shown.
66. Thus, where there are contradictions as to medical findings (such as hymen status), age, or school attendance, an appellate court must carefully assess whether those contradictions are material and fundamental, affecting core elements of the offence, before holding that they have prejudiced the appellant and warrant quashing the conviction. Minor or trivial inconsistencies, particularly in auxiliary evidence, do not ordinarily undermine the prosecution's case to the extent of creating reasonable doubt. The Court of Appeal in the case of *Mwolongo Chichoro Mwanjembe –Vs- Republic, Mombasa Criminal Appeal No. 24 of 2015* (UR) (cited in *Edwin Nyambaso Onsongo – Vs- Republic* (2016) eKLR) where the court stated that:-

“...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.” “..we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”
67. Therefore, the major contradictions weaken the prosecution's case leading to one conclusion, the appellant must be given a benefit of doubt.
68. The fact that the appellant allowed a female congregant point to a naïve and stupid person and not an amorous person. Therefore, suspicion alone cannot be and must never be the basis of conviction. In the case of *Sawe v Republic* [2003] KECA 182 (KLR). The Court of appeal [RO Kwach, AA Lakha & EO O'kubasu, JJA] addressed the question of suspicion as follows:

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 Gichira 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. In view of the foregoing and my earlier, elucidations, it is not necessary to deal with sentence, having found that the appeal in conviction is merited.

69. The court has said enough to demonstrate that the impugned judgment is for setting aside. The sentence also goes with the setting aside of the conviction. Having done so, it is not necessary to deal with the sentence as it goes with the conviction.

### **Order**

70. In the circumstances, I make the following orders: -
- a. The Appeal is allowed. Judgment of the trial court, Hon. P C Biwott, SPM, in Ogembo CMCSO No.E003 of 2023, given on 19.09.2023, is set aside. In lieu thereof, conviction and sentence are set aside. The charges against the appellant are dismissed.
  - b. Consequently, the appellant is set free forthwith, unless otherwise lawfully held.
  - c. The appellant shall be removed from the register of sexual offenders.
  - d. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18<sup>TH</sup> DAY OF DECEMBER, 2025.  
JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Mr Koima for the State

Appellant in person.

Court Assistant – Michael

