



**EOA v Republic (Criminal Appeal E021 of 2025)
[2026] KEHC 10 (KLR) (8 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 10 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E021 OF 2025
DKN MAGARE, J
JANUARY 8, 2026**

BETWEEN

EOA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the trial court, S.N. Mutava given on 3.12.2024 in Rongo MCSO No. E019 of 2024. The appellant was convicted of the offence of indecent act against a minor and acquitted of the offence of attempted defilement.
2. The Appellant was attempted defilement contrary to section 9(1)(2) of the sexual offences act NO. 3 OF 2006, the particulars being:

EOA (Alias P): On 31st day of May 2024, at around 1100hrs, at [Particulars Withheld] area in Rongo Sub-County within Migori County in the Republic of Kenya intentionally attempted to cause your penis to penetrate vagina of M.A.A. 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 being:

EOA (Alias P): On 31st day of May 2024, at around 1100hrs, at [Particulars Withheld] area in Rongo Sub-County within Migori County in the Republic of Kenya unlawfully and intentionally touched breasts of M.A.A. a child aged 15 years.
4. The Appellant was arraigned in court on 21.06.2024. The court complied with the plea requirements. Plea was taken and the appellant denied bond on very unconstitutional reasons, which I shall address later in the judgment.



5. Pope Ochieng, a clinical officer from Rongo subcounty hospital with 20 years' experience testified as PW1. He examined the complainant and found that she had not been defiled. The hymen was intact. He concluded there was no abnormalities but she was an indecent Act. On cross examination, he stated that the complainant stated that she had been defiled upon investigations they found that she was indecently touched. He stated that had no way of confirming that she had been indecently touched.
6. The minor was examined on *voire dire*. He stated that the appellant wanted to defile her. The court found that she was to give sworn testimony. The *voire dire* was superfluous for the minor as she is not a child of tender years.
7. The trial court conducted what he called *voire dire*. The complainant was 15 years and the court did not need the charade of *voire 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:
 - (1) A person under the age of twelve years shall not be criminally responsible for any act or omission.
8. 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 years are not children of tender years.
9. The complainant testified that on 30.05.2024, she fell sick and the deputy head teacher took her from class as she had chicken pox and malaria. She went home and informed her mother, PW4. It was her testimony that PW4 took her to Jakadem but found no medic. The appellant, who is a stepbrother, joined to the hospital before they left. The appellant took the complainant to median hospital and paid 700/=, for her treatment.
10. It was her evidence that after treatment, they picked PW4 and went home. She stated that the next day, PW4 was to go to Rongo. The appellant inquired where the mother was and was told that she had gone to Rongo. The appellant wanted to take her to hospital as the medicine was not working. They went to Nyalbunga and did not find the nurse. They branched off to Riosiri Tausi Guest House. He left her at the guest house and went to look for a nurse who would treat her. The caretaker took her to room 2.
11. The appellant came and gave her four tablets and water as the nurse was said to be busy at Rosewood. There were other medicines that she was to apply to the body. She refused. He tried pulling down her skirts. He took Xtraderm[®] and tried applying it over the body while touching the complainant's breasts. She took off her blouse and put it on. She requested to go to the toilet. She found someone and asked the appellant, he took her home and was told that she informed her mother that she was in Rongo hospital.
12. The complaint was pestered for two days until Monday when she told her mother and took her to the guest house. She stated that the caretaker recognized her. He stated that the complainant entered the room with a tall man. The mother discovered that it was a lodging. This was how she learnt that it was a lodging. She was taken to Rongo hospital on 8.06.2024. Reporting was done on 5.06.2024. The appellant was arrested on 20.06.2024. She stated that she was wearing an orange top, black skirt and a green skirt. She identified the photos, now, exhibits 6(a) and (b) stating that this was at the guest house. Contrary to what she said in *voire dire*, she did not allege any threat to defile her. She denied that she was defiled. It was her mother who reported the attempted defilement to the police.



13. On cross-examination, she stated that the appellant had an issue with the mother. She stated that the appellant had ever threatened to kill her mother and family and cut them into pieces. He stated that the appellant directed the caretaker to take the complainant to the room. She did not scream because she was told that the nurse had given some medicine to treat her. She stated that the appellant had pretended to apply some medicine.
14. PW3 was Kennedy Odhiambo Odera stated that he did not work on any specific job. He was working at Tausi Restaurant as a caretaker with a work description of giving assigning people rooms as lodging. He remembered that on 31.05.2024, the appellant and the complainant went to the guest house. The appellant paid a sum of Ksh 500/=. He was given room 2C. The man did not have his national identification card. The appellant ordered for two sodas, Coke and Fanta. He stated that he did not know that the complainant was a minor since, she wore a Marvin. He identified the appellant in the dock.
15. She stated that she told PW4 that he recognised the minor as she had come to the guest house. A photo was shown to him and he stated that the same was a photo showing the appellant leaving the guest house with a motorcycle. He believed that the minor and the appellant stayed in the room for hours.
16. He stated that the law does not allow minors in guest houses. Further, he could not tell whether the complainant was minor was a minor wearing a marvin. He denied taking the complainant to the room. He reiterated that it is the appellant who took the minor to the room, as she was not his guest. He had no noise from the room.
17. PW4 was the complainant's mother and stated that the complainant is her daughter, aged 15 years. She stated that the appellant took the minor to the hospital. She stated that on 31.05.2024, she met the appellant on the road who informed her that he was not going to Rongo. She took a different motor cycle and went her way. She went back home at 4pm, when the appellant told her that the appellant told her that she had taken her to Rongo, past Kodero Bara. The house had a bed and a chair.
18. She stated that on 3.6, 2024, PW4 asked PW3 to take her to the place they were in. She was shown, and noted it was a lodging. The caretaker confirmed that she was there earlier with a tall gentleman. Never mind that the caretaker could not ascertain that she was minor despite the recognition. The complainant informed PW4 that the appellant touched her breasts.
19. On cross-examination, she stated that she was born in 1972 and was 45 years old, a very good way of triangulating a lie. She stated that the appellant was a stepson. He stole the PW4's cow in 2014. There were no other land-related issues between them. She stated that the minor informed her that the appellant wanted to defile her. She denied reporting that the minor was defiled. She had reported that the minor was taken to Tausi Guest House and had her breasts touched.
20. PW5 reported that PW4 reported that the appellant had an indecent act with the minor. This was said to have occurred on 31.5.2024 when the appellant took the minor to a guest house in Kanga pretending to take her to the hospital. The minor was escorted to the hospital, where PRC and P3 were filled. He visited the scene and saw his rooms. He saw the caretaker, who confirmed he saw the minor.
21. He was shown photographs of show the minor was at the scene. He did not explain the origin of the photographs. He stated that he was given the photographs by the caretaker. He stated that the man he talked to does not work at the centre. The appellant reportedly dropped her off at Rakwaro and gave her 100.



22. On cross-examination, he stated that the mother did not report defilement. He stated that the photos were given by the caretaker, who was arrested but yet to be charged. It was not indicated for which offence he was arrested and when they proposed to indict him.
23. The appellant was placed on his defence. He stated that on 30.5.2024, he was at work at Kanga Centre. He found PW2 and PW4 going to the hospital. PW2 was being taken to the hospital. The appellant stated that PW4 was her stepmother. The appellant informed her that she had no money. She took them to the hospital as the doctor she had to see was not present. On 5.06.2024, she received a call from the OCS Kitere to go to the station, where he was taken to Kosir, where it was alleged that she had defiled the appellant. The caretaker had also been arrested.
24. On cross-examination, he stated that the complaint is about her sister and that they have no differences. The caretaker was arrested and had said that the appellant went to the room with the stepsister.
25. DW2 Patrick Oyango, state that it was on Thursday that the appellant took the minor to hospital. He received a report of defilement on Monday, stating that on Friday the appellant had defiled the minor. He was not cross-examined.
26. The court then found that there was no attempted defilement at all. She did not analyse any facts touching on indecent acts but found. Out of the blue, the appellant was found guilty. She stated:

Subsequently on the alternative charge, I find that the prosecution proved beyond reasonable doubt the offence and as such, the accused person is convicted....
27. This was the only finding. No ingredients of the offence were considered, no evidence was considered, but a conviction by fiat. Such a conviction cannot stand. However, to avoid releasing a guilty person, the court will analyse the evidence and the law and come to its own independent conclusion. However, some of the court's errors are irredeemably incurable.

Submissions

28. The appellant submitted on 1.10.2025, on the process that the alleged offence was committed. He questioned why the CCTV cameras, which were recording, according to PW3, did not yield footage showing the alleged assailant's movement. The owner of the guest house did not testify that the photographs produced were not photoshopped. He submitted that no guest house receipt was produced to show that he was a guest. He decried the harshness of the sentence and mitigated for the children and being a breadwinner.
29. The state submitted in a dual manner. There were written submissions on the sentence, which I will deal with later. They submitted on conviction relying on Section 124 of the *Evidence Act*. They submitted that the complainant was the sole witness. On being put to task by the court regarding compliance with the proviso to section 124 of the *Evidence Act*, the learned state counsel requested a retrial. No basis was laid except that the errors they noted were a result of the shortcomings of the court below. This court was then invited to disregard the earlier decision and reassess the evidence.
30. The learned prosecution counsel submitted that the evidence of the complainant was partially corroborated by PW3. It was unclear how the appellant could be the sole witness and at the same time have her evidence corroborated. He was, however, at pains to defend the court's decision. He beseeched the court not to throw out the baby with the bath water, which, nevertheless the court is doing shortly.



Analysis

31. 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 duty of the first appellate court remains as set out by the former Appeal for Eastern Africa in the case of *Pandya -vs- Republic* [1957] EA 336, where the court emphasized that it must reconsider the evidence, evaluate it itself, and draw its own conclusions while bearing in mind that it did not have the opportunity to see and hear the witnesses. the court expressed itself as hereunder:

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.

32. In criminal cases, the standard of proof is beyond reasonable doubt, and it was due to this that, Mativo, J (as he then was) in *Elizabeth Waithigeni Gatimu vs. Republic* [2015] eKLR expressed himself as hereunder:

To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt.

It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.



33. Reasonable doubt need not reach certainty, but it must carry a high degree of probability. It was held by the Court of Appeal in *Moses Nato Raphael vs. Republic* [2015] eKLR as doth:

What then amounts to reasonable doubt? This issue was addressed by Lord Denning in *Miller v. Ministry of Pensions*, [1947] 2 ALL ER 372 where he stated:—“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.

34. The legal burden refers to the burden of proof, which remains constant throughout the trial. It is the obligation of a party to establish the facts and contentions necessary to support its case, in this case, the prosecutor. 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.

35. The standard of proof required in such cases was addressed by Brennan, J. in the United States Supreme Court decision of *in re Winship* 397 U.S. 358 (1970), at pages 361–364, where he stated 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”.

36. The courts cannot let their guards down. The court has read, the proceedings with trepidation, but I was flabbergasted by the travesty of justice that was occasioned to the appellant. When the matter came before me on Monday, I was hoping against hope to find any scintilla of evidence to give the appellant the benefit of doubt. After reading the evidence, I came to the inevitable conclusion that the case against the appellant was concocted to achieve an end other than the course of justice. The mastermind was PW4, the appellant’s stepmother. She maliciously devised a scheme with her young daughter to fix her stepson.

37. Unfortunately for the prosecution, the complainant’s own evidence demonstrated that she had maintained her virginity. Consequently, the offence of defilement could not be sustained in law. Faced with this evidentiary failure, the prosecution descended to what may be described as the lower rungs of the offence spectrum, opting instead to pursue the charge of attempted defilement and an indecent act. The trial court, without careful scrutiny, uncritically accepted the falsehoods that were advanced, wholly disregarding the truth of the matter. The court did not analyse any evidence at all for the count of indecent act. She however acquitted on attempted defilement.



38. What was even more startling was that when the matter came up for submissions, the respondent, instead of addressing the issues arising in this case, filed submissions relating to an entirely different offence, robbery with violence. Nevertheless, in the interest of fairness, the court afforded them an opportunity either to file written submissions or to address the court orally. He elected to seek time to file proper submissions. I granted him until yesterday, with judgment scheduled for today.
39. There is no doubt that the mother and daughter know the appellant. The appellant confirmed that he was assigned to take the appellant to hospital and actually paid. The only question is whether, after taking the minor to the hospital, he went to a lodging with her, the following day.
40. Witnesses agree that the minor was sick with malaria and smallpox. They also agree that the appellant paid for her hospital bill as a stepbrother when they were unable to pay. The dispute is whether there was a second hospital visit the following day.
41. On a more sombre note, the court, on perusing the proceedings, noted that the court below treated the appellant's application for bail in a rather cavalier manner. and in a manner that is in total disregard of the right to bail. The reasons given presumed the appellant guilty at the very outset, thereby unlawfully depriving him of his constitutional rights. The bond terms given were so high, even exceeding those of murder suspects. This then made the entire trial a poisoned chalice, a trial before a biased court. It is not the high bond terms per se that made the trial a poisoned chalice, but reliance on unconstitutional reasons.
42. The fact that someone has been accused of having several cases in court is not and cannot be the reason for denial of bail. This thus removes the presumption of innocence. 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.”

43. The appellant, as an accused, enters the proceedings of a criminal nature presumed innocent. He is thus the darling of the law. Any doubt is to be given to him and not the state. The standard is set so high to avoid the conviction of innocent people. In the case of R vs. Lifchus {1997}3 SCR 320, the Supreme Court of Canada explained the standard of proof as doth:

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



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

44. The lower court thus started on the wrong footing, fixated with guilt of the appellant. The right to be heard in general and the right to a fair trial demand and obligate the court to hear everyone. Hearing means not only listening to the people but also receiving every nuance and impartation from the parties. It is more often crucial to hear the appellant and weigh his evidence. A court cannot dismiss offhand evidence as an afterthought. The appellant is usually the last person to testify after the prosecution's evidence. He has no other chance to testify earlier for his evidence to be an afterthought.
45. Worse still, the court did not find it in her heart to even consider the appellant's defence. It may have been as well that the appellant did not testify since, other than setting out what the appellant said, there was absolutely no consideration of the same. This is an error of the law of irreversible character. Failing to hear a party does not mean failing to record what they said. It includes ignoring what they said. The principle of *Audi alteram partem*, meaning, hear the other side, is a basic element of procedural fairness, ensuring impartiality and preventing unfair condemnation. It matters not what decision is made, but ignoring the evidence given in defence is anathema to judicial prudence, procedural fairness and derogates from the constitutional safeguards of a fair trial and results in an incurable error.
46. Secondly, the appellant cannot, as an accused person, bear the burden of proving matters alleged by the defence. The court correctly found that the offence of attempted defilement was not proved. However, there is no analysis on how the offence of indecent act was committed or proved. It is only God who is allowed to say let this it or that be, and it is. All of us fallible mortals should and must bear true alliance to the truth and search for the facts. Declaring alone does not make it happen. This then places a very heavy burden on the court to analyse the evidence and come to its own conclusion, when no evidence was analysed in the court below. The court below did not give this court a chance to analyse its findings of fact. This leaves the court to sit at the same pedestal as the court below, but with certain handicaps. In the case of *Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR)* Kiage JA stated as doth:

“I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; *Selle Vs Associated Motor Boat Co [1968] EA 123*). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge”.



47. However, the court lost three very important aspects. First, expressing her views on the defence evidence. Secondly, meeting the three pertinent issues on section 124 of *evidence Act*. Finally, making conclusions of fact to enable the court in reviewing evidence have regard to the finding of fact by the lower court.
48. The most critical matter is that Section 124 of the *Evidence Act* was not applicable to this case for two reasons. First, the minor was not the only witness, since there was evidence of PW3. Secondly, the court did not find that the minor was telling the truth. Thirdly, there were no reasons recorded for believing (which belief was absent) that the minor was telling the truth.
49. Indeed, from the court's finding in court one, there was an implicit finding that the minor was not telling the truth. The court found that there was no attempt to defile her contrary to her allegations. Meaning then that the court found that she had lied in certain respects. Once a witness lies, her whole evidence is an edifice of lies and must crumble. 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”

50. The requirements for Section 124 of the *Evidence Act* to apply, the following must be met:
- a. A criminal case involving a sexual offence
 - b. The only evidence is that of the alleged victim of the offence,
 - c. For reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.
51. All the three parameters must coincide otherwise the section does not apply. It is true that this was a sexual offence. However, the minor was not the only witness to the alleged defilement. The evidence of PW 3 was supposed to be corroborating the minor. Thus, the second limb fails. The evidence of PW3 was not tested or analysed. Thirdly the court did not assign reasons or even state that she believed the minor. The court must first belief the minor to be saying the truth then assign reasons. The reasons must be on record. A simple statement that they believe is otiose.
52. The court wrongly assumed that the most important recognition was that of the minor which is not true. The evidence of PW3 was supposed to be of an independent witness. His evidence was that the minor was wearing a marvin and with a tall person. This was dock identification. The appellant is said to have gone to the guest house. There was no evidence of the appellant paying for any room. The minor alleged that she was taken to room 2 by PW3, while PW3 said it was the Appellant who took her to room 2 C. No effort was made to reconcile the rooms. Of importance was that the court had already found that was no attempt to defile the complainant or any resistance, or any struggle with the appellant.



53. The appellant is supposed, to have touched the minor on 31.05.2024. Nothing was reported until 5.06.2024 the report with the police was one of defilement. When medical evidence showed otherwise, they went for attempted defilement. However, this could not hold as the appellant never attempted to defile at all. To that extent the court was correct. Where then is the evidence of indecent act?
54. Given the defence that there was a grudge between the two families, the court ought to look at the animus of a fairly independent witness. He did not know the appellant. He was not invited to an identification parade. He did not see that the alleged tall person was with a minor. How then will he know that the alleged tall person and the lady wearing a marvin were the appellant and the minor. How come there was no identification casts at the guest house and lodging records on the appellant being in the guest room. There was no evidence of payment or any receipt issued. No details were taken in respect of the appellant.
55. The next issue is the close-up photos. They do not appear to have an origin. There was no evidence on how and when they were taken. The appellant testified that he was taken to the guest house and found PW arrested. The photographs do not depict any of the evidence of the parties. PW3 stated he did not accompany the to the room while PW2 stated that she was taken to the room by PW3. There was no evidence of all of them being in one place at the same time. Who took the photo is still unknown. It is thus not far to state that without evidence of how the photos were generated, the same may have been photoshopped. It is not enough to throw photos to the court, the evidence chain must be supported. The easiest option was to produced the CCTV, which was not provided though it was evidence of PW3 that there was CCTV.
56. It is also not possible to identify the person on the photograph without the evidence to that effect from the people who took them and circumstances of the taking of the photos. It is not fathomable that appellant posed for a phot on this to committee a crime. The alleged close-up photos do not meet the threshold of evidence. It is not possible to identify and none did identify the persons on the photograph. There is no date stamp on the same. The appellant was not cross examined on the photos. They are thus bogus evidence that add no value to the charge that was facing the appellant. All in all the photos, were not known who took them the certificate under Section 106(4) B of the Evidence Act.
57. One crucial witness was not called. As per PW2, she was with Mary at her home. She did not testify. It must be recalled that there is no number of witnesses required to prove a fact. 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.”
58. There is no requirement to call a superfluity of witnesses. However, there must be at least a bare minimum of witnesses to prove a charge. Where key witnesses are not called, and the case is wholly, then an adverse inference must be made for failure to call such. In the circumstances of this case, failure to call Mary resulted in a break in the chain of evidence. PW4 placed the appellant away from home on the material day and time. there is no connecting witness, 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’s 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’s 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's 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.”

59. The foregoing had earlier been dealt with in the case of *Keter v Republic* [2007] 1 EA 135, 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.”

60. In the circumstances, failure to call Mary was fatal to the case as the court must make an adverse inference that if she had been called, her evidence would have been adverse to the prosecution.

1. It is also evident from cross examination that PW3 had been arrested over the alleged offence, only for him to name another person. Was the arrest meant to force PW3 to give favourable evidence. He was thus an accomplice, if his evidence was true. It was no as the complainant stated that the appellant was allegedly out looking for a nurse and came long after PW3 had taken her to the room. Parties could not agree on who took the minor to the room. It is not even clear whether she was in room 2 or 2C.

62. The identification of the appellant was not met. The appellant allegedly went home and met Mary and the complainant. Mary was present. She was not called as a witness. She could have resolved the question whether the appellant went to pick the complainant on 31.5.2025. For some strange reason, Mary was not called as a witness. Failure to call a witness who will have shed light must be construed against the prosecution. Section 143 of the *Evidence Act* provides as follows:

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

63. The appellant was not identified by PW3. There was evidence that it is PW3 who took PW2 to the room. Nothing placed the appellant in the room. All the contradiction and failure to identify the parties must be resolved in favour of the appellant. It was surprising that PW2 placed a lot of emphasis on what her mother was doing. However, by a twist of fate, the very witness who framed the appellant placed the appellant on the road. Nothing returned her back to the house. Therefore, if there is, any contradictions and inconsistencies, the same must be construed in favour of the appellant as an accused person.

64. In the case of *R vs. Lifchus* {1997}3 SCR 320, the Supreme court of Canada explained the standard of proof as doth:

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



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

65. The next issue was the discrepancies in the evidence of the witnesses. The discrepancies in evidence were so humongous, that no reasonable tribunal properly informed of the facts could convict on the evidence. PW3 could not identify the minor. He could not lawfully admit a minor to a lodging. Nothing placed the appellant in the locus in quo. As a fact, from them minor’s evidence, she was free to ingress and egress. If it is true was held in the said hotel, she could have easily walked to the caretaker.
66. Both the appellant and complainant were not identified at all in the alleged guest as there was no evidence of the duo being in the lodge. Evidence of the appellant was cogent on how he took the complainant to hospital. The learned trial magistrate thus failed to analyse the facts. The appellant had no duty to controvert evidence that was itself inconsistent and uncorroborated. I concur with the appellant that the court abdicated its duty.
67. On this, this court has to establish whether the alleged discrepancies and contradictions were fundamental as to cause prejudice to the Appellant. In *Joseph Maina Mwangi vs. Republic* CA No. 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held:

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

68. The next question is identification. Based on the above analysis, I find that the conviction was not supported. Especially where the gravity of the offence necessitated a higher degree of punishment, the court had to be clear that the ingredients of the offence were well met before convicting the appellant. The identification of the appellant was shaky. The evidence that was led by PW3 was phoney hence the finding that the events did not take place. In *Anjoroni v Republic* 1980 KLR 59, the court thus:

“Recognition of an assailant is mere satisfactory, mere assenting, and mere variable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”

69. Having finding that the complainant was lying, her evidence is of no probative figure. Leaving only PW3, who differed with PW1. There was consequently, it was the primary duty of the trial court, which it failed, to carefully analyze the contradictory evidence and determine which version of evidence, on the basis of judicial reason, it could prefer. In *Erick Onyango Ondeng’ vs. Republic* [2014] eKLR, the Court of Appeal held that:

The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine



whether, on the basis of those facts, the decision of the trial court is justified. (See *Okeno vs Republic* (1972) EA 32). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.

70. The trial court failed in not holding that such magnitude of contradictions, unless satisfactorily explained, will usually but not necessarily lead to the evidence of a witness being rejected. As was noted in *Twehangane Alfred vs. Uganda*, Crim App. No. 139 of 2001, [2003] UGCA, 6:

With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

71. The court finds that the conviction of the Appellant was purely on fanciful evidence. There was no direct or circumstantial evidence connecting the appellant to the offence. Circumstantial evidence is like any other evidence. Though it finds that its probative value is reasonable and not speculative, inferences to be drawn from the facts of the case, and, in contrast to direct testimonial evidence. It is conceptualized in the circumstances surrounding disputed questions of fact. Circumstantial evidence should never be given a derogatory tag. *Jowitt's Dictionary of English Law*, 4th Edition, states thus of circumstantial evidence:

...with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, ... a fingerprint recovered from the window forced open by the burglar matches the accused's fingerprints, ... [or where there is] a ... DNA match between the accused's control sample and genetic material recovered from the scene of the crime

This is why, way back in 1928, the English Court of Appeal asserted that circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with an accuracy of mathematics.

This is why, way back in 1928, the English Court of Appeal asserted that circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with an accuracy of mathematics.

72. However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court should proceed with circumspection when drawing from inferences from circumstantial evidence. The court should also consider circumstantial



evidence in its totality and not in piecemeal. As the Privy Council stated in *Teper v. R* [1952] AC at p. 489:

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.”

73. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable, and not speculative, but also the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. In the case of circumstantial evidence, the prosecution had the duty to fully establish the circumstances from which the conclusion of guilt is to be drawn in the first instance and, therefore, need for the trial court to ascertain that the facts sought to be relied on were proved individually.

74. Further on circumstantial evidence 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

75. The trial, incarceration and conviction and sentence of the appellant is an indictment of the justice system that is supposed to safeguard the rule of law and the right to fair trial it is anathema to good conscience and was not for the public good. The court will set the appellant free with the words of the high court, C.B.Madan, CJ, D.K.S.Aganyanya and J.E.Gicheru, JJ in *Stanley Munga Githunguri v Republic* [1986] KEHC 44 (KLR) as doth:

You have been beseeching the Court for Order of Prohibition. Take the order. This Court gives it to you.

When you leave here raise your eyes up unto the hills. Utter a prayer of thankfulness that your fundamental rights are protected under the juridical system of Kenya.

Determination

76. In the circumstances I make the following orders: -

- a. The Appeal on conviction and sentence is allowed.
- b. The conviction and sentence are set aside.
- c. The Appellant is set free unless otherwise lawfully incarcerated.
- d. The file is closed.
- e. This decision shall be served on the trial court by the deputy registrar of the court and a record of the service be filed in the file.
- f. The appellant be removed from the sexual offenders' register.



**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 8TH DAY OF JANUARY, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Oimbo for the State/Respondents

pro se Appellant

Court assistant – Mr. Osoo.

